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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1964
SPRING TERM, 1965

JOHN M. STRONG

REPORTER

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1965

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1964

HILDA TERRY v. DOUBLE COLA BOTTLING COMPANY, INC.

(Filed 25 November, 1964.)

1. Food § 1—

A manufacturer, processor and packager of food and the bottler of drink intended for human consumption are held to a high degree of responsibility to the ultimate consumer to see that the food and drink are not injurious to health, and may be held liable by the ultimate consumer on the ground of negligence for injuries proximately resulting from the failure to use such care.

2. Same; Sales § 8—

Subject to the exception of food or drink in sealed packages with labels bearing representations to the ultimate consumer, the ultimate consumer or subvendee may not ordinarily hold the manufacturer or processor of food or the bottler of drink liable on the theory of breach of implied warranty of fitness for human consumption, since there is no privity of contract.

3. Same—

Evidence tending to show that plaintiff was injured by a deleterious substance contained in a bottled drink purchased from a retailer and bottled by defendant *held* insufficient to be submitted to the jury, since the evidence fails to show privity of contract between plaintiff and defendant.

SHARP, J., concurring.

APPEAL by plaintiff from *Walker, S. J.*, July 13, 1964 Civil Session, GASTON Superior Court.

The plaintiff instituted this civil action to recover damages for temporary illness allegedly caused by deleterious matter (a green fly) in a soft drink bottled by the defendant and sold in due course to the plaintiff by the Arlington Mill lunch room. The plaintiff relies upon warranty of fitness for human consumption and a breach of that warranty. The defendant entered a general denial.

The plaintiff offered evidence the defendant bottled the drink containing the deleterious matter. She bought the drink from a subvendee. After consuming a part of the contents of the bottle, she became violently sick, was required to pay doctor bills, medical expenses, and suffered loss of time from her work. At the close of the plaintiff's evidence, the court entered judgment of compulsory nonsuit. The plaintiff appealed.

Dolley & Harris by Steve Dolley, Jr., and Charles J. Katzenstein for plaintiff appellant.

Hollowell & Stott by Grady B. Stott for defendant appellee.

HIGGINS, J. The plaintiff in this action seeks to recover for that: (1) The defendant bottled and sold the drink containing the deleterious substance, knowing that it would be resold for human consumption; (2) the bottler's implied warranty of fitness extended to the ultimate consumer because of the knowledge that the contents of the bottle would be resold in the condition in which it left the bottler's plant. The plaintiff cites as authority the decision in *Ward v. Sea Food Co.*, 171 N.C. 33, 87 S.E. 958 (a negligence, not a warranty case); the dissenting opinion in *Thomason v. Ballard & Ballard Co.*, 208 N.C. 1, 179 S.E. 30; *Simpson v. Oil Co.*, 217 N.C. 542, 8 S.E. 2d 813; *Davis v. Radford*, 233 N.C. 283, 63 S.E. 2d 822; *Service Co. v. Sales Co.*, 261 N.C. 660, 136 S.E. 2d 56.

Authorities generally hold that the manufacturer, processor and packager of foods and the bottler of drinks intended for human consumption are held to a high degree of responsibility to the ultimate consumer to see to it that the food and drink are not injurious to health. Responsibility to the ultimate consumer arises upon a failure to use the required degree of care and is grounded in negligence. *Wyatt v. Equipment Co.*, 253 N.C. 355, 117 S.E. 2d 21. Warranty — actual or implied — is contractual. It does not extend beyond the parties to the contract. "Because of the danger to life and health, the manufacturer and packer of foods and the bottler of beverages intended for human consumption, by offering them for sale, impliedly warrant the fitness of their products for such use. As pointed out, however, the warranty ex-

tends no further than the parties to the contract of sale." *Prince v. Smith,* 254 N.C. 768, 119 S.E. 2d 923; *Enloe v. Charlotte Coca-Cola Bottling Co.,* 208 N.C. 305, 180 S.E. 582; *Thomason v. Ballard & Ballard Co.,* 208 N.C. 1, 179 S.E. 30.

"A warranty is an element in a contract of sale and, whether express or implied, is contractual in nature. Only a person in privity with the warrantor may recover on the warranty; the warranty extends only to parties to the contract of sale. *Murray v. Aircraft Corporation,* 259 N.C. 638, 131 S.E. 2d 367; *Prince v. Smith,* 254 N.C. 768, 119 S.E. 2d 923; *Wyatt v. Equipment Co.,* 253 N.C. 355, 116 S.E. 2d 21. A manufacturer is not liable to an ultimate consumer or subvendee upon a warranty of quality or merchantability of goods which the ultimate consumer or subvendee has purchased from a retailer or dealer to whom the manufacturer has sold, for there is no contractual relation between the manufacturer and such consumer or subvendee. *Rabb v. Covington,* 215 N.C. 572, 2 S.E. 2d 705; *Thomason v. Ballard & Ballard Co.,* 208 N.C. 1, 179 S.E. 30. There is an exception to this rule where the warranty is addressed to the ultimate consumer, and this exception has been limited to cases involving sales of goods, intended for human consumption, in sealed packages prepared by the manufacturer and having labels with representations to consumers inscribed thereon. *Simpson v. Oil Co.,* 217 N.C. 542, 8 S.E. 2d 813." *Service Co. v. Sales Co.,* 216 N.C. 666, 136 S.E. 2d 56.

In this case the evidence fails to show privity of contract between the plaintiff and the defendant. Without such privity there is no warranty liability. The judgment of nonsuit is

Affirmed.

SHARP, J., concurring:

When an ultimate consumer sues a manufacturer upon an implied warranty of fitness of the goods which he has purchased from a retailer, there are several hurdles which he must surmount. First, he must prove that there was a defect in the product when it left the defendant's possession; second, that he acquired title to it in the ordinary channels of commerce or came into rightful possession of the property; and third, that he has suffered injury as a result of the defect. *Coca-Cola Bottling Co. v. Savage,* 228 Miss. 612, 89 So. 2d 634; see Wilson, *Product Liability,* 43 Calif. L. Rev. 614 (Part I), 809 (Part II); Note, 16. U. Miami L. Rev. 765.

In this case plaintiff offered no evidence whatever that at the time she purchased the bottle of Sun-Drop in the Arlington Mill lunchroom it was in the same condition as when it left defendant's bottling plant.

Furthermore, the evidence is silent as to who opened the bottle or how long it had been opened before plaintiff drank any of its contents. Her evidence is quite consistent with the practical possibility that that green fly which so upset her digestion got into the bottle after it left defendant's control. For that reason I must concur in the result of the majority opinion. I cannot, however, concur in its premise that plaintiff is not entitled to recover solely because there was no privity between her and defendant.

No one has made a more penetrating, all-inclusive survey of the field of products liability than did Professor William L. Prosser in his scholarly article, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L. J. 1099, hereinafter cited as *Prosser*. The requirement of privity of contract as a prerequisite to recovery on warranty has already been exhaustively analyzed in countless law-review articles, treatises, and opinions, which have left no by-way unexplored. In this opinion I shall advance not a single idea new to legal writers, but I shall try to marshall the most salient of the ideas to support the position I take.

In the absence of privity the common-law rule is that the manufacturer of a defective article is liable neither in tort for negligence nor in contract for breach of warranty. As to tort, this rule has been altered in every state — with the possible exception of two — by the landmark case of *MacPherson v. Buick Motor Co.*, 160 App. Div. 55, 145 N.Y. Supp. 462, *aff'd* 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916F, 696, Ann. Cas. 1916C, 440; *Prosser*, 1100; Comment, 30 Fordham L. Rev. 484. The requirement of privity of contract in *negligence* suits against manufacturers is now almost nonexistent. Annot., Privity of contract as essential to recovery in negligence action against manufacturer or seller of product alleged to have caused injury, 74 A.L.R. 2d 1111, 1136, 1189; Note, 51 Ky. L. J. 168; Note, 13 Syracuse L. Rev. 305. North Carolina has followed *MacPherson*, and it is now the law in this state that a manufacturer of a product is under a duty to the ultimate purchaser, irrespective of contract, to use reasonable care in the manufacture and inspection of the article so as not to subject the purchaser to injury from a latent defect. *Gwyn v. Motors, Inc.*, 252 N.C. 123, 113 S.E. 2d 302; *Tyson v. Manufacturing Co.*, 249 N.C. 557, 107 S.E. 2d 170.

More slowly, the law of implied warranty is elsewhere undergoing a similar evolution, but as Cardozo, C.J., observed in 1931, in words now famous, "The assault upon the citadel of privity is proceeding in these days apace." *Ultramares Corporation v. Touche*, 255 N.Y. 170, 180, 174 N.E. 441, 445, 74 A.L.R. 1139, 1145, *reversing* 229 App. Div.

581, 243 N.Y. Supp. 179 (action on negligence theory). "If any court wishes to drop the requirement of privity, there is now ample and respectable authority to justify its decision to the legal world." Spruill, *Privity of Contract As a Prerequisite for Recovery for Warranty,* 19 N.C.L. Rev. 551, 565. See the following annotations where the cases are collected: Liability of manufacturer or packer of defective article for injury to person or property of ultimate consumer, who purchased from a middleman (III, b, 2, i); 17 A.L.R. 672, 709; 39 A.L.R. 992, 1000; 63 A.L.R. 340, 349; 88 A.L.R. 527, 534; 105 A.L.R. 1502, 1511; 111 A.L.R. 1239, 1251; 140 A.L.R. 191, 250; 142 A.L.R. 1490, 1494, with supplemental decisions. Today in a clear majority of the jurisdictions which have any definite law on the subject, one who prepares and puts food or drink, intended for human consumption, on the market in sealed containers is held to strict liability, or, in contract terms, liability for breach of implied warranty of fitness, without privity. According to Prosser,

> "No new state has rejected it since 1935, and since that year ten new ones have adopted it. A good many of the opinions in the minority group have recognized the trend, but have said that their law is established, and any change must be for the legislature.
>
> "It needs no seer or soothsayer to conclude that the outer defenses of the fortress of strict liability are even now in process of being carried; that so marked a trend will inevitably continue; and that the law of the future is that of strict liability for food." *Prosser,* 1110.

Those courts which have eliminated the requirement of privity between the consumer and the manufacturer in food cases have obviously been motivated by considerations of public policy and a recognition of the fact that modern merchandising is not accomplished by direct contract but by advertising. See Note, 36 So. Cal. L. Rev. 291. To arrive at liability within the framework of warranty, the courts have used many theories. They include, but are not limited to, the following: (1) a covenant (analogous to one running with the land) runs from the manufacturer to the ultimate consumer; (2) the retailer is the manufacturer's agent to sell; (3) the retailer assigns his warranty to the buyer; (4) the consumer is the third-party beneficiary of the retailer's contract with the manufacturer; (5) the manufacturer's marketing of the goods is an offer to the consumer to warrant the goods if he will buy; (6) the manufacturer's marketing of the goods is a representation to the consumer that they are fit for human consumption;

and (7) the manufacturer's advertising is an express warranty to the customer.

The following illustrate typical rationales by which courts remove the stumbling block of privity so as to allow recovery by an injured consumer who has purchased food in its original container:

> "(It is) equitable to impose responsibility upon the 'manufacturer,' who has control of the situation and can do something about it, for the protection of the 'ultimate consumer and who, under modern, economic conditions, almost of necessity, must purchase many items of food prepared in original packages by the manufacturer and intended for the consuming public, although marketed through an intermediate dealer.' *Klein v. Duchess Sandwich Co.*, 14 Cal. 2d 272, 283, 93 Pac. 2d 799, 804." *Collum v. Pope & Talbot, Inc.*, 135 Cal. App. 2d 653, 657, 288 P. 2d 75, 78.
>
> "Under modern conditions, when products of food or drink have been prepared under the exclusive supervision of the manufacturer and the consumer must take them as they are supplied, the representations constitute an implied contract, or implied warranty, to the unknown and helpless consumer that the article is good and wholesome and fit for use. If privity of contract is required, then, under the situation and circumstance of modern merchandise in such matters, privity of contract exists in the consciousness and understanding of all right-thinking persons." *Madouros v. Kansas City Coca-Cola Bottling Co.*, 230 Mo. App. 275, 283, 90 S.W. 2d 445, 450.

The third-party beneficiary theory was relied upon by Clarkson, J., in his dissent in *Thomason v. Ballard & Ballard Co.*, 208 N.C. 1, 179 S.E. 30, a case involving a contaminated sack of flour, manufactured by defendant and purchased by plaintiff from a grocery store. The majority opinion denied recovery because of the lack of privity. Dissenting, Clarkson, J., said:

> "As pointed out in *Ward Baking Co. v. Trizzino,* 161 N.E. 557 (Ohio), there is no doubt that an implied warranty arises between the groceryman who makes the purchase and the manufacturer. The groceryman did not make the purchase for himself, but for his customers, who are the ultimate consumers. The groceryman is merely the distributing agent, he has no opportunity to make an inspection of a sealed package and the manufacturer is fully aware of that fact. The contract between the manufacturer and the retailer is one for the benefit of a third party, the ultimate con-

sumer. If there is any implied warranty between the manufacturer and the retailer, and there is no conflict of decisions on that point, then it is for the benefit of the third party, the ultimate consumer." *Id.* at 6, 179 S.E. at 33.

The limitation of privity in contracts for the sale of goods developed in the "good old days" when marketing was simple, products were uncomplicated and open to inspection, and the buyer was able to evaluate their quality. "But with mass marketing, the manufacturer is removed from the purchaser, sales are accomplished through intermediaries and the demand for products is created primarily by advertising media." Note, 36 So. Cal. L. Rev. 291, 294. The observation of the Washington court, although made in a case not involving a food product, is pertinent:

> "Since the rule of *caveat emptor* was first formulated, vast changes have taken place in the economic structures of the English-speaking peoples. Methods of doing business have undergone a great transition. Radio, billboards, and the products of the printing press have become the means of creating a large part of the demand that causes goods to depart from factories to the ultimate consumer. It would be unjust to recognize a rule that would permit manufacturers of goods to create a demand for their products by representing that they possess qualities which they, in fact, do not possess; and then, because there is no privity of contract existing between the consumer and the manufacturer, deny the consumer the right to recover if damages result from the absence of those qualities, when such absence is not readily noticeable." *Baxter v. Ford Motor Co.*, 168 Wash. 456, 463, 12 P. 2d 409, 412, 88 A.L.R. 521, 525.

Prosser summarizes, substantially as follows, the arguments which the courts allowing recovery have found convincing, *Prosser,* 1122 *et seq:* (1) The public interest in human life and health demands the law's maximum protection against deleteriousness in food which helpless consumers must buy, and their helplessness justifies the imposition of full responsibility upon suppliers for the harm the latter have caused, even absent negligence. (2) By placing the product on the market, the manufacturer or supplier represents it to be suitable, desirable, and safe to use, and by every advertising method at his command, he makes the maximum effort to induce that belief and to sell his product. The middleman is a mere conduit through whom the product reaches the user. (Furthermore, he is very rarely at fault and may not be able to

satisfy a judgment against him.) If harm results, the manufacturer or supplier should not be permitted to avoid responsibility merely because he has made no direct contract with the consumer. (3) Strict liability may be enforced everywhere by a resort to a series of actions in which each party sues his immediate vendor until finally, after concatenated litigation, the manufacturer or supplier pays the damage. Such a multiplicity of suits is a disservice to the suitors and, particularly, to the courts.

The reasons for imposing strict liability upon the manufacturer of products intended for human consumption do not obtain when the injury results from defective mechanical products as Dean Leon Green convincingly points out in his article, *Should the Manufacturer of General Products Be Liable Without Negligence?*, 24 Tenn. L. Rev. 928. His arguments, in substance, are:

A. (1) *Food products* are supplied for immediate consumption and are used once with no opportunity for testing before use. The first swallow or application may prove hurtful.

(2) The victim is under a great disadvantage if he must prove negligence on the part of the manufacturer. "It is *burden enough — indeed it may be a very heavy burden — for the victim to show that his injury resulted from the consumption of the product and that it was not the result of his own conduct or condition or the conduct of someone else.*" *Id.* at 930.

(3) As a matter of justice to the victim, the loss from the consumption of food-chemical products should fall on the manufacturer, who can guard against the cause and who is best able to bear the loss as well as to protect himself against it both by insurance and by price control.

B. (1) *Mechanical gadgets* are made to be used over a considerable period of time, during which observations can be made of their operational hazards and precautions taken. They are frequently the subject of "setting up, inspection, and testing by others experienced in their use before (they reach) . . . the ultimate consumer." *Id.* at 932.

(2) A manufacturer is helpless to guard against dangers incident to the misuse of his product. No mechanical device can be safe very long in the hands of someone who does not know how to use it, who will neither study nor follow the directions, or who attempts to use it for a purpose for which it was not designed.

(3) On the trial, a purchaser can ordinarily demonstrate a defective mechanical gadget, but a manufacturer would be unable to show the manner in which the machine had been used or whether anybody had tinkered with it.

Although liability in warranty on foods in sealed containers is referred to as "strict liability," *Prosser,* 1110; Green, *op. cit. supra* at 929, this does not mean an automatic judgment for every injured plaintiff who sues a manufacturer. A manufacturer does not warrant that his product is incapable of deteriorating into a dangerous state if mishandled or kept too long before being used. An unreasonable use of the product or the use of it when its defect should have been apparent would preclude recovery. *Prosser,* 1144. In both negligence and warranty actions the plaintiff must overcome the formidable obstacle of convincing a jury that the food was not fit for human consumption by healthy and normal persons under ordinary circumstances when he acquired it in the routine channels of commerce; that this dangerous condition existed when the product left the defendant's control; and that the then existing defect caused him injury. James, *Products Liability,* 34 Texas L. Rev. 193; Note, 16 U. Miami L. Rev. 758, 765.

It having been seen that the present-day actions in negligence and on warranty are similar and that privity is no longer required in negligence actions, perhaps privity will seem even less inviolable if we recall that warranty originated in tort as a remedy for misrepresentation. 1 Williston, Sales, §§ 195-197 (1948 ed.); Green, *op. cit. supra* at 929; Note, 36 So. Cal. L. Rev. 291, 292. It was not until 1778 that a contract action for breach of warranty was held to lie at all. *Stuart v. Wilkins,* 1 Doug. 18, 99 Eng. Rep. 15 (K.B. 1778); *Prosser,* 1126; and as late as 1797, Lord Kenyon, L.C.J., spoke of breach of warranty as a form of "fraud." *Jendwine v. Slade,* 2 Esp. 572, 170 Eng. Rep. 459 (N.P. 1797). For full discussion of the history of warranty see Prosser, *The Implied Warranty of Merchantable Quality,* 27 Minn. L. Rev. 117, 119. The original tort action as an action on the case survives, of course, in our negligence action. Everywhere today the purchaser from a retailer may sue the manufacturer for negligence. *Caudle v. Tobacco Co.,* 220 N.C. 105, 16 S.E. 2d 680; *Enloe v. Coca-Cola Bottling Co.,* 208 N.C. 305, 180 S.E. 582.

Those courts which cling to the requirement of privity seem to fear that, if they dispensed with it, they would open a Pandora's box of litigation, based largely on spurious claims. *Winterbottom v. Wright,* 10 M & W 109, 152 Eng. Rep. 402 (Exch. 1842), to which is usually traced the rule that privity is a prerequisite to recovery for injuries

caused by a breach of duty assumed by contract, appears to have been based on that fear. In denying recovery to a stagecoach driver seeking damages, for negligence, from the lessor who had contracted with the Postmaster-General to supply coaches and keep them in repair, Lord Abinger, C. B., warned:

> "'(U)nless we confine the operations of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.'" *Id.* at 114, 152 Eng. Rep. at 405 (Exch. 1842).

See Note, 13 Syracuse L. Rev. 305.

In his article Professor Spruill opines that *Winterbottom v. Wright* laid down "horse and buggy" law for a "horse and buggy" age. Spruill, *op. cit. supra* at 551. It is implicit in the majority's opinion in this case that they are convinced that Professor Spruill's observations are determinative:

> "On the other hand there is the danger that every stomach ache may become a judgment to be figured as an industrial cost and passed on to the public. There is the even greater fear of faked stomach aches. It would seem that the rats of Hamlin were as nought in comparison with that horde of mice which has sought refreshment within Coca-Cola bottles and died of a happy surfeit. In the reports one cannot distinguish genuine claims from false; he can only suspect. And in such a field, where factual information is so unavailable, judgment is likely to follow suspicion." *Id.* at 566.

Since the courts deal with people on earth and not in heaven, they must expect to be confronted with some claims based on fictitious defects and faked injuries. Suffice it to say, however, that the danger of perjury is not confined to actions based on warranty; it is also ever-present in negligence actions. That perjury is rampant in divorce actions has long been the judicial suspicion, but few would suggest to the legislature that divorce be eliminated because of the popularity of false swearing.

In cataloging the states which continue to hold that the seller of food is not liable to the consumer in the absence of negligence or privity, Prosser lists North Carolina and West Virginia as probably rejecting the rule of strict liability although, he says, "they are somewhat doubtful." *Prosser*, 1109.

North Carolina has waivered in its rule that the basis of a manufacturer's liability to the ultimate consumer who has purchased from a

retailer is negligence rather than implied warranty. In *Simpson v. Oil Co.*, 217 N.C. 542, 8 S.E. 2d 813, plaintiff alleged that she was injured when an insecticide manufactured by defendant Oil Company and sold to her by defendant Drug Company, came in contact with her skin. The product was sold in a can upon which was printed, "Amox is made for the purpose of killing insects. It is not poisonous to human beings but is sure death to insects." The Court said with sophisticated perception that these written assurances "were obviously intended by the manufacturer and distributor of Amox for the ultimate consumer," *Id.* at 546, 8 S.E. 2d at 815, and thus constituted a direct warranty from them to her. North Carolina holds a manufacturer to his express warranty on the label without privity. See *Prince v. Smith*, 254 N.C. 768, 770, 119 S.E. 2d 923, 925.

Prosser's doubts about North Carolina were engendered by *Davis v. Radford*, 233 N.C. 283, 63 S.E. 2d 822, in which plaintiff's intestate purchased a patented bottled product known as Westsal (a salt substitute), from Radford's Drug Store. Plaintiff sued Radford for breach of *implied* warranty of the wholesomeness of Westsal, the use of which, he alleged, caused the death of his intestate. Radford, upon allegations that Smith Company, from which he had purchased the product for resale, was *primarily* liable to plaintiff, had Smith Company made a party defendant. This Court approved. Although the facts in the case do not disclose the wording of the label on the bottle of Westsal, Devin, J. (later C. J.) said: "Under the decision in *Simpson v. Oil Co.*, it would seem that the plaintiff here could have maintained an action against Smith Company, the distributor, for the cause set out in the complaint, although he has elected to sue only the retail dealer." *Id.* at 286, 63 S.E. 2d at 825. It is noted that if there had been an express warranty on the label it would have excluded any action on the implied warranty. *Petroleum Co. v. Allen*, 219 N.C. 461, 14 S.E. 2d 402; *Ward v. Liddell Co.*, 182 N.C. 223, 108 S.E. 634.

Primary and secondary liability between defendants exist in tort actions only when they are jointly and severally liable to the plaintiff. *Edwards v. Hamill*, 262 N.C. 528, 138 S.E. 2d 151. As *Moore, J.*, points out in *Service Co. v. Sales Co.*, 261 N.C. 660, 669, 136 S.E. 2d 56, 64:

> "The rationale of the opinion of this Court (in *Davis v. Radford*) is that it was a matter of primary and secondary liability — a holding more appropriate in a case sounding in tort rather than contract. The opinion emphasizes that the article was intended for human consumption, was prepared and placed in a sealed package by the original seller, and the package reached the con-

> sumer in the identical form in which it was prepared by the original seller. The opinion suggests that the same results might have been reached had plaintiff sued Smith directly under authority of *Simpson v. Oil Company, supra.* In any event the decision constitutes an abandonment of the privity rule for the purposes of that case. 30 N.C.L. Rev., 191-197. But it seems clear from the discussion that it was not intended to abandon the privity rule in all warranty cases, but the procedure approved therein was to apply only to sales of articles for human consumption sold in sealed packages prepared by the manufacturer. This case must be considered an exception to the privity rule."

Thus, we have recognized that *Davis v. Radford, supra,* amounts to a *de facto* holding that the manufacturer could have been liable to the consumer on implied warranty without privity. For comment to this effect see 2 Strong, North Carolina Index, *Food,* § 1 (1959 ed.). *Davis v. Radford, supra,* clearly discloses the tort heredity of contractual warranty and illustrates the comment of *Higgins, J.,* in *Prince v. Smith, supra* at 770, 119 S.E. 2d at 925: "In some of the cases liability on the basis of breach of implied warranty and for negligence seem to shade into each other." A note in 42 Harv. L. Rev. 414 graphically sizes up the character of warranty:

> "A more notable example of legal miscegenation could hardly be cited than that which produced the modern action for breach of warranty. Originally sounding in tort, yet arising out of the warrantor's consent to be bound, it later ceased necessarily to be consensual and at the same time came to lie mainly in contract. In recent years, a steadily increasing grist of decisions has presented acutely the necessity for re-examination of the nature of a warranty. . . ."

Strict liability for a food manufacturer's or supplier's default is *sui generis.* As to it, distinctions between tort and contract, either procedural or substantive, are artificial and unjustified, so that the law of primary and secondary liability ought to be appropriate irrespective of whether warranty is descended from tort or contract. Thus should the doubt expressed in *Service Co. v. Sales Co., supra* at 669, 136 S.E. 2d at 64, be resolved.

Having held him to his label in *Simpson v. Oil Co., supra,* can we seriously argue or reasonably contend that a manufacturer or a supplier who, after extensive advertising, sells a retailer bottled drinks, canned pineapple, or boxes of candy for resale to the consumer, does not like-

wise represent to the buying public that his product is fit to eat, even though no label or imprint on the container specifically says so?

Plaintiff, in this case, made no effort to base her action upon an express warranty from the manufacturer to the ultimate consumer by way of advertising. It is to be observed, however, that no manufacturers advertise more extensively than do the bottlers of soft drinks. Certainly it is the consumer whom the bottling companies are trying to persuade when they proclaim in neon lights from atop tall buildings, and by every other known advertising medium, that this cola and that crush are refreshing, delicious, delightfully nonfattening, and just "the drink for you." The consumer is their mark even though the manufacturers have no direct contract with him. It is to shut one's eyes and ears in today's "world of advertising" to say that, because no reassuring words appear on the product's container, the manufacturer of a nationally advertised product has made no representation to the purchaser. He makes one every day — sometimes every hour on the hour. Any food entitled to status as a "famous name brand" has been warranted by the manufacturer to the consumer — very probably in color! — in magazines, on billboards, and by "glamorous stars of stage and screen" over radio and on television.

All sympathy accorded for plaintiff's unhappy experience, she suffered minimal damage, and I should have preferred to assault the citadel in behalf of one who, victimized by lack of privity with the manufacturer or the supplier, had been more ruinously afflicted. The majority opinion, however, reaffirms the rule in North Carolina that without privity there can be no recovery on warranty, and thus buttresses the citadel in this state. Therefore, at the risk of playing Don Quixote, now after a bottled green fly, I have felt compelled to champion her cause, lest this and previous pronouncements of the instant rule by this Court be strengthened by silence, with, in consequence, "futility the fate of every endeavor to dislodge them," Cardozo, C. J., in *Ultramares Corp. v. Touche, supra* at 186, 174 N.E. at 447, 74 A.L.R. at 1148.

Whether we call the rule for which I contend strict liability in tort, as the professors and chaste logic might require, or an implied warranty of fitness imposed by law, makes no difference. It seems to me that reason and justice should now impel this Court to hold that, under modern merchandising conditions, a manufacturer of food products in sealed containers represents to all who acquire them in legitimate channels of trade that his goods are wholesome and fit for human consumption; and that, if they are not, and injury results to the ultimate consumer, he may recover as well against the manufacturer as against his immediate vendor.

RAY E. SIZEMORE v. D. V. MARONEY AND DIVISION 1493 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, AFL-CIO.

(Filed 25 November, 1964.)

1. Appeal and Error § 21—

An appeal is itself an exception to the judgment or order and presents the questions whether error appears on the face of the record proper and whether the conclusions of law are supported by findings of fact.

2. Process § 3—

When original process is not served, the action or special proceeding may be kept alive by the issuance of alias and pluries summons. G.S. 1-95.

3. Process § 4—

Where no service of process has been had upon an individual in an action *in personam*, but there is nothing to indicate that the action had not been kept alive by the proper issuance of alias and pluries summons, it is error for the court to dismiss the action as to him, since, defendant not having been brought into court, his rights are unaffected by the pendency of the action, and there is no process served on him to quash.

4. Libel and Slander § 1; Courts § 20—

Since libel actions are transitory, libelous matter sent through the mails is actionable, at the place of posting or at the place of receipt by the addressee, even in another state, unless otherwise provided by statute.

5. Same; Process § 4—

In an action for libel based on letters posted in another state, it is error for the court to dismiss the action on the ground that it was for a tort arising in such other state in the absence of any finding that none of the letters was received by an addressee in this State and the absence of any finding that none of the alleged tortious acts was committed by defendant in this State.

6. Same; Process § 13—

Where, in an action against a labor union, it is alleged that defendant union had agents in this State and carried on in this State the activities for which it was organized in representing employees residing in this State, but the court fails to find any facts in regard to the activities of defendant union, if any, carried on in this State, there are no findings supporting the court's conclusion that the union was not doing business in this State. G.S. 1-97(6).

7. Appeal and Error § 55—

Where, on appeal from an order of the clerk refusing motion to quash process and dismiss the action, the Superior Court is requested by the defendant to find the facts, and the Court grants the motion to dismiss without any finding of facts supporting its conclusions of law that the action was an action in tort arising in another state and that defendant labor union was not doing business within this State so as to permit service on it

under G.S. 1-97(6), the conclusions are not supported by findings of fact and the cause must be remanded for further hearing and specific findings.

APPEAL by plaintiff from an order of *Olive, E. J.*, entered 13 April 1964 Civil Session of Forsyth, upon separate special appearances and motions by defendant Maroney and by Division 1493 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO, quashing service upon them.

Hatfield & Allman by Roy G. Hall, Jr., for plaintiff appellant.

White, Crumpler, Powell, Pfefferkorn & Green by James G. White for defendant appellees.

PARKER, J. The complaint alleges in substance: Plaintiff is a citizen and resident of Stokes County, North Carolina. The defendant union is an unincorporated association, which maintains an office and transacts business in Forsyth County, North Carolina; that it has not designated of record in the office of the clerk of the superior court of Forsyth County a registered agent upon whom service of process may be had, and consequently it is amenable to service of process under the provisions of G.S. 1-69.1. Defendant Maroney is a citizen and resident of Kanawha County, West Virginia, and was at all times referred to in the complaint, and at the time of the commencement of this action still is, the president of defendant union, and all of his conduct hereinafter described was in the course and scope of his employment by defendant union as its president.

In March 1962 plaintiff, by reason of a groundless complaint filed against him by a citizen of Charleston, West Virginia, was dismissed from his employment with the Greyhound Bus Company, with which company he had been continuously employed as a driver for almost twenty years. He was never given an opportunity for a hearing, and was never confronted by or given the right to confront the person who filed the complaint against him. At the time he was a dues-paying member in good standing of defendant union. A part of the duties of defendant union was to protect him and others similarly situated in such instances, but despite the duties imposed upon the defendant union by its constitution and bylaws and by the applicable provisions of the federal "Labor-Management Reporting and Disclosure Act of 1959," respecting rights of individual union members, the union, under the direction and leadership and influence of defendant Maroney, failed to protect him and to give him his rights of appeal and grievance.

He requested a hearing by the union but he was foreclosed by defendant Maroney and by the defendant union from asserting his rights.

In the course of such denial of his rights, defendant Maroney on 22 June 1962 prepared and mailed to all the executive board members of the defendant union a letter containing words that were libelous *per se,* said words accusing him of immoral conduct. The charges, allusions, insinuations and threats contained in the letter were without foundation and were made maliciously, wantonly, and knowingly, and were published by defendant Maroney acting as president of the defendant union and subject to the control of the members of its executive board and on the letterhead of said defendant union, without any semblance of justification. Then follows allegations in respect to damages.

Defendant Maroney made a special appearance and moved to dismiss the action as to him for the following reasons: He is a citizen and resident of West Virginia. No summons has been served on him within the State of North Carolina. The Secretary of State of North Carolina is not his agent, and he has never designated him as any process agent for him. No legal process has been had on him by plaintiff's having the said Secretary of State to forward to him at his residence in West Virginia a copy of the summons herein, an extension of time for filing the complaint, and later a copy of the complaint.

Defendant association made a special appearance and moved to quash the summons served upon it for the following reasons: It is an unincorporated association, has no property, and is not doing business in the State of North Carolina. It has never designated the Secretary of State of North Carolina as its process agent. No summons has been served upon it in this State. The cause of action which plaintiff alleges does not arise on any matters occurring within the State of North Carolina, but arises entirely from matters which the plaintiff alleges constitute a libel arising in the State of West Virginia. The attempted service of process upon it by having the said Secretary of State to mail to it at its office in West Virginia a copy of the summons and extension of time for filing complaint is a nullity, and does not amount to service of process.

The plaintiff filed an answer to the special appearance and motion to dismiss filed by defendant Maroney, in which he alleges in substance: The defendant association is unincorporated, and is doing business in the State of North Carolina for the purpose for which it was formed, to wit, representing as a labor union employees of a business in the State of North Carolina. It has failed to comply with the requirements of G.S. 1-97(6), in that it has failed to appoint an agent in this State upon whom process may be served, and has failed to certify to the clerk of the superior court of Forsyth County, in which county the organization

is actually doing business, the name and address of a process agent. By failing to appoint a process agent, this plaintiff is authorized by the language of the statute to serve process upon the Secretary of State of North Carolina, which in fact he has done as set out in defendant's own motion to dismiss. Defendant association is and has been for the past several years actively doing business in the State of North Carolina; it represents employees of the Greyhound Bus Company; it maintains a regular business agent and other officials in Winston-Salem, with whom it transacts the organization's business. He has not endeavored to serve process upon defendant Maroney through the Secretary of State of North Carolina, but instead has endeavored to serve him personally, since the provisions of G.S. 1-97(6) do not apply to service upon an individual. The sheriff of Forsyth County has been unable to locate defendant Maroney, and he has kept process alive by the issuance of alias and pluries summonses.

There is one affidavit in the record which was filed by plaintiff on 22 January 1964. This is a summary of this affidavit, except when quoted: "Division 1493 union operates in several states as Division 1493. Most of the employees of the Greyhound Bus Company in Winston-Salem belong to this union, as do most of the employees at terminals in the other states served by Division 1493, including Charleston, West Virginia; Jacksonville, Florida; Portsmouth, Ohio; Columbia, South Carolina; Asheville and Raleigh, North Carolina; Roanoke, Virginia; *et cetera*. All of these employees in these various cities and states belong to Division 1493 of the union. This division is not broken into separate locals, as is the case with some affiliated groups of national unions. Division 1493 of union conducts substantial business in North Carolina and particularly in Winston-Salem. It conducts almost all of the business for which a union exists. It solicits membership. It holds meetings and rents a union hall for such purposes." It has a regular employee, Roy Gough, who is paid by the union and who looks after all the union's affairs in Winston-Salem, in addition to his work with the Greyhound Bus Company. Gough is a board member of Division 1493, and participates in negotiations regarding drivers' contracts in connection with local division members. Division 1493 conducts grievance hearings in Winston-Salem, which are connected with the operation of the union and its conduct with respect to its members. All of the Winston-Salem members of the union are subject to all of the constitutional and bylaw regulations of Division 1493, and these are applied and enforced in Winston-Salem by union officials. The union has a steward in Winston-Salem, a Mr. Collette, and also a Mr. Orrell,

and these officials perform and have performed regularly business in the union's behalf, and continue to represent union interests.

The motions by the defendants first came on to be heard by the clerk of the superior court of Forsyth County on 24 February 1964. He entered two separate orders: One on Maroney's motion, and the other on the motion of the defendant association. The order entered on defendant Maroney's motion states in substance: The court heard arguments of counsel and examined the record in the case. It appears that this action was instituted on 29 May 1963, that original summons was issued on the same date and returned without having been served on defendant Maroney; that the chain of summonses as to Maroney has been kept up by the issuance of alias and pluries summonses, and that the time for issuing another pluries summons for Maroney has not expired. It is, therefore, ordered that defendant Maroney's motion to dismiss the action as to him be denied.

The order entered on defendant association's motion states in substance: It appears from a statement filed by counsel for plaintiff that on the date this action was instituted on 29 May 1963 the records in the office of the clerk of the superior court of Forsyth County indicate that the defendant union has failed to comply with the requirements of G.S. 1-97(6), in that it has failed to appoint an agent in this State upon whom process may be served, and has failed to certify to the office of the clerk of the superior court of Forsyth County the name and address of a process agent; that in failing to appoint a process agent in Forsyth County defendant union has authorized the plaintiff to serve process upon the Secretary of State of North Carolina as legal agent of defendant union, which in fact plaintiff has done as set out in defendant union's own special appearance and motion to dismiss. It further appears from representations by plaintiff's counsel, from the duly verified complaint filed herein, and from an additional affidavit filed by plaintiff that defendant union is and has been for several years doing business in the State of North Carolina, that it is the legal representative of the employees of the Greyhound Bus Company, that it maintains a business agent and other officials in Winston-Salem by whom it transacts business, that it has a regular employee who is paid by the union and who looks after its affairs in Winston-Salem in addition to doing his work for the Greyhound Bus Company, that it conducts grievance hearings in Winston-Salem in connection with its operations, that it solicits memberships and holds meetings and rents a union hall and conducts the other business for which it exists as a union. The court is of the opinion and finds as a fact that the defendant union has been duly served with summons and a copy of the complaint, and

the court further finds that the allegations of the complaint, together with separate affidavit filed herein, are sufficient to support the institution of action in this court. It is, therefore, adjudged that service on defendant union is in compliance with the laws of the State of North Carolina, that defendant union's motion to set aside such service be denied, and that it be given 30 days in which to answer or otherwise plead.

The defendants excepted to the orders of the clerk of the superior court, and appealed to the judge, and requested that "specific findings be made of all facts concerning service of process on the defendants and each of them and further move the court that after making findings of fact with respect to service on the defendants, that an order be entered dismissing this action."

The appeal came on to be heard by Judge Olive, who entered an order, which, after reciting that the action was heard upon a special appearance by the defendants and motion to quash service, reads as follows:

> "* * * it appearing to the court that this is a tort action arising in the State of West Virginia and it further appearing to the court that the defendant, Division 1493 of the Amalgamated Association of Street, Electric, Railway and Motor Coach Employees of America, AFL-CIO is an unincorporated association having its principal office and place of business in the State of West Virginia, and it further appearing to the court from the evidence upon the hearing that there is insufficient evidence before the court that the said association is or was doing business in the State of North Carolina, and it further appearing to the Court that service in this cause was by service on the Secretary of State of North Carolina and by mailing a copy of the pleadings by the Secretary of State to the defendant, Division 1493 of the Amalgamated Association of Street, Electric, Railway and Motor Coach Employees of America, AFL-CIO, and it further appearing that there has been no personal service upon the defendant, D. V. Maroney.
>
> "IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the motion of the defendants that service in this action be quashed be and the same is hereby allowed."

The merits of plaintiff's claim and the sufficiency of his complaint are not presented here for determination. The sole question for review is Judge Olive's order.

Plaintiff has three assignments of error: (1) Judge Olive erred in reciting in his order "it appearing to the court that this is a tort

action arising in the State of West Virginia"; (2) Judge Olive erred in reciting in his order "and it further appearing to the court from the evidence upon the hearing that there is insufficient evidence before the court that the said association is or was doing business in the State of North Carolina"; and (3) Judge Olive erred in entering and signing the order.

Plaintiff's appeal is itself an exception to Judge Olive's order, and presents for review the questions as to whether error of law appears on the face of the record proper, and as to whether those matters that Judge Olive terms as appearing to him are sufficient to support his order that "the motion of the defendants that service in this action be quashed be and the same is hereby allowed." *Lowie & Co. v. Atkins*, 245 N.C. 98, 95 S.E. 2d 271; *Balint v. Grayson*, 256 N.C. 490, 124 S.E. 2d 364; *Horn v. Furniture Co.*, 245 N.C. 173, 95 S.E. 2d 521; Strong's N. C. Index, Vol. 1, Appeal and Error, § 21.

It appears plaintiff's action against defendant Maroney is an action *in personam*. Judge Olive's order recites "and it further appearing that there has been no personal service upon the defendant, D. V. Maroney." Plaintiff states in his brief in substance: He did not contend before Judge Olive, and he does not contend now, that defendant Maroney has been served with process. Therefore, there has been no service of summons on Maroney to quash. But he does contend that he had an original summons issued for Maroney in this action, which was not served on him, and he has kept up the chain of summonses by the issuance of alias and pluries summonses for Maroney under G.S. 1-95, thereby keeping the action alive against Maroney. Defendants in their joint brief state: "The summons was never served on the individual defendant."

In this jurisdiction in a civil action or special proceeding where a defendant has not been served with the original summons, the proper issuance of alias and pluries summons under "the alternate method" prescribed by the provisions of G.S. 1-95 keeps the cause of action alive, and prevents its discontinuance. *Morton v. Insurance Co.*, 250 N.C. 722, 110 S.E. 2d 330; *Hodges v. Insurance Co.*, 233 N.C. 289, 63 S.E. 2d 819; McIntosh, N. C. Practice and Procedure, 2d ed., Vol. 1, §§ 292 and 891; 33 N.C.L.R. 529.

According to Judge Olive's order and the briefs of counsel, no service of summons has been made on defendant Maroney. There is nothing in Judge Olive's order, or in the record proper before us, to suggest that Maroney has accepted service of process, or has made a special appearance, actual or constructive. There is nothing in Judge Olive's order, or in the record proper before us, to indicate there has

been a discontinuance of plaintiff's action against Maroney according to the provisions of G.S. 1-96. Maroney not having been brought into court, his rights are unaffected by the pendency of the action, and there was and is no process served on him to quash. *Hodges v. Insurance Co., supra.*

Judge Olive's recital in his order "it appearing to the court that this is a tort action arising in the State of West Virginia" is a pure legal conclusion. See *In re Bane,* 247 N.C. 562, 101 S.E. 2d 369. He has found no facts as to what alleged tortious acts the defendants, or either one of them, committed, if any, and if any were committed, whether or not any of them were or were not committed by defendants in North Carolina. The complaint alleges in substance that defendant Maroney mailed to all the executive board members of defendant association a letter containing words that were libelous *per se* about plaintiff, but it does not allege where the letters were mailed or received. Unless otherwise provided by statute, libelous matter sent through the mails is generally actionable either at the place of posting or at the place of receipt by the addressee, even in another state, because libel actions are transitory in their nature. The rationale of the rule is that each time a libelous matter is brought to the attention of a third party a new publication has occurred, and that each publication is a separate tort. 53 C.J.S., Libel and Slander, § 158; 33 Am. Jur., Libel and Slander, § 227. See *Hartmann v. Time, Inc.,* 166 F. 2d 127, 1 A.L.R. 2d 370, *cert. den.* 334 U.S. 838, 92 L. ed. 1763. Of course, when the libel action is brought in a state other than the state of residence of defendant, there is the problem of procuring service of process on defendant. Judge Olive has found no facts so that we can determine as to whether this is a tort action arising in the State of West Virginia.

Judge Olive erred in his order in decreeing that service in this action in respect to defendant Maroney be quashed, for there is nothing in his order to support it.

Plaintiff assigns as error Judge Olive's recital in his order "and it further appearing to the court from the evidence upon the hearing that there is insufficient evidence before the court that the said association is or was doing business in the State of North Carolina." This is another pure legal conclusion. Judge Olive in his order has made no findings of fact as to what acts, if any, defendant association has done or is doing in this State, so that we can determine whether or not from the facts found the defendant association was and is doing business within this State so as to permit service of process upon it within the purview of G.S. 1-97(6). Judge Olive's order does not recite what evidence he heard; his order merely recites "From the evidence upon the hear-

ing." Further, his order recites "it appearing," etc. It makes no findings of fact. Judge Olive's order quashing the action against defendant association is not supported by determinative findings of fact on the crucial questions presented, and it must be vacated, and the cause is remanded for further hearing and specific findings of fact, *inter alia*, as to whether or not defendant association is doing business in this State by performing any of the acts for which it was formed, so as to permit service of process on it according to the provisions of G.S. 1-97(6), and then for an entry of an order based upon the findings of fact and the conclusions in accordance with law. *In re Bane, supra; Columbus County v. Thompson*, 249 N.C. 607, 107 S.E. 2d 302; *Insurance Co. v. Trucking Co.*, 256 N.C. 721, 125 S.E. 2d 25.

Error and remanded.

RAY E. SIZEMORE v. DIVISION 1493 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, AFL-CIO.

(Filed 25 November, 1964.)

APPEAL by plaintiff from an order of *Olive, E. J.*, entered 13 April 1964 Civil Session of Forsyth, upon a special appearance and motion to dismiss by defendant association, quashing service in this action upon it.

Hatfield and Allman by Roy G. Hall, Jr., for plaintiff appellant.

White, Crumpler, Powell, Pfefferkorn & Green by James G. White for defendant appellee.

PER CURIAM. Plaintiff alleges a cause of action to recover damages for an alleged breach by the defendant association of the duties and obligations owed to him as a dues-paying member in good standing of defendant association under its constitution and bylaws and under the applicable provisions of the federal "Labor-Management Reporting and Disclosure Act of 1959," in that it failed to give him a full and fair hearing and failed to give him a right to exhaust his appeal remedies for grievances, when he was discharged as a driver by the Greyhound Bus Company upon a complaint filed against him by a person in West Virginia.

Defendant made a special appearance and moved to quash the summons served upon it: this motion is almost verbatim with a similar motion made by it in the case of *Sizemore v. D. V. Maroney and Division 1493, etc., ante,* 14, 138 S.E. 2d 803. Plaintiff filed an answer to its special appearance and motion to dismiss almost verbatim with the one it filed in *Sizemore v. Maroney, supra,* with the exception of the references to Maroney. Plaintiff filed an affidavit in this action almost verbatim with the affidavit he filed in *Sizemore v. Maroney, supra.* The clerk of the superior court of Forsyth County rendered an order denying defendant association's motion and giving it 30 days within which to answer or otherwise plead: this order is practically verbatim with the order the clerk made in *Sizemore v. Maroney, supra,* denying a similar motion by defendant association.

Defendant association appealed to the judge. Judge Olive, on the same day he entered an order in *Sizemore v. Maroney, supra,* rendered an order here in which he recites, among other things, "it further appearing to the court upon the hearing that there was insufficient evidence that the defendant was or is doing business in the State of North Carolina," and then ordered "that the motion of the defendant that service in this action be quashed be and the same is hereby allowed."

Plaintiff assigns as errors the following recital in Judge Olive's order: "* * * and it further appearing to the court upon the hearing that there was insufficient evidence that the defendant was or is doing business in the State of North Carolina," and that the judge erred in entering and signing the order.

Defendant association states in its brief: "This case and No. 390 [*Sizemore v. Maroney, supra*] are companion cases, the facts being substantially identical, except in case No. 390, D. V. Maroney, the president of the unincorporated defendant, is also a defendant." Defendant association's brief in the instant case in its material parts is identical with the brief it filed in case No. 390. The argument in the brief filed by plaintiff in the instant case in respect to whether defendant association was or is doing business in the State of North Carolina is practically identical with the argument on the same subject set forth in his brief which he filed in case No. 390.

The decision in the instant case is controlled by the decision in *Sizemore v. Maroney, supra,* filed this day, *ante,* 14, 138 S.E. 2d 803. Upon authority of that case, Judge Olive's order is vacated, and the cause is remanded for further proceedings as set forth in that case.

Error and remanded.

HARRY W. BELK v. O. DOUGLAS BOYCE.

(Filed 25 November, 1964.)

1. Appeal and Error § 42—

An instruction to the effect that defendant would be negligent if at the time and place defendant shot his pistol he knew or had reasonable ground to know that plaintiff was on the premises will not be held for error as confining the rule to the presence of plaintiff himself when in context the instruction charges that defendant's conduct should be judged in the light of the presence of any human being at the scene.

2. Animals § 7—

It is illegal for the owner of premises to attempt to kill a dog thereon when there is no evidence that the dog was a mad dog, was molesting or killing any domestic animals or fowl, was damaging property, or had ever done so. G.S. 14-360, G.S. 67-3, G.S. 67-14.

3. Weapons and Firearms § 2—

The rule that a person violating the law in shooting a weapon is civilly liable for injuries resulting to another person, irrespective of negligence, applies when the shooting of the weapon is in violation of an ordinance or statute for the safety of persons, and therefore the fact that a person firing a pistol was illegally attempting to kill a dog does not render him absolutely liable for injury to another, since the statutes relating to the killing of domestic animals were not enacted for the protection or safety of persons.

4. Negligence § 28—

Ordinarily, it is error for the court to instruct the jury that defendant's negligence must be the proximate cause of the injury in order to impose liability, but such instruction is not prejudicial when there is no evidence of concurring negligence or other responsible cause, and only the defendant's negligence is at issue.

5. Negligence § 4—

The rule that persons having possession and control over dangerous instrumentalities are under duty to use a high degree of care commensurate with the dangerous character of the article to prevent injury to others applies to firearms, and the instruction in this case *is held* in substantial accord therewith.

6. Same; Negligence § 38—

The owner of premises who injures a licensee as a result of the owner's attempt to shoot a dog on the premises is not liable to the licensee in the absence of negligence, even though his act in attempting to kill the dog is illegal, and if the owner did not know, or in the exercise of reasonable care should not have known, of the presence of the licensee in the vicinity, his act in firing the pistol on his own premises would not be a breach of duty toward the licensee.

7. Evidence § 15—

In an action to recover for injuries resulting to a boy injured by a shot fired by defendant at a dog on defendant's premises, testimony of a witness that he had been shot at by some "unknown person" on two occasions while at a pond on the premises, is not admissible for the purpose of fixing defendant with knowledge that boys frequented the pond, and further its exclusion is not prejudicial when defendant himself testifies that he knew boys had been coming to the pond.

APPEAL by plaintiff from *Clarkson, J.*, May 1964 Civil Session of GASTON.

Action to recover damages for personal injuries, including loss of an eye, resulting from a bullet wound.

Plaintiff alleges that he was injured by reason of defendant's negligence in firing a pistol several times in his direction while he (plaintiff) was fishing in a pond on defendant's land; that defendant's negligence consisted in (1) firing the pistol without first ascertaining that he could do so without injury to another, (2) shooting at or near plaintiff when he saw or in the exercise of due care could have seen him, (3) firing the pistol in a wilful, wanton and dangerous manner without due regard to the presence or probable presence of persons in the line of fire, and (4) shooting at and hitting plaintiff.

Defendant owned a 130-acre farm in Gaston County. Defendant did not reside on the farm but his employee or caretaker lived in a house thereon. The farm was used, among other things, for pasturing sheep, and was enclosed by a wire fence with strands of barbed wire at the top and bottom. On the farm was a 6-acre pond surrounded by a meadow.

Plaintiff's evidence is summarized as follows: About 4:00 P.M., 27 April 1955, plaintiff, then 16 years old, went to defendant's pond to fish. His dog followed him there. After he had been fishing about 30 minutes, he saw two men, one of whom was defendant, coming toward him across the field; plaintiff started walking toward them, thinking they saw him — there was nothing to obstruct the view. Plaintiff was clad in a white T-shirt and blue jeans. Defendant raised a pistol and fired toward plaintiff; the distance separating them was 150 to 175 feet. At that time plaintiff's dog was between him and defendant. When defendant fired, plaintiff turned and hurried in the opposite direction to the edge of the woods — 40 feet from the north end of the pond — and lay down in some low bushes to avoid being hit. As plaintiff fled toward the edge of the woods two bullets kicked up dust beside him. Defendant continued firing and while plaintiff was lying in the bushes a bullet struck him in the vicinity of his left eye; he started screaming.

Defendant and the caretaker came to plaintiff, picked him up and carried him to a hospital. As a result of the bullet wound plaintiff lost his left eye, experienced much pain and suffering and incurred large medical expenses. In going to defendant's farm on the day of the accident, plaintiff followed a path through the woods, the nearest way. The fence was "about tromped down" where the path crossed it. There were not any "No Trespassing" signs. He had been to the pond many times before, both alone and with other boys; he had never been told to leave or stay off. He had never asked permission. He didn't know whose land the pond was on. There was testimony that at least 18 boys (8 of whom testified) went to the pond frequently prior to the accident in question, to fish, hunt snakes and frogs and swim. The farm was not posted and they had never been ordered away.

Defendant's evidence tends to show: On the afternoon in question defendant and his caretaker were on the farm repairing an electric fence. They were south of the pond about 100 yards from the head or north end of the pond. Defendant had his .22 caliber target pistol; he carried it with him when he went to the farm to shoot snakes which were plentiful in and around the pond. Furthermore, dogs had been killing his sheep. He spied a dog near the edge of the woods on the west side of the pond, about 125 feet from the head of the pond. The dog was trotting eastwardly toward the head of the pond. Defendant began shooting at the dog; he shot nine times. The last time he fired the dog was in the bulrushes at the head of the pond. About 30 seconds after he fired the last shot he heard someone moaning and saw a boy's back rise out of the bulrushes at the head of the pond. He and his caretaker ran to plaintiff and took him to a hospital as quickly as they could. He did not see plaintiff at any time until after the shooting. "No Trespassing" signs were posted all around the farm on every fifth or sixth fence post. There was a "No Fishing" sign on a tree about 30 feet from the head of the pond. Defendant had never given anyone permission to fish in the pond. He knew boys had been coming on his property and to the pond — this is the reason he put up the "No Trespassing" signs. The caretaker had been instructed to keep the boys away, and whenever he had seen them at the pond he yelled to them and told them to get off the property. A deputy sheriff went with plaintiff to the pond about two weeks after the accident. Plaintiff told the deputy that on the day of the accident he went to the pond to fish, his dog ran out barking at someone approaching and he hid. He showed the deputy where he hid at the head of the pond, and told the deputy that someone started shooting while he was hidden and he was hit.

Issues were submitted to and answered by the jury as follows:

"1. Was the plaintiff injured by the negligence of the defendant, as alleged in the Complaint?

"ANSWER: No.

"2. What compensatory damages, if any, is the plaintiff entitled to recover of the defendant?

"ANSWER: .....

"3. Was the plaintiff injured by the wilful and wanton conduct of the defendant as alleged in the complaint?

"ANSWER: .....

"4. What punitive damages, if any, is the plaintiff entitled to recover of the defendant?

"ANSWER: ....."

Judgment was entered dismissing the action, and plaintiff appeals.

Daniel J. Walton for plaintiff.
Hollowell & Stott for defendant.

MOORE, J. Appellant's main attack is upon certain portions of the charge. Attention is particularly focused on the judge's final instruction on the first issue, as follows:

> ". . . if the plaintiff . . . has satisfied the jury from the evidence and by its greater weight that the defendant . . . at the time and place in question shot the plaintiff and that at the time the defendant knew or had reasonable grounds to know that plaintiff was on defendant's premises . . . that would constitute negligence on the part of the defendant, and if the plaintiff has further satisfied you from the evidence and by its greater weight that such negligence on the part of the defendant was the proximate cause of plaintiff's injuries, then you would answer the first issue Yes."

Plaintiff contends that this instruction is erroneous in three respects.

(1) He says it "imposed an undue burden on him to prove that defendant knew or had reasonable grounds to believe that the *plaintiff, himself,* was on defendant's premises." It certainly is not essential that the negligent person should have anticipated injury to the particular person who was in fact injured, or the particular kind of injury produced. *Drum v. Miller,* 135 N.C. 204, 47 S.E. 421; *Lancaster v. Greyhound Corp.,* 219 N.C. 679, 14 S.E. 2d 820. When the above in-

struction is read in context with the preceding portions of the charge it is clear that the court did not intend and the jury did not understand that the strained construction now urged by appellant should be given the language used. The objection is not sustained.

(2) Plaintiff contends that defendant's liability in this case does not depend upon his knowledge of the presence of plaintiff, actual or imputed. This requires a more extended discussion.

As a general rule, "If a person is violating the law by . . . shooting a weapon, he is civilly liable for any injury, even an accidental injury, inflicted by him with such weapon, the question of negligence being immaterial. . . . The fact that defendant's motive in discharging the weapon is laudable is immaterial where his act is illegal." 94 C.J.S., Weapons, § 28, pp. 527, 528.

Defendant's act in attempting to kill the dog, in the instant case, was unquestionably illegal. G.S. 14-360. The dog was not molesting or killing sheep or any other domestic animal or fowl and was not damaging property. There is no evidence he had ever done so. See G.S. 67-3; G.S. 67-14. There is no evidence that any sheep were in the vicinity. He was not a mad dog. G.S. 67-14.

The case of *Corn v. Sheppard,* 229 N.W. 869 (Minn. 1930), is in point. Defendant gave permission for boy scouts to camp on his farm at any time. On the night in question two scouts set up camp some distance from the house. During the night they went to the house to get water. Dogs had been molesting defendant's hogs. Defendant saw some dogs on the premises, got his pistol and went outside. He fired at a running dog and struck and injured one of the boys. He did not know the boys were on the premises until after the injury had been inflicted. The Court said:

> "Dogs are personal property. . . . It is unlawful to kill them except when necessary to save persons, domestic animals, or poultry from injury. . . . There is no claim that the dog in question was menacing anyone, or any animal or had ever done so. The attempt to shoot him was unlawful."
>
> "Where a person intentionally discharges a firearm for a wrongful purpose and another is hit, he is liable for the injuries inflicted, although he did not intend to hit the other nor even know any person was within range."

The court held that defendant was clearly liable for the injuries to the boy, and approved a peremptory instruction to that effect.

The courts have applied this rule where persons were unintentionally injured from the discharging of firearms within the limits of towns and cities in violation of municipal ordinances. *Townsend v. McCollum,* 175 N.C. 698, 95 S.E. 364; *Farrow v. Hoffecker,* 79 A. 920 (Del. 1906). Also in other situations: *Sitton v. Twiggs,* 213 N.C. 261, 195 S.E. 801; *Gross v. Goodman,* 19 N.Y.S. 2d 732 (1940); *Wright v. Clark,* 50 Vt. 130 (1862).

But the courts are now inclined to modify the rule and enlarge the scope of exceptions to this rule of absolute liability. ". . . clearly, the modern tendency of the court is to apply the general rule of negligence where injury or death has been inflicted by missiles from a firearm, and to permit the defendant in an action for damages to show in defense his freedom from negligence in causing the injury complained of." 56 Am. Jur., Weapons and Firearms, § 22, p. 1005.

Moore v. Fletcher, 363 P. 2d 1056 (Colo. 1961), is a case in point. Defendant had a goose pit on his farm from which he shot wild geese which came to eat grain in his field. During the night plaintiffs, without the knowledge or permission of defendant, came on the farm and dug a goose pit about 225 yards from defendant's pit, put out decoys and waited for dawn and the arrival of geese. In the meanwhile defendant went to his pit. About daybreak he saw the decoys, thought they were geese, and in shooting at them struck and injured plaintiffs. Defendant was shooting a .22 rifle. It was unlawful to shoot wild geese with such firearm. Because of the unlawful use of the firearm plaintiffs insisted that defendant was liable. The court discussed the matter in these terms:

> "Trespassers and mere licensees take the premises as they find them. The owner of the premises is not under the same obligation to trespassers and licensees as he is to those who are upon the premises by his express or implied invitation. . . . To the former (trespassers and mere licensees) . . . he is under obligation not wilfully and intentionally to injure them, or, as it is sometimes expressed, not to injure them after becoming aware of their presence. Of course, he must exercise reasonable care *after becoming aware of their presence, not to injure them by the affirmative act or force set in motion.*" (Quoted by the court from *Gotch v. K. & B. Packing and Provision Company,* 93 Colo. 276, 25 P. 2d 719, 720, 89 A.L.R. 573.)
>
> "It is plaintiff's contention that inasmuch as defendant was hunting migratory waterfowl with a rifle he was negligent, *per se.* A most casual reading of C.R.S. '53, 62-12-3 clearly indicates that

> the purpose and intent of this particular statute is to protect migratory waterfowl and not those who seek to kill them. Accordingly, violation of this particular statute does not of itself establish negligence nor responsibility on Fletcher (defendant)."

By the same reasoning, it is our opinion that the fact defendant was unlawfully shooting at a dog does not render the act negligence *per se,* nor impose on defendant absolute liability. Plaintiff was at best a mere licensee. The "Cruelty to Animals" statute (G.S. 14-360) is for the protection of animals, not for the protection of trespassers or mere licensees. Since the statute is not for the protection of the class to which plaintiff belongs, its violation does not impose liability in the absence of a showing that defendant knew, or in the exercise of reasonable care should have known, of plaintiff's presence in the vicinity.

If, as plaintiff contends in another connection, defendant saw him and was shooting at him, he would be liable. Such conduct would not only be negligence *per se,* but would be gross and wilful negligence. The charge of the court is clear and direct on this point.

(3) Plaintiff contends the judge erred in the instruction set out first above in that he used the expression "*the* proximate cause." It is true that there may be more than one proximate cause of an injury, and it is not ordinarily required that the negligence of the defendant be the sole proximate cause of the injury in order to fix liability upon defendant. In some circumstances it is prejudicial error for the court to charge that plaintiff must show that defendant's conduct was *the* proximate cause of the injury and damage. *Price v. Gray,* 246 N.C. 162, 97 S.E. 2d 844. But where there is no evidence of concurring negligence or other responsible cause, and only the defendant's negligence is at issue, it is not error for the court to use the expression "the proximate cause." In the instant case only the alleged negligence of defendant is involved. The objection is not sustained.

Appellant complains that the charge fails to inform the jury as to the degree of care required in the use of firearms. The court's instructions on this point were as follows:

> "He (plaintiff) says and contends that Dr. Boyce (defendant) was negligent in shooting at him, shooting 9 times, . . . and he says and contends that defendant was using a pistol, a dangerous instrumentality, and that he should have used a very high degree of care in the use of that pistol and that he could have foreseen the injuries would occur in shooting at random like he did." (Here the court was stating contentions of plaintiff on the first issue.)

". . . the court instructs you that a pistol, a .22 pistol, such as the evidence tends to show was used in this case, is a type of firearm, and is a dangerous instrumentality, depending, of course, upon the manner in which it might be used, and that in handling firearms a person is charged with a high degree of care . . . depending on the use of said firearms. . . . the court has given you the rule with reference to the alleged liability of the defendant in instructing you on the first issue, and the fact that a pistol was used in this is something you should take in consideration together with all of the other evidence in the case." (Here the court is giving additional instructions at the oral request of plaintiff.)

"It is often said that a very high degree of care is required from all persons using firearms in the immediate vicinity of others regardless of how lawful or innocent such use may be, or that more than ordinary care to prevent injury to others is required. Some courts refer to the degree of care required as a high degree of care; others say that the utmost or highest degree of care must be used to the end that harm may not come to others. More often, the requisite degree of care is defined as such care as is commensurate with the dangerous nature of the firearm." 56 Am. Jur., Weapons and Firearms, § 28, p. 1006. Persons having possession and control over dangerous instrumentalities are under duty to use a high degree of care commensurate with the dangerous character of the article to prevent injury to others. This rule applies to firearms. 3 Strong: N. C. Index, Negligence, § 4, pp. 445, 446; *Rea v. Simowitz*, 225 N.C. 575, 35 S.E. 2d 871; *Luttrell v. Mineral Co.*, 220 N.C. 782, 18 S.E. 2d 412; *Fox v. Army Store,* 215 N.C. 187, 1 S.E. 2d 550; *Sitton v. Twiggs, supra.*

The court's instructions are in substantial accord with the law as declared in the former opinions of this Court.

Finally, plaintiff contends that the court erred in excluding the testimony of plaintiff's witness, Verlon Gibson, that he had on two prior occasions been shot at by some person unknown to him while he was at defendant's pond. Plaintiff insists that the evidence was admissible to fix defendant with knowledge that boys were frequenting the pond. This position is not tenable. The witness does not know who did the shooting or that defendant even knew that it took place. Furthermore, defendant testified he knew boys had been coming to the pond and that was the reason he put up "No Trespassing" signs.

No error

THE PLANTERS NATIONAL BANK & TRUST COMPANY OF ROCKY MOUNT, N. C. v. SOUTH CAROLINA INSURANCE COMPANY.

(Filed 25 November, 1964.)

1. Taxation § 31—

The lien of the Federal Government for taxes upon the recording of notice of Federal tax lien in the office of the register of deeds of a county is effective only against the property of the taxpayer, and the property or property rights of the taxpayer to which the lien attaches must be determined by State law. 26 U.S.C.A. §§ 6322, 6323, G.S. 44-65.

2. Same; Chattel Mortgages and Conditional Sales § 8—

Where the purchaser of a motor vehicle executes a conditional sales contract and note for the deferred portion of the purchase price, his property right is subject to the purchase money lien, which has priority over the lien of the Federal Government for taxes upon the subsequent recording of notice of Federal tax lien in the office of the register of deeds of the county, even though the conditional sales contract is not registered.

3. Same; Indemnity § 2—

Plaintiff was the assignee for value of a conditional sales contract and note for the deferred portion of the purchase price of a motor vehicle. Defendant issued its policy to indemnify plaintiff for loss sustained solely from failure of plaintiff to record the instrument. The vehicle was seized and sold to satisfy the subsequently recorded notice of Federal tax lien. *Held:* Plaintiff's loss resulted from its failure to assert its lien against the United States and not from plaintiff's failure to record the conditional sales agreement, and the policy of indemnity insurance did not cover such loss.

APPEAL by defendant from *Parker, J.*, March Civil Session 1964 of NASH.

This is an action instituted by the plaintiff to recover indemnity under a policy of insurance issued by the defendant to plaintiff, whereby the defendant contracted to indemnify the plaintiff from all losses sustained from failure solely of plaintiff to record an instrument it acquired in the usual course of business.

It was stipulated that the policy of insurance was in full force and effect from 1 November 1959 to 1 November 1960.

On 23 April 1959, "A Notice of Federal Tax Lien," in the amount of $1,923.08, against one A. E. Gurganus, a resident of Martin County, North Carolina, was recorded properly in the office of the Register of Deeds of Martin County. On 22 September 1960 a similar notice was recorded in the same office, in the amount of $1,879.46, against A. E. Gurganus. This second notice was not a renewal of the first lien but an additional one.

On or about 29 August 1960, Griffin Motor Company sold and delivered a 1960 Valiant station wagon to the said A. E. Gurganus, who executed a conditional sales contract and note for the deferred portion of the purchase price of the automobile in the sum of $2,525.00, to be paid in monthly installments. The conditional sales contract provided that "title to the property shall remain in seller or assigns until all amounts due hereunder or rearrangements thereof are fully paid in cash." This contract was sold for a valuable consideration to plaintiff on 1 September 1960. The contract has never been recorded by the plaintiff.

The station wagon was seized by the United States on or about 23 September 1960, advertised and sold on 21 October 1960, to satisfy the aforesaid tax liens against the said A. E. Gurganus. Nothing appears in the record to indicate that the plaintiff sought to assert its lien on said station wagon against the United States.

It was stipulated that the 1960 Valiant station wagon, the property for which claim was made under the policy of insurance, was on 23 September 1960 valued at $2,000.00; that the balance due and unpaid on the conditional sales contract and note on 21 October 1960, the date the station wagon was sold for $1,500.00, was $2,210.19.

The court below, on the facts stipulated in accord with those hereinabove set out, held that the plaintiff was entitled to recover of the defendant the sum of $2,000.00, with interest at six per cent per annum from 21 October 1960 until paid, and the costs of the action. Judgment was signed in accord therewith.

Defendant appeals, assigning error.

W. A. Wilkinson, James W. Keel, Jr., for plaintiff.
Jeff D. Batts, Cary Whitaker for defendant.

DENNY, C.J. It is provided in 26 U.S.C.A., § 6321, "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount * * * shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

It is further provided in 26 U.S.C.A., § 6322: "Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time"

Likewise, *ibid.*, § 6323 reads as follows: "(a) Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not

be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate." Subsection (c)(1) in pertinent part provides as follows: "Even though notice of a lien provided in section 6321 has been filed in the manner prescribed in subsection (a) of this section, the lien shall not be valid * * * as against any mortgagee, pledgee, or purchaser of such security, for an adequate and full consideration in money or money's worth, if at the time of such mortgage, pledge, or purchase such mortgagee, pledgee, or purchaser is without notice or knowledge of the existence of such lien."

G.S. 44-65 provides: "Notices of liens for internal revenue taxes payable to the United States of America and certificates discharging such liens may be filed in the office of the register of deeds of the county or counties within which the property subject to such lien is situated."

Since the lien is only against the property of the taxpayer, it becomes necessary to determine what is property of the taxpayer.

The property or property rights to which the lien attaches must be determined by state law. *United States v. Durham Lumber Co.,* 363 U.S. 522, 4 L. ed. 2d 1371, 80 S. Ct. 1282.

"The existence of 'property' upon which the lien may attach must be determined under state law, but federal law determines whether that property is subject to the lien." 5 Rabkin & Johnson, Federal Income, Gift and Estate Taxation, § 73.06.

In the case of *United States v. Bess,* 357 U.S. 51, 2 L. ed. 2d 1135, 78 S.Ct. 1054, the taxpayer, a resident of New Jersey, was assessed for deficiencies in income taxes for the years 1945-1949. The taxpayer died in 1950. The proceeds of certain insurance policies on his life, under which he had retained change-of-beneficiary and cash-surrender rights, were paid to his widow. The taxpayer's estate was insolvent. In an action instituted in the United States District Court in New Jersey, the Court held the taxpayer's widow liable for the total of the deficiencies notwithstanding that it exceeded the cash surrender value of the policies. On appeal, the Third Circuit Court reduced the District Court's judgment to the amount of the cash surrender value of the policies (243 F. 2d 675). The Supreme Court of the United States allowed *certiorari* and affirmed the judgment of the Circuit Court. The taxpayer, prior to his death, did have a property right in the cash surrender value of the policies.

In *United States v. Anders Contracting Co.,* 111 F. Supp. 700, on 15 September 1950, the Government duly filed a tax lien against Anders Contracting Company for something over $8,000.00 in the proper recording office for Greenville County, South Carolina. On 6 April 1951,

the Auto Sales Company sold a Ford truck to the Anders Contracting Company, and, contemporaneously therewith, took a conditional sales contract, securing a note for the balance of the purchase price, which contract provided, among other things, that title to and ownership of the truck should remain in the seller and its assigns until the balance due on the purchase price was paid in cash.

On 5 July 1951, the Government filed another lien against Anders Contracting Company in the amount of $1,583.00.

The Auto Sales Company did not record its conditional sales agreement until 23 July 1951.

The Anders Contracting Company defaulted in its payments, and on 21 January 1952, the Auto Sales Company and the Deputy Collector of Internal Revenue agreed that the truck might be sold and the proceeds held in trust until title to the proceeds could be determined. The District Court held: "The position of the Government is not sustained by the rules of common law or those prescribed by the Recording Act of South Carolina, neither is it sustained by any equitable principle. The Government has suffered no loss by reason of the failure to record the chattel mortgage, and to hold that the Government could take the property, which had been sold to the taxpayer, even though title had been retained by the seller, would result in an unjust enrichment of the Government at the expense of the Auto Company."

In the case of *Gauvey v. United States*, 291 F. 2d 42 (U.S.C.C. 8th), the appellant on 1 May 1956 agreed to sell Basin Rig & Trucking, Inc. (hereinafter called Basin), certain personal property in accordance with the terms of a conditional sales contract, which, among other things, contained the provision that title to the property was reserved by the seller until the purchase price had been fully paid. The conditional sales agreement was not recorded until 17 April 1957. Delinquent withholding and excise taxes were assessed against Basin in November and December 1956, and on 19 February 1957, a tax lien for $8,368.25 was filed with the Register of Deeds of Williams County, North Dakota.

The United States District Court, under the above facts, gave a judgment in favor of the Government. See 185 F. Supp. 374. The District Court held the conditional sales agreement was not a mortgage within the meaning of § 6323 of the Internal Revenue Code of 1954. On appeal to the Circuit Court the Court said: "Being mindful that the Supreme Court has adhered to the principle that the statute is not to be extended to afford protection to holders of inchoate and unperfected liens, we are nevertheless satisfied that the conditional sale contract does not fall within that category. The lien provided therein came into existence upon execution of the contract * * *. While there ap-

pears to be a division in the courts on this question, we observe that the factor of recording is not mentioned in § 6323 and, in our opinion, this element should not be read into the statute as a condition precedent to the protection afforded the enumerated classes.

"Irrespective of the nomenclature employed, realistically the conditional sale contract was a mortgage within § 6323; appellant falls within the protected class and his lien is entitled to priority. Accordingly, the judgment is reversed with directions to enter a judgment in accordance with the views herein expressed."

Under the facts in the instant case, it is clear that A. E. Gurganus had no property right in the 1960 Valiant station wagon to which the tax lien of the Government could attach. *United States v. Bank of United States,* 5 F. Supp. 942; *United States v. Bank of Shelby,* 68 F. 2d 538; *United States v. Durham Lumber Co., supra.*

Since the liens of the Government were duly filed and the plaintiff's conditional sales agreement has never been recorded, the situation is analogous to that of a mortgagee who holds a duly recorded mortgage containing an after-acquired property clause. *Citizens Nat. Trust & S. Bank of Los Angeles v. United States,* 135 F. 2d 527.

In *Dry-Kiln Co. v. Ellington,* 172 N.C. 481, 90 S.E. 564, the plaintiff sold to the Ellington Building Supply Company, under a conditional sales agreement, the property in question. Prior thereto the Building Supply Company, a partnership, had executed a mortgage to the defendant, W. J. Ellington, securing certain indebtedness. (The mortgage covered supplies and property of all and every kind and description belonging to them or which they might thereafter acquire in connection with the business they were running.) The conditional sales agreement was never recorded.

The defendant denied the right of plaintiff to recover under its unrecorded conditional sales agreement. On appeal from a verdict in favor of plaintiff, this Court discussed the generally recognized principle that a mortgage with an after-acquired clause operates to create a lien on the after-acquired property in favor of the mortgagee when the property comes into existence. The Court added: "The principle, however, is subject to the qualification that the mortgagee who claims after-acquired property takes it in the same condition in which it comes into the hands of the mortgagor, and if at that time it is subject to liens the general mortgage does not displace them, nor does the failure to register the lien, existing at the time of the acquisition of the property by the mortgagor, have this effect, as the registration laws are intended for the protection of subsequent, not prior, purchasers and creditors. *Cox v. Lighting Co.,* 151 N.C. 62 (65 S.E. 648.)" *Motor Co. v. Jackson,*

184 N.C. 328, 114 S.E. 478; *Finance Co. v. Weaver,* 199 N.C. 178, 153 S.E. 861; *Silvertown Stores v. Caesar,* 214 N.C. 85, 197 S.E. 698, 43 A.L.R. 2d 815; *Goodrich Silvertown, Inc. v. Rogers,* 189 S.C. 101, 200 S.E. 91; *United States v. New Orleans Railroad,* 79 U.S. 434, 20 L. ed. 362; 10 Am. Jur., Chattel Mortgages, § 205, page 855; 15 Am. Jur. 2d, Chattel Mortgages, § 163, page 332, *et seq.*

In light of the foregoing statutes and authorities cited herein, we have reached the conclusion that the plaintiff's loss as assignee of the conditional sales agreement involved herein was not occasioned solely as the result of plaintiff's failure to record the instrument but to its failure to assert its lien against the United States. Therefore, the judgment below is

Reversed.

FREDERICK WARNER AND WIFE, ELIZABETH L. WARNER; JOHN XENAKIS AND WIFE, GEORGIA XENAKIS; WILLIAM H. HAGGARD AND WIFE, BLANCHE HAGGARD v. W & O INCORPORATED AND FREDERICK STEINER.

(Filed 25 November, 1964.)

1. Appeal and Error § 22—

Legal conclusions of the trial court, even though denominated findings of fact, are not conclusive, and upon appeal the Supreme Court will examine all the findings of fact to ascertain if they support the judgment.

2. Judgments § 30—

Where a municipal board of adjustment refuses to revoke a building permit on the ground that the contemplated structure was prohibited by existing ordinances, judgment upon *certiorari* sustaining the order does not adjudicate the right of the municipality to thereafter prohibit the proposed structure by amending its zoning ordinances.

3. Municipal Corporations § 25—

If a property owner in good faith makes expenditures in reliance on a building permit issued to him, his right to construct the building will be protected as an existing use upon later amendment of the municipal zoning regulations, but the mere issuance of a building permit alone creates no property right in him, and he may not remain inactive and thereby deny the municipality the right to make needed changes in its ordinances.

4. Same—

Expenditures for architect's drawings prior to the issuance of a building permit cannot be made in reliance on the permit so as to protect the permittee from later changes in the zoning ordinances.

5. Same—

The felling of trees encroaching on the site of a proposed structure for which a building permit had been issued does not involve such an expenditure as will protect the permittee against a subsequent amendment to the zoning ordinances of the city, certainly when the trees are felled after the enactment and only shortly before the effective date of the amendment.

6. Frauds, Statute of, § 6b—

Parol acceptance by the optionee is not sufficient to repeal the statute of frauds so as to bind the optionee.

7. Municipal Corporations § 25—

Where, at the time of the enactment of an amendment prohibiting a proposed structure, the optionee who had obtained a building permit could not have been compelled to purchase and pay for the property by reason of the statute of frauds, the optionee may not assert the later payment of the purchase price as an expenditure in good faith exempting him from the operation of the amendment.

8. Same—

The law accords protection to nonconforming users who, relying on authorization then given, make substantial expenditures in the honest belief that proposed structures would not violate the zoning regulations, but the law does not protect one who waits until after the enactment of an ordinance forbidding a proposed use before making expenditures even though the expenditures are made prior to the effective date of the ordinance.

APPEAL by plaintiffs from *Froneberger, J.*, January 27, 1964, Civil Session of BUNCOMBE.

This action was begun December 5, 1962. Plaintiffs own lots in Reynolds Place, a residential area restricted to single family residences. They seek to enjoin the construction by W & O, Incorporated (W & O), of a 50 family apartment house on a lot adjoining Reynolds Place. The right to injunctive relief is based on the assertion that the proposed construction would violate the zoning ordinances of Asheville.

A temporary restraining order issued. This was continued to the hearing. A jury trial was waived. Most of the facts were stipulated. The determinative facts as stipulated, or as found by the court, are these: Defendant Steiner is the agent of W & O. On May 7, 1962, Johniet R. Scott, a widow, and Bessie Love Humphreys owned the lot on which W & O proposes to construct the apartment house. Francis Humphreys, husband of Bessie, was mentally incompetent and confined to a mental institution. On May 7, 1962, a written option was given to Steiner, as agent for Albert Owens. (The record is barren of anything to indicate how W & O acquired the rights of Owens under the option.) Within the option period, optionees gave verbal notice of their election to exercise the option. On August 6, 1962, a special pro-

ceeding was instituted so that a valid conveyance of the property might be made without the joinder of the incompetent husband of Bessie R. Humphreys. On August 8, 1962, Steiner applied to the building inspector for a permit for the construction of a building on the lot in question. The application lists W & O as the owner of the lot. Attached to the application were detailed plans and specifications. Permission to construct the proposed building was granted by the building inspector on August 8, 1962. The property was then zoned RA-8. The zoning ordinance did not prohibit the construction of apartment buildings in areas so zoned. On August 9, 1962, plaintiffs and other interested property owners filed a petition with the governing authorities of Asheville requesting that the area be rezoned and placed in zone RA-10, which classification prohibits the erection of multiple family dwellings.

On September 13, 1962, the City Council, acting upon the recommendation of the Planning and Zoning Commission, rezoned the area and placed the lot in question in class RA-10. This ordinance became effective on September 28, 1962. On the date the ordinance became effective no construction work had been done, except for soil borings and felling six or seven trees. W & O had, however, after it gave verbal notice of its election to purchase, but prior to its application for a permit, expended moneys in securing a commitment from a financial institution to provide funds for the construction of an apartment house. It had also made expenditures for the preparation of plans for the apartment house.

Petitioners sought to have the Board of Adjustment revoke the permit issued on August 8, 1962. On September 10, 1962, the Board of Adjustment refused to revoke the permit. On September 18, 1962, plaintiffs Warner filed a petition for *certiorari* to review the action of the Board of Adjustment. As a basis for their assertion that the permit was invalid, they alleged: "The proposed construction is not an apartment house or multiple-dwelling as permitted by RA-8 Regulations, the same not being designed for permanent residency, but is actually a motel or efficiency motel for use by transient or seasonal occupancy, in violation of said Zoning Ordinance." The writ of *certiorari* issued September 19, 1962. On September 27, 1962, a temporary restraining order issued enjoining construction of the building pending determination of the questions raised in the application for *certiorari*. The deeds conveying the property to W & O were executed and delivered on September 26, 1962, and on October 9, 1962.

In addition to the facts summarized above, the court found: "[T]he Building Permit was duly and properly issued on August 8, 1962, and the defendants acquired thereby a vested interest to erect the build-

ings authorized by said permit. That the action of the Asheville City Council in rezoning the Lake Shore area as RA-10 did not affect the permit theretofore issued to the defendant W & O., Inc., and that said permit is subject to recall or revocation only by action of the Building Inspector of the City of Asheville. * * * The Building Permit has been judicially determined to have been properly issued by final judgment entered by Judge Harry C. Martin on November 30, 1962." Based on the findings and stipulations, the court concluded that the restraining order theretofore issued was improvidently granted. It dissolved the restraining order and authorized defendants to proceed with the construction of the building. It retained the cause so that damages sustained by defendants by the issuance and continuance of the restraining order might be determined. Plaintiffs excepted to the findings and judgment and appealed.

James S. Howell and Harold K. Bennett for appellants.
John S. Stevens and William M. Styles for appellees.

RODMAN, J. The quoted findings listed by the court as facts are, in reality, legal conclusions determinative of the rights of the parties. Plaintiffs' exceptions to the findings and their assignments of error necessitate an examination of the facts, those stipulated and found by the court, to ascertain if the quoted conclusions are correct. The listing of what is in reality a legal conclusion as a fact, when contrary to the facts stipulated and not supported by the evidence, has no efficacy.

The finding that the validity of the permit to build had been judicially determined by judgment entered by Judge Martin, on November 30, 1962, finds no support in the record. No judgment bearing that date appears in the record. The parties, in their briefs, indicate that the judgment to which the finding relates is the judgment entered in the proceedings initiated by plaintiffs Warner to review by *certiorari* the Board of Adjustment's refusal, on September 10, 1962, to vacate the permit issued August 8, 1962. For the purpose of this opinion, we act upon the assumption that Judge Martin, when called upon to review the action of the Board of Adjustment, concluded that the reason then assigned for reversing the Board of Adjustment did not show invalidity on September 10, the date the Review Board acted. The reason then assigned for reversing the action of the Board of Adjustment was that the permit was invalid because the proposed building violated the provisions of the ordinance relating to properties classified in zone RA-8. The Board of Adjustment was not called upon to rule on the right of W & O to obtain a building permit because it was not a property

owner, or its right to act on the permit after the ordinance was amended. A judgment rendered in the proceedings for *certiorari* is not determinative of the questions presented in this action.

The parties have not seen fit to incorporate in the record the zoning ordinance. There is nothing in the evidence to show what the ordinances provide with respect to the right of an optionee to apply for a permit for the construction of a building. Our statute, G.S. 160-126, requires the owner of the property to obtain a permit before constructing or repairing a building. But there is nothing in this case which requires us to determine whether the word "owner," as there used, would exclude a lessee, or one having an option, to purchase. For present purposes, we assume that an optionee is within the class that might apply for, and obtain, a building permit.

Accepting as correct defendants' contention that the permit was valid on August 8, 1962, when issued, we are brought to the crucial question: Did that permit create a vested right denying to the city the power to amend its ordinances by enlarging the area of zone RA-10?

The permit created no vested right; it merely authorized permittee to act. If he, at a time when it was lawful, exercised the privilege granted him, he thereby acquired a property right which would be protected; but he could not remain inactive and thereby deny to the municipality the right to make needed changes in its ordinances. It is not necessary for the permittee to show that the construction authorized by the permit has been completed before the ordinance is amended. He is protected if, acting in good faith, he has made expenditures on the faith of the permit at a time when the act was lawful. *Stowe v. Burke*, 255 N.C. 527, 122 S.E. 2d 374; *In Re Appeal of Supply Co.*, 202 N.C. 496, 163 S.E. 462; 101 C.J.S. 1006-7, 58 Am. Jur. 1041.

Expenditures made for architect's drawings, so that W & O might apply for a permit, were manifestly not made in reliance on the permit thereafter issued. The parties stipulated: "That on the date of September 13, 1962, the date that Ordinance 462 was adopted rezoning subject property, and on the date of September 28, 1962, the effective date of said rezoning ordinance, no construction work had been done on subject property; except for certain clearing and grubbing operations." This stipulation must be interpreted in the light of the testimony of defendants' witness, Steiner, the only witness to testify with respect to the work. He testified he engaged "a tree man to eliminate the trees on the property that would encroach upon the building site, which consists of approximately six to seven trees that we had eliminated. * * * I would say he dropped the trees, and at the time that the trees were dropped and had fallen on the ground he was stopped from doing any

further work." The record shows the work was stopped by a restraining order issued and served on September 27, 1962. Nowhere is there any estimate of the cost of doing this work. The evidence discloses that the expenditures could not have cost any substantial sum. They were made at a time when the permittee knew that the city had adopted an ordinance prohibiting the construction of apartment buildings in the area. It appears from Steiner's testimony that this work was done on September 27, just one day before the amended ordinance became effective. Steiner, the agent for W & O and in charge of its operations, was aware of the opposition to the construction of the apartment house, the effort to revoke the permit, and the application of protesting citizens to the City Council for an amendment of the ordinance.

The court found as a fact that defendants "obligated themselves for the purchase price of the land in complete good faith, and without notice or knowledge of any opposition to the erection of the proposed buildings." Plaintiffs excepted to and assigned the foregoing finding as error, because the parties had expressly stipulated there was no written notice of the election to purchase; notice of the election to purchase was given verbally in May, 1962; and the deeds executed pursuant to the notice were dated September 26, 1962, and October 9, 1962.

No contract to buy or sell land can be enforced unless in writing and signed by the party to be charged, G.S. 22-2. A written option offering to sell, at the election of the optionee, can become binding on the owner by verbal notice to the owner, *Kottler v. Martin,* 241 N.C. 369, 85 S.E. 2d 314; but a parol acceptance by the optionee is not sufficient to repel the statute of frauds and bind the optionee. *Burriss v. Starr,* 165 N.C. 657, 81 S.E. 929; *Hall v. Misenheimer,* 137 N.C. 183, 49 S.E. 104; *Love v. Atkinson,* 131 N.C. 544, 42 S.E. 966; *Improvement Co. v. Guthrie,* 116 N.C. 381, 21 S.E. 952; *Love v. Welch,* 97 N.C. 200, 2 S.E. 242; *Mizell v. Burnett,* 49 N.C. 249; *Carr v. Rawlings,* 123 S.E. 875; *Imholz v. Southern Oil Corporation of America,* 134 S.W. 2d 301; James, Option Contracts, pp. 187-189, Ann. Cas. 1913A 1042; 30 A.L.R. 2d 974; 49 Am. Jur. 691; 37 C.J.S. 664. It follows as a matter of law from the stipulated facts that W & O could not have been compelled to purchase and pay for the property because of their verbal acceptance. The ordinance had been amended before the deeds were executed; it became effective only two days after the first deed was dated, and was in effect prior to the date of the second deed.

The fact that plaintiffs obtained a restraining order on September 27, 1962, forbidding defendants from proceeding with the construction of the proposed building, did not enlarge their rights. They knew that

the ordinance prohibiting the construction would become effective the following day. The law accords protection to nonconforming users who, relying on the authorization given them, have made substantial expenditures in an honest belief that the project would not violate declared public policy. It does not protect one who makes expenditures with knowledge that the expenditures are made for a purpose declared unlawful by duly enacted ordinance. *Lee v. Board of Adjustment,* 226 N.C. 107, 37 S.E. 2d 128, 168 A.L.R. 1; nor does it protect one who waits until after an ordinance has been enacted forbidding the proposed use and, after the enactment, hastens to thwart the legislative act by making expenditures a few hours prior to the effective date of the ordinance, *Stowe v. Burke, supra.*

Reversed.

FROSTY ICE CREAM, INC., A CORPORATION; ROL-A-LONG, INC., A CORPORATION; O. L. ROGERS, T/A FREEZ-O, A SOLE PROPRIETORSHIP; I. L. OATES, JR., T/A FREDDIE FREEZE OF CHARLOTTE, A SOLE PROPRIETORSHIP; W. E. COX, T/A COX FROZEN DELIGHT, A SOLE PROPRIETORSHIP; WILFORD R. LOOKADOO, T/A MR. COOL, A SOLE PROPRIETORSHIP; FRENTO BURTON, T/A FRENTO'S ICE CREAM, A SOLE PROPRIETORSHIP; ON BEHALF OF THEMSELVES AND SUCH OTHER PERSONS, FIRMS OR CORPORATIONS AS ARE SIMILARLY AFFECTED BY ARTICLE III, SECTION 13-52 AND SECTION 13-53 OF THE CODE OF THE CITY OF CHARLOTTE, NORTH CAROLINA *v.* JOHN HORD, CHIEF, CHARLOTTE POLICE DEPARTMENT.

(Filed 25 November, 1964.)

1. Injunctions § 5; Municipal Corporations § 34—

Ordinarily, injunction will not lie to restrain enforcement of an ordinance creating a criminal offense, since a defendant prosecuted thereunder may raise the question of the constitutionality of the ordinance as a defense, and thus has an adequate remedy at law.

2. Same—

Companies engaged in the retail sale of ice cream from motor vehicles cruising the streets of a municipality are not entitled to restrain enforcement of a municipal ordinance prohibiting loud and unnecessary noises on the ground that they had been instructed by enforcement agencies to cease the use of any type of bell, musical instrument, or similar device necessary to attract customers to the mobile units, since they have an adequate remedy at law by attacking the constitutionality of the ordinance as applied to them as determined upon particular factual situations in which the bells or musical instruments are used.

3. Municipal Corporations § 34; Statutes § 5—

A municipal ordinance, as well as a statute, may be valid in part and invalid in part, and its constitutionality may be more satisfactorily determined upon the basis of a particular factual situation rather than upon attack of its constitutionality generally.

APPEAL by plaintiffs from *Pless, J.*, March 23, 1964, Schedule "D" Civil Session of MECKLENBURG.

Civil action to declare invalid and enjoin enforcement of ordinances of the City of Charlotte.

The seven named plaintiffs, and other persons, firms or corporations in whose behalf this class action was instituted, "are engaged in the retail sale and distribution of ice cream and related products from motor vehicles in and about the City of Charlotte," and utilize the public streets in their business. Each has "some type of bell or musical instrument or other device affixed to his or its motor vehicle which is used for the purpose of attracting the attention of the public and of inviting patronage for the advertisement and sale of his or its ice cream and other related products from his or its motor vehicles."

Plaintiffs set forth in their complaint the ordinance provisions they attack, being all of Section 13-52 and a part of Section 13-53 of Article III of the Code of the City of Charlotte, as follows:

Section 13-52: "LOUD, DISTURBING AND UNNECESSARY NOISES — PROHIBITED. It shall be unlawful for any person to create, assist in creating, permit, continue or permit the continuance of any unreasonably loud, disturbing or unnecessary noise in the city."

Section 13-53: "SAME — ACTS CONSTRUED. The following acts, among others, are declared to be loud, disturbing, annoying and unnecessary noises in violation of this article, but said enumeration shall not be deemed to be exclusive: . . . (f) SHOUTING, ETC., TO ATTRACT ATTENTION. To make any noise upon a public street . . . by any kind of crying, calling, or shouting or by means of any whistle, rattle, bell, gong, clapper, horn, hammer, drum, musical instrument, or other device for the purpose of attracting attention or of inviting patronage of any persons to any business whatsoever; or thereby to cause annoyance to persons upon any street or public place or to persons in neighboring premises or otherwise create a public nuisance."

Defendant, as Chief of the Charlotte Police Department, is charged with the responsibility of enforcing the ordinances of the City of Charlotte.

Plaintiffs allege, and defendant denies, that plaintiffs are subject to the provisions of G.S. 105-87 entitled "Motor advertisers," relating to license taxes.

Plaintiffs allege, and defendant denies, that plaintiffs will not be able "to remain in this type of business" if they are unable "to utilize some type of bell, musical instrument or other device to attract attention and to invite patronage by advertising as aforesaid."

Plaintiffs allege, and defendant denies, that plaintiffs have no adequate remedy at law.

Plaintiffs allege, and defendant denies, that the quoted ordinance provisions are invalid because (1) repugnant to G.S. 105-87 and (2) violative of designated provisions of the State and Federal Constitutions.

Defendant admits "that the plaintiffs, and each of them, have been instructed by the agents, servants and employees of the defendant to cease entirely the continued use of any type of bell, musical instrument or other similar device for the purpose of attracting attention and of inviting patronage to their business of selling ice cream and related products under the pains of arrest," and that plaintiffs "have been informed that the defendant, his agents, servants and employees, will make, or cause to be made, arrests of any persons, firms or corporations, which include the plaintiffs herein, for the violation of the aforesaid City ordinances."

A temporary restraining order issued by Judge Froneberger on July 12, 1963, simultaneously with the institution of this action, was, by order of August 21, 1963, signed by Judge Bone, continued in effect until the final hearing.

The cause was before Judge Pless for final hearing. The order entered by Judge Pless, bearing date of March 31, 1964, after reciting that the cause was before him for the purpose of determining whether the order of Judge Bone should be made permanent and after quoting the challenged ordinance provisions, concludes as follows:

"The Court is of the opinion that the determination as to whether or not a noise is unreasonably loud or disturbing is one that would have to be determined by the nature, extent, volume, raucousness or lack of it, of the particular instrument used, and therefore, that to issue an Order preventing the arrest of any of the plaintiffs without regard to the nature of the instrument to be used would be, in effect, to prejudge the question of whether or not the instrument was unreasonably loud or disturbing, and that the only proper way to determine the question would be upon the trial of a person based upon the evidence applicable to that particular case and the instrument used.

"The Court, therefore, is of the opinion that the plaintiffs are not entitled to the relief sought and denies the same; without prejudice to the right of the plaintiffs, and each of them, upon their arrest or indictment to have the matter fully determined based upon the evidence at it may appear in the trial of that prosecution.

"IT IS THEREFORE ORDERED AND DECREED that the temporary Order of Judge Bone be, and the same is hereby vacated and set aside."

Plaintiffs excepted and appealed.

Thereupon, the court, exercising the discretionary power conferred by G.S. 1-500, ordered that the restraining order remain in effect pending disposition of plaintiffs' appeal.

Wardlow, Knox, Caudle & Wade and Gertzman & Goldfarb for plaintiff appellants.

John T. Morrisey, Sr., for defendant appellee.

BOBBITT, J. The violation of a (valid) municipal ordinance is a misdemeanor. G.S. 14-4; *S. v. Barrett,* 243 N.C. 686, 91 S.E. 2d 917, and cases cited.

Plaintiffs do not allege that they, or any of them, were at any time prosecuted or arrested for alleged violation of said ordinance provisions. Since July 12, 1963, defendant has been restrained from obtaining warrants and making arrests for such violations.

Ordinarily, under a well-established general rule, an injunction will not lie to restrain enforcement of an ordinance creating a criminal offense. If, as plaintiffs allege, the ordinance provisions now challenged are unconstitutional or otherwise invalid, any plaintiff who may be prosecuted for violation thereof will have a complete defense to such criminal prosecution and therefore an adequate remedy at law. Decisions and texts stating the general rule, the reasons therefor and exceptions thereto are collected and set forth in *Walker v. Charlotte,* 262 N.C. 697, 138 S.E. 2d 501. Restatement is unnecessary.

The challenged ordinance provisions do not purport to prohibit the sale by plaintiffs from motor vehicles of ice cream and related products. Compare *Tastee-Freez, Inc. v. Raleigh,* 256 N.C. 208, 123 S.E. 2d 632; also, see *S. v. Byrd,* 259 N.C. 141, 130 S.E. 2d 55. Moreover, plaintiffs may advertise their products and the itineraries and schedules of their mobile units by any and all methods not in conflict with said ordinance provisions.

The challenged ordinance provisions do not refer to plaintiffs' said business or to any business involving the use of public streets for the

sale of products from mobile units. They declare "(i)t shall be unlawful for any person to create, assist in creating, permit, continue or permit the continuance of any unreasonably loud, disturbing or unnecessary noise in the city." As stated by Judge Pless, whether any ordinance provision has been violated and the validity of such provision must be considered in the context of a specific factual situation.

"A statute may be valid in part and invalid in part." 82 C.J.S., Statutes § 92; *Constantian v. Anson County,* 244 N.C. 221, 228, 93 S.E. 2d 163, and cases cited. This applies equally to an ordinance. *Fox v. Commissioners of Durham,* 244 N.C. 497, 501, 94 S.E. 2d 482. Connor, J., reminds us that confusion is caused "by speaking of an act as unconstitutional in a general sense." *St. George v. Hardie,* 147 N.C. 88, 97, 60 S.E. 920.

Whether any provision of the challenged ordinances has been violated must be determined on the basis of the time, place and circumstances on the day and occasion of the alleged violation. In the event of arrest and criminal prosecution for such alleged violation, the accused may defend on the grounds (1) that his conduct did not violate such ordinance provision, and (2) that such ordinance provision, if interpreted as applicable to his conduct, is unconstitutional or otherwise invalid. In such case, the accused has an adequate remedy at law.

Plaintiffs' action is to enjoin enforcement of the ordinance provision in respect of any and all conduct in which any of the several plaintiffs may engage. In the circumstances here considered, such class action does not lie. Here, the said general rule, namely, that injunction will not lie to restrain enforcement of an ordinance creating a criminal offense, applies.

Plaintiffs cite *Speedway, Inc. v. Clayton,* 247 N.C. 528, 101 S.E. 2d 406; *Advertising Co. v. Asheville,* 189 N.C. 737, 128 S.E. 149; *Surplus Store, Inc. v. Hunter,* 257 N.C. 206, 125 S.E. 2d 764; *Schloss v. Jamison,* 258 N.C. 271, 128 S.E. 2d 590. In these and similar decisions, statutes or ordinances *prohibiting* otherwise lawful businesses or business transactions were involved. The questions presented were decided in the context of specific factual situations. Suffice to say, we are not disposed to make further exceptions to the well-established general rule stated above. *Walker v. Charlotte, supra; Smith v. Hauser,* 262 N.C. 735, 138 S.E. 2d 505.

The order (judgment) of Judge Pless, which vacated the interlocutory restraining order, is affirmed; and the cause is remanded with direction that judgment dismissing the action be entered.

Affirmed.

STATE v. ROBERT BINES.

(Filed 25 November, 1964.)

1. Constitutional Law § 32—

Defendant's waiver of counsel must be intelligently and understandingly made in order to be effective, but the court is not justified in forcing counsel upon an accused who wants none.

2. Same—

Where the record shows that the trial court was careful to advise defendant of the charges against him and the permissible punishment in case of conviction, and that defendant, experienced by a number of prior prosecutions, with full understanding waived appointment of counsel, it is not error for the trial court to permit the defendant to begin trial without counsel. G.S. 15-4.1.

3. Criminal Law § 30.1—

One defendant has no ground to complain that his codefendants, before the conclusion of the State's evidence, withdraw their pleas of not guilty and enter pleas of guilty, when neither of them testifies against defendant and there is no indication of any deal by the State in return for the change in pleas, each being given a prison sentence.

4. Constitutional Law § 32—

Where one defendant, at the time of arraignment, waives counsel, the fact that his codefendants during the trial change their pleas from not guilty to guilty does not require the court of its own motion to reiterate the seriousness of the charge and caution defendant to reconsider his waiver of counsel.

APPEAL by defendant from *Hobgood, J.*, March, 1964 Session, WAKE Superior Court.

The appellant, Robert Bines, and two others, Andy Edward McClain and Cedric Bost, were charged in a bill of indictment with the felonious breaking into and larceny from the Wake County A. B. C. Store No. 3 at Wendell. The stolen property consisted of five cases of whiskey of the wholesale value of $203.73. The offenses were alleged to have been committed on January 16, 1964.

At the time of arraignment, the defendants McClain and Bost were represented by counsel of their own selection. They entered pleas of not guilty. The appellant Bines filed the following before entering his plea of not guilty:

> "The undersigned represents to the Court that he has been informed of the charges against him, the nature thereof, the statutory punishment therefor and the right to appointment of counsel upon his representation to the court that he is unable to employ counsel

and the reasons therefor, all of which he fully understands. The undersigned now states to the Court that he does not desire the appointment of counsel, expressly waives the same and desires to appear in all respects in his own behalf, which he understands he has the right to do. /s/ Robert Bines, Defendant.

"Sworn to and subscribed before me this 18 day of February, 1964. /s/ Jane L. Caruthers, Clerk of Superior Court."

The Court entered the following:

"I hereby certify that the above named defendant has been fully informed in open Court of the charges against him and of his right to have counsel appointed by the Court to represent him in this case; that he has elected in open Court to be tried in this case without the appointment of Counsel; and that he has executed the above waiver in my presence after its meaning and effect have been fully explained to him.

"This 18 day of February, 1964. /s/ Hamilton H. Hobgood, Judge Presiding."

The State introduced evidence of the breaking and entering of the described building and the larceny of five cases of whiskey — one each of Kentucky Gentleman, Melrose Bourbon, Glenmore, Millstream, and J. W. Dant. Later, during the night of the theft, one case of J. W. Dant was taken from an automobile belonging to Andrew Williams — four other cases from a lavendar-colored automobile belonging to the defendant Bost. At about 8:30 on the night of the 16th, an eye-witness saw an automobile which he later identified as belonging to the defendant Bost parked at the rear end of the ABC store and standing beside it was the appellant Bines. Another witness saw the three defendants at the Bost home about eleven o'clock on the night of the 16th. They said they had some whiskey and wanted help to get rid' of it. All three of the defendants were talking about it being "hot." The State offered other circumstances tending more or less strongly to implicate the three defendants.

Before the conclusion of the State's evidence, defendants McClain and Bost, through their respective counsel, withdrew their pleas of not guilty and entered pleas of guilty. However, neither testified as a witness in the case. During the trial some of the State's witnesses testified with respect to admissions of McClain and Bost which tended also to implicate appellant Bines, who did not object. Bines brought out the following on cross-examination:

"When we met with defendant Bost and his attorney he told us that you (defendant Bines) and McClain brought the whiskey to his house.

"It was about a month after their arrest that your name (Bines) was even mentioned in it. The solicitor and I did not promise you (Bines) anything. Defendant Bost was not promised anything during the conversation with him in the presence of his attorney.

"The last story he told was when he testified at the preliminary hearing. The first story he told in the presence of his attorney was that you (Bines) and McClain brought the whiskey to his house and that that was the first time he had seen the whiskey. Then when he testified under oath, he said that all three of you went there to the whiskey store."

The appellant not only cross-examined State's witnesses, but testified in his own behalf, and made an argument to the jury. He denied any connection with the charges contained in the indictment. However, before the appellant took the stand, Judge Hobgood advised him: "The State has rested its case against you now and you have the privilege of going upon the stand, testifying in your own behalf, or you may not go upon the stand. If you do testify you will be subject to cross-examination by the solicitor. If you do not go upon the stand, the jury will be instructed that that is not to be considered to your prejudice just because you did not see fit to testify. Which do you want to do?"

"The defendant Bines states, 'I want to go on the stand and testify.' "

The appellant testified, denying any implication in the charges. On cross-examination, he admitted:

"I got twelve months for house-breaking and larceny. I got assault with a deadly weapon sometime around September 14, 1936. You (solicitor) have got the record there on a five-to-seven year sentence on March 12, 1938. I guess I did get five-to-seven years for assault with a deadly weapon with intent to kill in 1946 and I know in 1950 I got two years for assault with a deadly weapon, and another one in 1952 for two years for that same thing. In 1953 I got framed on a whiskey charge and got thirty months for that liquor charge. No, I did not get 12 months in 1956 for assault with intent to kill. I ain't never got 12 months for assault with a deadly weapon. I got two years out of here with the charge assault with a deadly weapon. In November of 1960 I got 60 days suspended sentence for disorderly conduct and interfering with an officer. I never been caught no way stealing because that ain't my business. My trademark is by business and my trademark is fighting."

The jury returned a verdict of guilty. The court imposed a prison sentence of not less than eight nor more than ten years. The defendant gave notice of appeal and upon his request the court appointed his present counsel of record to perfect the appeal. The record discloses that McClain and Bost each received an active prison sentence of five to seven years.

T. W. Bruton, Attorney General, Harry W. McGalliard, Deputy Attorney General, James F. Bullock, Assistant Attorney General for the State.

Harold D. Coley, Jr., for defendant appellant.

HIGGINS, J. The defendant raises three questions on this appeal: (1) Did the court violate the defendant's constitutional rights by permitting the State to proceed against the defendant after the two co-defendants had withdrawn their pleas of not guilty and entered pleas of guilty during the trial? (2) Did the court violate defendant's constitutional rights by failing to reiterate the seriousness of the charges and to allow him to reconsider his waiver of counsel after the other defendants had changed their pleas? (3) Did the defendant intelligently and understandingly waive his right to have counsel appointed for his defense?

The record discloses that Judge Hobgood was careful to advise the defendant of the charges against him and the permissible punishment in case of conviction. With this full understanding, the appellant waived appointment of counsel and stated his desire to appear in all respects in his own behalf. The defendant's waiver of counsel in this case is not the act of an immature or inexperienced person unfamiliar with criminal court procedure. According to his own admission, he had served eight prison sentences totaling approximately 20 years as a result of convictions for violations of criminal laws dating back to 1936. "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L. ed. 1461. "The record must show, or there must be an allegation in evidence which shows, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." *Carnley v. Cochran*, 369 U.S. 506, 82A S.Ct. 884, 8 L. ed. 2d 70. "The constitutional right (to counsel), of course, does not justify forcing counsel upon an accused who wants

none." *Moore v. Michigan*, 355 U.S. 155, 78 S.Ct. 191, 2 L. ed. 2d 167; *Herman v. Claudy*, 350 U.S. 116, 76 S.Ct. 223, 100 L. ed. 126.

The court did not commit error in permitting the defendant to begin the trial in this case without counsel, in view of his intelligent, specific, and unequivocal waiver. G.S. 15-4.1.

Did the court commit error in permitting the State to continue the case against the appellant after McClain and Bost changed their pleas? The appellant had no right to require the co-defendants to continue their unequal contest with the State. The course of the trial, insofar as the appellant was concerned, did not change in any respect. Neither of his co-defendants testified for the State. Their pleas of guilty did not deprive the appellant of any evidence otherwise available to him. We may speculate upon the probable effect the two pleas had on the jury. However, legal rights ordinarily are not based on speculation. There is no suggestion the State made a deal with McClain and Bost in return for their change of pleas. Neither testified. Both were given prison sentences of five to seven years. The appellant's sentence was from eight to ten years. His horrible criminal record could easily account for the difference.

The appellant having stated under oath that he did not want counsel and preferred to conduct his own defense, the court was warranted in permitting him to continue unless and until he gave indication that he preferred a different course. It was up to him to make an appropriate move to that end. When the jury was impaneled in his case, jeopardy attached. For the court of its motion to order a mistrial unless at his instance, would raise a serious question whether he could be tried again for the same offense. *State v. McIntosh*, 260 N.C. 749, 133 S.E. 2d 652; *State v. Birckhead*, 256 N.C. 494, 124 S.E. 2d 838; *State v. Barefoot*, 241 N.C. 650, 86 S.E. 2d 424.

The State did not offer any evidence made available by the pleas of guilty. The defendant was not deprived of any evidence by reason of those pleas. Careful examination of the assignments of error and inspection of the record proper fail to disclose error of law in the trial.

No error.

STATE v. JOHN P. O'KEEFE.

(Filed 25 November, 1964.)

1. Crime Against Nature § 2—

Evidence of defendant's guilt of committing the crime against nature with another male person *held* sufficient to be submitted to the jury.

2. Crime Against Nature § 1—

In this jurisdiction crime against nature embraces sodomy, buggery, and bestiality as those offenses were known and defined at common law. G.S. 14-177.

3. Crime Against Nature § 2—

A bill of indictment charging a male defendant with committing "the abominable and detestable crime against nature with" a named male person on a specified date in a named county is sufficient, it not being required that the manner in which the offense was committed be set forth.

4. Same—

An indictment charging defendant with committing the crime against nature with a named pathic on a specified date permits the introduction of evidence that defendant committed two acts of unnatural intercourse, one *per os* and the other *per anum*, during the single visit of the pathic to defendant's room, since the two acts were essentially parts of a single transaction, and the court correctly instructs the jury that proof of either act would be sufficient for conviction of the crime charged.

5. Indictment and Warrant § 9—

Two acts constituting essentially parts of a single transaction may be charged together as a single offense, and defendant is not entitled to complain that only one offense was charged even though each act would have been ground for a separate charge.

ON *certiorari* from *Mintz, J.*, February 1963 Session of ONSLOW.

Attorney General Bruton, Assistant Attorney General Bullock and Staff Attorney Eugene A. Smith for the State.

Charles L. Abernethy, Jr., for defendant.

MOORE, J. The bill of indictment charges that defendant "on the 25th day of December . . . one thousand nine hundred and 62 . . . at and in the County (Onslow) aforesaid, did unlawfully, wilfully and feloniously commit the abominable and detestable crime against nature with one Peter P. Howe, a male person. . . ."

The evidence for the State tends to show that on the date alleged defendant and Howe met in a bar, went to the former's motel room, drank beer and engaged in two acts of unnatural copulation, once *per*

os and once *per anum*. Defendant's motion for nonsuit was properly overruled.

Defendant pleaded not guilty, was found guilty by the jury, and was given an active prison sentence.

Defendant moves in arrest of judgment on the ground that the indictment is phrased in such general terms that it does not identify the offense charged, does not support the judgment, and will not protect the accused from being again put in jeopardy for the same offense.

Our statute provides that "If any person shall commit the abominable and detestable crime against nature, with mankind or beast, he shall be imprisoned in the State's prison not less than five nor more than sixty years." G.S. 14-177. In this jurisdiction crime against nature embraces sodomy, buggery and bestiality as those offenses were known and defined at common law. *State v. Griffin*, 175 N.C. 767, 94 S.E. 678. Because of the ancient origin of the offense and the uniformity of the practice in the courts with respect thereto, crime against nature has a well recognized meaning. ". . . A statute providing for the punishment of the abominable and detestable crime against nature is sufficiently descriptive of a crime known to the common law." 81 C.J.S., Sodomy, § 1, p. 368.

Requirements as to the form and content of bills of indictment charging crime against nature vary somewhat in the different jurisdictions, due to differing statutory provisions and court interpretations. The practice in North Carolina has been to charge the offense in the manner employed in the bill of indictment in the instant case. This is in accord with the practice at common law. See Archb. Cr. Pr. & Pl. 309; 2 Macclain on Criminal Law, § 1154, p. 317; Wharton's Precedents of Indictments and Pleas, Form 191, p. 209; 2 Chitty's Cr. Law, pp. 48-50. It was the practice to specifically allege the person with or against whom the offense was committed, by name or sex, but not the manner in which it was committed. An indictment which charges that defendant did unlawfully, wilfully and feloniously commit the infamous crime against nature with a particular man, woman or beast is sufficient. 2 Macclain on Criminal Law, § 1154, p. 317; 81 C.J.S., Sodomy, § 4, pp. 373, 374. ". . . in charging the crime of sodomy, because of its vile and degrading nature there has been some laxity of the strict rules of pleading. It has never been the usual practice to describe the particular manner or the details of the commission of the act." 48 Am. Jur., Sodomy, § 4, p. 551. According to Blackstone, the English law treated the offense in its indictments as unfit "to be named among Christians." IV Blackstone's Commentaries, p. 215. Our courts are no less sensitive than their English predecessors.

Certainly the defendant has little cause for complaint if the law is reluctant to spread upon the public record the revolting details of the offense. Where the defendant feels that he may be taken by surprise or that the indictment fails to impart information sufficiently specific as to the nature of the charge, he may before trial move the court to order a bill of particulars to be filed. *State v. Tessnear,* 254 N.C. 211, 118 S.E. 2d 393; *State v. Shade,* 115 N.C. 757, 20 S.E. 537. Defendant does not claim surprise.

Defendant contends that his exception to the sufficiency of the indictment is supported by *State v. Callett,* 211 N.C. 563, 191 S.E. 27, and *State v. King,* 256 N.C. 236, 123 S.E. 2d 486. In *Callett* the substantive portion of the bill is, ". . . commit the abominable and detestable crime against nature." It does not name the pathic nor even allege whether with mankind or beast. The bill was quashed for failure to use the word "feloniously." The Court suggests that the bill might be defective for the further reason that it fails to bring the case within the description given in the statute. In the *King* case the indictment upon which the trial proceeded was held to be valid. A former bill had been quashed in superior court; it merely charged that defendant did "commit the abominable and detestable crime against nature." This former bill was not in question on appeal, but the Court commented that "such bill of indictment would not have supported a verdict in the form submitted and returned." The language of *Callett* and *King,* in which defendant finds comfort, is pure *dicta.* Besides, it does not deal with the questions here presented.

There is evidence in the record of two acts of unnatural intercourse, one *per os* and the other *per anum,* committed by defendant with Howe during the latter's visit to defendant's room. Defendant contends that the two acts constitute separate and distinct offenses and that the indictment, if otherwise valid, should have included only one of the offenses. On this reasoning, defendant complains that the judge erred in instructing the jury that proof of either act would be sufficient for conviction of the charge alleged.

"As a general rule the instructions should be confined to the issues made by the pleadings, and should not be broader or narrower than the indictment or information, and an instruction which is not based on, and in conformity with, the issue properly raised by the pleadings is generally erroneous, and may be properly refused. It has been held that the instructions should not . . . submit to the jury an offense not included in the indictment or information. It is erroneous to give instructions on issues not made by the pleadings . . . ; but, on the other hand, an instruction may be based on evidentiary facts, although

such facts are not alleged . . ." 23A C.J.S., Criminal Law, § 1311, pp. 759-761. "Although there is authority to the contrary, it has been held that where the indictments or information charges the offense conjunctively, the court must submit the question in conjunctive form, and it is error to submit the question in disjunctive form, except where the offense charged is essentially one transaction." *ibid,* p. 762.

Admittedly the two acts of unnatural intercourse might have been charged as separate offenses. But they were essentially parts of a single transaction, occurred during a single visit to defendant's room by Howe, and were components of a single continuous debauch. That the State subjected defendant to one criminal penalty instead of two is certainly not prejudicial to defendant. The bill of indictment alleges the time and place of the offense and the identity of the pathic. This indictment provides protection from any further prosecution of defendant on account of any unnatural sex acts between him and Howe which might have occurred within the time and place alleged.

"Acts entering into a single and continuous transaction may be charged together as a single offense." 42 C.J.S., Indictments and Informations, § 164, p. 1117; *State v. Sherman,* 107 P. 33 (Kan.). Where a single offense may be committed by several means, it may be charged in a single count if the ways and means are not repugnant and are component parts of one transaction. *State v. Laundy,* 204 P. 958 (Ore.). Proof of any one means will support conviction. *United States v. Otto,* 54 F. 2d 277 (C.C. 2d). And an instruction to this effect is not error. *State v. Davis,* 203 N.C. 47, 53, 164 S.E. 732.

We have examined and fully considered each of defendant's exceptions and we find no prejudicial error.

No error.

L. J. SPIERS v. P. W. DAVENPORT, CHARLOTTE-MECKLENBURG COUNTY TAX COLLECTOR; CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, AND MECKLENBURG COUNTY, A MUNICIPAL CORPORATION.

(Filed 25 November, 1964.)

1. Statutes § 5—

Where a statute requires an administrative board to act "not later than" a specified time, the time limit is mandatory.

2. Taxation § 25—

G.S. 105-327(e) stipulating that a county board of equalization and review complete its duties "no later than" the date specified is mandatory in

requiring that the board complete its work within the time prescribed, at least to the extent authority is given the board to act *ex mero motu*, and therefore the board may not in December increase the assessed valuation of realty after the taxpayer has already paid the taxes for that year based on the valuation theretofore placed on the property in the regular octennial revaluation.

3. Same; Statutes § 2—

Chapter 916, Session Laws 1961, applicable only to Mecklenburg County, does not have the effect of extending the time for the assessment of taxes in Mecklenburg County, but merely gives the board of equalization and review of that county opportunity to act on appeal by property owners from the assessing authorities, and the statute does not vest the board with authority *ex mero motu* to increase valuations after the time limited by G.S. 105-327(e), and to construe it as having such affect would render it unconstitutional as a special act.

4. Statutes § 4—

Where a statute is susceptible to two constructions, one of which is constitutional and the other not, the constitutional construction will be given it.

APPEAL by plaintiff from *Riddle, S.J.*, May 18, 1964, Civil D Session of MECKLENBURG.

Plaintiff instituted this action to determine the validity of an additional tax imposed on his lands after the lands had been assessed, the tax liability determined and paid.

The parties waived a jury trial. Summarily stated, the court found these facts: Plaintiff, on January 1, 1963, owned three lots in Charlotte. The assessed value of these lots in 1962 was: Parcel No. 1, $15,990.00; Parcel No. 2, $2,085.00; Parcel No. 3, $5,080.00. An octennial revaluation of lands in Mecklenburg County was made in 1963. Plaintiff listed his three lots. They were then appraised and valued at these figures: Parcel No. 1, $26,930.00; Parcel No. 2, $6,600.00; Parcel No. 3, $32,500.00.

Prior to Thursday after the third Monday in August 1963 (G.S. 105-339), the taxing authorities of Charlotte and Mecklenburg County fixed the tax rate for 1963. Taxes were computed on plaintiff's lots at the rate and appraised values for 1963. The books showing the taxes so levied were delivered to the tax collector for collection prior to September 24, 1963. On that date, plaintiff paid the taxes then charged to his properties. Receipts showing payment were then given plaintiff.

On December 13, 1963, the Board of Equalization and Review, "acting upon its own motion and without any appeal having been taken by plaintiff or by any other person from the assessments made and the taxes levied theretofore against said three parcels of land by the said Tax Supervisor as part of the regular octennial revaluation for the

year 1963, made a new determination and so notified plaintiff of the assessed values of said three parcels of land for the year 1963 and increased the same for said year to the assessed values stated as follows: Parcel No. 1 — $32,405.00; Parcel No. 2 — $22,140.00; Parcel No. 3 — $86,435.00."

The tax books were in February 1964 revised by substituting the values of plaintiff's lots as determined in December 1963 for the appraised value. Tax liability was then computed on the substituted values at the rate fixed by the taxing authorities in August 1963. The tax collector demanded payment of the difference between the amount which plaintiff had theretofore paid and the amount asserted to be owing because of the change in values.

"[T]he Board of Equalization and Review finally adjourned its sessions for the tax year 1963 on March 26, 1964, and that it recessed from time to time without final adjournment until March 26, 1964."

Based on the foregoing findings, the court concluded that plaintiff's lands were liable for the additional sum, as contended by the tax collector. Plaintiff excepted and appealed.

Parker Whedon for appellant.

Dockery, Ruff, Perry, Bond & Cobb and Hamlin L. Wade for defendants.

RODMAN, J. The Machinery Act, G.S. 105-271, *et seq.*, prescribes the time and manner for listing and valuing property for ad valorem tax purposes. It also fixes the time for payment. The portions of the act pertinent to a decision of this case provide:

Property must be listed annually, G.S. 105-280. Personal property is valued annually, G.S. 105-280; real property is valued octennially, G.S. 105-278. The values are as of January 1 of the year in which the valuation is fixed. The Board of County Commissioners is required to appoint a tax supervisor, G.S. 105-283; he is responsible for the proper listing and appraising of property, G.S. 105-286. The supervisor appoints list takers, 105-287, who in the first instance determine values. But the tax supervisor has the power, at any time prior to the meeting of the Board of Equalization and Review, "to change the valuation placed on any property by the list taker." G.S. 105-286(g). After the property has been listed and valued, the county commissioners sit as "a county board of equalization and review." G.S. 105-327(a). The tax supervisor acts as clerk to the Board of Equalization and Review, G.S. 105-327(d). The time fixed for the first meeting of the Board is "the eleventh Monday following the day on which tax listing began."

(That date is the first Monday in January.) The Board is authorized to recess from time to time, but "it shall complete its duties not later than the third Monday following its first meeting." G.S. 105-327(e). It is the duty of the Board of Equalization and Review "to equalize the valuation of all property in the county, to the end that such property shall be listed on the tax records at the valuation required by law; and said board shall correct the tax records for each township so that they will conform to the provisions of this subchapter." G.S. 105-327(g). Property owners dissatisfied with values equalized by the Board may appeal to the State Board of Assessment. G.S. 105-329. After the Board of Equalization and Review has finished its work, the Board of County Commissioners is without authority to change the records, except to give effect to decisions of the State Board of Assessment; or to correct the name of the taxpayer, or the description of the property, or clerical errors or to list omitted property. They may reassess only "when the supervisor reports that, since the completion of the work of the board of equalization, facts have come to his attention which render it advisable to raise or lower the assessment of some particular property of a given taxpayer." G.S. 105-330.

The reason why the Board of Equalization is required to act within a fixed time is apparent. The taxing authority must know the value of the taxable property before it can fix a rate sufficient to meet governmental needs. This rate must be fixed prior to September, G.S. 105-339, G.S. 153-120. Having ascertained both rate and tax, the amount due by each taxpayer must be computed, and the tax books delivered to the tax collector on or prior to the first Monday in October, on which day the taxes are due and payable, G.S. 105-345. The taxpayer may obtain a discount by prepayment. If he pays prior to the time his tax liability is ascertained, his payment is credited on his tax liability. Here, plaintiff paid his tax in September and obtained a discount of one percent, as provided by G.S. 105-345(6).

The duty imposed on the Board of Equalization and Review to complete its work within the time prescribed by G.S. 105-327(e), at least to the extent that authority is given the Board to act *ex mero motu*, is mandatory. As said by Clark, C.J. in construing a similar statute: "There are some circumstances under which a requirement that a certain act shall be done on a date named may be treated as directory, but that is not possible when the statute conferring a power provides that it shall be performed 'not later than' the time specified." *Williams v. Comrs.*, 182 N.C. 135, 108 S.E. 503; *Wolfenden v. Comrs.*, 152 N.C. 83, 67 S.E. 319; *Fromkin v. State*, 63 N.W. 2d 332; *State v. Johnson*, 106 S.E. 2d 353; Annotations, 105 A.L.R. 624.

Since the Board of Review was without authority under the Machinery Act to increase the value of plaintiff's property in December, after he had paid the taxes assessed thereon, we must determine whether the general rule has been changed by statutes applicable only to Mecklenburg County.

Chapter 916, S.L. 1961, is entitled: "AN ACT AUTHORIZING APPOINTMENT OF A BOARD OF EQUALIZATION AND REVIEW FOR MECKLENBURG COUNTY." The act applies only to Mecklenburg County (sec. 8). Commissioners of that county are authorized to act as the Board of Equalization and Review, or to appoint a special Board of Review. The tax supervisor, or a deputy designated by him, acts as clerk to the Board of Review. The authority vested in the special Board, which the commissioners are authorized to appoint, is substantially the same as the authority given to regular Boards of Review by G.S. 105-327. Section 5 of the 1961 act provides: "The board of equalization and review shall meet at such times and at such places as the chairman of such board may direct, provided, however, it shall complete its duties not later than ten days before the date provided by law for fixing the tax rate for the current year."

Chapter 281, S.L. 1963, ratified April 23, 1963, has this preamble:

"WHEREAS, pursuant to the provisions of G.S. 105-278, the County of Mecklenburg is revaluing real property for *ad valorem* tax purposes as of January 1, 1963; and

"WHEREAS, there have been numerous protests or appeals filed by taxpayers with the Mecklenburg County Board of Equalization and Review and it is anticipated that many other appeals may be filed; and

"WHEREAS, it is deemed desirable that the Mecklenburg County Board of Equalization and Review should have sufficient time in which to fully consider all appeals and to make such adjustments as may be deemed fair and equitable:"

The act provides: "The Mecklenburg County Board of Equalization and Review is hereby authorized to continue its sessions for the year 1963 to hear all appeals which may be brought before it upon the assessed valuations of property, and to make any adjustments, whensoever it shall hear the appeal, as of January 1, 1963."

Defendant relies on the 1963 act to support its position that it could in December, after plaintiff had paid his taxes, increase the appraised value of plaintiff's property. We are of the opinion that the Legislature did not intend to grant such authority. The preamble clearly indicates that the act was intended to afford the Board of Equalization and Re-

view opportunity to act on appeals by property owners from the assessing authority. The act merely granted this authority. It does not purport to vest the Board with authority *ex mero motu* to increase the values which the assessor has placed on a taxpayer's property.

The people have limited the power of the Legislature to enact local or special laws. Our Constitution provides in Art. II, sec. 29: "The General Assembly shall not pass any local, private, or special act * * * extending the time for the assessment or collection of taxes * * *." If defendants' interpretation of c. 281, S.L. 1963, is correct, the statute would do violence to this constitutional provision. Everywhere in North Carolina, except in Mecklenburg County, the power of the Board of Equalization and Review to increase the value assigned by the assessors to the taxpayer's property terminated prior to the time the commissioners were required to levy taxes. Defendants' contention would authorize the Legislature to enact a special statute extending the time for the assessment of taxes in Mecklenburg County. The statute ought not to receive a construction which would bring it into direct conflict with constitutional prohibitions.

We conclude the Board of Equalization and Review was without authority in December 1963 to increase the assessed value of plaintiff's property.

Reversed.

DELMAS C. BROWN v. JAMES WILSON GRIFFIN, JR.

(Filed 25 November, 1964.)

1. Appeal and Error § 20—

Appellant may not assert an error in the charge relating to an issue answered in his own favor.

2. Appeal and Error § 40—

New trials are not awarded for nonprejudicial errors.

3. Trial § 52—

A motion to set aside the verdict for inadequacy of award is addressed to the discretion of the court, and the fact that plaintiff has introduced evidence that he incurred medical and hospital bills in an amount exceeding the award, without anything for physical suffering, does not show abuse of discretion in the refusal of the court to set aside the verdict, since the jury was not compelled to accept plaintiff's testimony with respect to his expenditures.

4. Appeal and Error § 44—

Where plaintiff does not allege damages from loss of wages, and, after specific inquiry by the court, states that he requests no further instruction upon the point in addition to the court's instruction that plaintiff was entitled to recover by way of compensation a fair and reasonable sum considering, *inter alia*, the amount of plaintiff's salary, *held*, plaintiff is not in a position to complain that the court failed to charge that he was entitled to recover the amount of his wages for the time lost from work.

5. Trial § 45—

The court is without authority to reduce the verdict rendered by the jury without the consent of the interested party.

6. Damages § 9—

An admission by plaintiff that he received medical payments in a certain sum under an insurance policy issued to him is not an admission that defendant is entitled to a credit on the damages for such payment, and if there is nothing in the record to show that defendant paid plaintiff anything for medical expenses or that such payment was made under a liability policy, it is error for the court to deduct the amount of the insurance payment from the award of the jury.

APPEAL by plaintiff from *Latham, S.J.*, June 1, 1964 Schedule C Civil Session of MECKLENBURG.

This action was instituted May 2, 1963. Plaintiff, in his complaint filed the day the action was begun, alleges: He was injured about 1:54 a.m. on July 29, 1962, when his automobile left the highway and collided with a utility-power pole. He was occupying the right front seat. Defendant was driving the automobile when plaintiff was injured. The collision causing plaintiff's injuries was the result of defendant's negligent failure to maintain a proper lookout, or to apply brakes, or to keep the vehicle under control. The complaint describes with particularity the injuries plaintiff sustained. These, he alleges, have caused, and will cause in the future, physical pain and mental anguish. Because of his injuries, he has incurred obligations for doctors, dentist, hospital and drug bills, and will continue to incur additional expense of a like nature in the future.

Defendant answered on June 25, 1963. He admitted he was operating plaintiff's automobile when the collision occurred. He denied the allegations charging negligence, and denied, for lack of information, the extent of plaintiff's injuries.

On March 26, 1964, defendant was granted permission to amend his answer. Thereupon he alleged as an additional defense: Plaintiff and defendant with two others, shortly after noon on July 28, went to Lake Wylie for relaxation. The four drank a bottle of vodka; one left; the other three consumed another bottle of vodka. About 11 p.m. plaintiff

and defendant went to a restaurant where they had a steak dinner and a pitcher of beer. When they left the restaurant, plaintiff drove his car until 1:30 a.m., at which time he announced he was too sleepy to drive. Defendant thereupon took control of the car. He went to sleep. Defendant alleges plaintiff was contributorily negligent in permitting defendant to drive when he knew, or should have known, the food and alcohol which caused plaintiff to be sleepy would have a like effect on defendant.

The court submitted issues which were answered as follows: "Was the Plaintiff injured and damaged by the negligence of the Defendant as alleged? ANSWER: Yes. What amount, if any, is the Plaintiff entitled to recover from the Defendant? ANSWER: $1,000.00."

Judgment was entered in favor of plaintiff. The judgment, after reciting the issues as answered by the jury, has this further recital: "Upon the coming in of the verdict, the defendant, through counsel, made a motion in the cause that this verdict be reduced by the amount and to the extent of $500.00, advising the Court, and the Court finding as a fact, that that amount, to-wit: $500.00, had, subsequent to the institution of this action, been paid by the defendant to the plaintiff in payment of a portion of the medical and hospital expenses incurred by the plaintiff as a result of the accident complained of by the plaintiff."

The court then adjudged that plaintiff recover the sum of $500.00 and his costs, which included an allowance for counsel fees.

Plaintiff requested the court to set the verdict aside as contrary to the evidence. His motion was denied. He then moved for a new trial as a matter of right. The motion was denied. The judgment was signed. Plaintiff, having excepted to the denial of his motions and to the judgment, appealed.

John D. Warren for appellant.
Boyle, Alexander and Wade for appellee.

RODMAN, J. Plaintiff's first assertion of error is directed to the court's charge with respect to the first issue. His interpretation of the charge would require him to carry a greater burden of proof than the law requires. We do not agree with plaintiff's interpretation, but if error in that respect be conceded, it was harmless. The jury answered the issue as plaintiff says it should be answered. New trials are not awarded for nonprejudicial errors. *Jones v. Hester,* 262 N.C. 487, 137 S.E. 2d 846. Plaintiff testified he incurred medical and hospital bills to the amount of $1,752.00. Hence he says even if the jury awarded nothing for pain and suffering, it could not have answered the second issue

for any sum less than $1,752.00. True, the jury could have accepted plaintiff's testimony with respect to his expenditures; but it was not compelled to do so. Defendant made no admissions with respect thereto. The judge had the discretionary power to set the verdict aside; but he was not compelled to act. *Dixon v. Young,* 255 N.C. 578, 122 S.E. 2d 202. Abuse of discretion is not shown.

Plaintiff, on direct examination, testified he was out of work for one month. His salary was $575.00 per month. On cross examination, he said he did no work for one week, but then worked half of each day "until I could get where I could stay all day * * * I worked half days for possibly at least two weeks. After that, I returned to work full time except for several periods when I was hospitalized." He further testified, "My company was good enough to pay me the time I was out. I did not have actual wage loss."

The court charged in part: "[I]t is for you, the jury, to say, under all the circumstances, what is fair and reasonable sum which the defendant should pay the plaintiff by way of compensation for the injuries he has sustained, if any. [T]he age and occupation or profession of the plaintiff, the nature and extent of his business, the value of his services, the amount of his salary, whether plaintiff was employed or unemployed."

In concluding the charge, the court inquired: "Any requests for further instructions?" Counsel for plaintiff replied: "No requests for the plaintiff."

Plaintiff does not except to the quoted portion of the charge. He challenges its accuracy indirectly by excepting to the failure of the court to specifically inform the jury that plaintiff was entitled to recover for the time he was not at work, even though his employer made no deduction because plaintiff was not able to work full time. The failure to so charge was, he says, a violation of the duty imposed by G.S. 1-180.

The decisions on this question are not in harmony. *Pensak v. Peerless Oil Co.,* 166 A. 792; *Limbert v. Bishop,* 101 S.E. 2d 148; *Morgan v. Woodruff,* 208 S.W. 2d 628; *Hudgens v. Mayeaux,* 143 So. 2d 606; *Martin v. Sheffield,* 189 P. 2d 127; 15 AM. JUR., Damages, sec. 200. Decision is not now necessary. Plaintiff did not allege damage because of loss of wages. Not only did he not allege such loss, but when a specific inquiry was made with respect to the sufficiency of the charge, he stated he did not ask for further instructions. He can not now complain of the asserted inadequacy of the charge. *Overton v. Overton,* 260 N.C. 139, 132 S.E. 2d 349; *Parks v. Washington,* 255 N.C. 478, 122

S.E. 2d 70; *State v. McPeak*, 243 N.C. 273, 90 S.E. 2d 505; *Owens v. Lumber Co.*, 212 N.C. 133, 193 S.E. 219.

Other assignments relating to the charge have been carefully examined. We find none requiring discussion.

Plaintiff's final assignment of error is directed to the action of the court in reducing the amount which the jury awarded as damages, and rendition of judgment for the reduced amount. A court may not, without the assent of the interested party, reduce a verdict. The judgment should, of course, follow the verdict. *Bethea v. Kenly*, 261 N.C. 730, 136 S.E. 2d 38. Here, the court found that "$500.00, had, subsequent to the institution of this action, been paid by the defendant to the plaintiff in payment of a portion of the medical and hospital expenses incurred by the plaintiff as a result of the accident complained of by the plaintiff."

There is no evidence to support the court's statement. Significantly, defendant does not plead payment in whole or in part even though he was permitted, within 60 days of the trial, to amend his answer to plead contributory negligence. "Payment is an affirmative plea and the burden of showing payment is on the one who relies on payment as a defense." *White v. McCarter*, 261 N.C. 362, 134 S.E. 2d 612.

The briefs make it clear, we think, that the court did not intend to find as a fact that defendant had paid plaintiff any sum; and what is stated as a finding is a legal conclusion. Whether that conclusion is correct depends on the facts. The only thing in the record on which the court could base its conclusion was a letter written by the Assistant Treasurer of Southeastern Fire Insurance Company to plaintiff on June 5, 1963. The letter reads:

"Re: Policy # ACF 34924
Date of Accident
7-29-62

"Dear Mr. Brown:

"We are pleased to attach our draft in the amount of $500.00, payable to you on the Medical Expenses incurred as a result of the captioned accident. This payment represents the maximum payment possible under the Medical Payments coverage of your policy.

"We trust you will find the attached draft in order."

We infer from plaintiff's brief that he admits he received $500.00 from the insurance company, but that is not an admission that defen-

dant can pay plaintiff with insurance bought and paid for by plaintiff. The policy of insurance is not a part of the record. We have no information with respect to the policy provisions. Was the policy an accident and health policy paid for by plaintiff, or was it a combination medical and liability policy? There is nothing here to show a payment to plaintiff by defendant. If defendant had desired the benefit of the insurance payment, he should have placed the facts to support his plea in the record and not left his right to benefit by the payment to speculation.

That portion of the judgment reducing the verdict will be stricken, and the jury's verdict reinstated. The judgment will thereon be modified to conform with the verdict. The judgment is

Modified and affirmed.

STATE OF NORTH CAROLINA EX REL. JAMES A. GRAHAM, NORTH CAROLINA COMMISSIONER OF AGRICULTURE v. NASH JOHNSON AND SONS' FARMS, INC., A CORPORATION.

(Filed 25 November, 1964.)

1. Agriculture § 8—

Under the contract in question defendant provided baby chicks, feed, medication, and feed bins to certain farmers in the area, and such farmers furnished water, fuel, electricity, and labor and were paid a specified amount for each chicken raised. Defendant's employees had actual supervision of the flocks during the "grow-out operation." Defendant mixed the feed used from separate ingredients purchased by it. *Held:* The farmers raising the chicks were employees and not independent contractors, and defendant is exempt by the provisions of G.S. 106-95.1 from the inspection fee imposed by G.S. 106-99.

2. Master and Servant § 3—

If a person performing labor under contract is under the supervision and control of the employer in the performance of the work he is not an independent contractor even though the labor is performed on the servant's premises.

APPEAL by plaintiff, State of North Carolina, from *Hobgood, J.*, April 6, 1964 Session of WAKE.

The State instituted this action to collect $1,458.65, inspection taxes allegedly due from defendant under G.S. 106-99 for the period January 1-June 30, 1962. Defendant, claiming an exemption under G.S. 106-95.1, denies any liability. Under an agreed statement of facts Judge Hobgood concluded that defendant was not liable for the taxes and entered judgment accordingly. The State appealed. The original relator, L. Y.

Ballentine, having died pending this appeal, his successor in office, James A. Graham, upon motion of the Attorney General, has been substituted.

Attorney General Bruton and Assistant Attorney General Ray B. Brady for the State.

Ervin, Horack, Snepp & McCartha for defendant.

SHARP, J. The facts agreed are summarized as follows:

Defendant is a corporation engaged in farming approximately 3,500 acres of land which it owns in Duplin and Sampson Counties. As a part of its farming activities defendant conducts an integrated poultry-raising operation, producing about 8.5 million chickens per year. Defendant hatches 75% of its required baby chicks and buys the rest. It places 99% of the broods in broiler houses owned by other farmers in the area when the chicks are one day old. These farmers raise the chicks for defendant in what is termed a "grow-out operation." Under this arrangement the owners of the houses furnish the water, fuel, electricity, and labor necessary to raise the birds. Defendant provides the chicks, feed, medication, litter, and feed bins. When the birds reach the proper size, defendant's regular employees catch them and haul them to market. Defendant pays the owner of each house 6¼ cents for every bird thus caught and loaded. The farmer's compensation depends solely upon the number of birds he raises for market, not upon the amount of feed used or the price defendant receives when the birds are sold. After each flock is marketed, defendant decides whether to entrust the farmer with another.

Employees of defendant, known as servicemen, have active supervision of the flocks during the grow-out operation. They visit each flock at least once a week in order to check the manner of the birds' care, their growth, and their health, and generally to oversee the activities of the owners of the houses with respect to the birds. Defendant carries the flocks in its inventory and lists them for taxes.

To provide feed for its various poultry operations, defendant operates its own feed mill adjacent to its hatcheries. From time to time it purchases from suppliers and stores at its mill soy bean meal, corn gluten meal, alfalfa meal, phosphate, fish meal, poultry by-product meal, limestone, liquid animal fat, salt, corn distillers' solubles, wheat middling, whey, and dried brewers' yeast, whole corn, whole oats and medications. As feed is needed, the corn and oats are ground and mixed with the other materials according to formulas. Defendant has never registered

this feed under the provision of G.S. 106-96. After the feed is mixed, defendant's trucks transfer it in bulk to the various broiler houses, where it is placed in defendant's storage bins. When a particular flock is marketed, these bins are cleaned out, and defendant's trucks return the surplus feed to defendant's mill.

During the period in suit defendant used the total output of its feed mill for its own poultry business except for a small amount not involved here. Defendant raises turkeys, also, for market, but this operation is conducted entirely by regular employees of defendant on lands owned by defendant.

The statutory provisions applicable to this controversy are:

> G.S. 106-99. Inspection tax on feeding stuffs: Each and every manufacturer, importer, jobber, agent, or seller of any concentrated commercial feeding stuff, as defined in this article, shall pay to the Commissioner of Agriculture an inspection tax of twenty-five cents (25¢) per ton for each ton of such commercial feeding stuff sold, offered or exposed for sale or distributed in this State. This shall apply to all commercial feeding stuff furnished, supplied or used, for the growing or feeding under contract or agreement, of livestock, domestic animals and poultry, and shall also apply to any feeding stuffs which are produced by the purchase of grain or other materials and the grinding and mixing of same with concentrated commercial feeding stuff being used as a supplement or base. The requirements of this section, however, are subject to the following conditions:
>
> (1) If the concentrated commercial feeding stuff, used as a supplement or a base, has already been taxed under this article and the inspection tax paid, then the amount paid shall be deducted from the gross amount of tax due on the total feeding stuff produced.
>
> (2) Only that portion of a custom-mixed feed supplied by a farmer and used in custom-mixed feeds as defined in G.S. 106-95.1, shall be exempt from the feed inspection tax as provided for in this article."
>
> G.S. 106-95. "Commercial feeding stuffs" defined. — The term "commercial feeding stuffs" shall be held to include the so-called mineral feeds and all feeds used for livestock, domestic animals and poultry, except cottonseed hulls, whole unground hays, straw and corn stover, when the same are not mixed with other materials, nor shall it apply to whole unmixed, unground and uncrushed grains or seeds when not mixed with other materials."

> G.S. 106-95.1. Custom-mixed feed. — A "custom-mixed feed" is a feed composed of grains or other feed materials grown or stored on the farm of a person, firm, or corporation engaged in farming and ground and mixed with a concentrate or base, for the sole purpose of being fed to the livestock, domestic animals or poultry of the said person, firm or corporation: Provided, this section shall not be construed as prohibiting a farmer from using grain grown or stored on neighboring farms when moved directly by him or his employee to a mill, to his own farm, or to a neighboring storage facility.

The State contends that the feed which defendant mixes and delivers to the farmers conducting its grow-out operations is "commercial feeding stuffs" as defined by G.S. 106-95, and that it is taxed by G.S. 106-99 as feed furnished for the growing of poultry "under contract." Defendant contends that it is "custom-mixed feed" as defined by G.S. 106-95.1 and exempt under G.S. 106-99(2). It is stipulated by plaintiff that no inspection tax is due or payable upon that portion of feed produced by defendant and used to feed the turkeys and the chickens (1% of its total chicken production) grown by defendant's regular employees on land owned or leased by it.

His Honor concluded as a matter of law that the feed was not subject to the inspection tax and dismissed the State's action. In this ruling we concur. The State concedes that the same feed which it seeks to tax when fed to defendant's chickens on a grow-out operation is not subject to the inspection tax when fed to defendant's turkeys and chickens raised on its own land by its regular employees. We can perceive no essential difference between the two operations. The chickens raised in other farmers' houses during the grow-out process still belong to defendant.

"Whether one is an independent contractor depends upon the extent to which he is, in fact, independent in performing the work. Broadly stated, if the contractor is under the control of the employer, he is a servant. . . ." *Lassiter v. Cline,* 222 N.C. 271, 273, 22 S.E. 2d 558, 560. Here, defendant's employees regularly supervise all grow-out operations, including the labor of the owners of the houses. The individual farmer who uses his own brooders is nonetheless the supervised employee of defendant so far as this operation is concerned. "(E)ven supposing . . . that the servant did live in his own house, if he were employed to furnish a certain number of shoes for a particular person by a fixed time, . . . he is a servant *quoad hoc.* . . ." Aston, J., in *Hart v. Aldridge,* 1 Cowp. 54, 56, 98 Eng. Rep. 964, 965 (K.B. 1774) (obiter).

The purpose of Gen. Stat. ch. 106, art. 9 is not to protect from himself a farmer who mixes his own feed, but to protect a farmer-buyer from the manufacturer-seller of concentrated, commercial feeds who might sell substandard or mislabeled feedstuff. To that end, the law requires such feed to be registered with the Commissioner of Agriculture, and an analysis to be furnished him, G.S. 106-96. The feedstuff must be properly labeled and carry a guarantee, G.S. 106-93. It must be sold in packages of prescribed weight, G.S. 106-94. The Commissioner is empowered to collect samples of feedstuff, and analyze them to determine the contents, G.S. 106-102. Penalties are provided for selling substandard feed, G.S. 106-102.1. To finance the cost of administering article 9, an inspection tax of 25 cents per ton is imposed upon commercial feedstuffs, G.S. 106-99.

Specifically, G.S. 106-95.1 exempts from the inspection tax in question custom-mixed feed produced by farmers for their own use. Defendant, instead of being within the class to be regulated, is, as a purchaser of commercial feedstuffs for use in the product it mixes for itself, one of those whom the law seeks to protect. When defendant transfers feed from its own mill to its own bins for use in feeding its own chickens — even though they are "growing out" on the lands of its employees —, it is not *distributing* feed or *furnishing* feed for the growing of poultry under contract within the meaning of G.S. 106-99. "Surely, it is not necessary to recite sustained authority for the statement that one cannot distribute to himself." *Union Oil Co. v. State*, 2 Wash. 2d 436, 440, 98 P. 2d 660, 662.

The judgment of the court below is

Affirmed.

IN RE ROBERT BRATTON.

(Filed 25 November, 1964.)

Automobiles § 2—

The fact of conviction of reckless driving during the period of revocation of license for drunken driving, G.S. 20-17(2), without conviction of driving while his license was revoked, G.S. 20-28(a), does not warrant the Commissioner of Motor Vehicles under G.S. 20-16(a)(1) to suspend the driver's license for an additional period of a year. G.S. 20-16(a)(1).

APPEAL by respondent from *Clarkson, J.*, April 13, 1964, Civil Session of GASTON.

While the documents comprising the record, including the pleadings and judgment, bear the caption, *"In re Robert Bratton,"* the caption *"Robert Bratton, Petitioner, v. Edward Scheidt, Commissioner of Motor Vehicles of North Carolina, Respondent,"* would seem more appropriate. Herein Bratton is referred to as petitioner and Scheidt, Commissioner, is referred to as respondent.

Proceeding for review of an order issued by respondent under date of January 7, 1964, suspending petitioner's operating privilege, heard below on the facts set forth in a stipulation dated April 20, 1964, to wit:

"1. That the petitioner is a citizen and resident of Gaston County, North Carolina;

"2. That the Petition was filed on February 20, 1964, in the Superior Court of Gaston County; and that the respondent, to wit, Edward Scheidt, Commissioner of Motor Vehicles of the State of North Carolina, filed an Answer on March 21, 1964, and the case is now at issue;

"3. That the petitioner was issued a valid North Carolina motor vehicle driver's license, being number OP 1247786, and was duly authorized to operate a motor vehicle on the highways of the State of North Carolina;

"4. That on March 27, 1963, the petitioner was tried and convicted in the Municipal Court of Winston-Salem, North Carolina, of the offense of operating an automobile while under the influence of intoxicating beverages; that the petitioner did not surrender his driver's license for revocation at that time;

"5. That pursuant to General Statutes 20-17, subsection 2, the Department of Motor Vehicles of the State of North Carolina, through its Commissioner, notified the petitioner on April 11, 1963, that his operator's license was revoked for a period of one year, beginning April 16, 1963, and ending April 16, 1964; that the petitioner did not forward his driver's license to the Department;

"6. That on December 12, 1963, the petitioner was tried and convicted in the Belmont Recorder's Court in Gaston County, North Carolina, of the offense of careless and reckless driving, the date of the offense being October 5, 1963. That by official notice and record of the suspension of license, dated January 7, 1964, the petitioner's operator's license was suspended for an additional period of one year, beginning April 16, 1964, and ending April 16, 1965, under the authority of General Statutes 20-16(a)(1). That the basis for the additional

suspension dated January 7, 1964, was the conviction in the Belmont Recorder's Court on December 12, 1963;

"7. That the petitioner has not been tried and convicted of the offense of driving while his license has been suspended or revoked;

"8. That this proceeding is brought pursuant to General Statutes 20-25."

The judgment entered by Judge Clarkson, after recitals, provides:

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, after hearing oral argument and reviewing the stipulations of fact, that the Order of the respondent dated January 7, 1964, suspending the North Carolina operator's license number OP1247786 of the petitioner effective April 16, 1964, to April 16, 1965, be, and the same is hereby voided and rescinded.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the respondent issue a valid North Carolina Operator's License to the petitioner if the petitioner has complied with the other relevant laws of the State of North Carolina and is otherwise qualified."

Respondent excepted and appealed.

Frank P. Cooke and Joseph B. Roberts, III, for petitioner appellee.

Attorney General Bruton and Assistant Attorney General Brady for respondent appellant.

BOBBITT, J. Petitioner does not challenge respondent's authority under G.S. 20-17(2) to revoke his operator's license for the year beginning April 16, 1963, and ending April 16, 1964, on account of his conviction on March 27, 1963, in the Municipal Court of Winston-Salem, North Carolina, of operating a motor vehicle while under the influence of intoxicating liquor in violation of G.S. 20-138. The sole question for decision is whether respondent had authority under G.S. 20-16(a)(1) to suspend his operator's license for an additional period of one year, beginning April 16, 1964, and ending April 16, 1965, on account of his conviction on December 12, 1963, in the Recorder's Court of Belmont, of reckless driving in violation of G.S. 20-140.

The offense for which petitioner was convicted in the Recorder's Court of Belmont is not an offense for which, upon conviction, the revocation or suspension of an operator's license is mandatory. G.S. 20-17; G.S. 20-16.1; G.S. 20-16(a)(1). Moreover, it is not an offense for which the Department of Motor Vehicles is authorized by G.S. 20-16 to suspend an operator's license.

Respondent contends G.S. 20-16(a)(1) and petitioner's said conviction of reckless driving authorized respondent to issue his order of January 7, 1964. The identical question was decided adversely to respondent at Spring Term 1963 in *Gibson v. Scheidt, Comr. of Motor Vehicles,* 259 N.C. 339, 130 S.E. 2d 679, to which reference is made for a full discussion.

Respondent contends *Gibson* is distinguishable in that there the Department was proceeding and our decision was based on G.S. 20-28(a). True, the provisions of G.S. 20-28(a) were stressed and constituted a basis of decision. G.S. 20-28(a) deals solely and directly with the offense of driving while one's operator's license is suspended or revoked and contains provisions (see *Gibson*) bearing directly upon periods of suspension and revocation *upon conviction.* Even so, the opinion in *Gibson* discloses that G.S. 20-16(a)(1) as well as G.S. 20-28(a) was considered in reaching decision. Thus, in *Gibson* the judgment of the court below was reversed "on the ground that, absent *a conviction* of plaintiff for the criminal offense defined in G.S. 20-28(a), the Department's order of February 23, 1962, was not authorized by G.S. 20-28(a) *or otherwise.*" (Our italics). The Department is authorized by G.S. 20-16(a)(1) to suspend an operator's license only *upon conviction* of an offense for which "mandatory revocation of license" is required. According to the stipulated facts, petitioner has not been *convicted* of *such offense.* It is noted that the stipulated facts disclose no reason why petitioner may not now be prosecuted and convicted for driving in Gaston County on October 5, 1963, while his operator's license was revoked, in violation of G.S. 20-28(a).

On authority of *Gibson,* on which Judge Clarkson presumably based decision, the judgment of the court below is affirmed.

Affirmed.

STATE v. RICHARD VIRGIL.

(Filed 25 November, 1964.)

1. Criminal Law § 168—

In passing upon defendant's exception to the refusal of his motion to nonsuit, all of the evidence admitted at the trial, whether competent or incompetent, must be considered.

2. Criminal Law § 101—

Defendant's motion to nonsuit is properly overruled if there is evidence to support a conviction of the crime charged or an included crime. G.S. 15-170.

3. Criminal Law § 48—

Officers of the law obtained a confession from one of the parties charged with perpetrating the offense, read the confession to defendant and took defendant to the hospital room where the party who had made the confession made statements implicating defendant. *Held:* Defendant's silence in the face of the accusation is not competent as an implied admission of guilt since such implied confession was not voluntary, and therefore testimony as to the accusations is incompetent as hearsay.

APPEAL by defendant from *McLaughlin, J.*, April "A" Session, 1964, of WAKE.

Defendant was indicted in a bill charging burglary in the first degree as defined in G.S. 14-51.

Plea: "Not Guilty."

Verdict: "Guilty as charged with recommendation that the punishment be imprisonment for life."

Judgment, imposing a sentence of life imprisonment, was pronounced. Defendant excepted and appealed.

Attorney General Bruton and Deputy Attorney General McGalliard for the State.

George M. Anderson for defendant appellant.

BOBBITT, J. The State's evidence, in brief summary, tends to show:

On February 9, 1963, about 3:00 a.m., T. S. Matthews, part owner, was sleeping inside the premises of Matthews & Gentry Service Station and Grocery. He was awakened by a tapping noise at one of the outer doors. Thereafter, one Oliver Evans broke a glass panel in an overhead door to the garage portion of the premises, entered where the glass panel had been broken and then, passing through a swinging door, entered the portion of the premises in which Matthews had been sleeping. Matthews' dog barked. Evans fired his shotgun and injured Matthews. Matthews fired his shotgun and injured Evans. Evans got out of the building and with difficulty reached the shoulder of the road. A car came along and stopped. When Evans attempted to get in this car, Matthews "fired a pistol over the top of this car 2 or 3 times," and the car "immediately sped off and left this man (Evans) lying on the shoulder of the road."

There was evidence tending to connect defendant with the crime. Decision on this appeal is based on the admission over defendant's objections of the portion of such evidence set forth below.

Defendant's assignments of error, based on his exceptions to the court's denial of his general motions for judgment as of nonsuit, are overruled. Pertinent legal principles include the following: (1) Admitted evidence, whether competent or incompetent, must be considered in passing on defendant's motions for judgment as of nonsuit. *S. v. McMilliam,* 243 N.C. 771, 774, 92 S.E. 2d 202; *Early v. Eley,* 243 N.C. 695, 700, 91 S.E. 2d 919; *Kientz v. Carlton,* 245 N.C. 236, 246, 96 S.E. 2d 14. (2) A motion for judgment as of nonsuit addressed to the entire bill is properly overruled if there is evidence sufficient to support a conviction of the crime charged or of an included (G.S. 15-170) crime. *S. v. Brooks,* 206 N.C. 113, 114, 172 S.E. 879; *S. v. Marsh,* 234 N.C. 101, 105, 66 S.E. 2d 684.

Defendant assigns as error the admission over his objections of testimony of Deputy Sheriff Covert as to statements made by Oliver Evans on February 12, 1963, at Wake Memorial Hospital. The facts in evidence bearing upon the competency of this testimony are stated below.

Covert arrested defendant shortly after 7:30 a.m., February 9, 1963, and put him in the Wake County Jail. Thereafter, defendant was in custody. Covert advised defendant he was "under arrest for burglary." Between February 9th and February 12th, Covert questioned defendant "several times." Covert testified: "Virgil repeatedly told me that he did not know anything about the breakin."

From early morning on February 9th until February 12th and thereafter, Evans was a patient in Wake Memorial Hospital. On the night of February 11th, Covert went to the hospital and obtained a statement signed by Evans "of where he was and what happened on the morning of the 9th." Covert testified: "After obtaining the statement I came back and confronted Virgil with it. I read it to him." (Note: The written statement was not offered in evidence.)

The following day, February 12th, defendant was taken to Evans' hospital room. In the presence of Evans, A. G. Scarborough, a deputy sheriff, and defendant, Covert read the statement he had obtained from Evans the preceding night and asked Evans if it was true. Evans stated it was true. Thereafter, according to Covert, Evans made the following statement in the presence and hearing of defendant: "Richard, you know you carried me down to Mr. Poole's Store, which I broke into, didn't get much money. We talked it over and decided to go to Matthews & Gentry, went to Matthews & Gentry. I broke in, I got

shot, came back out to the road, I tried to get in your car, and I said, 'Richard, I have been shot, carry me to the hospital,' you drove off and left me there to die."

Covert testified: "When Oliver Evans made this statement, Virgil dropped his head and begun to cry — shake all over. After Oliver Evans made this statement that I have testified to to Richard Virgil, Richard Virgil had an opportunity to make any statement that he might want to in reply. I asked him, I said, 'Richard, how about it?' He didn't say anything, kept crying and shaking. I then brought him back to the Wake County jail. Deputy Scarborough and myself sat in the car in the parking lot and talked to him for several minutes; he cried continuously until we put him back in the lockup. He never made any statement as to Oliver Evans' statement not being true, said he didn't see why he would do that. That was all he ever said. He made this statement in the parking lot. We were in Evans' hospital room some three or four minutes after he made this statement before we took Richard away."

A warrant charging defendant with burglary "was signed" by Covert on February 15th and served on February 16th.

Nothing else appearing, Covert's testimony as to what Evans said was incompetent as hearsay and therefore inadmissible. Stansbury, North Carolina Evidence, § 138. Here, the competency thereof depends upon whether, under the circumstances, defendant's failure to deny such statements may be considered an implied admission of the truth thereof. Competency is to be determined by legal principles established by decisions of this Court reviewed and applied in *S. v. Temple,* 240 N.C. 738, 83 S.E. 2d 792, and in *S. v. Guffey,* 261 N.C. 322, 134 S.E. 2d 619. See Stansbury, *op. cit.,* § 179.

According to undisputed evidence: Defendant was under arrest and in custody from February 9th through February 12th. Covert had advised defendant he was under arrest for burglary. Covert questioned defendant *several times* and defendant *repeatedly* told Covert he knew nothing about the alleged burglary. No warrant charging defendant with burglary had been issued. Under these circumstances, Covert "took" defendant to Evans' hospital room. Against this factual background, defendant's failure to deny Evans' incriminating statements may not, in our opinion, be considered an implied admission of the truth thereof.

Moreover, as stated by *Moore, J.,* in *S. v. Guffey, supra:* ". . . an admission or confession, even where it may be implied by silence, must be voluntary. Any circumstance indicating coercion or lack of voluntariness renders the admission incompetent. *State v. Hawkins,* 214 N.C.

326, 199 S.E. 284; *State v. Dills,* 208 N.C. 313, 180 S.E. 571. No one can be forced to incriminate himself, or to make a false statement to avoid doing so. *State v. Dills, supra.*" In our view, defendant's presence and conduct in Evans' hospital room on February 12th may not reasonably be considered voluntary on the part of defendant.

Under the circumstances disclosed by the evidence, we are of opinion, and so hold, that Covert's testimony as to Evans' statements (declarations) was incompetent and that the admission thereof was prejudicial error.

New trial.

STATE v. CLARKE EUGENE PAYNE.
AND
STATE v. WILLARD RAY MARTIN, JR.

(Filed 25 November, 1964.)

Criminal Law § 25—

Since a plea of *nolo contendere* will support the same punishment as a plea of guilty, it comes within the purview of G.S. 15-4.1 requiring the court to warn and advise an accused who is without counsel of the consequences of the plea.

APPEALS by defendants from *Crissman, J.,* June, 1964 Session, ROWAN Superior Court.

The defendants were jointly indicted and tried for obtaining from Foodtown, Inc., and from Linda Helms $37.50, money and merchandise, in return for a worthless check drawn on the Wachovia Bank & Trust Company with intent to defraud in violation of G.S. 14-106. With respect to the arraignment, the record of the trial contains the following:

"Solicitor thereupon called (each defendant) to the Solicitor's table and the Court Reporter made the following record: (As regards counsel): Upon inquiry of the Court as to the ability of employing counsel, Willard Ray Martin, Jr., and Tony Ray Martin stated to the Court that they had the money in a guardianship fund for counsel. Upon investigation, the Court found that Clarke Eugene Payne was able to employ counsel and was not indigent.

"(As regards pleas): The defendants were charged with obtaining money under false pretense that check was good, under the misdemeanor statute - - - EXCEPTION #3.

"Each of the defendants tendered to the Court a PLEA OF NOLO CONTENDERE to obtaining property in return for worthless check (14-106)."

As to each defendant, the court entered this judgment:

"The defendant comes into Court and pleads *Nolo Contendere* to obtaining property in return for a worthless check which plea is accepted by the Solicitor on behalf of the State. Thereupon it is considered, ordered and adjudged by the Court that the defendant be confined in the Common Jail of Rowan County for a term of 18 months to 24 months and assigned to work under the supervision of the State Highway and Public Works Commission."

Each defendant gave notice of appeal.

T. W. Bruton, Attorney General, Theodore C. Brown, Asst. Attorney General for the State.

Graham M. Carlton for defendant appellants.

HIGGINS, J. In the trial, neither defendant was represented by counsel. The court made inquiry and ascertained the defendant Payne was not indigent and that the defendant Martin, though a minor, had access to guardian funds and hence was not indigent. The court refused to appoint counsel. Upon arraignment, each defendant was called by the solicitor to his table and each thereafter tendered a plea of *nolo contendere* which the solicitor accepted. The record fails to disclose any explanation as to the meaning of the plea or the possible consequences which the plea involved.

The defendants being without counsel, G.S. 15-4.1 required the court to "inform the accused of the nature of the charge and the possible consequences of his plea, and as a condition of accepting the plea of guilty the judge shall examine the defendant and shall ascertain that the plea was freely, understandably and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency . . ." Ch. 1080, § 1, Session Laws 1963.

A plea of *nolo contendere,* although not strictly a confession of guilt, nevertheless will support the same punishment as a plea of guilty. The rule of strict construction in favor of an accused, therefore, requires that a plea of *nolo contendere* be treated as a plea of guilty in so far as the right to be examined by the judge and to be informed as to the consequences of such plea.

The Attorney General's brief closes with this paragraph:

"The record does not reflect an examination by the Court of the defendant as to whether he knew or understood what his plea of *'nolo contendere'* meant, nor whether he knew or understood what jail term or fine could be imposed as a result of his plea."

On account of the court's failure to warn and advise the defendants of the consequences of their pleas, the same are set aside and the judgments thereon are vacated. The cases will be remanded to the Superior Court of Rowan County for a

New trial.

DEMOS KARROS AND GUS HAVELOS v. OTIS TRIANTIS.

(Filed 25 November, 1964.)

1. Judgments § 28—

A judgment dismissing an action instituted to set aside a former judgment is *res judicata* and bars a subsequent action between the parties to set aside the judgment, the remedy if the judgment of dismissal was erroneous being solely by appeal.

2. Appeal and Error § 21—

A sole exception to the judgment presents only the face of the record proper for review.

APPEAL by plaintiffs from *Hobgood, J.*, April 1964 Session of WAKE.

In this action, which was instituted October 7, 1963, plaintiffs pray "that the judgment rendered by McKinnon, J., at the November Term 1960, of Wake Superior Court be set aside and a new trial ordered." Defendant demurred to the complaint on the ground it appears therefrom that the issues attempted to be raised herein "have heretofore been determined and adjudicated."

Defendant's demurrer was in substance a plea of *res judicata;* and the record indicates the hearing below was on facts alleged in the complaint and stipulated facts. The relevant facts are summarized below.

On November 1, 1956, Triantis (defendant herein) instituted an action against Karros and Havelos (plaintiffs herein); and, after trial of said action before McKinnon, J., and a jury, at November Term 1960, of Wake Superior Court, Triantis recovered a judgment against Karros and Havelos, jointly and severally, for $1,800.00 plus interest and costs. The action was to disaffirm a sale by Triantis to Karros and Havelos of a restaurant or an interest therein. The verdict included a

jury determination that "the plaintiff (was) under the age of 21 years at the time of entering into agreements with the defendants and accepting payments thereunder, as alleged in the Complaint."

In the trial of said action, Triantis introduced evidence tending to show he was born on May 21, 1935. He so testified. He offered evidence "that the plaintiff's naturalization papers and insurance papers and war service papers showed his birthday at May 21, 1935." Too, he "produced a judgment" of a court of Greece entered May 22, 1959, to the effect he was born on May 21, 1935. Karros and Havelos "had no notice of this action in Greece." They contended Triantis "was born on the 2nd day of January, 1935, and was Christened on the 18th day of the same month, but did not have proof of that fact other than oral testimony."

In his complaint in said action, plaintiff admitted "he had received on the purchase price" the sum of $500.00 on March 1, 1956, and $100.00 on May 15, 1956. Karros and Havelos then alleged and now allege that Triantis accepted these payments after he had reached the age of 21 years and thereby ratified his contract with them.

Karros and Havelos gave notice of appeal from said judgment of McKinnon, J., but did not perfect an appeal therefrom.

In December, 1960, Karros and Havelos instituted an action "in the appropriate Court of Greece" to determine the true date of the birth of Triantis. Karros and Havelos and also Triantis were represented by counsel in said action. In said action, on the 19th day of December, 1961, "the said Court in Greece entered a judgment setting aside the judgment that Otis Triantis was born on the 21st day of May, 1935, and finding on the contrary that he was born on the 2nd day of January, 1935, and was christened on the 18th day of the same month." (Note: The judgment of December 19, 1961, contains this provision: "VI. Whereas, both parties in the present instance had reasonable doubts on the outcome of the suit, as it appears from the evidence produced by them, the judicial costs must be set off in part (art. 211, paragraph 2, of the Civil Procedure Law).")

On March 8, 1962, Karros and Havelos instituted an action against Triantis in Wake Superior Court to set aside the said judgment entered by McKinnon, J., at November Term, 1960, on the ground "said judgment had been procured by the false and fraudulent testimony of . . . Triantis." At October Term, 1962, a judgment dated October 8, 1962, entered by Clark (Heman R.), J., upheld defendant's demurrer to complaint, allowed defendant's plea of *res judicata* and dismissed the action. Notice of appeal was given but the appeal was abandoned.

The said judgment of McKinnon, J., is identified as No. D-1284, Judgment Docket 74, page 87; and the said judgment of Clark, J., is identified as No. D-4830, Judgment Docket 78, page 172.

The said judgment of October 8, 1962, entered by Clark, J., is worded as follows:

"THIS CAUSE duly and regularly came on to be heard and it was heard at this the First October, 1962, Regular Civil Term of this Court by and before the undersigned Presiding Judge upon the defendant's demurrer to the complaint and motion to dismiss this cause and plea of *res adjudicata* because of an action in this Court entitled '*Otis Triantis v. Demos Karros and Gus Havelos,*' No. D-1284, judgment in which action was duly entered sometime ago in Judgment Docket 74, Page 87, in the office of the Clerk of this Court; and it appearing to the Court, and this the Court so finds, that the parties in this cause and the parties in said other cause are the same and that the circumstances and the controversy of the two causes are the same, after hearing arguments of counsel for the plaintiffs and counsel for the defendant, it is, upon due consideration, ORDERED that the defendant's demurrer be, and it is hereby sustained; and it is further ORDERED that the defendant's motion to dismiss this action be, and the same is hereby, sustained; and it is found by the Court that the defendant's plea of *res adjudicata* because of said other action and judgment therein is proper; and it is further ORDERED that said plea be, and it is hereby, allowed:

"NOW, THEREFORE, in consideration of the premises, it is ORDERED, ADJUDGED and DECREED that this action be, and the same is hereby, dismissed, the costs hereof to be paid by the plaintiffs."

The judgment entered by Judge Hobgood in this action on May 25, 1964, after recitals, concludes:

"And after hearing argument of counsel for the plaintiffs and counsel for the defendant it is, upon due consideration,

"ORDERED that said demurrer be, and the same is hereby, sustained, and it is further ORDERED, ADJUDGED and DECREED upon the finding by the Court that said other judgment entered in Judgment Docket 74 at page 87 in the office of the Clerk of this Court, No. D-1284, and the judgment entered as aforesaid in Judgment Docket 78 at page 172 in the office of the Clerk of this Court, No. D-4830, constitute and each of them constitutes *res judicata* for the above-entitled action, that this action be, and the same is hereby, dismissed at the cost of the plaintiffs."

Plaintiffs excepted and appealed.

Morris & Hinsdale for plaintiff appellants.
John D. Xanthos and R. L. McMillan for defendant appellee.

PER CURIAM. This is the *second* action instituted by plaintiffs to set aside the judgment entered by McKinnon, J., at November Term 1960. The *first* was instituted March 8, 1962, after plaintiffs, in January 1962, had acquired knowledge that the court in Greece, on December 19, 1961, had modified its prior judgment of May 22, 1959. The judgment of Clark, J., entered therein on October 8, 1962, sustained defendant's demurrer, allowed defendant's plea of *res judicata* and dismissed the action. If erroneous, the said judgment of Clark, J., could be corrected only by this Court on appeal. *Mills v. Richardson*, 240 N.C. 187, 81 S.E. 2d 409. Plaintiffs did not see fit to perfect their appeal. Since said judgment of Clark, J., constitutes a bar to this action and supports Judge Hobgood's judgment herein, it is unnecessary to consider other grounds for affirmance of Judge Hobgood's judgment.

It is noted: Unless the fact that the judgment entered May 22, 1959, in the court in Greece, was modified by the judgment entered therein on December 19, 1961, is so considered, plaintiffs' allegations herein do not specify any ground on which they seek to set aside the judgment entered by McKinnon, J., at November Term, 1960.

The only exception appearing in the record is an exception to the judgment. This presents only the face of the record proper for inspection and review. *Moore v. Crosswell*, 240 N.C. 473, 82 S.E. 2d 208. No error appears thereon. Indeed, the record proper, the stipulated facts and the judgment of Clark, J., affirmatively support Judge Hobgood's judgment.

Affirmed.

LOUISE BRYAN PRESSLEY v. WILSON GODFREY.

(Filed 25 November, 1964.)

1. Automobiles § 17— Evidence held to raise conflicting inferences of negligence on part of each party causing intersection accident.

In this action to recover for a collision occurring when defendant entered from the north an intersection with a six-lane boulevard, intending to make a left turn into the boulevard, and was struck by plaintiff's car traveling west

on the boulevard in the southern lane for westbound traffic, the evidence *is held* to raise conflicting inferences taking the case to the jury in plaintiff's action and on defendant's cross-action, and not to show contributory negligence as a matter of law on the part of either party, and nonsuit of defendant's counterclaim was error.

2. Trial § 33—

Ordinarily, it is not sufficient for the court to state the evidence only in giving the contentions of the parties.

3. Trial § 35—

Where the evidence of each party is approximately equal, a charge of the court which states the contentions of one party in grossly disproportionate length must be held for prejudicial error.

APPEAL by defendant from *Phillips, E. J.*, March 9, 1964, Civil "C" Session of MECKLENBURG.

Action for damages resulting from a collision of automobiles.

The collision occurred about 5:00 P.M., 21 June 1963, at the intersection of Independence Boulevard with South Cedar Street in Charlotte. Independence Boulevard runs generally east and west; Cedar Street runs north and south. Independence Boulevard has three lanes for eastbound traffic and three lanes for westbound traffic, with a concrete median separating the eastbound from westbound lanes, and with a turning lane just south of the median for vehicles making left turns to go north on Cedar. About 400 feet east of the intersection Independence Boulevard crosses a bridge over a railroad, and going westwardly from the bridge slopes downwardly and curves to the left in approaching the Cedar Street intersection. A "Stop" sign controls traffic on Cedar Street at the intersection. The speed limit on the Boulevard was 40 miles per hour, on Cedar Street 35 miles per hour. Plaintiff was operating her car westwardly on Independence Boulevard in the inside or southernmost lane for westbound traffic; the front of her car collided with the rear half of the left side of defendant's car in the intersection and in the inside lane in which she was travelling. Defendant had proceeded southwardly on Cedar Street and had entered the intersection with the intention of turning east on the Boulevard. The sun was shining but the streets were wet from a recent shower. Both cars were damaged and plaintiff suffered personal injuries.

The following is plaintiff's version of the occurrence: Plaintiff's speed was 25 miles per hour. Defendant was almost in front of plaintiff and only 20 yards away when she first saw him. There were cars in the other lanes going west, but not quite as far advanced as plaintiff. When she saw defendant she applied brakes and tried to stop but could not do so in time to avoid the collision. She left no tire or brake marks. She

could not turn into another lane because of traffic. Defendant was coming into plaintiff's lane when she first saw him; his car was moving at the time of the collision.

Defendant's testimony: Defendant stopped for the "Stop" sign at the curb line of the Boulevard, he checked traffic to his right and left, there was no traffic in sight to the left toward the railroad bridge, and he saw none to the right. He proceeded southwardly across the westbound lanes and as he neared the center of the Boulevard he saw an eastbound car to his right about 200 feet away. He decided to "play it safe" and stopped to let the eastbound car pass. He stopped with the front of his car opposite the ends of the median and with the rear in the inside westbound lane. After he stopped he saw plaintiff's car approaching him 200 feet away, half the distance to the railroad bridge. He had been stopped about 5 seconds before the collision. He "did not hear the sound of any skidding tires."

Plaintiff alleged that defendant was negligent in that he failed to stop before entering the intersection, failed to ascertain that the movement could be made in safety before entering the intersection, failed to yield to plaintiff the right of way, failed to maintain a reasonable lookout and to keep his vehicle under proper control, and violated the reckless driving statute.

Defendant pleaded contributory negligence and counterclaimed for damage to his automobile, alleging that plaintiff was negligent in that she was proceeding at a speed greater than was reasonable and prudent, failed to reduce speed in approaching the intersection, failed to maintain a reasonable lookout and to keep her car under control, and failed to yield the right of way to his vehicle which was standing in the intersection before she reached the intersection.

At the close of all the evidence the court allowed plaintiff's motion for nonsuit of defendant's counterclaim. Defendant excepted.

The jury found that defendant was negligent, plaintiff was not contributorily negligent, and awarded plaintiff damages. Judgment was entered on the verdict, and defendant appeals.

John Warren; Craighill, Rendleman & Clarkson, and John R. Ingle for plaintiff.

Wardlow, Knox, Caudle and Wade for defendant.

PER CURIAM. Defendant assigns as error the nonsuit of his counterclaim and makes seventeen specific exceptions to the charge.

The factual accounts of the respective parties as to how the accident occurred are conflicting on all material points. Plaintiff's evidence

makes out a *prima facie* case of actionable negligence against defendant, and defendant's evidence entitles him to go to the jury on his counterclaim. On this record neither is guilty of contributory negligence as a matter of law.

Both parties were entitled to have the jury consider their respective theories of the case, insofar as the evidence offered by them supports their allegations. Notwithstanding the nonsuit of the counterclaim, the court submitted an issue as to the contributory negligence of plaintiff, and defendant was entitled to have his theory of the case presented on this issue and also on the negligence (first) issue as opposed to plaintiff's theory. *Chambers v. Allen,* 233 N.C. 195, 63 S.E. 2d 212. The court did not state the evidence except in giving the contention of the parties. *Bulluck v. Long,* 256 N.C. 577, 124 S.E. 2d 716. In about 12 pages of the record, the court fully defined and explained the principles of law arising on plaintiff's allegations and gave in much detail plaintiff's contentions with respect thereto. Parenthetically, we observe that the charge deals at length with the duty of a motorist to stop in obedience to a "Stop" sign. There is no evidence in the record that defendant did not stop before entering the Boulevard; he testified that he did stop. See *Dunlap v. Lee,* 257 N.C. 447, 126 S.E. 2d 62. With respect to defendant's factual and legal version of the case, the court read to the jury an excerpt from *Primm v. King,* 249 N.C. 228, 106 S.E. 2d 223, and later in the charge on the first issue gave (in about two pages of the record) general contentions of defendant, answering plaintiff's contentions with respect to defendant's conduct. Defendant's contentions with respect to the alleged negligent conduct of plaintiff are merely listed in about one-third of a page of the record. The evidence of defendant as to how the accident occurred is about equal in length to that of plaintiff. There is a glaring inequality in the stress given the contentions of the parties. *Brannon v. Ellis,* 240 N.C. 81, 81 S.E. 2d 196. With respect to the contributory negligence (second) issue, the court said: "The court will not repeat the evidence or contentions of the parties on the second issue because each makes the same contentions as to the other on the second issue that they do on the first . . ." The court merely submitted the issue to the jury for answer, explaining that plaintiff would be entitled to recover only if the answer to the first issue was "Yes" and the answer to the second issue "No." See *Therrell v. Freeman,* 256 N.C. 552, 124 S.E. 2d 522.

The court erred in nonsuiting defendant's counterclaim. There are many prejudicial errors in the charge.

New trial.

EDNA GREY MARTIN v. WILLIAM AUGUSTUS MARTIN.

(Filed 25 November, 1964.)

1. Divorce and Alimony § 18—

While the amount of alimony *pendente lite* for the support of the wife and minor children rests in the sound discretion of the trial court, such discretion must be exercised with regard to the conditions and circumstances of the parties and the current earnings of the husband and his ability to pay, as well as the needs of the children.

2. Same; Appeal and Error § 46—

Where the amounts allowed as alimony *pendente lite* are excessive and unrealistic if the facts set forth in the husband's affidavit as to his earnings and obligations are true, such allowance exceeds the limits of judicial discretion, and in the absence of specific findings with respect to the matters set out in the affidavit or indication that such matters were considered by the court, the cause must be remanded.

APPEAL by defendant from *Johnson, J.*, at Chambers July 1, 1964. From JOHNSTON County Superior Court.

This is an action pursuant to G.S. 50-16 for alimony without divorce, custody of children, subsistence for the children, attorney's fees, and possession of the home of the parties.

Plaintiff and defendant were married 24 May 1958 and are now separated. There are three children of the marriage, ages 5, 3 and 1.

The cause came on for hearing and was heard on plaintiff's motion for custody and alimony *pendente lite*. Defendant interposed a demurrer *ore tenus*. The court overruled the demurrer, found certain facts, and adjudged that it is for the best interest and welfare of the children that their custody be awarded to the plaintiff, with visitation privileges to the father, that plaintiff "have possession and control" of the home, and that defendant assume certain obligations and make specified payments for the support of plaintiff and the children.

Defendant appeals.

Spence & Mast and Britt & Ashley for plaintiff.
Albert A. Corbett and Pope Lyon for defendant.

PER CURIAM. The allegations of the complaint, if established on the trial, are sufficient to base an award of alimony. *Lawson v. Lawson*, 244 N.C. 689, 94 S.E. 2d 826.

The court found facts, and the only findings with respect to defendant's financial circumstances and earnings are that his "take-home" pay is $457 per month, and that he receives a $20 monthly pension from the Veterans Administration which is used by him "in payment of his

G. I. insurance and the loan on said policy of insurance." The court ordered that plaintiff "have the right of possession of the home of the parties, owned by the entireties," that defendant "pay on the note secured by deed of trust on said home . . . $110.00 per month," pay plaintiff for support of herself and children $42.50 per week, and pay the light, water, sewer and telephone (not including long distance calls) bills arising by reason of the use and occupancy of the home by plaintiff and the children.

The hearing was on affidavits. Defendant's uncontradicted affidavit tends to show the following facts: Defendant owns no real estate other than the home, which is owned by the entireties and is mortgaged. The home consists of a house and lot in Smithfield; the house was renovated prior to the hearing. Defendant is obligated to make monthly payments, in addition to the payments required in the order herein, $41 automobile payments (30 payments remaining), $18 hospitalization insurance. Defendant has other indebtedness, $5000 borrowed for down payment on and renovation of the home, $300 for materials used in the renovation, $130 floor covering, $115 drug store account, $200 oil bill, $100 auto and fire insurance, and $250 city and county taxes. He is attempting to pay $25 per week on these accounts. The operation and maintenance of automobile for transportation to and from work costs $50 per month. Defendant's take-home pay is $457 per month.

If defendant's evidence is true, defendant will have, including the payments required by the order herein, fixed and certain charges of at least $370 per month out of his monthly income of $457. From the balance of $87 per month defendant must provide for himself food, clothing, shelter and other necessaries, provide for the operation and maintenance of his automobile for transportation to and from work, provide for emergencies, and make payments on additional obligations of $6095 incurred on behalf of his family. It is obvious that such is impossible.

There is no evidence that defendant has any income other than his monthly wages, or any other assets to which resort may be had. The amount of alimony allowable *pendente lite* is a matter of sound judicial discretion having regard to the condition and circumstances of the parties and the current earnings of the husband. *Conrad v. Conrad,* 252 N.C. 412, 113 S.E. 2d 912. In providing for the support of minor children the ability of the father to pay, as well as the needs of the children, must be taken into consideration by the court. *Coggins v. Coggins,* 260 N.C. 765, 133 S.E. 2d 700.

If the facts set out in defendant's affidavit are true, the payments required of defendant are clearly excessive, unrealistic and beyond the

limits of judicial discretion. The court made no specific findings with respect to the matters set out in the affidavit, and it does not appear whether they were considered. The cause is remanded for determination of proper alimony *pendente lite* and subsistence for the children in accordance with the rules above stated.

Error and remanded.

J. ARCHIE WILSON v. MARIAN S. WILSON.

(Filed 25 November, 1964.)

1. Appeal and Error § 19—

Assignments of error must be based on exceptions duly noted, and may not present a question not embraced in the exceptions.

2. Appeal and Error § 21—

An exception to the judgment presents the correctness of the judgment and whether it is supported by the verdict, properly interpreted, but it cannot affect the verdict.

3. Trial § 42—

The verdict will be interpreted with reference to the pleadings, evidence, and charge, and to the extent it is not inconsistent and repugnant when so construed, is acceptable.

4. Claim and Delivery § 5—

Where judgment is entered that plaintiff is entitled to the chattel, judgment against the surety on plaintiff's bond may not be allowed, even though defendant recovers judgment against plaintiff for purchase money payments made on the chose.

APPEAL by plaintiff from *Walker, S. J.,* December 1963 Civil Session of WAKE.

This is an action for possession of an automobile.

Defendant is plaintiff's daughter-in-law. Plaintiff purchased the automobile in 1959 about two months prior to the marriage of defendant and plaintiff's son; his son was then a minor. Plaintiff registered the car in his own name, but defendant and her husband kept and used it. There is evidence that defendant drove the car to and from work, and that she paid most of the credit installments on the car as they fell due. She and her husband separated in September 1962 and she retained possession of the car.

Plaintiff instituted this action and caused the automobile to be seized under claim and delivery proceedings. Defendant failed to replevy.

Plaintiff thereafter sold the automobile. Defendant counterclaimed for $2558.59 for payments which she alleges she made on the purchase of the vehicle.

The jury found that plaintiff is entitled to the possession of the automobile and defendant is entitled to recover of plaintiff and his surety the sum of $1000. Judgment was entered accordingly. Plaintiff appeals.

Morris & Grandy for plaintiff.
Lake, Boyce & Lake for defendant.

PER CURIAM. "Assignments of error must be based on exceptions duly noted, and may not present a question not embraced in the exception." 1 Strong: N. C. Index, Appeal and Error, § 19, p. 89. The only exception in the record on this appeal is to the signing and entry of the judgment. "An exception to the judgment presents the correctness of the judgment and whether it is supported by the verdict, properly interpreted, but it cannot affect the verdict." *Ibid,* § 21, p. 93.

The first and third issues, when considered according to their phraseology, are inconsistent and repugnant. But when interpreted by reference to the pleadings, evidence and charge of the court (*Moore v. Humphrey,* 247 N.C. 423, 101 S.E. 2d 460), the verdict is sustained, except as to the surety on plaintiff's undertaking in claim and delivery. Such surety must be discharged from liability where it is determined by the verdict that plaintiff is entitled to the possession of the chattel in question.

The judgment as against John B. Rogers, surety, will be vacated. In all other respects the judgment is affirmed.

Modified and affirmed.

BERLINE CARPENTER PARKER v. ALIENE C. MOORE, ADMINISTRATRIX OF THE ESTATE OF W. BERNARD MOORE, DECEASED.

(Filed 25 November, 1964.)

1. Infants § 6—

Before funds belonging to infants or incompetents may be taken from them, the law requires that they be represented by a guardian, a guardian *ad litem,* or a next friend, as the situation may require.

2. Same—

On an *ex parte* petition filed by the minor's mother and father, the court approved the payment by the infant out of the proceeds of a life policy a sum as a credit on the funeral expenses of the insured. *Held:* The infant not being represented by a guardian *ad litem*, the court was without authority to authorize the payment, and the infant, upon attaining her majority, is entitled to recover the fund against the insured's estate.

APPEAL by plaintiff from *Crissman, J.*, July 1964 Session, RICHMOND Superior Court.

The plaintiff instituted this civil action to recover from the Estate of W. Bernard Moore the sum of $500.00 with interest from May 28, 1958. The plaintiff alleged in substance the following: On January 22, 1958, the Southern Life Insurance Company paid to the Clerk of the Superior Court for the use and benefit of the plaintiff the sum of $500.00, the amount due her as one of the beneficiaries of a policy of insurance on the life of Ernest Burr. At that time the plaintiff was a minor, 15 years of age, living with her parents. W. Bernard Moore, trading as Moore Funeral Home, conducted the funeral services at the burial of Ernest Burr.

On March 10, 1958, the mother and father of the plaintiff filed an *ex parte* petition with the clerk requesting the $500.00 in his hands belonging to their daughter be paid to W. Bernard Moore as a credit on the funeral expenses incident to the burial of Ernest Burr. The plaintiff joined in the petition. The Resident Judge of the district approved the order and the payment was made on May 28, 1958. The plaintiff was not represented either by guardian, guardian *ad litem*, or next friend.

The plaintiff became 21 years of age on February 14, 1964. On March 9, following, she filed a claim with the Administratrix of W. Bernard Moore, demanding return of the $500.00 which the Clerk had paid to Mr. Moore. Upon the denial of the claim, she filed this action on May 16, 1964. The defendant demurred on the ground the complaint failed to allege facts sufficient to constitute a cause of action. From the judgment sustaining the demurrer, the plaintiff appealed.

Pittman, Pittman & Pittman by W. G. Pittman for plaintiff appellant.

Taylor & McLendon by Moran D. McLendon, Jr., and F. O'Neil Jones for defendant appellee.

PER CURIAM. Before funds belonging to infants and incompetents may be taken from them, the law requires that they be represented by

guardian, guardian *ad litem,* or next friend, as the situation may require. Parents as such are not authorized to divert funds belonging to their children. The court cannot authorize such diversion until the infant or incompetent is represented in the manner provided by law. The procedure followed here does not conform to that requirement.

By receiving the $500.00, Mr. Moore became unjustly enriched at the plaintiff's expense. His estate should make restitution. The plaintiff had the right to repudiate the payment of her money when she became of age. She acted promptly after her 21st birthday. The complaint states a good cause of action. The court committed error in sustaining the demurrer. The defendant will be permitted to answer.

Reversed.

SARAH JANE EVANS v. C. C. BOVA & COMPANY.

(Filed 25 November, 1964.)

Trial § 35—

Where defendant's answer denies any negligence on the part of his driver in connection with the accident complained of and his counsel throughout the trial so maintains, an instruction by the court in stating the evidence and in stating defendant's contentions that defendant did not controvert the question of negligence must be held for prejudicial error.

APPEAL by defendant from *Armstrong, J.,* 16 March Session 1964 of RICHMOND.

This is an action to recover damages sustained in an automobile accident occurring in the City of Rockingham, North Carolina, on 13 February 1962, at about 1:00 p.m. The plaintiff was the driver of an automobile which she alleged was stopped at a stop light at the intersection of U. S. Highway No. 74 and West Washington Street. The defendant was the owner of a 1961 Diamond Tractor-Trailer Unit which was at said time being operated by his agent and employee, Emanuel Gilbert Smith.

It was stipulated below that defendant C. C. Bova & Company was a sole proprietorship, owned and operated by C. C. Bova.

Plaintiff alleges that her car was struck from behind while she was stopped for a traffic signal. Defendant in his answer denied that the accident occurred while plaintiff's car was stopped for the traffic signal to change, but that the plaintiff negligently and carelessly stopped her

automobile in the middle of the intersection, without giving any signal or warning whatsoever, after having started from a complete stop; that said stop was made after she had traveled approximately 20 feet; that the stop was made at such time as to render a collision between the front of the tractor-trailer unit and the rear of plaintiff's automobile completely unavoidable.

Defendant offered no evidence.

From a verdict in favor of plaintiff and judgment entered on the verdict, the defendant appeals, assigning error.

Webb & Lee for plaintiff appellee.

Leath, Bynum, Blount & Hinson for defendant appellant.

PER CURIAM. The defendant assigns as error the following portion of the court's charge: "Now, members of the jury, in this case there is no real serious controversy about this first issue."

Since the defendant in his answer expressly denied any negligence on the part of his driver in connection with the accident complained of, and the record nowhere discloses any concession of negligence on the part of the defendant or his driver, we think the above portion of the charge was erroneous.

The issue of negligence was not only sharply contradicted in defendant's pleadings, but also by his counsel throughout the course of the trial.

A reading of the entire charge clearly conveys the impression that the court assumed that the defendant's driver was negligent, and virtually so charged the jury.

In *S. v. Simpson,* 233 N.C. 438, 64 S.E. 2d 568, Stacy, C.J., speaking for the Court, said: "It can make no difference in what way or manner or when the opinion of the judge is conveyed to the jury, whether directly or indirectly, by comment on the testimony of a witness, by arraying the evidence unequally in the charge, by imbalancing the contentions of the parties, by the choice of language in stating the contentions, or by the general tone or tenor of the trial. The statute forbids any intimation of his opinion in any form whatever, it being the intent of the law to insure to each and every litigant a fair and impartial trial before the jury."

In stating the defendant's contentions, the Court said: "* * * (T)he defendant says and contends that while he denied such negligence in his answer, he does not now seriously contend that Mr. Smith was not negligent, and that if you find that this negligence was the proximate cause of this collision and any injuries that the plaintiff sustained from

the collision, then you may answer this issue YES"; and again, "the defendant says and contends that probably you should * * * find that his agent, Smith, did run into this car negligently, thereby failing to keep a reasonable lookout, and having his truck under proper control * * *." Exceptions by defendant.

The defendant is entitled to a new trial and it is so ordered.

New trial.

STATE v. BOBBY WARD.

(Filed 25 November, 1964.)

Attorney and Client § 8; Criminal Law §§ 25, 173—

Where defendant's counsel enters a plea of *nolo contendere* and defendant maintains throughout that he was not guilty, the judgment may not be allowed to stand, and when there is no specific finding as to whether defendant did consent to the plea entered for him, the cause must be remanded.

CERTIORARI to review an order of *Burgwyn, E. J.*, entered in a Post Conviction Hearing at the December, 1964 Session, JOHNSTON Superior Court. The court denied the defendant's application for a new trial in three cases tried at the June 25, 1956 Term of the Court.

At the time of his trial in 1956, the defendant was 21 years of age. He had a seventh grade education. His parents employed an able and experienced lawyer to defend the accused against the charge of house breaking and assault with intent to commit rape. The defendant's counsel, now deceased, testified at the post conviction hearing in part, as follows:

"Before the trial Sheriff Henry and his deputies unearthed two other cases against Bobby; one was for an alleged offense against the little Thorne girl in Selma and one against the Hartley boy over near Holt Lake. We were prepared to defend the case of Mrs. Wright (assault with intent to commit rape) against him . . . Bobby Ward denied his guilt. . . . It looked like a bad situation. I tried to have an agreement with the solicitor with the approval of the judge that if we would tender a plea of *nolo contendere* in all cases and let the judge hear the facts, that he would not be given any more sentence than could be given in the Wright matter . . . Bobby never did admit to me that he did either of them. He told me he was not guilty. His parents and I —

they were led largely by me . . . at the time came to the conclusion that the best way to handle it would be tender a *nolo contendere* in the cases. . . ."

The plea was entered in No. 7999, containing two counts, one charging house breaking, and the other assault with intent to commit rape; and in 7999B — crime against nature on the Hartley child, and in 7999C a similar charge on the Thorne child; the court imposed prison sentences in 7999 of ten years on the first count and 15 years on the second count, to run consecutively; in 7999C ten years to begin at the expiration of the 15 years sentence in the prior case; in 7999B, not less than 45 nor more than 60 years. This sentence was to run concurrently with the others.

At the Post Conviction Hearing, Judge Burgwyn heard evidence, but inasmuch as the petition for the Post Conviction Review was filed more than five years after the judgments were imposed, dismissed the petition without a specific finding that the defendant had not authorized the entry of the pleas of *nolo contendere*. The defendant's court-appointed counsel brought the cause here for review.

T. W. Bruton, Attorney General, James F. Bullock, Asst. Attorney General for the State.

Wiley Narron for defendant appellant.

PER CURIAM. The Attorney General's evaluation of the evidence offered at the hearing is thus stated in the brief: "This appears to be a case where the defendant's counsel tendered a plea of *nolo contendere* while the defendant was insisting that he was not guilty. . . . If the evidence in the record is to be considered and believed, then it seems that defendant should have his day in court before a jury on a plea of not guilty."

While the evidence indicates the defendant did not authorize the entry of a plea of *nolo contendere* to the three indictments, nevertheless there is no specific finding to that effect made by Judge Burgwyn. In this condition of the record we remand the case to the Superior Court of Johnston County for a specific finding and if, as the evidence indicates, the defendant did not consent to the pleas entered for him, then the Superior Court is directed to set aside the pleas and judgment and order a jury trial in all cases.

Remanded for further findings and disposition.

STATE OF NORTH CAROLINA v. BARBARA ANN MATTHEWS.

(Filed 25 November, 1964.)

Criminal Law §§ 32, 106; Homicide § 23—

An instruction that the burden was on defendant to prove self-defense to the satisfaction of the jury and that such degree of proof exceeds proof by the greater weight of the evidence is prejudicial error, since proof by greater weight of the evidence may be sufficient to satisfy the jury.

APPEAL by defendant from *Crissman, J.*, June 22, 1964 Criminal Session of RANDOLPH.

Defendant was indicted for the murder of her husband, Jack Benson Matthews, who died as the result of a single gunshot wound on February 26, 1964. At the trial the State did not seek a verdict of murder in the first degree but sought a conviction of murder in the second degree. The defendant pled not guilty and asserted a plea of self-defense.

The evidence disclosed that the married life of the deceased and defendant had been stormy from the beginning and marred as well by mutual distrust as by assaults by the husband upon the wife. After an evening of cat-and-mouse activity on the part of both, the deceased reached home first and retired. When defendant came in, he indicated to her that he did not want "to hear her mouth." She persisted, however, in an attempt to thrash over the events of the evening and to turn on the lamp in the bedroom as fast as he would turn it off. Whereupon, uttering threats that he was going to "stomp hell out of her and shut her mouth once for all," he started to get out of bed. When he put one foot on the floor, defendant reached for a pistol in the chest of drawers and shot him. He died shortly thereafter.

The jury returned a verdict of guilty of manslaughter. From a sentence of imprisonment defendant appealed.

Attorney General Bruton and Assistant Attorney General Richard T. Sanders for the State.

Morgan, Byerly, Post, Van Anda & Keziah for defendant.

PER CURIAM. Defendant assigns as error the following portion of the charge on her right of self-defense:

> "(B)ut the defendant does not meet the requirement of the law when she satisfied you members of the jury merely by the greater weight of the truth of facts she relies on in mitigation, justification or excuse . . . So the Court charges you that for a person to prove

to the satisfaction of you members of the jury, that that is a degree of proof which might be said to be in between the proof beyond a reasonable doubt and proof by the greater weight of the evidence. So to prove a fact or facts to the satisfaction of you members of the jury requires a higher degree of proof and signifies something more than a belief founded upon the greater weight of the evidence, but it does not require as high a degree or as strong an intensity of proof as proof beyond a reasonable doubt."

The substance of this charge was held to be reversible error in *State v. Prince,* 223 N.C. 392, 26 S.E. 2d 875, wherein this Court laid down the correct rule as follows:

"The intensity of the proof required is that the jury must be satisfied. Even proof by the greater weight of the evidence may be sufficient to satisfy the jury. Hence, the correct rule as to the intensity of such proof is that when the intentional killing of a human being with a deadly weapon is admitted, or is established by the evidence, 'the law then casts upon the defendant the burden of proving to the satisfaction of the jury — not by the greater weight of the evidence nor beyond a reasonable doubt — but simply to the satisfaction of the jury . . . the legal provocation that will rob the crime of malice and thus reduce it to manslaughter, or that will excuse it altogether upon the grounds of self-defense, accident or misadventure.' *S. v. Benson,* 183 N.C. 795, 111 S.E. 869." *Id.* at 393, 26 S.E. 2d at 876.

His Honor's charge bore too heavily against defendant. Therefore, there must be a

New trial.

STATE v. EARLE CALDWELL BLACKWELDER.

(Filed 25 November, 1964.)

Automobiles § 3; Criminal Law §§ 65.1, 136— Certificate of revocation without admission or proof of identity is not conclusive.

The introduction by the State of certificate of the Department of Motor Vehicles that a person of the same name as defendant had been convicted of drunken driving and his license suspended does not justify an instruction that the jury should convict defendant of driving during the period of revocation of his license if the jury believed the State's evidence beyond a reasonable doubt that defendant drove a vehicle upon a public high-

way during that time, since the certificate was merely evidence upon which the jury could determine the question of identity of defendant as the person whose license had been revoked. The revocation of the prior suspended execution must be set aside also.

APPEAL by defendant from *Crissman, J.*, April 1964 Session of CABARRUS.

Defendant was charged and convicted in the Recorder's Court of Cabarrus County of operating a motor vehicle while his license was suspended, a misdemeanor, G.S. 20-28. Based on the conviction, the court activated a sentence suspended in a prior criminal action. Defendant appealed to the Superior Court the judgment based on the verdict, and the activation of the suspended sentence. In that court there was a verdict of guilty, sentence and activation of the suspended sentence. Defendant then appealed to this Court.

Attorney General T. W. Bruton, Deputy Attorney General H. W. McGalliard and Assistant Attorney General James F. Bullock for the State.

B. W. Blackwelder for defendant appellant.

PER CURIAM. The evidence in the Superior Court was sufficient to support a finding that defendant was, on the night of December 26, 1963, driving an automobile. The State also offered a certified transcript of the records of the Department of Motor Vehicles. This record showed one Earle Caldwell Blackwelder was, on November 21, 1963, convicted of drunken driving. Based on that conviction, the Department had revoked that person's license to operate a motor vehicle from December 3, 1963, to December 3, 1964.

The court charged the jury to return a verdict of guilty if they should find beyond a reasonable doubt that defendant was operating a motor vehicle on the highways of the State on the night of December 26, 1963. This was but one element of the crime which the State had to prove. The other element, that the operator's license was then suspended or revoked, was another essential ingredient of the crime. The plea of not guilty placed the burden on the State to prove both. The certificate from the Department did not, standing alone, identify defendant as the person whose license had been revoked. It was merely evidence on which the jury could determine the question of identity. *State v. Mitchner*, 256 N.C. 620, 124 S.E. 2d 831.

The failure of the court to require the jury to find as a fact that defendant's license had been revoked was error, entitling defendant to a new trial.

Since the activation of the suspended sentence was based on the erroneous assumption that defendant's violation of the terms of the suspended sentence had been properly determined, there was error in activating the suspended sentence.

New trial.

ROSA MORGAN HENDERSON HOLSHOUSER v. FANNIE J. MORGAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF LOVE HILL, DECEASED.

(Filed 25 November, 1964.)

APPEAL by defendant from *Crissman, J.*, May 18, 1964, Session of ROWAN.

Civil action to recover compensation for services rendered Love Hill, who died testate on April 24, 1962, "at the age of approximately 80 years."

The only evidence was that offered by plaintiff.

The issues submitted and the jury's answers were as follows: "1. Did the plaintiff, Rosa Morgan Henderson Holshouser, during the last three years of the life of Love Hill, under an implied contract, perform services for the said Love Hill, which he knowingly accepted and did not pay or settle for, and for which the plaintiff expected pay, as alleged in the Complaint? ANSWER: YES. 2. If so, what amount, if any, is the plaintiff entitled to recover for such services? ANSWER: $2600.00."

Judgment for plaintiff in accordance with the verdict was entered. Defendant excepted and appealed.

Woodson, Hudson & Busby for plaintiff appellee.
Graham M. Carlton for defendant appellant.

PER CURIAM. The complaint, when considered in the light most favorable to plaintiff, alleged facts sufficient to constitute a cause of action; and the evidence, when considered in the light most favorable to plaintiff, was sufficient to require that the court submit the issues for jury determination. Hence, defendant's demurrer to complaint "for failure . . . to allege a cause of action," and defendant's motion for judgment of nonsuit, were properly overruled.

Defendant's remaining assignments of error, except formal assignments, relate to (1) rulings on evidence, (2) portions of the charge as given and (3) the court's failure to give additional instructions. Each of these assignments has received full consideration. In our view, none discloses prejudicial error or merits discussion in detail.

No error.

STATE v. LESSIE MAE SHAW.

(Filed 25 November, 1964.)

APPEAL by defendant from *Brock, S.J.*, assigned mixed session 20 July 1964 of ONSLOW.

Criminal prosecution on an indictment charging that defendant on 30 December 1963 feloniously, wilfully, and of her malice aforethought did kill and murder William Shaw. G.S. 15-144. William Shaw was defendant's husband. Prior to the commencement of the trial, the prosecuting officer for the State announced that he would not ask for a verdict higher than murder in the second degree.

Plea: Not guilty. Verdict: Guilty of manslaughter.

From a judgment of imprisonment in the Women's Division of the State Prison for a period of not less than five years nor more than seven years, defendant appeals.

Attorney General T. W. Bruton and Deputy Attorney General Harry W. McGalliard for the State.

Yarborough, Blanchard & Tucker for defendant appellant.

PER CURIAM. Defendant offered evidence tending to show that she killed her husband in self-defense. Her sole assignment of error, except two formal ones, is to a portion of the charge in respect to her defense that she killed her husband in self-defense. A charge must be read as a whole and not in detached fragments. A close study of the judge's charge in its entirety shows clearly that the court charged fully, amply, and correctly on all aspects of the law of self-defense arising upon the evidence in the case, and that the law given the jury for its guidance in determining the merits of defendant's claim of self-defense was as declared in the following cases, and almost in the verbatim language of these cases: *S. v. Fowler,* 250 N.C. 595, 108 S.E. 2d 892; *S. v. Goode,*

249 N.C. 632, 107 S.E. 2d 70; *S. v. Rawley,* 237 N.C. 233, 74 S.E. 2d 620; *S. v. Ellerbe,* 223 N.C. 770, 28 S.E. 2d 519; *S. v. Robinson,* 213 N.C. 273, 195 S.E. 824; *S. v. Marshall,* 208 N.C. 127, 179 S.E. 427.

In the trial below we find

No error.

STATE v. DEXTER YATES.

(Filed 25 November, 1964.)

APPEAL by defendant from *Crissman, J.,* June Session 1964 of RANDOLPH.

The defendant was tried upon a bill of indictment charging him with breaking and entering, on 27 September 1963, the premises occupied by Nance Chevrolet Company, Inc., in Asheboro, North Carolina, and the larceny therefrom of $1,750.00 in checks and money, property of Nance Chevrolet Company, Inc.

Defendant entered a plea of not guilty, and from a verdict of guilty on both counts and judgment thereon, imposing successive active sentences, he appeals, assigning error.

Attorney General Bruton, Asst. Attorney General Richard T. Sanders for the State.

Ferree, Anderson & Ogburn for defendant appellant.

PER CURIAM. The State's evidence was sufficient to carry this case to the jury and to support the verdict rendered. Hence, the defendant's motion for judgment as of nonsuit was properly overruled.

Other assignments of error present no error sufficiently prejudicial to justify the granting of a new trial.

No error.

SIDNEY M. DOWD v. CHARLOTTE PIPE & FOUNDRY COMPANY, A CORPORATION, AND W. FRANK DOWD AND WIFE, ELIZABETH RODDEY DOWD, FRANK DOWD, JR., RODDEY DOWD, W. D. THOMPSON, F. DWIGHT STEPHENS, ROBERT C. STEPHENS, AND E. H. HARDISON, SAID INDIVIDUALS CONSTITUTING THE BOARD OF DIRECTORS AND ALSO THE OFFICERS OF THE DEFENDANT CORPORATION.

(Filed 2 December, 1964.)

1. Corporations §§ 13, 19, 27; Pleadings § 18— Causes for declaration of dividends and for dissolusion of corporation may be properly joined in action against corporation and its directors.

Demurrer for misjoinder of parties and causes of actions is properly overruled upon complaint in an action by a shareholder against the corporation and the individuals constituting its board of directors to compel the declaration of adequate dividends, G.S. 55-50(k), and to compel the liquidation and involuntary dissolution of the corporation upon allegations that defendant-director controlling a majority of the voting stock had in bad faith suppressed the declaration of dividends and had diverted corporate funds to his own use, thus precluding plaintiff from obtaining a fair dividend or a fair market value for his stock, since both causes of action arise out of the same subject matter and the statute permits the joinder of directors with the corporation as parties. G.S. 1-123.

2. Pleadings § 2—

The complaint should allege the material facts entitling plaintiff to the relief sought concisely so as to pinpoint the controversy and disclose the proper issues for its determination, without allegation of evidentiary facts. G.S. 1-122.

3. Pleadings § 34—

The court on motion should strike from the complaint the embellishments and banjowork inserted for their effect upon the jury.

APPEAL by defendants from *Copeland, S. J.*, April 6, 1964 Schedule "D" Non-Jury Session, MECKLENBURG Superior Court.

The plaintiff, a shareholder in, and one of the directors of, the Charlotte Pipe & Foundry Company, instituted this action on April 29, 1963, against the corporation and against all other directors. The plaintiff undertakes to state two causes of action: (1) To require payment of adequate dividends, and (2) to liquidate and dissolve the corporation.

According to the allegations of the complaint, the corporation is a closely held family business. The corporate stock consists of 2,000 shares of A, the voting stock, and 10,000 shares of B, non-voting stock. Each share has a par value of $100.00. At the time the action was instituted, the plaintiff was the owner of 240 shares of A, and 1209 shares of B stock. The defendant, Frank W. Dowd, President and director,

owns 1,020 shares of A stock and since 1940 "has maintained absolute, positive and unchallenged control of each and every function of Charlotte Pipe & Foundry Company." Although the capitalization is $1,200,000, the assets exceed the capital by $7,800,000. The corporation has available cash surplus in excess of three million dollars and a net profit for the last year of operation of $500,000, and a net earning of $36.72 per share. The corporation paid a dividend of only $6.00 per share. Its liabilities, including taxes, do not exceed $500,000.00.

Here, quoted in full, are four paragraphs of the complaint:

> "19. At the annual meeting of the Board of Directors of the defendant corporation on April 24, 1963, the plaintiff offered the following Motion:
>
> " 'Resolved, that an extra dividend of $125.00 per share be and it hereby is declared upon all of the capital stock of the Charlotte Pipe & Foundry Company payable on the 24th day of May 1963, to all stockholders of record at the close of business on the 24th day of April 1963.'
>
> "20. Immediately following the plaintiff's introduction of the Motion as set forth in the preceding paragraph, the individual defendant, W. Frank Dowd, stated, 'That Motion is dead; I just killed it.' "
>
> "46. As of the fiscal year ending November 30, 1961, the defendant corporation had available for payment of dividends surplus in the minimum amount of $2,357,808.18."
>
> "50. After payment of the aforementioned dividends in the amount of $72,000.00 a minimum of $2,736,800.84 remained as accumulated earnings and undistributed surplus. The individual defendant, W. Frank Dowd, through his arbitrary and dominant control of the defendant corporation and for lack of good faith has refused to permit just, reasonable and equitable dividends to be paid to this plaintiff and to the other shareholders, in complete derogation of their lawful and equitable rights to such profits based upon their holdings in the defendant corporation."

In his second cause of action (for liquidation of the assets of the company and its dissolution) the plaintiff alleges: The defendant W. Frank Dowd, since acquiring control, has dictated the policies of the corporation, "in lack of good faith," but for his own personal benefit and advantage.

> "66. No shareholder of the defendant corporation will ever be able to secure payment of fair, just and equitable dividends so

long as the individual defendant, W. Frank Dowd, maintains his absolute, arbitrary control of his holding in excess of 50% of the Class A Voting stock, unless equitable relief is afforded by this Court.

"70. As plaintiff is informed and believes and upon such information and belief alleges, the small dividend income and the attempt to deflate the true value of the corporate stock of the defendant corporation, all as directed by the individual defendant, W. Frank Dowd, has precluded this plaintiff from obtaining a fair market value for the sale of his stock. As the plaintiff is further informed and believes and upon such information and belief alleges, the plaintiff's remedy is now to compel the liquidation of the defendant corporation as the liquidation is reasonably necessary for the protection of the rights of this plaintiff who constitutes a complaining stockholder."

Throughout both causes of action, the plaintiff has alleged numerous instances in which the president has diverted to his own and to his family's use funds totaling many thousands of dollars belonging to the corporation. The complaint alleges details as to the purposes and the amounts of the diversions.

In his first cause of action plaintiff seeks a *mandamus* to compel the corporation to pay adequate dividends.

In the second cause of action he demands the following relief:

"2. For the liquidation of the assets and business of the defendant corporation for the protection of the rights and interests of the plaintiff, pursuant to North Carolina General Statute 55-125 (a) (4).

"3. For subsequent dissolution of the defendant corporation after order of liquidation of the assets and business of the said corporation, pursuant to the provisions of North Carolina General Statute 55-125 (c).

"4. For the appointment of a Receiver, in accordance with North Carolina General Statute 55-127, to effect the liquidation and involuntary dissolution of the defendant corporation, with such powers and duties as are provided in Article 38, Ch. 1, of the General Statutes of North Carolina.

"5. For an accounting by order of this Court.

"6. For the Court to entertain such further proceedings as may be necessary and proper for the involuntary liquidation of the as-

sets of the defendant corporation and the winding up and dissolution of the defendant corporation."

Upon motion of the defendants, the court struck 26 of the 90 paragraphs from the first cause of action and 13 of the 70 paragraphs from the second cause of action. Thereafter, the defendants filed a demurrer to the complaint upon the ground of misjoinder of parties and causes. The court overruled the demurrer. The defendants appealed.

Warren C. Stack, James L. Cole for plaintiff appellee.

Blakeney, Alexander & Machen, Whiteford S. Blakeney, Ernest W. Machen, Jr., for defendant appellants.

HIGGINS, J. The appeal involves the question whether the complaint shows a misjoinder of parties and causes. The demurrer was based solely upon that ground. May a stockholder in a corporation sue the corporation, and join its directors as defendants, for failure to declare adequate dividends from the corporation's earnings; and may he join therewith a second cause of action for liquidation and involuntary dissolution of the corporation based upon bad faith management in suppressing dividends and in deflating the value of the corporation's assets, thus precluding the plaintiff from obtaining either a fair dividend or a fair market for his stock?

The Business Corporation Act, G.S. 55-50(k) provides: "Any action by a shareholder to compel the payment of dividends may be brought against the directors or against the corporation with or without joining the directors as parties." Hence the inclusion of the directors as defendants is not a misjoinder of parties to the first cause of action. When the power of the court in the exercise of its equitable jurisdiction is invoked to liquidate and decree involuntary dissolution under G.S. 55-125 (a)(4), there must be a showing that the liquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder. Subsection (3) provides that it shall not be necessary to make shareholders parties unless relief is sought against them personally. Clearly, directors would seem to be proper parties to a suit to dissolve the corporation upon the complaint of one shareholder, even though no relief is sought against them personally. We are not required, at this stage, to determine to what extent the interests of other shareholders may be balanced against those of one complaining shareholder who seeks liquidation and dissolution. The implication in the statute is that directors and other interested shareholders may be made, or, on their own application, may become parties to a complain-

ing shareholder's action to liquidate and dissolve the corporation. Certainly the directors are not improper parties.

The two causes of action arose out of the same controversy and involve the same subject-matter — the transaction of the corporate business. G.S. 1-123 permits such joinder. *Conger v. Ins. Co.*, 260 N.C. 112, 131 S.E. 2d 889; *Hancammon v. Carr*, 229 N.C. 52, 47 S.E. 2d 614; *Pressley v. Tea Co.*, 226 N.C. 518, 39 S.E. 2d 382.

We have difficulty in following the manifold ramifications of the complaint. As originally drafted, it contained 160 paragraphs covering more than 40 pages of the record. Thirty-nine paragraphs were stricken by the court. In preparing the complaint the draftsman evidently at all times stood far from and kept his back turned on G.S. 1-122. The requirement is: the complaint must give the title, the court, the county, the parties, and "a plain and concise statement of the facts constituting a cause of action without unnecessary repetition; and each material allegation must be separately numbered." The plaintiff should state the relief to which his allegations of fact entitle him. In a few simple words the pleadings should pinpoint the controversy and disclose the proper issues for its determination. It is the duty of plaintiff's counsel to follow the statutory requirement in preparing the complaint.

The trial judge, on motion, should strike from a complaint the embellishments and banjowork inserted for their effect upon the jury. If a plaintiff wants admissions or factual details, he should get them by interrogatories or by adverse examination. The reasons against pleading evidentiary details were stated by Merrimon, J., in *McLaurin v. Cronly*, 90 N.C. 50: "Reason and common justice, as well as THE CODE, require that the plaintiff shall state in a plain, strong, intelligible manner his grounds of action, and that the defendant shall in like manner state the grounds of his defense, and any counterclaims or demands he may have and desires to set up. This is not mere matter of form. It is of the essential substance of the litigation. It is necessary to the end the contending parties may understand and prepare to meet, each the other's contention, and prepare himself for the trial of issues of law or fact presented, that the court may have a proper, just and thorough apprehension of the controversy, and that the same may go into the record and stand as a perpetual memorial of the litigation and all that it embraces. Any other course of procedure would lead to endless confusion and litigation. If this were not done, it would be difficult to show what any litigation embraced or that it had been settled and ended, and when and how." See also, *Parker v. White*, 237 N.C. 607, 75 S.E. 2d 615.

While the two causes of action relate to the same controversy, we wonder what will become of the cause for dividends if the plaintiff is

successful in having the corporation liquidated and dissolved. The liquidation and dissolution would render moot any question involving dividends.

In view of the repetitious and evidentiary details in which the complaint was originally drawn, and even in which it was left as the result of the order to strike, the plaintiff will be well advised to draft a new complaint more in keeping with G.S. 1-122. He may obviate the apparent inconsistencies in his position by alleging the cause of action for dividends as an alternative in the event he fails in his efforts to liquidate and dissolve the corporation.

The complaint is objectionable for the reasons indicated, but it is sufficient to survive the demurrer for misjoinder of parties and causes.

Affirmed.

FRANK X. FARNAN, JR., MARY F. ARNOLD, REBECCA F. HUNTER, DOROTHY F. DARROCOTT v. FIRST UNION NATIONAL BANK, AS EXECUTOR AND TRUSTEE UNDER THE WILL OF JOSEPH JENKINS FARNAN, DECEASED, VINCENT S. WATERS, AS BISHOP OF THE ROMAN CATHOLIC DIOCESE OF RALEIGH, NORTH CAROLINA.

(Filed 2 December, 1964.)

1. Wills § 40—

The rule against perpetuities requires that an estate vest no later than twenty-one years plus, when apposite, the period of gestation after the life or lives of persons in being at the time of the creation of the estate, and is a rule of law and not of construction.

2. Same— Time of vesting and not time of payment is determinative of whether bequest violates rule against perpetuities.

A bequest to trustees to pay the income for life to testator's nieces and nephews, and after the death of the survivor to hold the property for a period of twenty years and then "as soon as practicable" thereafter pay the sum to a charity, provided the charity accepted the conditions that the fund be matched for the construction of a church to bear one of two designated names, with further provision that if the charity failed to accept the conditions within one year following the expiration of the twenty-year period, the fund should be distributed to other designated charities, *held* not to violate the rule against perpetuities even though the trustees are given time after the expiration of the twenty-one year period in which to pay the sum, since the fund vests after the twenty-year period when the charity accepts the conditions of the bequest and not when the funds may be actually paid.

3. Wills § 61; Appeal and Error § 6—

Where a will directs trustees to pay to a designated charity certain funds upon the acceptance in writing by the charity of certain conditions of the bequest, the acceptance of the conditions by the charity vests the funds in it, and the rights of the parties in the event the conditions should thereafter be broken will not be determined until the happening of such contingency, since the courts will not enter anticipatory judgments.

4. Wills § 50—

Bequests to charities in this case held not void for vagueness. G.S. 36-21, G.S. 36-23.1.

5. Wills § 40—

The will in question made a gift to a named charity to vest contingently if the charity accepted the conditions specified therein within twenty-one years after the death of the survivor life beneficiary of the income, with further provisions that if the charity did not within that time accept the conditions, the fund should go to the other specified charities. *Held:* The fact that the contingent limitation over to the ultimate charities would not vest until the expiration of the complete period permitted by the rule against perpetuities does not violate that rule.

APPEAL by plaintiffs from *Riddle, S. J.,* June 12, 1964, "D" Session of MECKLENBURG.

Action for interpretation of certain provisions of a will.

Plaintiffs are heirs at law and next of kin of Joseph Jenkins Farnan, late of Mecklenburg County, who died testate 27 March 1963. His will and a codicil thereto (together hereinafter referred to as "will") have been duly probated and recorded. The First Union National Bank has qualified as executor and is acting as such. The inventory shows that the value of the estate at testator's death was $242,279.46 personal property, $25,000 real estate.

Item VI of the will (as amended by the codicil) is in pertinent part as follows:

> "All of the rest, residue and remainder of all property . . . I devise and bequeath to Union National Bank of Charlotte . . . in trust . . . for the following uses and purposes . . .
>
> "The Trustee shall . . . manage . . . invest and reinvest any and all funds and properties . . . and . . .
>
> "(a) Six months after the date of my death, and semi-annually thereafter, the Trustee shall pay to each of my nieces and nephew hereinafter named (plaintiffs in this action) who are living at the time the payments become due, the sum of One Hundred Twenty Dollars ($120.00), the payments . . . to continue during the life-time of each of said beneficiaries . . ."

. . . . . .

"(c) I direct that upon the date that all of my nieces and nephew above named shall be dead the trust estate shall continue to be held in trust for a period of twenty years from such date and shall be invested and reinvested and the income therefrom accumulated. At the expiration of said twenty years the Trustee shall as soon as practicable after the Roman Catholic Church of the Diocese of North Carolina has in writing expressed its willingness to accept and use such fund for the purpose hereinafter stated, pay and distribute, free of any trust, to the Roman Catholic Church of the Diocese of North Carolina, all of the remainder of the principal or corpus of the said trust fund and its accumulations, to be used for the following purpose and upon the following stated conditions: The trust fund shall be matched by an amount equal to the amount of said trust and the total amount thus derived shall be used to construct and equip a Catholic Church in the City of Charlotte, North Carolina. The church so constructed shall be named either St. Mary's Catholic Church or St. Joseph's Catholic Church, and the name which is selected shall be the name of said church forever. This gift to the Roman Catholic Church of the Diocese of North Carolina is made upon the express condition that the above specified conditions shall be strictly complied with in each and every detail.

"If, however, the Roman Catholic Church of the Diocese of North Carolina, at any time within one year after the expiration of the twenty year period following the death of the survivor of my nieces and nephew, above named, in writing declines to accept the said gift upon the said terms, or if at the end of said one year, it has not affirmatively elected to accept said gift upon said terms, then I direct that the Trustee shall pay and distribute the said trust fund, free of any trust, to certain charitable institutions located in western North Carolina, which are supported, maintained and operated by the Episcopal, Methodist, Baptist and Lutheran denominations of the Christian Church for the care and keeping of orphans and needy children of the white race. Said institutions shall be well established which shall be determined by their having been in existence at the time of my death. The institutions to receive the said trust fund shall be selected by the trustee in its absolute discretion and shall number five, unless there shall be less than this number which qualify under the terms of my will, in which case the distribution shall be to said number. The distribution of the said trust fund among said institutions shall be made

upon the basis of the proportionate number of children cared for by each at the time payment and distribution is made, and the amount so received by each institution shall be used by the duly constituted authorities of said institution for such purposes, at such times and in such manner as they may deem proper. By way of explanation I will say that by western North Carolina I mean the counties of Alleghany, Wilkes, Caldwell, Burke, and Rutherford and all North Carolina counties lying west of those named."

Being of the opinion that the foregoing provisions for religious and charitable purposes are void for vagueness and uncertainty and in violation of the rule against perpetuities, plaintiffs instituted this action for construction of these provisions.

Jury trial was waived. At the close of plaintiffs' evidence defendants moved for nonsuit. The court, being of the opinion that the challenged provisions of the will are valid and do not violate the rule against perpetuities, allowed the motion and entered judgment dismissing the action. Plaintiffs appeal.

Clayton & London for plaintiffs.

Harkey, Faggart, Coira and Fletcher for defendant First Union National Bank, Executor and Trustee.

Bradley, Gebhardt, DeLaney and Millette; Francis J. Heazel and Joseph C. Gaither for defendant Vincent S. Waters.

MOORE, J. This appeal presents for discussion and decision two questions or propositions.

(1) Plaintiffs make the following contentions: The provisions of the will are vague and uncertain in that it contains no guide, formula or instructions by which testator's wishes with respect to the Roman Catholic Church of the Diocese of North Carolina (hereinafter "church") might be carried out or the time within which the specified conditions imposed must be met and complied with. The gift to the church is contingent and not vested. The contingency arises by reason of certain conditions precedent which must be performed before title vests. These conditions are that the trust funds are to be matched and the combined total used to build and equip a church in Charlotte to be permanently named St. Mary's or St. Joseph's — these "specified conditions must be strictly complied with in each and every detail." The language of the will indicates the positive intention that title shall not pass to the church unless and until these conditions are met. There is a possibility that the specified conditions might not be performed or

capable of performance within the period of time limited by the rule against perpetuities, and therefore the purported gift to the church is void.

The rule against perpetuities requires that an estate vest not later than twenty-one years, plus the period of gestation, after the life or lives of persons in being at the time of the creation of the estate, and if there is a *possibility* that a future interest may not vest within the time prescribed the gift or purported estate is void. The rule is one of law and not of construction, and is to be applied even if it renders the express intent of the testator impossible of accomplishment. *Parker v. Parker,* 252 N.C. 399, 113 S.E. 2d 899. The period of gestation cannot be added in computing the time unless gestation is in fact then taking place. 70 C.J.S., Perpetuities, § 4, p. 580. It is obvious that the period of gestation may not be added in the instant case.

In our opinion plaintiffs misconstrue the provisions of the will with respect to the gift to the church. We agree that the gift to the church is subject to a condition precedent and is contingent. But the performance of the specifications which plaintiffs denominate "conditions precedent" is not related to the vesting of title. The plain and clear provision with respect to vesting is: "At the expiration of the said twenty years (after the death of the last surviving niece or nephew) the Trustee shall as soon as practicable after the . . . Church . . . *has in writing expressed its willingness to accept and use such fund for the purpose* hereinafter stated, pay and distribute, free of any trust, to the . . . Church . . . all of the remainder of the principal or corpus of said trust fund and its accumulations . . ." A time limit of one year within which the church may accept is imposed. It is the acceptance in writing that will vest title, and the acceptance must be made within the year or "at the end" of the year. That the trustee is allowed indefinite additional time ("as soon as practicable") to pay and distribute the fund to the church after acceptance, does not prevent the vesting of title upon acceptance. *Stellings v. Autry,* 257 N.C. 303, 126 S.E. 2d 140; *Fitchie v. Brown,* 211 U.S. 321; *English v. Cliff* (1914), 2 Ch. 376. The gift to the church does not violate the rule against perpetuities.

After stating the purpose of the gift and how it is to be carried out, the will states that the gift to the church is made "upon the express condition that the . . . specified conditions must be strictly complied with in each and every detail." This does not mean that an equal sum must be added to the fund, a church building constructed and equipped, the church be named and the name remain unchanged *forever,* before the donee shall be entitled to the fund. The fund shall be *used* for these purposes. The effectuation of these purposes are not conditions prece-

dent to vesting of title to the fund. Any further interpretation of the last quoted provision is not necessary to a decision of this case. Should the church accept the gift in apt time, receive the fund, and fail in any particular to carry out the listed purposes, interested parties may then present the matter to the courts. The courts have no jurisdiction to enter anticipatory judgments. *Little v. Trust Co.*, 252 N.C. 229, 243, 113 S.E. 2d 689.

With reference to any question of vagueness or uncertainty as to any part of the challenged provisions of the will, see G. S. 36-21; G.S. 36-23.1.

(2). Plaintiffs further contend that under the provisions of the will there is a possibility that the church will neither decline nor accept the gift in writing. This possibility must be conceded. Plaintiffs say that, in such event, the time for vesting title in the alternate charitable donees will be beyond the period permitted by the rule, and for this reason the purported bequests to church or charitable institutions (western North Carolina orphanages) are void. This is the contention upon which plaintiffs principally rely in this case.

The provision for gift over to the western North Carolina orphanages is that if the church "at any time within one year after the expiration of the twenty year period following the death of the survivor of my nieces and nephew, above named, in writing declines to accept the said gift upon the said terms, or if *at the end* of said one year, it has not affirmatively elected to accept said gift upon said terms, then I direct that the Trustee shall pay and distribute the said trust fund, free of any trust, to" the orphanages specified. It is our opinion that the gift to the orphanages would timely vest under the above language. The applicable rule in this situation is stated as follows: "The fact that by the terms of the instrument creating the future interest, such interest is to arise immediately at the expiration of the period of the rule rather than at some point 'within' the period, should not violate the rule. Thus, a trust that is to arise 'at the expiration' of a gross term of twenty-one years has been held to be good, the term being held to end and the trust to arise at the same instant." 41 Am. Jur., Perpetuities and Restraints on Alienation, § 20, p. 65; *English v. Cliff, supra.* See also *Kolb v. Landes,* 115 N.E. 539 (Ill.); *In re Lewis' Estate,* 37 A. 2d 487 (Pa.); *Singer v. Singer,* 230 S.W. 2d 242 (Tex.). We find no authority to the contrary.

Affirmed.

PEGGY JEAN ROUTH v. HUDSON-BELK COMPANY OF ASHEBORO, INC.

(Filed 2 December, 1964.)

1. Negligence § 37b—

The proprietor of a store is not an insurer of the safety of its customers, but it does owe the duty to exercise ordinary care to keep the premises in a reasonably safe condition and to give warning of hidden perils or of unsafe conditions insofar as they are known, or should be known by reasonable inspection.

2. Negligence § 37f—

Evidence that the defendant's employee stopped a manually operated elevator on the balcony floor not even with the floor but at an elevation some two inches above it, and that plaintiff, in entering the elevator did not look, tripped over the two-inch elevation, and fell to her injury, *held* to require nonsuit.

APPEAL by plaintiff from *Crissman, J.*, February 10, 1964 Civil Session, RANDOLPH Superior Court.

The plaintiff instituted this civil action to recover damages as a result of a foot injury she alleged she sustained as she entered an elevator maintained by the defendant for the use of its customers in its three-story department store. At the conclusion of the plaintiff's evidence, the court entered a judgment of involuntary nonsuit, from which the plaintiff appealed.

Ottway Burton for plaintiff appellant.

Lovelace & Hardin by James B. Lovelace for defendant appellee.

HIGGINS, J. The plaintiff alleged and offered evidence tending to show that on July 31, 1961, she entered the defendant's department store as an invitee for the purpose of exchanging merchandise. The defendant maintained elevator service for the convenience of its customers. George Kenneth Edwards, the operator, was on the elevator for the first time. The plaintiff alleged the "defendant put him to operating the elevator without proper training in so far as the elevator on the balcony floor is concerned. . . . After bringing the elevator to a stop, the floor of the elevator was approximately two inches above the balcony floor. . . . The plaintiff, with packages in her arms, proceeded to enter the elevator. . . . Her shoe caught on the two-inch rise . . . on the side of the elevator floor and she stumbled into the elevator. . . . The plaintiff stepped forward relying on the elevator floor being level with the floor of the balcony and that the employee of the

defendant did not warn her that the elevator floor was approximately two inches above the balcony floor." She offered evidence, including medical testimony, of her injuries.

According to her testimony, the plaintiff was acquainted with the defendant's premises. She was on the balcony floor for the second time the day of the injury. On the prior occasion she had used the elevator. On leaving, she summoned the elevator by pressing the button, but before it arrived she stepped back about eight feet to look at some dishes on a table. "(A)s I walked, I tripped on the elevator floor, . . . I tripped over that and fell forward. . . . I did not see the bottom floor of the elevator before I fell. The package was not obstructing my view. . . . I was expecting it to be level. I didn't look to see if it was level until after I fell."

The plaintiff's counsel contends the evidence is sufficient to go to the jury on the question of defendant's negligence. He cites in support the following: A Note in 34 A.L.R. 2d, p. 1387; *Walker v. County of Randolph,* 251 N.C. 805, 112 S.E. 2d 551; *Harrison v. Williams,* 260 N.C. 392, 132 S.E. 2d 869; and *Long v. National Food Stores,* 262 N.C. 57, 136 S.E. 2d 275. No other authority is cited.

The Note in A.L.R. refers to an open elevator shaft without sufficient illumination and no elevator. The plaintiff in *Walker* stepped into an open, unenclosed stairway in front of a bulletin board in the County Courthouse. The plaintiff was attempting to ascertain whether property in which she was interested was advertised for sale. The bulletin board extended over the stairway and was an implied invitation to those interested to come and inspect the notices. The evidence that no barricade or rail surrounded the stairway was sufficient to make out a case for the jury. In the *Harrison* case, the plaintiff, in a dimly lighted restaurant, failed to observe the difference in floor levels, fell and was injured. This Court sustained nonsuit for failure to offer evidence of negligence. In *Long,* the plaintiff stepped on a slippery substance (grapes) on the floor of a grocery store, sustaining injuries. The condition of the substance permitted the inference the substance had been there for a sufficient length of time for its discovery and removal in the exercise of due care. Mrs Long looked. In this case, the plaintiff did not. The cases cited do not support the plaintiff's position.

The proprietor of a store is not an insurer of the safety of its customers, but it does owe the duty to exercise ordinary care to keep the premises in a reasonably safe condition and to give warning of hidden perils or of unsafe conditions in so far as they are known, or should be known by reasonable inspection. *Long v. National Food Stores, supra;*

Coleman v. Colonial Stores, Inc., 259 N.C. 241, 130 S.E. 2d 338; *Case v. Cato's, Inc.*, 252 N.C. 224, 113 S.E. 2d 320.

The question before us is this: Is an operator negligent if he fails to stop his elevator on the level of the floor where he stops to pick up a passenger? Only in cases where an elevator has an automatic floor stop may we expect exactness at all times. In a manually-operated elevator, to miss attaining exactness by only two inches is an insufficient showing to establish actionable negligence.

Even if permitted to go to the jury on an issue of negligence, the plaintiff would then be confronted with her admission that she did not look to see whether the elevator was level with the balcony floor, but assumed that it was.

The judgment of nonsuit is

Affirmed.

JOHN ROBERT POTTER v. STATE OF NORTH CAROLINA.

(Filed 2 December, 1964.)

Criminal Law § 133—

Where defendant is serving a sentence at the time of commitment under a subsequent sentence specifying that time of service thereunder should begin at the expiration of the first, and the prior sentence is set aside for deprivation of his constitutional right to counsel, defendant should be recommitted under the second sentence with provision that the term should begin on the first day of the term of court at which the judgment and sentence was imposed, and not the date of recommitment.

ON a paper writing, which we treat as a petition for a writ of *certiorari* for declaratory relief to determine the starting date of a consecutive prison sentence imposed at 20 August 1962 Term of NASH County superior court, which prison sentence petitioner is now serving. The Attorney General of North Carolina filed an answer to this paper writing.

Attorney General T. W. Bruton and Staff Attorney Theodore C. Brown, Jr., for the State.

John Robert Potter in propria persona.

PARKER, J. We have taken cognizance of this matter in the exercise of our supervisory jurisdiction over the proceedings of lower courts.

North Carolina Constitution, Article IV, section 10; *In re Sellers*, 234 N.C. 648, 68 S.E. 2d 308.

The following facts are shown by copies of original records in the office of the clerks of the superior courts of Wayne and Nash Counties, which copies are certified by the respective clerk of the superior court of each county to be true and perfect copies of original records in his office and are attached to the answer of the Attorney General, and by the written instrument of the petitioner Potter:

At the 13 August 1962 Term of Wayne County superior court, petitioner John Robert Potter entered pleas of guilty to five indictments, each charging him in one count with a felonious breaking and entry into a certain storehouse, shop, and other building with intent to commit larceny of personal property therein kept, and in a second count with the larceny of personal property therein kept; and to two indictments charging him with a felonious breaking and entry into a certain storehouse, shop, and other building with intent to commit larceny of personal property therein kept. The trial judge consolidated these seven cases for judgment and sentenced him to a term of imprisonment in the State's prison for a period of not less than four nor more than seven years. Potter was committed to the State's prison on 14 August 1962, and began the service of this sentence.

At the 20 August 1962 Term of Nash County superior court, petitioner John Robert Potter entered a plea of guilty to an indictment charging him in one count with a felonious breaking and entry into a certain storehouse, shop, and other building occupied by the Nash County Alcoholic Beverage Control Board with intent to commit larceny of personal property therein kept, and in a second count with the larceny of 48 cases and 23 bottles of ABC whisky of the value of $2,888.05 therein kept. The trial judge sentenced him to a term of imprisonment in the State's prison for a term of three years, "said sentence to begin at the expiration of sentence imposed in Wayne County superior court August Term 1962 in Case No. 7162 and consolidated cases therewith for judgment." Potter was committed to the State's prison on 22 August 1962 pursuant to this judgment.

At the 10 August 1964 Session of Wayne County superior court, Judge Joseph W. Parker in a post conviction hearing, G.S. 15-217 through G.S. 15-222, entered an order in which he "set aside and nullified" the prison sentence of not less than four years nor more than seven years imposed upon Potter at the 13 August 1962 Term of Wayne County superior court, for the reason that Potter was not represented by counsel at the trial of the seven cases in which the prison sentence was imposed, and had not waived his right to have counsel represent

him at such trial. In his order he further decreed that Potter should appear at the November 1964 Session of Wayne County superior court to stand trial again on these seven indictments.

It is the starting time of the sentence imposed at the 20 August 1962 Term of Nash County superior court with which we are concerned. The case of *Brown v. Commissioner of Correction,* 336 Mass. 718, 147 N.E. 2d 782, 68 A.L.R. 2d 708 (5 February 1958) had substantially similar facts as in the instant matter. The facts in the *Brown* case were: On 13 May 1952 the plaintiff Brown was convicted in Middlesex County on three indictments and was sentenced on each to serve from five to seven years in the State prison, the sentences to run consecutively. On 23 September 1952 the plaintiff was convicted in Suffolk County on five indictments and was sentenced on each to from three to five years in the State prison. These sentences were concurrent and were to commence "from and after" the expiration of the Middlesex sentences. In 1956 the plaintiff brought a writ of error in the Massachusetts Supreme Judicial Court to have the Middlesex conviction set aside. Pursuant to an opinion of the full court, *Brown v. Commonwealth,* 335 Mass. 476, 140 N.E. 2d 461, judgment was entered on 11 March 1957, setting aside the Middlesex convictions on the ground that the plaintiff, who did not have the assistance of counsel, was prejudiced by a series of incidents during the trial which probably would not have occurred had he had counsel. On 30 April 1957 the plaintiff was brought before the superior court in Middlesex County and pleaded guilty to two of the indictments and was placed on probation for one year on each. The third indictment was *nol prossed.* In the case at bar a final decree was entered adjudicating that the plaintiff started serving his Suffolk sentences on the day they were imposed, 23 September 1952. The defendant appealed. The defendant contended that the Suffolk sentences commenced to run on 30 April 1957, the date when the plaintiff was brought into court following the decision of the Massachusetts Supreme Judicial Court. The plaintiff on the other hand contended that the decree below was right, and that the Suffolk sentences commenced to run on 23 September 1952, the date of imposition. The Massachusetts Supreme Judicial Court refused to follow an earlier dictum to the contrary in *Kite v. Commonwealth,* 52 Mass. (11 Met.) 581, and upheld the decree below holding that the Suffolk sentences commenced on the date of their imposition, and that this was true regardless of whether the earlier conviction was considered void or merely voidable. The Court in its opinion said: "The rule for which the plaintiff contends is not without support in some of the more recent cases. See, for example, *Youst v. United States,* 5 Cir., 151 F. 2d 666,

668; *Ekberg v. United States,* 1 Cir., 167 F. 2d 380, 388. We think this is the better and more humane view, for only in this way can a prisoner receive credit, not as a matter of grace, but as of right, for time served under an erroneous conviction." The Massachusetts Court also held that their statute relating to "from and after" sentences does not cover this situation.

There is some contrary opinion. Unquestionably the leading case in support of the proposition that where the first of consecutive sentences is invalidated, the second valid sentence runs as of the date of the invalidation of the first is to be found in Massachusetts in which the view supported by the leading case is no longer the law. The leading case is *Kite v. Commonwealth, supra,* 1846, and the view expressed there bearing the great name of Chief Justice Shaw was held to be dictum, and repudiated in *Brown v. Commissioner of Correction, supra.* Annotation 68 A.L.R. 2d 712, 720-21; this is an illuminating annotation entitled "Effect of Invalidation of Sentence upon Separate Sentence which runs consecutively." It seems that few courts of last resort have had occasion to pass upon the subject discussed in this annotation.

We think the view expressed in *Brown v. Commissioner of Correction, supra,* is sound law, and certainly "the better and more humane view," and we adopt it as law in this jurisdiction. We hold that when the sentence imposed upon Potter at the 13 August 1962 Term of Wayne County superior court was invalidated, the later sentence imposed upon him at the 20 August 1962 Term of Nash County superior court, which was to begin at the expiration of the sentence imposed upon him in Wayne County, commences from the first day of the term of the Nash County superior court when it was imposed.

When this case is certified down to the Nash County superior court, the presiding judge at the first criminal term thereafter will direct the clerk of the Nash County superior court by written order placed in the minutes of the court to send another commitment to the State's prison in the case of *State v. John Robert Potter* tried at the 20 August Term 1962 of Nash County superior court stating that the sentence in this case was for a term of imprisonment in the State's prison for a term of three years, "said sentence to begin at the expiration of sentence imposed in Wayne County superior court August Term 1962 in Case No. 7162 and consolidated cases therewith for judgment," which is set forth in the original commitment; and that the prison sentence imposed in Wayne County superior court August Term 1962 has been invalidated, and, therefore, the sentence imposed in Nash County superior court commences from the date of the first day of the term when it was imposed, to wit, 20 August 1962.

Petition for writ of *certiorari* allowed and remanded with directions.

MARSHALL KEITH v. HENRY G. KING AND WIFE, MARIE JONES KING.

AND

HENRY G. KING v. PHILLIP MARSHALL KEITH.

(Filed 2 December, 1964.)

Automobiles § 46—

The evidence of one driver was to the effect that she stopped before entering an intersection with a dominant highway, gave a left turn signal, turned left, and had traveled a distance of 100 to 130 feet before the front of a car traveling along the dominant highway struck her. She did not admit that the collision occurred at the intersection. The evidence of the other driver tended to show debris from the collision only 40 feet from the intersection. *Held:* An instruction that it was admitted that the collision occurred at the intersection must be held for prejudicial error, this being a crucial and controverted fact.

APPEAL by Henry G. King and wife, Marie Jones King, from *Clark, S. J.*, First March Assigned Civil Session, WAKE Superior Court.

The two civil actions were separately instituted but consolidated and tried together. They grew out of a two-car collision which occurred about 11:30 on the morning of June 2, 1962, on the old Wake Forest Road, U. S. Highway 1-A, near its intersection with Honeysuckle Lane, just north of Raleigh.

In the first action Marshall Keith, owner of a 1956 Pontiac, driven at the time by his minor son, Phillip Marshall Keith, brought suit against Mr. and Mrs. King to recover $300.00 damages to the Pontiac. Mr. Keith alleged the collision occurred at the intersection as a result of the negligence of Mrs. King, the driver of her husband's 1960 Rambler, in that she entered the intersection into his son's lane of travel on the dominant highway without giving any signal of her intention to make the movement, and without ascertaining it could be made in safety.

In the second action, Henry G. King brought suit against Phillip Marshall Keith for $1,000.00 damages to the Rambler and $20,000.00 for his personal injury. The plaintiff alleges that his wife approached U. S. Highway 1-A from Honeysuckle Lane, stopped at the intersection, ascertained that no traffic was in sight on the highway, gave a left turn signal, entered the highway, and proceeded more than 100 feet at about 15 miles an hour towards Raleigh when Phillip Marshall Keith, driving his father's Pontiac at a dangerous rate of speed of more than 55 miles per hour, approached from the rear, lost control of his vehicle, and skidded into the left side of the Rambler which was in its proper lane of traffic. As a result of the impact, the Rambler crashed into a

light pole on the right-hand side of the road, causing property damage and seriously injuring Mr. King.

Phillip Marshall Keith testified: "I was proceeding south toward Raleigh from Millbrook and I came over a hill. When I got within 75 feet of Honeysuckle Lane this car came right out in front of me. Like to scared me to death. I applied my brakes and pulled to the left to try to avoid hitting the car in the side and went into the intersection and when I hit that intersection, loose gravel was there, and this made my car skid and it skidded and collided with the King car. I was going between 50 and 55. . . . There was dirt and glass from my headlights on the highway. This dirt and glass was located 40 feet from the intersection. . . . The distance from the intersection to the light pole pole was 101 feet."

Mrs. King testified she approached Highway 1-A from the east on Honeysuckle Lane, stopped at the sign. At the time there was no traffic in sight on the highway. She gave a left turn signal, entered the highway and proceeded towards Raleigh. At the time she entered the highway the Keith Pontiac had not crossed the hill and was not in sight. She traveled on the highway a distance of 100 to 130 feet when the Pontiac skidded into the left side of the Rambler, knocked it sideways off the road, the right side collided with the light pole.

The investigating officer testified the Rambler was damaged on both sides; the Pontiac only in front.

On appropriate issues, the jury found Mrs. King was negligent; that Phillip Marshall Keith was not negligent, and awarded $300.00 to Mr. Keith and denied any recovery to Mr. King. Mr. and Mrs. King appealed.

Douglass & Douglass, J. C. Keeter for appellees.

Purrington & Culbertson by Charles H. Sedberry, for Henry G. King and Marie J. King, appellants.

HIGGINS, J. The critical question in this case is whose negligence caused the collision. After explaining the respective duties of motorists at an intersection between a dominant and a servient highway, the court defined an intersection as "the area embraced within the prolongation (of) the lateral boundary lines of the highways." The court charged: "Now, members of the jury, it is admitted that the collision in question occurred at an intersection, that is, the intersection of Honeysuckle Lane and the old Wake Forest Road."

Of course, under ordinary conditions, Mr. Keith had the right of way at the intersection, he being on the dominant road. G.S. 20-158(a);

Primm v. King, 249 N.C. 228, 106 S.E. 2d 223. But Mrs. King and her witnesses testified the collision occurred not at the intersection but some 100 to 130 feet down the highway towards Raleigh after she had cleared the intersection. According to all the evidence, she was in her own traffic lane at the time the Keith Pontiac skidded into the side of the vehicle she was driving. At no time, according to the record, did the Kings stipulate or admit the collision occurred at the intersection where ordinarily the Pontiac would have had the right of way. Inadvertently, the court placed the accident at the intersection where the rules of the road gave Mr. Keith the advantage and removed it from the place where the Kings' evidence tended to show it occurred, where the rules favored Mrs. King. In charging the jury that the parties admitted the collision occurred at the intersection, the court took from the Kings the benefit of their evidence that it occured after she had entered and passed the intersection. The instruction was prejudicial error.

New trial.

GLADYS McLAMB CAPPS, ADMINISTRATRIX OF THE ESTATE OF BOBBY L. CAPPS, DECEASED v. ALEXANDER SMITH.

(Filed 2 December, 1964.)

1. Parent and Child § 2—

The administrator of an unemancipated minor child killed by the negligence of his parent has no cause of action against the parent for the wrongful death of his intestate.

2. Automobiles § 41b— Evidence held not to show negligence in failing to avoid collision with vehicle suddenly turning across defendant's lane.

The evidence tended to show that the right wheels of a truck ran off the pavement onto the shoulder, that the truck wobbled down the shoulder for a short distance, and then angled back across the pavement in front of defendant's car. It was asserted that defendant was negligent in failing to maintain a proper lookout, driving at excessive speed, and failing to take appropriate action to avoid the collision. *Held:* Even if defendant had seen the truck run off the road the instant it did so, defendant could not have anticipated when, where, or whether the truck would cut back across the highway, and it appearing from the physical facts that defendant could not

have avoided the accident even if he had been traveling at a speed much less than that contended by plaintiff, nonsuit was proper.

3. Automobiles § 7—

Negligence involves more than being at a particular place at a particular time.

APPEAL by plaintiff from *May, J.*, April 1964 Civil Session of HARNETT.

Action for wrongful death. These facts are undisputed: About 10:00 a.m. on December 16, 1962, plaintiff's intestate, nine-months-old Bobby Capps, was a passenger in the truck being operated by his father, M. D. Capps, in a westerly direction on rural paved road No. 2042 in Harnett County. The pavement, twenty feet wide, was dry; there was no center line. On a straight, level stretch, Capps lost control of his truck, and the right wheels ran off onto the north shoulder. The truck wobbled down the shoulder for a short distance and then angled back across the pavement in front of defendant's Plymouth automobile, which was traveling east. The front of the Plymouth hit the right side of the truck and damaged its front wheel and fender. In the collision both Bobby Capps and M. D. Capps were killed.

Plaintiff administratrix, the mother of her intestate and the wife of M. D. Capps, was a passenger in the truck. Plaintiff's evidence came from herself and from Curtis Smith, a passenger in the Plymouth. In plaintiff's opinion, Capps was going about *forty-five miles per hour* when he ran off the highway. At that time, defendant was 400 feet away, in the center of the road and was approaching *at a speed of sixty miles per hour*. The truck "wobbled down the shoulder of the road" two or three seconds before it angled to its left across the pavement. *When the truck cut back onto the highway, defendant was then 100 feet away from it. Three seconds later it collided with the Plymouth.* Neither vehicle ever slowed down, and a total of five to six seconds elapsed between the time the truck left the highway and the collision. Curtis Smith's testimony corroborated that of plaintiff.

Defendant's evidence tended to show that his automobile was traveling from forty to forty-five miles per hour on its own side of the road; that he failed to see the truck go off onto the shoulder because his view was obstructed by another car, driven by A. B. Williams, ahead of the truck and traveling in the same direction; and that when the forward car passed him, the truck was not more than a car's length and a half away and came straight across the road in front of him. Williams' testimony corroborated that of defendant. He testified that his attention was attracted to the truck when he heard a sound "like a

tire go out," and in his rear-view mirror he observed the truck leave the pavement.

Defendant offered the testimony of the investigating officer, who said that after the collision the Plymouth was on its side of the road. From the debris and "dug-out marks" which he found in defendant's lane of travel, other marks led directly to the Plymouth. He observed a mark also running off the northern edge of the road and down the shoulder about 100 feet, then coming "back up on the highway" 20 to 21 feet and making a kind of semi-circle to the left.

Defendant's motion for judgment as of nonsuit, denied at the close of plaintiff's evidence, was allowed at the close of all the evidence, and plaintiff appealed.

Bryan & Bryan for plaintiff.
Teague, Johnson and Patterson for defendant.

PER CURIAM. Plaintiff, alleging that her intestate's death was caused by the joint and concurring negligence of defendant Smith and M. D. Capps, originally sued Smith and Capps' administrator. Although the allegations of Capps' negligence remain in the complaint, his administrator had been eliminated from the case when it reached us. The administrator of an unemancipated minor child killed by the negligence of his parent has no cause of action against the parent for the wrongful death of his intestate. *Lewis v. Insurance Co.*, 243 N.C. 55, 89 S.E. 2d 788; *Goldsmith v. Samet*, 201 N.C. 574, 160 S.E. 835.

Plaintiff's specifications of negligence against Smith are that he failed to keep a proper lookout, drove at a speed in excess of fifty-five miles per hour, and failed to take appropriate action to avoid the collision which he should have anticipated when he saw, or should have seen, the Capps truck go off the highway. Although plaintiff alleges elsewhere in the complaint that the collision occurred in the center of the road, she does not specifically allege that defendant operated the Plymouth to his left of the center of the highway.

Plaintiff's estimates of speed, distance, and time are incompatible because they are mathematically impossible. If two vehicles are 100 feet apart and one of them is traveling forty-five miles per hour and the other sixty miles per hour, they must, of course, necessarily meet in less than three seconds — as a matter of fact, in approximately 0.65 second. Even if one of the vehicles were at a dead stop, the vehicle traveling sixty miles per hour would traverse the distance of 100 feet in approximately 1.14 seconds. Understandably, plaintiff's observations, made under stress and apprehension, are unlikely to have been accu-

rate. All the evidence tends to show that when the Capps truck returned to the pavement, it came across the road directly in front of defendant's approaching automobile, and that the collision occurred on the paved portion of the highway. If, as we must, we accept plaintiff's estimate of speed and distance, defendant could not have averted an encounter with the truck. That he took no evasive action in the time at his disposal — especially when his view of the truck was obstructed by another car approaching in front of it — is not evidence of actionable negligence. *Forgy v. Schwartz,* 262 N.C. 185, 136 S.E. 2d 668. Defendant did not see the truck leave the road; but, even if he had, there is no reason to suppose he could have escaped the crash either by stopping or by turning to the right. He could not have anticipated when, where, or even whether the truck would cut back across the highway. In retrospect, it is clear that the only effective action defendant could have taken would have been to increase his speed so as to have passed the Capps truck before it returned to the road.

On cross-examination plaintiff conceded that she could not tell whether defendant was going over fifty miles per hour. If we assume, however, that he was traveling sixty miles per hour and that he was in the center of the highway (the undisputed physical facts belie the latter), neither his speed nor his position on the highway was a proximate cause of the collision. *Garner v. Pittman,* 237 N.C. 328, 75 S.E. 2d 111; *Butner v. Spease,* 217 N.C. 82, 6 S.E. 2d 808. *Post hoc, ergo propter hoc.* When the Capps truck suddenly came across the highway directly in front of him, defendant could not have avoided the impact had his speed been fifty-five miles per hour or less. Indeed, had he been stopped in the ditch on his right at that point, the collision would nevertheless have occurred. Considering all the evidence in the light most favorable to plaintiff, the motion for nonsuit was properly sustained. *Tew v. Runnels,* 249 N.C. 1, 105 S.E. 2d 108. It is plain that defendant could have prevented the wreck only by being elsewhere at the time. "(N)egligence . . . involves more than being at a particular place at a particular time." *Bobbitt, J.,* in *Henderson v. Henderson,* 239 N.C. 487, 492, 80 S.E. 2d 383, 386.

The judgment of nonsuit is

Affirmed.

STATE v. WILLIAM LEWIS ANDERSON.

(Filed 2 December, 1964.)

1. Appeal and Error § 38—

An exception not brought forward and discussed in the brief is deemed abandoned. Rule of Practice in the Supreme Court No. 28.

2. Trial § 35—

In a prosecution for driving a vehicle on a public highway while under the influence of intoxicating liquor, an instruction to the effect that the State contended the statute was enacted to protect life and property and if the jury should fail to "convict on this evidence, then the law or statute commonly referred to as 'the drunken driving' statute, would have no purpose and no effect" *held* prejudicial as an expression of opinion by the court on the evidence. G.S. 1-180.

APPEAL by defendant from *Clark, S.J.*, 10 February 1964, Criminal Session, GUILFORD — High Point Division.

Criminal prosecution on a warrant charging defendant with unlawfully and wilfully operating an automobile upon the public highway while under the influence of intoxicating liquor, tried *de novo* in the superior court after an appeal by defendant from a conviction and judgment in the High Point municipal court, criminal division.

Plea: Not guilty. Verdict: Guilty as charged.

From the judgment imposed, defendant appeals.

Attorney General T. W. Bruton, Deputy Attorney General Harry W. McGalliard, and Assistant Attorney General Richard T. Sanders for the State.

Boyan & Wilson by Clarence C. Boyan for defendant appellant.

PER CURIAM. The State's evidence was amply sufficient to carry the case to the jury. Defendant's assignment of error to the denial of his motion for judgment of compulsory nonsuit made at the close of all the evidence has not been brought forward and discussed in his brief. It is therefore deemed abandoned. Rule 28, Rules of Practice in the Supreme Court. 254 N.C. 783, 810.

Defendant assigns as error this part of the charge:

> "They [the State] say and contend that the statute under which the defendant in this case is charged is a good law; that its primary purpose is to protect life and property on the highways; that the primary purpose of this statute, and other criminal statutes, is not to punish anybody, but is to protect your rights, and that

you have a right to operate a motor vehicle on the highways of the State without being run into by some drunk, or by some person drinking or operating a motor vehicle while under the influence, and that you should convict in this case, and that if you cannot, if you don't convict on this evidence, then the law or statute commonly referred to as the 'drunken driving' statute, would have no purpose and no effect."

This assignment of error is well taken. We think the manner of stating the contentions of the State as set forth above, and particularly the peculiar emphasis of the words "that if you cannot, if you don't convict on this evidence, then the law or statute commonly referred to as the 'drunken driving' statute, would have no purpose and no effect" was improper, gave the State an undue advantage over defendant, and was indicative of an opinion to the jury that the evidence had impressed on the judge's mind that defendant was guilty and should be convicted, and comes within the prohibition of G.S. 1-180. *S. v. Benton,* 226 N.C. 745, 40 S.E. 2d 617; *S. v. Rhinehart,* 209 N.C. 150, 183 S.E. 388. For error in the charge defendant is entitled to a

New trial.

STATE HIGHWAY COMMISSION, PLAINTIFF v. CLAYTON LUCK AND WIFE, ELOISE LUCK, W. D. LUCK, AND WIFE, FLORRIE B. LUCK, DEFENDANTS.

(Filed 2 December, 1964.)

APPEAL by defendants from *Riddle, S.J.,* May 1964 Civil Session of RANDOLPH.

Plaintiff instituted this action in March 1962 to acquire a perpetual easement across defendants' lands for use in constructing a by-pass, around Asheboro, on U.S. 220. The by-pass is a controlled access highway. Plaintiff estimated $1,274.00 as fair compensation for the taking. It deposited this sum with the court.

Plaintiff took 6.86 acres. This left defendants with a triangular tract containing one acre on the west side of the highway. This area is served by a service road constructed by plaintiff. Defendants are also left with a triangular tract on the east side of the highway. This piece contains 3.48 acres. It has no immediate access to the by-pass, but does have access by means of a private road across a tract containing 1.30

acres purchased by defendants in 1960 to afford access to their larger tract.

The pleadings raise only one issue: What is fair compensation? This issue was submitted to the jury. It answered: $2,600.00. The court thereupon entered judgment for defendants for $1,326.00, the difference between the amount fixed by the verdict and the $1,274.00 deposited with the declaration of taking, plus interest on $1,326.00 from March 9, 1962, the date of the taking, to the rendition of the judgment.

Defendants excepted and appealed.

Ottway Burton for defendant appellants.

Attorney General T. W. Bruton, Assistant Attorney General Harrison Lewis, Trial Attorney Claude W. Harris for plaintiff appellee.

PER CURIAM. Defendants, conforming to the requirements of Rule 27½ (254 N.C. 809; G.S. 4A, p. 184), propound this question: "Did the trial court make so many prejudicial errors in the rulings on the admissibility of evidence against the landowners that they were deprived of their property without due process of law as set out in the nine assignments of error and the first twenty-nine of the defendants' exceptions?" We have examined each of defendants' twenty-nine exceptions challenging the court's rulings on evidentiary matters. Our examination discloses no prejudicial error in the admission or exclusion of evidence. This is true whether the exceptions be considered individually or in the aggregate.

Defendants insisted their property should be valued for use as a residential area and, if so valued, the evidence would justify an award in sums varying from $22,000.00, estimated by defendant C. W. Luck, to $8,950.00, estimated by defendants' witness, Keeling.

Plaintiff's witnesses testified the property was not suitable for residential development. They based their estimates of value on an acreage basis. Their estimates of damage varied from a low of $940.00 to a high of $1,148.00. What was fair compensation was a question of fact for jury determination. That determination was reached without error, prejudicial to defendants.

No error.

STATE v. GRAYSON R. DAVIS.

(Filed 2 December, 1964.)

APPEAL by defendant from *Shaw, J.*, February 3, 1964 Criminal Session, GUILFORD Superior Court, Greensboro Division.

At the January 11, 1960 Term, Guilford Superior Court, the defendant and two others were tried and convicted on three bills of indictment, each charging a felony as follows: (1) Breaking and entering; (2) possessing, without lawful excuse, certain described implements of house breaking fitted and designed for use in burglary, etc.; and (3) larceny of an automobile. The three cases were consolidated for judgment. A prison sentence of seven to ten years was imposed on the present defendant for the possession of burglary tools; and a sentence of 18 months, to run concurrently, was imposed for the larceny of the automobile. Apparently no judgment was entered on the house breaking charge.

The petitioner challenged the legality of his imprisonment by *habeas corpus*. His petition was denied. However, on January 7, 1963, he filed a petition for a post conviction hearing upon the ground that he was an indigent, not able to employ counsel, and was not represented in the 1960 trial. Judge Shaw appointed counsel and at the post conviction hearing set aside the convictions and ordered a new trial on each of the three indictments. At the new trial held at February, 1964 Session, defendant was again convicted on the three charges. However, after the jury verdict was returned, Judge Shaw set aside the convictions for house breaking and for larceny, but imposed a sentence of seven to ten years for possession of the burglary tools. From that conviction and sentence, the defendant has appealed.

T. W. Bruton, Attorney General, Harry W. McGalliard, Deputy Attorney General, Richard T. Sanders, Assistant Attorney General for the State.

E. L. Alston, Jr., for defendant appellant.

PER CURIAM. At all stages since he petitioned for his post conviction hearing, the defendant has been represented by court-appointed counsel. In two instances he seems to have found fault with his attorney, and the court, after hearing, permitted counsel to withdraw. However, other counsel were immediately appointed. The record discloses the defendant has been properly represented at all times material to the present inquiry.

At the trial now here for review, Judge Shaw set aside the conviction on the charge of house breaking, whether as being against the greater weight of the evidence, or that no judgment was entered on that charge in the 1960 trial, the record does not disclose. The reason for setting the verdict aside is immaterial. Judge Shaw set aside the conviction for the larceny of the automobile upon the ground that the defendant had completed the service of that sentence before he applied for a post conviction hearing.

Judge Shaw has been careful to protect the defendant's rights at all stages of this proceeding. The record discloses

No error.

STATE v. RIALTO WILLIAM FARRINGTON.

(Filed 2 December, 1964.)

APPEAL by defendant from *Crissman, J.*, March 11, 1963 Criminal Session of GUILFORD (High Point Division).

Defendant was tried in the criminal division of the High Point Municipal Court upon a warrant charging that on December 27, 1962, he wilfully and unlawfully operated an automobile on South Wrenn Street, a public highway within the city limits of High Point, while under the influence of intoxicating liquors. Upon conviction and sentence, he appealed to the Superior Court, where he was tried *de novo* upon a plea of not guilty. The verdict was guilty as charged in the warrant. From a judgment that defendant pay a fine of $125.00 defendant appeals.

Attorney General Bruton; Assistant Attorney General Ray B. Brady; and Staff Attorney L. P. Hornthal, Jr., for the State.

Boyan & Wilson for defendant.

PER CURIAM. The State's evidence was fully sufficient to support the verdict. Defendant offered no evidence. He was arrested immediately after he parked his automobile and attempted to walk down South Wrenn Street. Two police officers who observed him on the occasion in question testified, after describing his appearance, speech, and manner of walking, that in their opinion defendant was appreciably under the influence of an intoxicant. One said, "(H)e was drunk, plain drunk."

When asked why he was driving a car in his condition, defendant replied, according to the officer, "that he could not very well walk."

The assignment of error directed to the court's refusal to sustain defendant's motion for judgment as of nonsuit is overruled. The assignments addressed to the charge are likewise without merit. The remaining assignments do not charge errors which, in our opinion, could have affected the verdict. The burden is on the defendant to show not only error but also prejudicial error. *State v. Gibson,* 233 N.C. 691, 65 S.E. 2d 508.

No error.

STATE v. ODIS HENRY WRIGHT.

(Filed 2 December, 1964.)

APPEAL by defendant from *Johnson, J.,* August Regular Mixed Session 1964 of BLADEN.

The defendant was tried upon a bill of indictment charging that he unlawfully, wilfully and feloniously did commit the abominable and detestable crime against nature with a thirteen-year-old boy (naming him), against the form of the statute, *et cetera.*

The jury returned a verdict of guilty of an attempt to commit a crime against nature.

The defendant was sentenced to not less than three nor more than five years in the State's prison. He appeals, assigning error.

Attorney General Bruton, Asst. Attorney General Richard T. Sanders for the State.

Holland & Faircloth; Nance, Barrington, Collier & Singleton for defendant.

PER CURIAM. The State's evidence was sufficient to carry the case to the jury and to support the verdict rendered. No error sufficiently prejudicial to justify a new trial has been shown.

We deem it inappropriate to include herein a recital of the sordid evidence revealed by the record.

The verdict and judgment are upheld on authority of *S. v. Spivey,* 213 N.C. 45, 195 S.E. 1.

No error.

STATE v. TRUETT LITTLE.

(Filed 2 December, 1964.)

APPEAL by defendant from *Braswell, J.*, May 1964 Session of BRUNSWICK.

Criminal prosecution on warrant charging that defendant "did unlawfully and willfully fail and refuse to support his illegitimate child; Shelia Ann Formyduval, age one (1) month, begotten upon the body of Helen E. Formyduval," a violation of G.S. 49-2, tried *de novo* in the superior court after appeal by defendant from conviction and judgment in the Recorder's Court of Brunswick County.

The jury returned a verdict of guilty as charged in the warrant. Judgment imposing a prison sentence, suspended on specified conditions, was pronounced. Defendant excepted and appealed.

Attorney General Bruton and Assistant Attorney General Sanders for the State.

S. Bunn Frink and Herring, Walton, Parker & Powell for defendant appellant.

PER CURIAM. There was ample evidence to support the verdict. Hence, the assignment of error directed to the court's denial of defendant's motion for judgment as of nonsuit is overruled. Moreover, it is our opinion, and we so decide, that the matters referred to in defendant's remaining assignments, if error, are not of such prejudicial nature as to constitute ground for the award of a new trial.

No error.

BERNICE BROWNING v. NORTH CAROLINA STATE HIGHWAY COMMISSION.

(Filed 16 December 1964.)

1. Tenants in Common § 5; Highways § 5—

The conveyance of a right of way easement by one tenant in common does not affect the title of the other tenant in common.

2. Eminent Domain §§ 1, 7a; Constitutional Law § 24—

A property owner has a constitutional right to just compensation for the taking of his property for a public purpose, and every property owner

is entitled to reasonable notice and opportunity to be heard on the question of damages for the taking.

3. Eminent Domain § 7a— Easement incident to widening of highway held not acquired by mere posting of map.

The evidence tended to show that at the time a highway was widened from 18 feet to 22 feet the Highway Commission plans and specifications called for a 100 foot right of way, and that a map was posted at the courthouse showing a 100 foot right of way. There was no evidence that the plans and specifications were available to the plaintiff or the public generally, or that the extent of the highway was ever marked on the ground in the immediate vicinity of plaintiff's property, or that the Commission exercised any dominion over the land outside of the original 60 foot right of way until shortly before the institution of this action when the Commission's agents went upon plaintiff's land and felled trees and put out stakes. *Held:* Plaintiff was given no reasonable notice of the taking of her property until the Commission first exercised actual dominion over the enlarged right of way, the mere filing of the map incident to widening an existing right of way being insufficient to give plaintiff notice and an opportunity to be heard, and therefore plaintiff's action to recover compensation for the actual taking of the easement outside the original 60 foot right of way is not barred. Consolidated Statutes 3846(bb).

APPEAL by plaintiff from *McConnell, J.*, 25 May Session 1964 of FORSYTH.

This is an action instituted by the plaintiff pursuant to the provisions of G.S. 136-111, to obtain compensation for the alleged taking by the North Carolina State Highway Commission (Commission) of a 20-foot strip of land on the east side of U. S. Highway 52 in Bethania Township, Forsyth County, North Carolina.

Pernelia C. Browning and the plaintiff, her daughter, Bernice Browning, became the owners of Lots Nos. 6, 7, 8 and 9 of the N. O. Covington property as shown in Plat Book 4, page 110, in the office of the Register of Deeds of Forsyth County, by warranty deed dated 27 October 1944, as tenants in common. Pernelia C. Browning died 3 June 1951, leaving her one-half undivided interest in the above lots to the plaintiff who has lived in the house on Lots 6, 7, 8 and 9 of the Covington property since 27 October 1944. Plaintiff's property has a frontage of 100 feet on the eastern side of U. S. Highway 52.

The undisputed facts may be summarily stated as follows:

At the time the property was purchased a line of power poles ran along the frontage of the property 30 feet from the center of the highway. The plaintiff has never signed any right of way agreement or release with the Commission, and has never been paid any damages by the Commission.

In 1949, the Commission resurfaced U. S. Highway 52 and widened it from 18 feet of hard surface to 22 feet.

On 7 April 1949, Pernelia C. Browning executed to the Commission a right of way agreement for a consideration of $100.00, granting the Commission a 50-foot right of way from the center of the highway across the front of the above property.

There is evidence tending to show that the plaintiff knew that her mother had signed some agreement with the Commission in consideration of the payment of $100.00 for damages in connection with the road widening project in 1949. However, there is no evidence tending to show that this plaintiff was ever informed that the paper executed by her mother was a right of way agreement extending the Commission's right of way from 30 to 50 feet from the center of the highway across the front of her property.

There is no evidence tending to show that the 1949 project was not constructed entirely within the original right of way of 60 feet, 30 feet on either side from the center of the original 18-foot hard surfaced road. Nor is there any evidence tending to show that the Commission ever exercised any dominion over the additional 20 feet across plaintiff's lots which it contends it obtained in 1949, until 27 July 1962 when plaintiff returned from work she found stakes in her front yard, and the following Monday morning she called the Commission and was informed that the stakes meant they were going to widen Highway 52 into a four-lane highway. On 10 August 1952, when she returned home for lunch she found several maple trees, approximately 40 feet high at the time, knocked over and lying across her front yard; she has never received any compensation for the taking of this additional 20 feet. There is evidence to the effect that the Commission never exercised any dominion whatever over the additional 20 feet now claimed across plaintiff's property prior to its project widening Highway 52 into a four-lane highway.

The Commission, in bar of this action, pleads the six- and twelve-months statutes of limitation contained in Colsolidated Statutes 3846(bb), Chapter 2, § 22, Public Laws of North Carolina of 1921 as amended by Chapter 160, § 6, Public Laws of North Carolina of 1923 and Chapter 1115, Public Laws of North Carolina of 1949. The Commission further contends that said statutes of limitation started to run from the completion of the 1949 repaving project and not from the completion of the project in January 1963. There is no contention that this action was not brought within six months of the completion of the project for widening Highway 52 into a four-lane highway in January 1963.

The Commission offered further evidence tending to show that it posted a map in the courthouse of Forsyth County in 1949, showing a right of way of 100 feet in connection with the resurfacing project; that the Commission placed signs at each end of the project showing that such project was completed, and placed certain markers along the right of way 50 feet from the center of the 22-foot pavement constructed in 1949.

The evidence shows unequivocally that no right of way marker has ever been placed on plaintiff's property, and the nearest marker on the east side of the highway to the north of plaintiff's property is 550 feet therefrom. At the time of the trial, according to the Commission's evidence, no right of way marker then existed on the east side of Highway 52 south of plaintiff's property towards Winston-Salem. There was evidence tending to show that a small sign was placed near the ground on the west side of the highway diagonally across from plaintiff's property; and the evidence further tended to show that this sign much of the time was obscured by undergrowth. This sign carried the following legend:

"NOTICE
RIGHT OF WAY OF THIS HIGHWAY INDICATED BY
MARKERS
ALL ENCROACHMENTS PROHIBITED
SH & PWC"

The court below held that the Commission, on or about 7 April 1949, and in connection with the construction of Highway Project 7453 (in 1949), acquired by purchase from Pernelia C. Browning, deceased, a 100-foot right of way, measuring 50 feet on both sides of the surveyed center line of said highway; that said highway extended over, across and past the lands described in the complaint; that plaintiff Bernice Browning is barred by the provisions of Consolidated Statutes 3846-(bb), Chapter 2, § 22, Public Laws of North Carolina of 1921 as amended by Chapter 160, § 6, Public Laws of North Carolina of 1923 and Chapter 1115, Public Laws of North Carolina of 1949, from recovering any damages from the Commission by reason of the matters and things alleged in the complaint.

Judgment was entered dismissing the action and taxing the plaintiff with the costs.

Plaintiff appeals, assigning error.

Attorney General Bruton, Asst. Attorney General Harrison Lewis,

Trial Attorney Millard R. Rich, Jr.; Blackwell, Blackwell, Canady & Eller for the defendant appellee Commission.

Elledge & Mast for plaintiff appellant.

DENNY, C.J. The rather careless and haphazard manner in procuring rights of way, together with the lack of clarity and accurateness in the preparation of right of way agreements by the Commission through the years, has been a source of much litigation.

The court below held that the Commission obtained by purchase from Pernelia C. Browning on 7 April 1949, a right of way 50 feet from the center of Highway 52 as it existed in 1949, and that because of the procurement of such right of way the plaintiff herein is barred from recovering any damages in connection therewith.

We concur in the ruling of the court below only as to the one-half undivided interest owned by Pernelia C. Browning at the time she executed such right of way agreement.

The purchase of an easement from one co-tenant does not carry with it an easement in the interest of the other co-tenant. *Hill v. Mining Co.*, 113 N.C. 259, 18 S.E. 171, where this Court said: "It cannot, we think, be seriously contended that the owners of one undivided fourth of a tract of land, through which a railroad is constructed, can be deprived of their rights for the damages due to them assessed under the provisions of section 1944, by the purchase by the railorad company of the rights of one of the other tenants in common."

There is no question about the right of the Commission to procure by dedication, purchase, prescription or condemnation such rights of way as it may deem necessary for highway purposes.

In this case, it is not contended that the Commission obtained the right of way in controversy by dedication, prescription or condemnation. On the one hand, it claims the right of way by purchase from one of the co-tenants involved, and on the other, on the ground that there was a taking in connection with the 1949 widening and resurfacing project which necessitated that any claim for damages be asserted within six months of the date of the completion of that project.

The facts in this case are substantially different from those in the case of *Kaperonis v. Highway Commission*, 260 N.C. 587, 133 S.E. 2d 464. In that case, the deed conveying the property from the predecessors in title to Kaperonis referred to a certain plat which showed an existing 50-foot right of way across the property conveyed, and the plat was made a part of the description. Moreover, the plat was introduced in evidence and identified as the plat referred to and incorporated in the deed. Furthermore, the predecessors in title to Kaperonis

had signed a release of claim for damages in consideration of $850.00 paid to them by the Highway Commission, which release was signed upon completion of the project involved in 1929. In our opinion, the evidence in the *Kaperonis* case was sufficient to have established a right of way by prescription, had the Commission not theretofore purchased the right of way from his predecessors in title.

In the instant case, there is no evidence on the record tending to show that the Commission ever authorized the procurement of a 100-foot right of way in connection with the widening and repaving project in 1949, as there was in the *Kaperonis* case. There is evidence that the plans and specifications called for a 100-foot right of way. Even so, there is no evidence tending to show that the plans and specifications for the 1949 project were available to the plaintiff or anyone else, other than the contractors and the Highway officials and employees. There is evidence tending to show that a map was posted in the courthouse in Forsyth County, which map showed a 100-foot right of way thereon. But there is no evidence as to who posted the map, when it was posted, or how long it remained posted, except the evidence with respect thereto by one of the Commission's engineers who testified that he saw the map while it was posted sometime in 1949.

In the case of *Penn v. Carolina Virginia Coastal Corp.*, 231 N.C. 481, 57 S.E. 2d 817, which was an action to recover compensation for property alleged to have been taken pursuant to the condemnation law of North Carolina, it is said: "* * * '(T)aking' under the power of eminent domain may be defined as 'entering upon private property for more than a momentary period, and, under warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof.' 18 Am. Jur. 756, Eminent Domain, Sec. 132.

"Moreover, 'what is a taking of property within the due process clause of the Federal and State constitutions,' the text writers say, 'is not always clear, but so far as general rules are permissible of declaration on the subject, it may be said that there is a taking when the act involves an actual interference with, or disturbance of property rights, resulting in injuries which are not merely consequential or incidental.' 18 Am. Jur. 757, Eminent Domain, Sec. 132."

Ibid., § 144, page 772: "It is the general rule that a mere plotting or planning in anticipation of a public improvement is not a taking or damaging of the property affected. Thus, the recording of a map showing proposed highways, without any provision for compensation to the landowners until future proceedings of condemnation are taken to ob-

tain the land, does not constitute a taking of the land, or interfere with the owner's use and enjoyment thereof. No damages are collectible until a legal opening occurs by the actual taking of the land. When the appropriation takes place, any impairment of value from such preliminary steps becomes merged, it is said, in the damages then payable. * * *"

In the case of *Martin v. United States,* 240 F. 2d 326 (1957), the United States, grantee of the State of North Carolina, was contending that no physical entry or evidence thereof was necessary to the acquisition of title, but that the same was acquired by the State of North Carolina by the mere filing and registration of maps, as provided under Chapter 2 of the Public Laws of 1935 (now a part of G.S. 136-19). In holding that the registration of maps was insufficient to divest the owner of title to his lands, *Parker, Chief Judge,* speaking for the Court, said: "It is true that, in ordinary cases where there has been an actual entry upon the land and the exercise of dominion pursuant to the statute authorizing the taking, the registration of a map showing the land taken pursuant to the statute will mark the time of the passage of the title; but we do not think that it was ever intended that the Highway Commission, already in possession of a traveled highway, could get title to adjacent lands by simply registering a map covering them, without exercising any rights of dominion or possession and without notice to the owners. As said by Mr. Justice Holmes in *Ramapo Water Co. v. City of New York,* 236 U.S. 579, 585, 35 S. Ct. 442, 59 L. Ed. 731, nothing but a specific decision of the highest court of the state would make us believe that such effect was to be accorded to the simple filing of a map. It is not necessary to decide whether, in the light of the due process clause, the mere filing of the map without any sort of notice could constitutionally be given such effect by statute; for we do not think that the statute of North Carolina upon which the government relies was ever intended to have such effect. The statute relied upon is the Act of January 23, 1935, Public Laws of 1935, ch. 2, * * *.

"* * * The statute did, indeed, provide for the filing of a map with provision that title should vest in the Commission upon such filing; but this must be construed along with the other language of the section which clearly contemplated that such filing should be in addition to and not in lieu of the existing procedures required for condemnation, its purpose being to facilitate conveyance to the United States of title properly acquired by 'purchase, donation, or condemnation.' That such entry upon the property as would amount to a taking by the government was contemplated as a prerequisite to a valid condemnation,

even if the map were filed as provided by the statute, is shown by the requirement that actions to recover compensation for land taken must be brought within six months, if notice of the completion of the project has been posted at the courthouse door of the county and at the end of the project, otherwise within twelve months of the completion of the project. General Statutes 136-19. The completion of the project is, in ordinary cases, a clear taking of the owner's property and notice to him of the taking. This is not true, however, where the project consists of the mere paving of an existing public highway. Such paving, where the rights of the public are unquestioned, would be no assertion of rights over adjacent land or notice to the owners that such rights were being asserted."

A property owner has a constitutional right to just compensation for the taking of his property for a public purpose, and such property owner is entitled to a reasonable notice and a reasonable opportunity to be heard on the question of damages for the taking. Under the evidence presented by the Commission in the court below, we hold that no reasonable notice was given to the plaintiff herein of a taking of her property until July or August 1962 when the Commission first exercised dominion over the property. *Hedrick v. Graham,* 245 N.C. 249, 96 S.E. 2d 129.

In the last cited case, after pointing out that the right to authorize the power of eminent domain and the mode of the exercise thereof is wholly legislative, *Parker, J.,* speaking for the Court, said: "* * * However, as both the Federal and our State Constitutions protect all persons from being deprived of their property for public use without the payment of just compensation and a reasonable notice and a reasonable opportunity to be heard, proceedings to condemn property must not violate these guaranties. *Dohany v. Rogers,* 281 U.S. 362, 74 L. Ed. 904."

Likewise, in the case of *Jennings v. Highway Commission,* 183 N.C. 68, 110 S.E. 583, Hoke, J., said: "* * * (I)t is not necessary to notify the owner that his property is to be appropriated, provided he is notified and given opportunity to appear and be heard on the question of the compensation that may be due him. *S. v. Jones, supra* (139 N.C. 613, 52 S.E. 240); *Kinston v. Loftin,* 149 N.C. 255 (62 S.E. 1069); 15 Cyc. 632."

In *Highway Commission v. Young,* 200 N.C. 603, 158 S.E. 91, the Commission had passed an ordinance to the effect that the right of way on all State highways, except as otherwise designated by appropriate signs on the ground, was extended 30 feet from the center of the highway. The defendant began the construction of a filling station at

the intersection of two highways within the rights of way of both highways. The action was instituted for the purpose of requiring the removal of the structure from the rights of way established by the Commission. This Court said: "The due process clause is not violated by failure to give the owner of property an opportunity to be heard as to the necessity and extent of appropriating his property to public use; but it is essential to due process that the mode of determining the compensation to be paid for the appropriation be such as to afford the owner an opportunity to be heard. * * * The laying out of the rights of way by the plaintiff manifested a purpose to acquire an easement in the entire width of each highway for the use of the public, although only a part would ordinarily be used for travel. * * * But the mere laying out of a right of way is not in contemplation of law a full appropriation of the property within the lines. Complete appropriation occurs when the property is actually taken for the specified purpose after due notice to the owner; and the owner's right to compensation arises only from the actual taking or occupation of the property by the Highway Commission. When such appropriation takes place the remedy prescribed by the statute is equally available to both parties. * * * It follows that section 3846(bb) of the N.C. Code of 1927, authorizing the Highway Commission to enter upon and take possession of the land before bringing condemnation proceedings and before making compensation is not an infraction of the due-process clause; and we find nothing in the record indicating a purpose to deprive the defendants of notice with respect to the assessment of damages."

The judgment below is affirmed as to the one-half interest in the property involved which Pernelia C. Browning devised to the plaintiff, but reversed as to the one-half interest in the property involved which the plaintiff purchased in 1944.

Affirmed in part

Reversed in part and

Remanded for further proceedings.

RUBY G. PETTICORD AND HUSBAND, JOHN W. PETTICORD v. EDWARD S. HEEFNER, JR., TRUSTEE, AND STANDARD SAVINGS AND LOAN ASSOCIATION, AND NORTH CAROLINA STATE HIGHWAY COMMISSION.

(Filed 16 December 1964.)

APPEAL by plaintiffs from *McConnell, J.*, 25 May Session 1964 of FORSYTH.

Attorney General Bruton, Asst. Attorney General Harrison Lewis, Trial Attorney Millard R. Rich, Jr.; Blackwell, Blackwell, Canady & Eller for the defendant appellee Commission.

Elledge & Mast for plaintiff appellants.

PER CURIAM. The factual situation in this case is similar to that in *Browning v. Highway Commission*, decided this day, *ante*, 130, except no written right of way has been obtained by the Commission from these plaintiffs or their predecessors in title to any interest in the land involved.

Therefore, the judgment entered below is reversed on authority of the *Browning* case, and the case is remanded for further proceedings in accord with that opinion.

Reversed and remanded for further proceedings.

CAROLINA HELICOPTER CORPORATION v. CUTTER REALTY COMPANY, INC.

(Filed 16 December 1964.)

1. Landlord and Tenant § 2—

A lease for a term of years is a contract by which one party agrees for a valuable consideration to let another have the occupation and profits of land for a definite time.

2. Same; Frauds, Statute of § 6a—

A lease for one year need not be in writing. G.S. 22-2.

3. Landlord and Tenant § 2—

The requirement that the term of a lease have a definite commencement date and duration is subject to the rule that that is certain which is capable of being made certain, and the parties to a lease may provide that the specified term of a lease should commence upon the happening of a subse-

quent contingency, and such agreement creates a valid lease provided the contingency occurs within a reasonable time after the execution of the contract.

4. Same—

An agreement to give lessee one year's use, rent free, of defendant's roof for a heliport upon condition that lessee secure necessary governmental approval for the establishment and operation of the port and secure for use in the proposed helicopter taxi service a helicopter and other necessary equipment, the year's use to begin upon plaintiff's performing the acts stipulated, *held* not void for uncertainty as to the commencement of the term, lessee having performed the stipulated acts within one year of the execution of the agreement.

5. Same—

The essentials of a lease are parties lessor and lessee, the real estate demised, the term of the lease and the consideration, and a complaint alleging these essentials is not subject to demurrer for its failure to allege agreement as to every element incidental to the occupancy and enjoyment of the premises.

6. Same— Lease agreement for use of roof as heliport held not void for indefiniteness.

A complaint alleging an agreement to give lessee one year's use, rent free, of defendant's roof for a heliport upon condition that lessee secure necessary governmental approval for the establishment and operation of the port and secure for use in the proposed helicopter taxi service a helicopter and other equipment, the year's use to begin upon plaintiff's performing the acts stipulated, and alleging that lessor agreed to fill out such governmental forms as might be required of it as owner, *held* not void for failure of the agreement to provide the extent of lessee's access to the roof, or for other matters incidental to the use and occupancy of the property in the proposed business.

7. Landlord and Tenant § 5—

A lease includes an implied covenant of quiet enjoyment, which extends to those easements and appurtenances whose use is necessary and essential to the enjoyment of the leased premises.

8. Same—

Lessee is under no duty to the lessor to insure the demised premises and lessor is under no obligation to provide liability insurance covering the operation by lessee of its separate business on the leased premises.

9. Same—

Municipal and governmental regulations applicable to the use and operation of lessee's business become a part of the lease contract.

10. Pleadings § 12—

A demurrer admits for its purpose the facts alleged in the complaint and reasonable inferences therefrom, and a demurrer may not invoke matters not appearing on the face of the pleading.

11. Same—

Upon demurrer, a complaint will be liberally construed with a view to substantial justice between the parties, and the demurrer will be overruled if the complaint in any portion or to any extent states facts sufficient to constitute a cause of action, giving the pleader the benefit of every reasonable intendment and presumption.

12. Contracts § 4—

Consideration necessary to support a simple contract may consist of some benefit or advantage to the promisor or some detriment to the promisee.

13. Landlord and Tenant § 2—

The lessee's expenditure of time and money in securing governmental approval for the use of the leased premises as a heliport and the rental of a helicopter for use in the lessee's proposed helicopter taxi service, in reliance upon lessor's promise to lease the roof of its building for a heliport, is sufficient consideration for lessor's promise, even though the use is to be rent free.

14. Quasi-Contracts § 1—

Where the offeree has performed a part of the service specified in the offer and is prevented by the offerer from completing the service, offeree is entitled at least to a compensation on a *quantum meruit.*

15. Contracts § 21—

Where there are mutually dependent stipulations in a contract constituting mutual considerations, if defendant's conduct is such as to prevent full performance on the part of the plaintiff, the latter may hold the contract as abandoned by defendant and sue to recover damages for what he has done and his losses occasioned by the default of defendant.

16. Contracts § 25; Quasi-Contracts § 2—

Where defendant declares on a special contract to pay for services rendered and fails to establish the special contract, he may go to the jury on *quantum meruit* if he alleges and proves defendant's knowing acceptance of the services performed in reliance on defendant's promise.

17. Quasi-Contracts § 2— Complaint held to allege cause of action on quantum meruit.

Allegations and evidence to the effect that defendant prepared the roof of its building for a heliport and made strenuous effort to secure approval by the government for the operation of the heliport, that thereafter defendant agreed to allow plaintiff the use of the roof, rent free, for a period of one year if plaintiff would obtain such governmental approval and that defendant would execute all papers necessary under governmental regulations required of it as owner for the operation of the heliport, that plaintiff, in reliance on the promise, went to great expense and time in procuring governmental approval, and that defendant then refused to execute the necessary forms, *held* sufficient to state a cause of action on *quantum meruit.*

18. Courts § 9—

The sustaining of a demurrer with leave to amend cannot preclude another Superior Court judge from thereafter overruling demurrer to the amended pleading when the amendment adds allegations of fact essential or relevant to the causes of action alleged.

APPEAL by plaintiff from *Riddle, S. J.*, April 20, 1964, "D" Session of MECKLENBURG.

Plaintiff instituted this action to recover damages for breach of contract or, in the alternative, to recover on *quantum meruit* for services rendered.

Defendant demurred to the original complaint on the grounds, among others, (1) that the facts alleged were too indefinite, uncertain and incomplete in material particulars to show the existence of a contract, and (2) the alleged services were of no value or benefit to defendant and the allegations with respect thereto would not support a recovery on *quantum meruit*. The demurrer was sustained on these grounds by Brock, S. J., in February 1964, and plaintiff was granted leave to amend.

The complaint, as amended, is summarized, except where set out verbatim, as follows:

(1) First cause of action.

Plaintiff is in the business of transporting passengers by helicopter for hire. Defendant owns and manages an office building at 201 South Tryon Street, Charlotte, N. C., the roof of the building was constructed in such way and manner as to make it suitable for a helicopter port. At the invitation and request of defendant, plaintiff had the roof examined and determined that it is feasible to use it for the operation of a helicopter taxi service. On or about 1 February 1963, as a result of plaintiff's study and findings, defendant, through its authorized officers and agents, "offered to the plaintiff that if the plaintiff would secure necessary United States of America governmental approval for the establishment and operation of the helicopter taxi service between the roof of defendant's building and the Douglas Municipal Airport, and would secure for use in such service the necessary helicopter and other equipment, the defendant would give the plaintiff corporation one year's use, rent free, said year's use of said roof to begin upon plaintiff performing the aforesaid acts, and exclusive possession of the roof of said building for the said helicopter service, defendant agreeing to fill out such government forms as might be required of it as owner. . . . acting on the above-described offer of the defendant to the plaintiff and as acceptance of said offer and at the expenditure of great

time, effort, and the incurring of great expenses, all to the knowledge of the defendant, and within the reasonable contemplation of the parties, the plaintiff by and through its said efforts and expense secured the necessary United States of America governmental approval for the operation of said heliport and service from the roof of defendant's building, subject to the condition subsequent that the defendant make application for the operation of said heliport on forms of the United States Government which were provided to the defendant from said government through the agency of the plaintiff, said governmental authority to operate having already been given as result of plaintiff's work and expense, and that at great expense, and the expenditure of many hours of work and effort, the plaintiff secured the necessary helicopter to operate said service." Defendant refused to submit the forms to the appropriate U. S. Government agency and denied to plaintiff the right to come on the roof and begin the taxi service. Plaintiff was then and still is ready, able and willing to discharge its obligations under the agreement. Plaintiff seeks to recover special damages for specified work and labor performed and expenses incurred in obtaining government approval for use of the roof as a helicopter port, and rental expenses incurred in procuring a proper helicopter.

(2) Second cause of action.

Plaintiff reiterates the facts alleged in the first cause of action, and states additionally that prior to December 1962 defendant had worked for 1½ years, at great expense, in an effort to secure approval by the U. S. Government of the use of the roof as a "heliport" but had failed, that as a result of plaintiff's work and expenditures, performed and made at the insistence of defendant, such approval had been obtained, and that plaintiff is entitled to recover the value of its work, services and expenditures.

Defendant again demurred and on the same grounds as before. The demurrer was sustained. Plaintiff appeals.

Richard M. Welling for plaintiff.

Grier, Parker, Poe & Thompson and James Y. Preston for defendant.

MOORE, J. Plaintiff seeks to recover special damages for a breach of an alleged contract, to wit, a parol lease of the roof of defendant's building for a term of one year.

A lease for a term of years is a contract, by which one agrees, for a valuable consideration, to let another have the occupation and profits

of land for a definite time. *Moring v. Ward*, 50 N.C. 272. A lease for one year need not be in writing. G.S. 22-2; *Moche v. Leno*, 227 N.C. 159, 41 S.E. 2d 369.

Defendant contends that the alleged lease, if otherwise valid, is void for uncertainty as to the commencement of the term. "It is a cardinal principle in the creation of terms for years that the term must be certain, that is, there must be certainty as to the commencement and duration of the term." 32 Am. Jur., Landlord and Tenant, § 62, p. 77. Plaintiff alleges that the term was to begin when plaintiff secured permission for use of the roof for operation of a helicopter taxi service, and secured a proper helicopter and necessary equipment for the operation of the service. Defendant insists that this provision is too indefinite.

Defendant relies on *Manufacturing Co. v. Hobbs*, 128 N.C. 46, 38 S.E. 26, which involved a conveyance of timber with a period of five years for cutting and removing logs from the land of defendant, the term "to commence from the time . . . party of the second part (plaintiff) begins to manufacture said lumber (timber) into wood or lumber." The Court said: "The contract may be treated as a lease, or a term for years, . . . An indispensable legal requirement to the creation of a lease for a term of years is that it shall have a certain beginning and a certain end. . . . That act on the part of plaintiff may never take place; it is entirely uncertain. . . . If the doctrine of reasonable time could be involved in this case, the plaintiff would be in no better condition than he now occupies. . . . the contract (was) made 13 years ago. . . ."

However, the *Hobbs* case has been criticized and overruled, except as to the result reached. *Hawkins v. Lumber Co.*, 139 N.C. 160, 165, 51 S.E. 852. In the *Hawkins* case the Court said: "Under the facts and circumstances of the *Hobbs* Case, the court very properly held that the time of commencing was unreasonable, and, being eight years beyond the stipulated period, the rights of the parties under the contract had determined. But the opinion errs in holding the deed was void. This conclusion was predicated on the assumption that the instrument in question was a lease and had no certain or definite beginning." The Court concluded that even if it were a lease, it would not be void. There is an extended quotation from Lord Coke, stating that "a lease for years may be made on a condition or contingent precedent," and that the term of a lease may be made certain "by reducing it to a certainty by matter *ex post facto*."

As to the proposition of indefiniteness, *Hobbs* furnishes no authoritative holding. It stands only for the proposition that the lessee or

grantee did not act within a reasonable time. In the case at bar plaintiff alleges that the agreement was made about 1 February 1963, and it had performed the acts necessary to fix the commencement of the one year term prior to 5 March 1964 — the date of the institution of this action.

"The general rule that a thing is certain which is capable of being made certain, *id certum est quod certum reddi potest,* is applied to leases for a term of years." 32 Am. Jur., Landlord and Tenant, § 62, p. 78. ". . . a lease may provide that the term is to commence on the happening of a stated event, with the result that *after the occurrence of the event all uncertainty is removed and the lease is valid and binding,* but if the event on which the commencement of the term is clearly conditional does not occur no tenancy commences." (Emphasis added). 51 C.J.S., Landlord and Tenant, § 28, pp. 534, 535. For cases involving leases to commence in the future, upon the happening of specified events, see: *Oldfield v. Angeles Brewing & Malting Co.,* 113 P. 630 (Wash. 1911); *Fanta v. Maddex,* 252 P. 630 (Cal. 1926); *Imperial Water Co. No. 8 v. Cameron,* 228 P. 678 (Cal. 1924); *De Pauw University v. United Electric Coal Companies,* 20 N.E. 2d 146 (Ill. 1936); *Wunsch v. Donnelly,* 19 N.E. 2d 70 (Mass. 1939); *Pfeiffenberger v. Scott's Cleaning Co.,* 144 S.E. 2d 183 (Mo. 1940).

Plaintiff performed all acts necessary on its part to make certain the commencement of the term. Defendant's contention that the commencement of the term is so indefinite as to render the lease void is not sustained.

Defendant contends further that the facts alleged do not constitute a contract or an agreement to make a contract for that it appears that other material terms, not agreed upon, were contemplated by the parties. Defendant suggests that there was no meeting of the minds with respect to the following: (1) how the roof was to be prepared for use as a "heliport" and who was to bear the expense thereof; (2) how extensive the service was to be and the number of helicopters to be used; (3) what means of access to the roof would be established; (4) what arrangements would be made for fire protection and who was to furnish the equipment; (5) who was to provide fire and liability insurance and in what amounts; (6) what maintenance and personnel to be provided to accommodate the service; (7) whether service was to be continuous or only a daytime operation; (8) who was to obtain permission from the City of Charlotte for operation of the service; and (9) what type of approval is available from the Federal Aviation Authority, that is, blanket or qualified authority.

This contention is in the nature of a speaking demurrer. For the purposes of the demurrer the facts alleged and reasonable inferences to be drawn therefrom are deemed admitted. *Copple v. Warner,* 260 N.C. 727, 133 S.E. 2d 641. Grounds for demurrer may not invoke matters not appearing on the face of the complaint. *Construction Company v. Electrical Workers Union,* 246 N.C. 481, 98 S.E. 2d 852. The essentials of a lease are parties (lessor and lessee), the real estate demised, the term of the lease, and the consideration or rent. 32 Am. Jur., Landlord and Tenant, § 2, pp. 27-29. The complaint sets out these essentials. Of course a lease may contain other terms, but for the purpose of testing the complaint by demurrer they must appear from the facts pleaded either expressly or by necessary implication. "The complaint is not to be overthrown by demurrer, if in any portion or to any extent, it states facts sufficient to constitute a cause of action. . . . It must be fatally defective before it is rejected as insufficient. . . . 'upon examination of a pleading to determine its sufficiency as against a demurrer, its allegations will be liberally construed with a view to substantial justice, C.S., 535 — G.S. 1-151 — and every reasonable intendment and presumption will be given the pleader, and the demurrer overruled unless the pleading is wholly insufficient.'" *Sandlin v. Yancey,* 224 N.C. 519, 521, 31 S.E. 2d 532. "In considering the expressions of agreement, the court must not hold the parties to some impossible, or ideal or unusual standard. It must take language as it is and people as they are. All agreements have some degree of indefiniteness and some degree of uncertainty." Corbin on Contracts, Vol. 1, p. 396.

A lease includes the implied covenant of quiet enjoyment, which extends to those easements and appurtenances whose use is necessary and essential to the enjoyment of the leased premises. *Manufacturing Co. v. Gable,* 246 N.C. 1, 97 S.E. 2d 672; *Huggins v. Waters,* 154 N.C. 443, 70 S.E. 842; 32 Am. Jur., Landlord and Tenant, § 169, pp. 163-165. This extends to the right of access and exit, including the use of steps, halls, stairways and elevators. 32 Am. Jur., Landlord and Tenant, §§ 170, 172, pp. 165-167. In the absence of some covenant or agreement to that effect, a lessee is under no duty to the lessor to insure the demised premises. *Ibid.,* § 183, p. 174. Likewise, the lessor is under no obligation to provide liability insurance covering the operation by lessee of its separate business on or from the leased property. It does not appear from the pleadings that there are any city ordinances requiring fire extinguishing equipment or special city license for the operation of the business proposed. If there are such they become a part of the contract according to their provisions. 1 Strong: N. C. Index, Contracts, § 1, pp. 571, 572. According to the complaint, the heli-

copter service was to be operated and managed by plaintiff. The extent of its services and the details of the operation are matters to be determined by it. The only requirement is that it provide a helicopter and necessary equipment and render service.

Defendant's contention that the complaint shows the parties had not agreed on some of the material terms of the contract is not sustained.

There is sufficient allegation of consideration. "It may be stated as a general rule that 'consideration' in the sense the term is used in legal parlance, as affecting the enforceability of simple contracts, consists of some benefit or advantage to the promisor, *or* some loss or detriment to the promisee. *Exum v. Lynch,* 188 N.C. 392, 125 S.E. 15; *Cherokee County v. Meroney,* 173 N.C. 653, 92 S.E. 616; *Institute v. Mebane,* 165 N.C. 644, 81 S.E. 1020; *Findly v. Ray,* 50 N.C. 125. It has been held that 'there is a consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do, whether there is any actual loss or detriment to him or actual benefit to the promisor or not.' 17 C.J.S. 426. *Spencer v. Bynum,* 169 N.C. 119, 85 S.E. 216; *Basketeria Stores v. Indemnity Co.,* 204 N.C. 537, 168 S.E. 822; *Grubb v. Motor Co.,* 209 N.C. 88,183 S.E. 730." *Stonestreet v. Oil Co.,* 226 N.C. 261, 37 S.E. 2d 676; *Bank v. Harrington,* 205 N.C. 244, 170 S.E. 916.

Plaintiff incurred large expenses and caused its officers and agents to expend much time and effort in securing government approval for the use of the roof as a "heliport," and additionally rented a helicopter, all on account of defendant's promise. An agreement by which one party is subjected to trouble, loss or inconvenience, is not a *nudum pactum. Findly v. Ray, supra.*

This brings us to the second cause of action — on *quantum meruit.* The following principles are applicable to the pleadings.

(1) When the offeree has performed a part of the service specified in the offer and is prevented by the offerer from completing the service, offeree is entitled at least to a compensation on a *quantum meruit. Roberts v. Mills,* 184 N.C. 406, 114 S.E. 530. Defendant refused in the case at bar to fill in the appropriate forms and submit them to the proper government agency for final consummation of government approval of the roof for helicopter taxi service, and also denied plaintiff entry to and use of the roof for establishment of the service. Defendant prevented plaintiff from fully performing.

(2) Where there are mutually dependent stipulations in a contract constituting mutual considerations, if defendant's conduct is such as to prevent full performance on the part of the plaintiff, the latter may

hold the contract as abandoned by defendant and sue to recover damages for what he has done and his losses occasioned by the default of defendant.

(3) Where plaintiff declares on a special contract to pay for services rendered, alleges and proves acceptance of services and the value thereof, and fails to establish the special contract, he may go to the jury on *quantum meruit*. *Allen v. Seay*, 248 N.C. 321, 103 S.E. 2d 332; *Stokes v. Taylor*, 104 N.C. 394, 10 S.E. 566. If there is no contract, defendant does not have to accept the services. *Thormer v. Mail Order Co.*, 241 N.C. 249, 85 S.E. 2d 140. "If there is a liability to pay for a partial performance which has not been beneficial to defendant, it is not on the ground of any promise which the law would imply, but is founded solely on the special contract between the parties." 17A C.J.S., Contracts, § 511, p. 831. Defendant insists that the complaint shows that it did not accept the services alleged and was not benefitted thereby. The jury may find this to be true, if it also finds that there was no contract, but it is not established by the complaint as a matter of law. Defendant at great expense constructed the roof of the building so that it was suitable for use as a "heliport," and prior to December 1962 (before negotiating with and making the offer to plaintiff) tried for a year and a half to obtain government approval of the roof as a "heliport" and failed. At defendant's insistence and to its knowledge, plaintiff at great effort and expense obtained the approval. Notwithstanding defendant's refusal to fill in and submit the forms, it may be reasonably inferred its purpose was to avoid its responsibility to plaintiff and retain the benefits of the service for use after termination of this litigation. It may also be inferred that defendant considered the services beneficial inasmuch as it prepared the roof for helicopter taxi service and made a strenuous effort to secure its approval before plaintiff came into the picture.

The complaint may allege an express contract or the allegations may be so general as to allow a recovery either upon the express contract or an implied contract. This type of pleading is tolerated but not approved. The orderly method of pleading is to state the express contract and the implied contract separately, or to state the express contract as an inducement or explanation of the implied contract and that defendant received the benefits. *Yates v. Body Co.*, 258 N.C. 16, 128 S.E. 2d 11; *Thormer v. Mail Order Co., supra*. Where the complaint pleads both an express contract and an implied contract and there is evidence to support both theories, issues should be submitted to the jury as to both. *Yates v. Body Co., supra*.

It is suggested that plaintiff has no right to appeal in this case. When the court sustained the demurrer to the original complaint it granted plaintiff leave to amend. Plaintiff noted an exception to the ruling on the demurrer, did not then appeal, but elected to amend. It is defendant's position that plaintiff thereby became bound by the ruling that the original complaint failed to state a cause of action, and that Judge Riddle was bound to sustain the demurrer to the amended complaint "in the absence of additional allegations changing the legal effect of those contained in the original complaint." We pass the question of the effect of plaintiff's failure to immediately appeal upon the sustaining of the demurrer to the original complaint. There are material allegations in the amended complaint which do not appear in the original complaint. (1) The time of beginning of the one year term. (2) Defendant's agreement "to fill out such government forms as might be required of it as owner." (3) Defendant's attempt prior to December 1962 to gain government approval of its roof for use as a "heliport," without success. The absence of (1) and (2) from the original complaint was fatal to the cause of action for breach of contract and to some phases of the action on *quantum meruit*. The presence of (3) adds support to the action on *quantum meruit* as to acceptance and benefit.

The judgment appealed from is

Reversed.

STATE v. EMORY JOSEPH ROUX, ALIAS DAVID L. WILLARD.

(Filed 16 December 1964.)

1. Criminal Law § 149—

The Supreme Court may issue the extraordinary writ of *certiorari* in its discretion to review judgment in a post conviction hearing to ascertain the validity of the judgment and correct any errors therein. G.S. 15-222.

2. Criminal Law § 143—

A defendant has a right to appeal from a conviction in the Superior Court for any criminal offense. G.S. 15-180.

3. Criminal Law § 148—

It is the duty of appellant to see that the record is properly made up and transmitted, but an indigent defendant is entitled to appointment of counsel and to have the county make available to him the transcript and all records required for an adequate and effective appellate review. G.S. 15-4.1.

4. Constitutional Law § 32—

A defendant in a criminal action may intelligently and understandingly waive his right to appeal, but such waiver is not knowingly made if defendant, at the time of waiver, is without knowledge of his rights, and the courts will indulge every reasonable presumption against waiver.

5. Waiver § 2—

Ordinarily, a waiver is an intentional relinquishment or abandonment of a known right or privilege.

6. Constitutional Law § 32— Findings held to disclose that defendant did not knowingly waive his right to appeal.

The court's findings, supported by evidence, were to the effect that defendant was an indigent, that, upon his conviction, notice of appeal was given in open court, that his trial counsel was allowed to withdraw from the case because he had not been paid, that defendant unsuccessfully sought to obtain a transcript of the trial from the court reporter, and that defendant then in open court announced that he desired to abandon his appeal. There was nothing in the findings of fact to indicate that defendant knew he had a constitutional right to have the State provide him with a transcript of the trial or other means of presenting his contentions on appeal as good as those available to a nonindigent defendant, or that defendant waived his right to have counsel appointed to prosecute his appeal. *Held:* The waiver of appeal was not knowingly and intelligently made, and the cause is remanded for proper proceedings. G.S. 15-4.1, G.S. 15-5.

CERTIORARI to review a final judgment entered by *Hubbard, J.*, in a post conviction hearing held pursuant to the provisions of G.S. 15-217 *et seq.* at the June 1963 Session of PITT County superior court.

Attorney General T. W. Bruton and Deputy Attorney General Harry W. McGalliard for the State.

Milton C. Williamson for petitioner appellant.

PARKER, J. About May 1963 defendant filed with the superior court of Pitt County a petition seeking a review of the constitutionality of his trial at the October Term 1959 of the superior court of Pitt County, in which trial he was convicted and received substantial prison sentences which he is now serving. G.S. 15-217 *et seq.* In his petition he prays that the verdict and judgment be set aside, and that he be awarded a new trial. The solicitor for the State filed an answer to his petition. On 22 May 1963 Judge Hubbard entered an order in which, after reciting that the defendant is an indigent, he appointed Milton C. Williamson of the Pitt County Bar as counsel to represent defendant at the post conviction hearing. G.S. 15-219.

At the June 1963 Session of the superior court of Pitt County Judge Hubbard held a post conviction hearing as requested by defen-

dant. He entered a final judgment, in which he made the following findings of fact, which we summarize:

In Case No. 7217 defendant was charged in an indictment with the larceny on 25 October 1958 of personal property of the value of $28,000 owned by George Lautares, John Lautares and Pearl Lautares. In Case No. 7218 defendant was charged in an indictment on the same day with breaking and entering a building occupied by George Lautares, John Lautares, and Pearl Lautares, with intent to commit larceny, and with attempting to open a vault, safe, and other secure places therein by the use of nitroglycerine, dynamite, gunpowder, and other explosives, and by an acetylene torch, in violation of G.S. 14-57.

These two cases were consolidated by consent and tried together at the October 1959 Term of Pitt County superior court. Defendant was represented by Frazier Woolard, a member of the Beaufort County Bar. Defendant pleaded not guilty and was convicted as charged in both indictments by the jury. In Case No. 7217 he was sentenced to imprisonment for a term of 10 years. In Case No. 7218 he was sentenced to imprisonment for a term of not less than 20 nor more than 25 years. He is now serving these sentences.

Defendant in open court gave notice of appeal to the Supreme Court. The usual appeal entries were made, and he was allowed 45 days in which to state and serve his case on appeal.

After notice of appeal was given, the Criminal Minute Docket Book 29, page 619, shows that defendant's counsel Woolard asked permission of the court to withdraw as counsel, assigning as the reason therefor that he had not been paid by defendant for his services. The court directed that defendant's counsel's request be discussed further by defendant and his counsel. The record is silent as to what transpired.

After giving notice of appeal defendant in open court asked the court reporter for an interview. The same day the reporter went to the jail and talked with the defendant. Defendant asked the reporter for a transcript of the evidence and record in his trial, and offered to give the reporter a wrist watch of the retail cost value when new of $350 in payment therefor. The court reporter refused to accept the watch in payment for a transcript, and a transcript was not furnished by him to defendant. Defendant made no further effort to obtain the transcript, nor did his attorney of record.

At the November 1959 Term of the superior court of Pitt County defendant in open court announced that his former counsel Woolard had withdrawn as his counsel, and that he desired to abandon and withdraw his appeal to the Supreme Court. Defendant signed a statement withdrawing his appeal, and, thereupon, an order was entered by

the presiding judge dismissing the appeal and directing that commitment issue. Nothing further was done with respect to the appeal.

Defendant testified at the post conviction hearing that he requested Judge Bundy presiding at the November Term 1959 to appoint counsel to prosecute his appeal. The record is silent as to this. The court is unwilling to accept the uncorroborated testimony of the defendant that such request was made, and, therefore, in view of the silence of the record in this respect, finds that no such request was made.

The record does not reveal the financial condition of defendant at the time of his trial. Defendant testified at the post conviction hearing that he had money and personal property and an equity in real estate located in Nevada of a value in excess of $15,000 at the time of his arrest, about one year prior to his trial, that during the interval between his arrest and trial his equity in the real estate was wiped out by foreclosure, that the money, cashier's cheque, and money orders in his possession when he was arrested were seized by the law enforcement officers, and his automobile was repossessed by the financing agency. He further testified that he had a wrist watch of a retail value of $350 when new, and personal clothes of a market value of $200. Nothing in the record, except the statement that his counsel has not been paid, throws any light on defendant's financial condition, but in view of the defendant's effort to give the wrist watch for a copy of the transcript the court finds the defendant at the time of his trial was indigent and had no funds or property to pay for a transcript of the record of his trial and to employ counsel.

Defendant testified, and the court finds as a fact, that at the time the defendant withdrew his appeal, he did so willingly and voluntarily, without duress or compulsion of any kind, and no promise of leniency was made to him. Although defendant testified that he had only an eighth grade education, he is a highly intelligent individual, and knew and understood he was abandoning and withdrawing his appeal. He knowingly and deliberately adopted a course of procedure which at that time appeared to him to be for his best interest. This finding is made despite the testimony of the defendant at the post conviction hearing that he abandoned his appeal because of his inability to obtain a transcript of the evidence at his trial. In this connection the court takes into consideration the evidence induced at this hearing that within less than one year after withdrawal of the appeal the defendant filed with the Supreme Court a petition for a writ or writs of *certiorari* in a civil action growing out of the seizure of his moneys and property by law enforcement officers.

At the May Session 1963 of Pitt County superior court defendant filed an application for a post conviction hearing. Thereupon, Milton C. Williamson of the Pitt County Bar was appointed counsel for him and filed a subsequent petition for a post conviction hearing. The post conviction hearing was held on the petition drafted by defendant's counsel Williamson. The defendant is now indigent and unable to pay counsel or pay the cost of this proceeding.

During the post conviction hearing counsel for defendant stipulated that the only bases for granting the application were as follows: "(1) denial of the petitioner's constitutional rights by failure of the Court to furnish him with a transcript of the evidence and record of his trial; and (2) failure of the Court to appoint counsel for the prisoner to enable him to prosecute his appeal to the Supreme Court."

Based upon his findings of fact, Judge Hubbard made the following conclusions of law, which we summarize:

(1) Defendant was entitled to have the court furnish him a transcript of the evidence and record of his trial in order that he might prosecute his appeal.

(2) At the November 1959 Term of the superior court of Pitt County defendant withdrew his appeal, and thereby waived his constitutional rights to have a transcript of his trial furnished him.

(3) Defendant is now legally confined, pursuant to judgment of the superior court of Pitt County, and the commitment issued thereon.

Whereupon, based on his findings of fact and conclusions of law, Judge Hubbard ordered and decreed that defendant's petition be denied and that he be returned to the custody of the State Prison Department.

At the September 1964 Civil Session of Pitt County superior court Judge Morris entered an order directing Pitt County to pay the costs of preparing necessary copies of the case on appeal and the defendant's brief in the Supreme Court.

On 1 September 1964 we issued a writ of *certiorari* to review the final judgment entered by Judge Hubbard in the post conviction hearing. G.S. 15-222. A writ of *certiorari* is an extraordinary remedial writ, and "it issues from a superior to an inferior court, officer or commission acting judicially, and it lies only to review judicial or *quasi*-judicial action" to ascertain its validity and to correct errors therein. *Pue v. Hood, Comr. of Banks,* 222 N.C. 310, 22 S.E. 2d 896; *Realty Co. v. Planning Board,* 243 N.C. 648, 92 S.E. 2d 82.

In North Carolina G.S. 15-180 provides that "in all cases of conviction in the superior court for any criminal offense, the defendant shall have the right to appeal" to the Supreme Court. This statute further

provides that criminal appeals are to be perfected and the cases for the Supreme Court settled, "as provided in civil actions." It is the duty of the appellant to see that the record is properly made up and transmitted. *S. v. Jenkins*, 234 N.C. 112, 66 S.E. 2d 819.

Judge Hubbard found as a fact that petitioner was an indigent at the time of his trial, conviction and sentence at the October 1959 Term of Pitt County superior court, and that he is now an indigent. He contends first that the failure of the superior court of Pitt County to furnish him, an indigent, with a copy of the transcript of his trial, and the failure of the same court to appoint counsel to represent him so as to perfect his appeal to the Supreme Court and to represent him on his appeal in the Supreme Court constitute a denial of his rights under the 14th Amendment to the United States Constitution; and second, that he, an indigent, unable to obtain a transcript of his trial, and without counsel, did not waive his right to appeal to the Supreme Court by signing a voluntary statement with the superior court of Pitt County as follows: "I am not now represented by counsel, my former counsel, Mr. Frazier Woolard of Washington, N. C. having withdrawn as my counsel. I desire and do now, in open court, abandon and withdraw my appeal to the Supreme Court."

The State contends that petitioner "effectively waived his constitutional rights to counsel on appeal and to a transcript of the trial record when he voluntarily in open court withdrew his appeal."

In *Douglas v. California* (1963), 372 U.S. 353, 9 L. Ed. 2d 811, the Supreme Court of the United States held that an indigent state court defendant has an unqualified right under the 14th Amendment to the United States Constitution to the assistance of counsel on appeal to the highest court of the state, when his appeal is to be heard and decided on the merits. Such a defendant can intelligently and understandingly waive his right to the benefit of counsel, because, "The constitutional right [to counsel], of course, does not justify forcing counsel upon an accused who wants none." *Moore v. Michigan*, 355 U.S. 155, 2 L. Ed. 2d 167, 172.

The constitutional right of an indigent defendant to the aid of the state in appealing or pursuing a post conviction remedy was first recognized in *Griffin v. Illinois* (1956), 351 U.S. 12, 100 L. Ed. 891, 55 A.L.R. 2d 1055. In the *Griffin* case, the United States Supreme Court vacated a judgment of the Illinois Supreme Court which had affirmed the dismissal of a petition under the Illinois Post Conviction Hearing Act, in which the petitioners alleged that manifest nonconstitutional errors were committed in their trial for armed robbery, and that they were denied a full appellate review of their convictions by the absence

of a transcript of the proceedings, which they lacked funds to purchase. In that case, a majority of the Court stated, "We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants. For example, it may be that bystanders' bills of exceptions or other methods of reporting trial proceedings could be used in some cases." In *Eskridge v. Washington State Board of Prison Terms and Paroles* (1958), 357 U.S. 214, 2 L. Ed. 2d 1269; *Burns v. Ohio* (1959), 360 U.S. 252, 3 L. Ed. 2d 1209, the Supreme Court, applying the *Griffin* rule to indigent defendants convicted before 1956, established the retroactive effect of the *Griffin* rule. Since the *Griffin* case, the Supreme Court has consistently stated that while it does not hold a state, by reason of provisions of the 14th Amendment to the United States Constitution, must purchase a stenographer's transcript in every case where an indigent defendant in a criminal action cannot buy it, it has held that "the State must provide indigent defendant with means of presenting his contentions to the appellate court which are as good as those available to a nonindigent defendant with similar contentions." *Draper v. Washington* (1963), 372 U.S. 487, 9 L. Ed. 2d 899; *Lane v. Brown* (1963), 372 U.S. 477, 9 L. Ed. 2d 892; *Eskridge v. Washington State Board of Prison Terms and Paroles, supra;* Annot., 6 L. Ed. 2d 1295. The General Assembly in its 1963 session enacted a statute, Session Laws of North Carolina 1963, Ch. 1080, which is codified in G.S. 15-4.1 *et seq.* G.S. 15-4.1 provides for the appointment of counsel for indigent defendants charged with felonies and certain misdemeanors, and provides as follows: "When an appeal is taken under this section the county shall make available trial transcript and records required for an adequate and effective appellate review."

There seems to be little doubt that a defendant in a criminal action may intelligently and understandingly waive his right to appeal. *S. v. Lakey,* 191 N.C. 571, 132 S.E. 570; *S. v. Harmon (Mo.),* 243 S.W. 2d 326; *Dunn v. State,* 18 Okla. Crim. 493, 196 P. 739; 4 Am. Jur. 2d, Appeal and Error, § 270; 24 C.J.S., Criminal Law § 1668.

Johnson v. Zerbst, 304 U.S. 458, 82 L. Ed. 1461, is a leading case defining waiver of a constitutional right. The question presented for decision was whether or not petitioner had waived his constitutional right to the aid of counsel in his trial in a federal district court on a charge of uttering and passing counterfeit money. The Court said: "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the laws of fundamental rights.' A

waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

In *Moore v. Michigan* (1957), 355 U.S. 155, 2 L. Ed. 2d 167, in the year 1938 a seventeen-year-old Negro of limited education and mental capacity, after expressly disavowing a desire for counsel, pleaded guilty in the Circuit Court to a charge of murder and was sentenced to imprisonment for life. In 1950 he filed a delayed motion for a new trial in the Circuit Court, asserting constitutional invalidity of his conviction and sentence because he did not have the aid of counsel at the time of his plea and sentence. The Circuit Court denied the motion, and the Supreme Court of Michigan affirmed. On *certiorari* a majority of the Supreme Court of the United States held, in part, that petitioner, as a matter of due process, unless he intelligently waived his constitutional right, was entitled to representation by counsel, and that he did not intelligently and understandingly waive his right to counsel, in view of the fact, showed by the evidence introduced in the proceedings for a new trial, that, prior to his plea of guilty, the sheriff informed him he could not protect him against mob violence if he did not plead guilty.

Fay v. Noia (1963), 372 U.S. 391, 9 L. Ed. 2d 837, was a case in which in 1942 three defendants, among them the petitioner in the instant *habeas corpus* proceedings, were convicted in a New York State court of a felony murder, the sole evidence against each defendant being his signed confession. The petitioner did not, but the other defendants did, appeal their convictions. When these appeals were unsuccessful, subsequent legal proceedings in the state courts resulted in the releases of the other defendants on findings that their confessions had been coerced. Petitioner instituted the present *habeas corpus* proceedings in the United States District Court for the Southern District of New York, in which the coercive nature of his conviction was conceded. Relief was denied on the ground that because of his failure to appeal he had not exhausted the remedies available in the state courts, within the meaning of the federal *habeas corpus* statute, but under peculiar circumstances of the case certificate of probable cause did issue. *United States v. Fay* (1960), 183 F. Supp. 222. The Court of Appeals for the Second Circuit reversed and ordered that petitioner's conviction be set aside and that he be discharged from custody unless given a new trial forthwith. *United States v. Fay,* 300 F. 2d 345. On *certiorari,* the Supreme Court of the United States in a majority opinion affirmed the judgment of

the Court of Appeals. The majority opinion held, in part, that the petitioner's failure to appeal could not be deemed an intelligent and understanding waiver of his right to appeal such as to justify the withholding of federal *habeas corpus* relief, in view of the fact that a retrial granted on appeal might well have led to a death sentence, as shown by a statement made by the State trial judge in imposing sentence, that petitioner's past record and his involvement in the crime almost led the judge to disregard the jury's recommendation against the death sentence.

Judge Hubbard made, *inter alia*, these crucial findings of fact: When petitioner was convicted and sentenced at the October 1959 Term he appealed in open court to the Supreme Court. That at the time of such trial petitioner was an indigent, and was unable to pay for a transcript of the record for his trial and to employ counsel to prosecute his appeal. That when his employed counsel withdrew from the case, he did not request Judge Bundy presiding at the November 1959 Term to appoint counsel to prosecute his appeal. In *Carnley v. Cochran* (1962), 369 U.S. 506, 8 L. Ed. 2d 70, the Court said: "But it is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." See *Uveges v. Pennsylvania* (1948), 335 U.S. 437, 93 L. Ed. 127. Nothing in Judge Hubbard's findings of fact, or in the record before us, suggests that petitioner waived his right to have counsel appointed for him to prosecute his appeal.

There is nothing in Judge Hubbard's findings of fact, or in the record before us, to indicate that petitioner, an indigent, knew he had a constitutional right to have the State provide him with a transcript of the proceedings of his trial, or with other "means of presenting his contentions to the appellate court which are as good as those available to a nonindigent defender with similar circumstances." Judge Hubbard found as a fact that petitioner in his impoverished condition tried, without success, immediately after he was convicted and sentenced at the October 1959 Term to obtain from the court reporter a transcript of the record of his trial by offering him in payment his wrist watch.

Considering all of these circumstances, it is manifest that when petitioner, an indigent, without counsel, without means to employ counsel, and without having intelligently and understandingly waived his right to have the aid of counsel, and without being able to secure a transcript of the proceedings of his trial, and with nothing to indicate that he knew he had a constitutional right to have the State provide him with means to secure a full appellate review of his trial, and therefore was unable to prosecute his appeal to the Supreme Court, filed a

written statement with Judge Bundy at the November 1959 Term that he desired to abandon and withdraw his appeal to the Supreme Court, that this did not constitute an intelligent and understanding waiver of his right to prosecute his appeal taken in open court. Judge Hubbard erred in holding otherwise, and in denying his petition *in toto*.

When this opinion is certified down to the superior court of Pitt County, it, at the first criminal session thereafter, to wit, 25 January 1965, shall issue an order directing his present court-appointed lawyer of record, Milton C. Williamson, to prepare and serve upon the solicitor for the State with all reasonable promptness a statement of petitioner's case on appeal from his conviction and sentence at the October 1959 Term of Pitt County superior court so as to afford petitioner an adequate and effective appellate review of his trial, the cost of securing a transcript of his trial, if available, or other means of preparing such statement of case on appeal to be paid for by Pitt County, G.S. 15-4.1, and further directing the said counsel to prepare, file a brief, and argue the case in the Supreme Court, the cost of which is to be paid by Pitt County, G.S. 15-4.1, and petitioner's counsel's fees to be paid by the State, G.S. 15-5. At such session the superior court shall direct the solicitor for the State to act on the statement of the case on appeal served on him with all reasonable promptness. And all of this is to the end that petitioner's case on appeal can be argued during the Spring Term 1965 of the Supreme Court. *Dowd v. United States*, 340 U.S. 206, 95 L. Ed. 215; *United States v. Reincke*, 225 F. Supp. 985.

Error and remanded with directions.

STATE OF NORTH CAROLINA v. ALVIS HOLLINGSWORTH.

(Filed 16 December 1964.)

1. Criminal Law § 19—

Upon transfer of a cause from a recorder's court to the Superior Court upon defendant's demand for a jury trial in accordance with provisions of a special act, defendant is properly tried in the Superior Court on an indictment.

2. Criminal Law § 77—

The relationship of physician and patient does not exist between a physician called by defendant's brother to examine defendant at the jail to determine whether defendant was under the influence of an intoxicant, it being clear that defendant's brother was acting in his own behalf and not as agent, and the testimony of the physician as to defendant's condition at that time is not precluded by G.S. 8-53.

3. Constitutional Law § 33—

Where a defendant does not object to an examination by a physician, testimony by the physician as to defendant's condition in respect to being drunk or under the influence of intoxicating liquor does not violate defendant's constitutional right not to be compelled to give evidence against himself.

4. Criminal Law § 164—

Where concurrent sentences are imposed on each of two counts, error relating to one count alone cannot be prejudicial.

5. Criminal Law § 107—

The court properly refrains from charging the jury as to the law upon a state of facts not presented by a reasonable view of the evidence in the case.

6. Criminal Law § 120—

After the verdict has been accepted and the jury discharged, the jurors should not be heard to impeach their verdict on the ground that they had not heard the judge's charge to them, since to permit jurors to impeach the verdict would be replete with dangerous consequences. The refusal to permit counsel to cross-examine the jurors for the purpose of impeaching their verdict does not violate defendant's rights under Article I, § 17 of the Constitution of North Carolina or under the Fourteenth Amendment to the Federal Constitution.

APPEAL by defendant from *Bickett, J.*, 24 August 1964 Session of HOKE.

Criminal prosecution on an indictment containing five counts: First count, operating a motor vehicle on the public highways while under the influence of intoxicating liquor, a violation of G.S. 20-138; second count, failing to stop when a policeman's siren is sounded; third count, failing to stop a vehicle involved in an accident resulting in property damage at the scene of the accident, a violation of G.S. 20-166(b), and failing to give his name, address, operator's license number, etc., to the driver of the vehicle collided with, a violation of G.S. 20-166(c) (this count charges a violation of two subsections of G.S. 20-166); fourth count, an assault on Alex S. Norton, a deputy sheriff of Hoke County, with a deadly weapon, to wit, a one-half ton pickup truck; fifth count, resisting, delaying, and obstructing a public officer, to wit, Alex S. Norton, deputy sheriff of Hoke County, while discharging or attempting to discharge a duty of his office, a violation of G.S. 14-223.

Plea: Not Guilty. The record states that at the end of the State's case the court dismissed the charges against the defendant alleged in counts two and three in the indictment. Verdict: Guilty of operating an automobile while under the influence of intoxicating liquor on a public highway as charged in the first count in the indictment, and of resist-

ing arrest as charged in the fifth count of the indictment, and not guilty of an assault with a deadly weapon as charged in the fourth count of the indictment.

From a judgment of imprisonment for twelve months on each of the counts upon which he was convicted, both sentences to run concurrently, defendant appeals.

Attorney General T. W. Bruton, Deputy Attorney General Harry W. McGalliard, and Assistant Attorney General Richard T. Sanders for the State.

Harrison & Diehl for defendant appellant.

PARKER, J. Defendant was arrested on a warrant charging the offenses later alleged in the indictment here, which required him to appear before the recorder's court of Hoke County. He appeared before the recorder's court and demanded a jury trial. Whereupon, his case was transferred to the superior court of Hoke County, pursuant to the provisions of Ch. 408, Public-Local Laws, Session 1937, which is an act relating to the recorder's court of Hoke County. In the superior court, under such circumstances, he was properly tried upon an indictment. *S. v. Thomas,* 236 N.C. 454, 73 S.E. 2d 283.

When defendant was tried in the superior court, he was represented by Arthur L. Lane, a lawyer of his own choice.

The indictment avers the offenses charged therein were committed on 10 March 1964. Dr. R. M. Jordan, a practicing physician in Raeford, was a witness for the State. This is a summary of his testimony on direct examination, except when quoted: On the night of 10 March 1964, he and defendant's brother were together at the common jail of Hoke County. He examined the defendant. He smelt the odor of alcoholic beverage on his breath. His brother "kept asking me if I thought he was drunk and I told him 'yes' I thought he was; so he told me I need not bother to go any further and he was going to get him back upstairs, that there was no use wasting any money." From his examination of the defendant, in his opinion he was under the influence of some intoxicant. At this point defendant's counsel objected, and his objection was overruled. Immediately thereafter, without objection, Dr. Jordan testified that in his opinion defendant was under the influence. The time was 10:55 p.m. This is the substance of Dr. Jordan's testimony on cross-examination by defendant's counsel Lane: Defendant's brother talked to him on the telephone. When he was at the jail, defendant's brother was there with him wanting to know if defendant was drunk. On re-direct examination Dr. Jordan testified:

"I could not tell from my examination that he was suffering any epilepsy seizure or any condition that he may have had." At this point defendant's counsel objected. His objection was overruled. He then excepted to the entire testimony of Dr. Jordan, and this is his exception No. 1.

Defendant assigns as error the admission of the entire testimony of Dr. Jordan, on the ground that his testimony was inadmissible under the provisions of G.S. 8-53. This assignment of error is based on his exception No. 1. This assignment of error is overruled. The evidence is clear that Dr. Jordan went to the jail to examine defendant to determine if he was drunk or under the influence of intoxicating liquor at the request of defendant's brother, not at the request of defendant, and not to perform any professional services for defendant. The relationship of patient and physician, under such circumstances, did not exist between defendant and Dr. Jordan within the purview of G.S. 8-53, and Dr. Jordan's testimony that defendant was under the influence of some intoxicant is not inadmissible by reason of the provisions of G.S. 8-53, and was properly admitted in evidence. *S. v. Newsome,* 195 N.C. 552, 143 S.E. 187; *S. v. Wade,* 197 N.C. 571, 150 S.E. 32; *S. v. Litteral,* 227 N.C. 527, 43 S.E. 2d 84; Stansbury, N.C. Evidence, 2d Ed., § 63.

Dr. Jordan examined defendant without any objection on his part. Dr. Jordan's testimony as to defendant's condition in respect to being drunk or under the influence of intoxicating liquor does not violate defendant's constitutional right not to be compelled to give evidence against himself. *S. v. Eccles,* 205 N.C. 825, 172 S.E. 415; *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572; *S. v. Grayson,* 239 N.C. 453, 80 S.E. 2d 387.

Defendant assigns as error, based on his exception No. 2, that the court failed to charge the jury in respect to the fifth count in the indictment that "an individual has the right to resist an unlawful arrest, using reasonable force." Defendant does not challenge the correctness of that part of the charge in respect to the first count in the indictment charging him with operating an automobile upon a public highway while under the influence of intoxicating liquor. Even if the court erred in failing to charge on the fifth count in the indictment as contended by defendant, or even if the court erred in its charge in any respect as to the fifth count in the indictment, which is not conceded, no harm resulted to defendant of which he can justly complain, because concurrent prison sentences of equal length were imposed by the court on the conviction on the first count in the indictment charging driving an automobile on a public highway while under the influence of intoxicating liquor and on the conviction on the fifth count in the indictment

charging resisting an officer while in the discharge of the duties of his office. *S. v. Booker,* 250 N.C. 272, 108 S.E. 2d 426; *S. v. Thomas,* 244 N.C. 212, 93 S.E. 2d 63; *S. v. Riddler,* 244 N.C. 78, 92 S.E. 2d 435. Further, the record contains the testimony of Dr. Jordan alone. The charge of the court indicates that Alex S. Norton, deputy sheriff of Hoke County, testified for the State. There is no evidence in the record before us tending to show defendant's arrest was unlawful. A judge should never charge the jury upon a state of facts not presented by some reasonable view of the evidence in the case. *S. v. McCoy,* 236 N.C. 121, 71 S.E. 2d 921; *S. v. Wilson,* 104 N.C. 868, 10 S.E. 315; *Electric Company v. Dennis,* 259 N.C. 354, 130 S.E. 2d 547.

It appears that defendant was tried, convicted, and sentenced on the first day of the session of court, and that on the third day of the session H. D. Harrison, Jr., a member of the Hoke County Bar, appeared in court and made a motion that the court permit him, "along with solicitor," to examine the jurors, who had convicted defendant, to find out whether they had heard the court's charge to the jury in defendant's trial. The court denied his motion, and he excepted. Attorney Harrison then asked would the court do so on its own motion. Eleven of the jurors in defendant's case were in the courtroom. The court asked the eleven jurors present did any one of them fail to understand his charge. Juror Duncan replied, "No sir." Duncan later said: "I would say it was difficult to hear you, but I think as for myself I heard you." Another juror replied: "We say it was hard to understand you, but I believe I could understand you." Juror Hendrix replied: "I understood the instructions. I didn't understand the whole entire charge, but I understood the instructions, part of it." Then this appears in record: "Court: Is there anybody that didn't understand the instructions, the words I gave you with respect to the offenses charged, is there any one that didn't understand the instructions? Pause — no answer — I take it from your silence then, that all of you eleven did understand the instructions of what you would have to find from the evidence and beyond a reasonable doubt to return a verdict of guilty to driving a motor vehicle upon a highway while under the influence of intoxicating liquor and on the charge of resisting arrest? Pause — You acquitted the defendant on assault with a deadly weapon, isn't that right?" The record then shows this: "JUROR DUNCAN: Yes sir. COURT: Did you understand all the instructions that I gave? JUROR: I understood that. COURT: Let the record so show." After this Attorney Harrison was permitted by the court to examine juror Hendrix, who answered him substantially as he stated to the court, and to examine juror Best, who answered: "I did not hear all of his charge; I heard his instruc-

tions, but his charge, all of it, I could not understand it, because it was too low, as he repeated the testimony." At this point the court told Harrison not to ask the jurors any other questions. Whereupon attorney Harrison requested the court to let him cross-examine the jurors as to their ability to hear fully and completely the court's instructions. The court denied his request, and he excepted and assigns this as error.

Beginning with *Sutrell v. Dry*, 5 N.C. 94 (1805), and in an unbroken line of decisions to the same effect since, it is firmly established in this State, as a general rule at least, based upon wise reasons of public policy that jurors, after their verdict has been rendered to and received by the court and after they have been discharged and separated, will not be allowed by testimony or affidavit to impeach, to attack, or to overthrow their verdicts, nor will evidence from them be received for such purpose, and that evidence for that purpose, if admitted at all, must come from some other source. *S. v. McLeod*, 8 N.C. 344; *Bellamy v. Pippin*, 74 N.C. 46; *S. v. Smallwood*, 78 N.C. 560; *S. v. Brittain*, 89 N.C. 481; *S. v. Royal*, 90 N.C. 755; *Lafoon v. Shearin*, 95 N.C. 391; *Jones v. Parker*, 97 N.C. 33, 2 S.E. 370; *Johnson v. Allen*, 100 N.C. 131, 5 S.E. 666; *S. v. Best*, 111 N.C. 638, 15 S.E. 930; *Purcell v. R. R.*, 119 N.C. 728, 26 S.E. 161; *Coxe v. Singleton*, 139 N.C. 361, 51 S.E. 1019; *S. v. Hall*, 181 N.C. 527, 106 S.E. 483; *Baker v. Winslow*, 184 N.C. 1, 113 S.E. 570; *Lumber Co. v. Lumber Co.*, 187 N.C. 417, 121 S.E. 755; *S. v. Dove*, 189 N.C. 248, 126 S.E. 610; *Newton v. Brassfield*, 198 N.C. 536, 152 S.E. 499; *Campbell v. R. R.*, 201 N.C. 102, 159 S.E. 327; *Lambert v. Caronna*, 206 N.C. 616, 175 S.E. 303; *In re Will of Hall*, 252 N.C. 70, 113 S.E. 2d 1; Stansbury, N. C. Evidence, 2d Ed., § 65.

In *Sutrell v. Dry, supra*, the Court held that it would not grant a new trial upon an affidavit of one of the jurors that he did not assent to the verdict. The Court said: "Applications like the present for new trials have always been rejected. Were they to be listened to by the Court, they would open a door for much corruption."

In *Jones v. Parker, supra*, a motion was made for a new trial, based upon affidavits filed by some of the jurors that they did not concur in the verdict, and by others that they did not understand portions of the charge of the court. Counter-affidavits by other members of the jury were also filed. The case states that "the Court, considering the affidavits fully, and acting upon personal knowledge of what transpired in court, in the exercise of its discretion, refused the motion." The opinion of the Court states:

"His Honor gave full consideration to the affidavits of the jurors in regard to their verdict. In *S. v. McLeod,* 1 Hawks, 346, Henderson, J., said: 'It has been long settled, and very properly, that evidence impeaching their verdict, must not come from the jury; but must be shown by other testimony'; and this has been affirmed in *S. v. Smallwood,* 78 N.C. 563.

"We call attention to these authorities, because we think it unsafe and unwise, as a rule, to permit verdicts to be impeached by the testimony of jurors rendering them."

The judgment below was affirmed.

In *Coxe v. Singleton, supra,* plaintiff presented to the court a paper-writing signed by several jurors who tried the case, to the effect that they did not fully understand the issues and the legal effect of their findings, and moved to set aside the verdict. The court declined and the plaintiff excepted. The Court said in its opinion: "It is familiar learning that jurors cannot be heard to impeach their verdict. If that were allowed, lawsuits would seldom be determined."

In re Will of Hall, supra, was a *caveat* proceeding to invalidate a will on the grounds of mental incapacity and undue influence, which resulted in a verdict for the propounders. The caveators moved to set aside the verdict, submitting affidavits of eight of the jurors who served at the trial to the effect that one juror had brought a volume of the Encyclopedia Americana into the jury room containing a definition of "undue influence," that this definition was read to the jury and a number of them studied it individually, and that the jury was influenced thereby. The trial judge refused to set the verdict aside, and this ruling on appeal was assigned as error. The majority opinion, after stating the firmly established rule in this State, as set forth above, that jurors will not be allowed to impeach their verdicts, said: "The rule is a salutary one. If it were otherwise, every verdict would be subject to impeachment." It is true the majority opinion went further and said the extraneous matter in respect to the definition of "undue influence" in the encyclopedia was not prejudicial. The majority opinion concludes: "We find no error in the refusal of the court to permit the jury to impeach the verdict." The affidavits were in respect to misconduct during the retirement of the jury in the secrecy of the jury room. In the instant case different facts exist. Here appellant's counsel Harrison sought to cross-examine on Wednesday the trial jurors, after their verdict had been rendered to and received by the court and after they had been discharged and separated on Monday, in respect to whether or not they had understood the judge's instructions to them, which

were uttered in open court, presumably in the presence of defendant and his counsel Lane.

The common law rule that jurors may not testify to misconduct on their part in order to impeach their verdicts derives from the opinion of Lord Mansfield, Lord Chief Justice of England, in *Vaise v. Delaval,* 1 T. R. 11, 99 Eng. Rep. 944 (K. B. 1785). In that case there was a motion by law for a rule to set aside a verdict based upon an affidavit of two jurors, who swore that the jury, being divided in their opinion, tossed up, and that the plaintiff's friends won. The Court in refusing the rule stated in its opinion:

> "The Court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor; but in every such case the Court must derive their knowledge from some other source: such as from some person having seen the transaction through a window, or by some such other means."

Vaise v. Delaval, with the prestige of the famous Chief Justice and bearing his great name, soon prevailed in England, and its authority came to receive in the United States an adherence almost unquestioned. 8 Wigmore on Evidence, § 2352, p. 697 (McNaughton Rev. 1961). In Wigmore, *ibid,* § 2354, p. 702, it is said: "Except in a few jurisdictions where the rule of Iowa is accepted, the rule of Lord Mansfield seems now to be firmly settled law." Of course, this statement would not be applicable where the *Delaval* rule has been abrogated by statute. See Wigmore, *ibid,* § 2353 *et seq.,* where there is a discussion of the policy of the rule in the *Delaval* case and quotations from opinions criticizing and analyzing it.

In Wigmore, *ibid,* § 2349, p. 681, it is said: "Accordingly, it is today universally agreed that on a motion to set aside a verdict and grant a new trial the verdict cannot be affected, either favorably or unfavorably, by the circumstances: that one or more jurors *misunderstood* the judge's *instruction;* * * *."

In *McDonald v. Pless and Winbourne,* 238 U.S. 264, 59 L. Ed. 1300, the Court held that jurors may not, in the Federal courts, impeach their own verdict by testimony that it was a quotient verdict. In its opinion the Court said:

> "[L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the

> hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference."

This is not a case like *Rex v. Thomas*, [1933] 2 K. B. 489, in which two of the jurors were Welsh and could not understand English, and the evidence was given partly in Welsh and partly in English, and the charge of the judge was delivered in English, and like *Ras Behari Lal and Others v. The King Emperor*, [1933] 50 T. L. R. 1, in which a number of native subjects of India were on trial for murder and were found guilty, and it subsequently appeared that several of the jurors could not understand English, and in which the addresses of counsel and the judge's charge to the jury were all delivered in English. In respect to these two cases there is a comment in The Canadian Bar Review, Vol. 12, 1934, p. 309 *et seq.*, and in The Australian Law Journal, Vol. 7, 1933-34, p. 350.

It would seem that defendant and his counsel Lane were in the courtroom when the judge delivered his charge to the jury, and heard all or part of it. At least, so far as the record shows, neither defendant nor his counsel Lane raised any objection to the tone of voice of the judge when he was delivering his charge to the jury. The verdict was rendered Monday, and judgment that day pronounced on the verdict, and the jury was discharged and separated. To permit defendant's new counsel Harrison on the following Wednesday, under such circumstances, to cross-examine the trial jurors to determine whether or not they had heard the judge's charge to them, or to permit defendant to offer affidavits of the trial jurors, or any of them, to that effect, would allow the harassment of the jurors, could lead to the grossest fraud and abuse, would be replete with dangerous consequences, and no verdict would be safe. When attorney Harrison made a motion to examine the trial jurors to determine whether they had heard the judge's charge to them, the trial judge should have promptly denied it, and ruled that under the circumstances here testimony from the trial jurors would not be heard to impeach their verdict on the ground they had not heard the judge's charge to them. Defendant in his brief contends the failure of the court to permit his counsel Harrison to cross-examine the trial jurors under the circumstances here violated his rights under Art. I,

sec. 17, of the State Constitution and under the 14th Amendment to the United States Constitution. He has favored us with no citation of authority supporting his contention, and after a diligent search we have found none. His contention is not tenable. There is no merit in defendant's assignment of error that the court erred in failing to set aside the verdict and judgment because of the jurors' alleged failure to hear the charge of the judge to the jury.

Defendant does not assign as error that the evidence was insufficient to carry the case to the jury. We have carefully considered all defendant's assignments of error, and all are overruled. In the trial below we find.

No error.

NORTH STATE FINANCE COMPANY, INC. v. H. L. LEONARD AND ELOISE G. LEONARD.

(Filed 16 December 1964.)

1. Process § 4—

The officer's return reciting service raises the legal presumption of due service and places the burden of proof upon the party attacking the service to rebut the presumption by evidence of nonservice.

2. Same—

The officer's return and corroborating testimony afford ample basis for a finding by the court that the process was duly served, notwithstanding positive evidence of nonservice, the credibility of the witnesses and the weight of the evidence being for the determination of the court in finding the facts upon motion to vacate.

3. Courts § 2; Judgments § 19—

If a court has not acquired jurisdiction of the parties by voluntary appearance or service of process, its judgment entered *in personam* is void and may be disregarded and treated as a nullity anywhere, notice and an opportunity to be heard being prerequisites of jurisdiction.

4. Statutes § 4—

A statute susceptible to two interpretations, one constitutional and the other not, will be given that interpretation which will sustain it.

5. Judgments §§ 14, 19—

G.S. 1-113, G.S. 1-114, G.S. 1-115 are applicable only when the obligations of defendants are joint and not when they are joint and several, and therefore in an action on a note against the makers thereof who are jointly and severally liable, a default judgment rendered against both makers is void as to the maker not served with process.

APPEALS by defendants from an order dated August 5, 1964, entered by *Walker, Special Judge,* after a hearing in Chambers, in RANDOLPH Superior Court.

The hearing below was on defendants' motion, filed December 19, 1963, to vacate a purported default judgment on the ground there had been no service of process on either defendant.

Summons issued herein under date of July 30, 1960, was returned bearing the endorsement of Deputy Sheriff Clyde Tippett to the effect he had on July 30, 1960, served defendant H. L. Leonard by delivering to him "a copy of the within summons, a copy of the application for an extension of time to file complaint and a copy of the order extending the time for filing complaint."

In complaint filed August 18, 1960, plaintiff alleged that defendants, on June 28, 1960, for value received, executed and delivered to plaintiff their promissory note in words and figures as follows:

"$19,319.44 Asheboro, N. C.
June 28, 1960

"For value received, on demand, the undersigned, jointly and severally promise to pay to the order of North State Finance Company, Inc., a North Carolina corporation with principal place of business in Asheboro, N. C., the sum of NINETEEN THOUSAND THREE HUNDRED NINETEEN AND 44/100 DOLLARS ($19,319.44), with interest from date at the rate of six per cent per annum.

"This note is secured by a deed of trust on real estate and personal property of even date herewith.

"Witness our hands and seals the day and year first above written.

H. L. LEONARD (SEAL)
ELOISE G. LEONARD (SEAL)

"Witness:

W. S. Farlow"

Plaintiff alleged defendants had made one payment of $1,050.00 on said note; that defendants were indebted to plaintiff thereon in the amount of $18,279.44 plus interest; and that defendants had failed and refused to make payment notwithstanding plaintiff's demand therefor.

Neither defendant answered or otherwise appeared. On September 27, 1960, the clerk entered default judgment "that the plaintiff have

and recover of the defendants, jointly and severally, the sum of $18,279.44." The said judgment *erroneously recites* it appeared that "the defendants" had been personally served with process on July 30, 1960. It also recites that an order that the Sheriff of Randolph County serve a copy of the complaint on defendants was returned by the sheriff marked "not to be found" and that the sheriff had filed an affidavit stating "that after due diligence said defendants cannot be found in the State of North Carolina."

The evidence before Judge Walker consisted of (1) three affidavits offered by defendants; (2) the summons and the return endorsed thereon by Deputy Sheriff Tippett; (3) the testimony of witnesses offered by defendants; and (4) the testimony of witnesses offered by plaintiff. The record does not contain a transcript of the evidence of those who gave oral testimony before Judge Walker. Judge Walker's order contains a statement of the gist of the testimony of each of these witnesses.

Judge Walker's order concludes as follows:

"The Court finds as a fact that the defendant H. L. Leonard was served with summons and other process in this action on July 30, 1960; the Court further finds as a fact that the defendant Eloise G. Leonard was not served with summons or other process on July 30th, 1960, but the Court is of the opinion and concludes as a matter of law that the judgment obtained against H. L. Leonard and Eloise G. Leonard in this action is binding and conclusive against both defendants by reason of the statutory provisions of G.S. 1-113; therefore, the Court is of the opinion that the motion of the defendants to set aside the judgment should not be allowed;

"IT IS NOW ORDERED that the motion of the defendants to set aside and vacate the judgment in this action is not allowed and the judgment is allowed to stand as heretofore entered."

Each defendant excepted and appealed.

Ferree, Anderson & Ogburn for plaintiff appellee.
Charles F. Lambeth, Jr., for defendant appellants.

BOBBITT, J.

Appeal of H. L. Leonard

H. L. Leonard's assignments of error are based on his exceptions (1) to the court's finding that he "was served with summons and other process . . . on July 30, 1960," and (2) to the judgment.

When the return shows legal service by an authorized officer, nothing else appearing, the law presumes service. The service is deemed established unless, upon motion in the cause, the legal presumption is rebutted by evidence upon which a finding of nonservice is properly based. *Downing v. White,* 211 N.C. 40, 188 S.E. 815; *Smathers v. Sprouse,* 144 N.C. 637, 57 S.E. 392. Upon hearing such motion, the burden of proof is upon the party who seeks to set aside the officer's return or the judgment based thereon to establish nonservice as a fact; and, notwithstanding positive evidence of nonservice, *the officer's return* is evidence upon which the court *may* base a finding that service was made as shown by the return. *Downing v. White, supra; Long v. Rockingham,* 187 N.C. 199, 121 S.E. 461; G.S. 1-592. For a more extended review of pertinent legal principles, see *Harrington v. Rice,* 245 N.C. 640, 97 S.E. 2d 239, and cases cited therein.

Notwithstanding there was positive evidence of nonservice, the officer's return and corroborating testimony afford ample basis for Judge Walker's finding of fact that service was made on H. L. Leonard as shown by the return. The credibility of the witnesses and the weight of the evidence were for determination by Judge Walker in discharging his duty to find the facts. *Harrington v. Rice, supra.*

Since nonservice of process is the sole ground on which the motion of H. L. Leonard is based, his assignments of error are overruled. Hence, as to H. L. Leonard, Judge Walker's order is affirmed.

Appeal of Eloise G. Leonard

Eloise G. Leonard's assignments of error are based on her exceptions (1) to the conclusion of law that she is bound by the judgment "by reason of the statutory provisions of G.S. 1-113," and (2) to the judgment.

The *erroneous recital,* referred to in our preliminary statement, indicates the clerk, when he signed the default judgment of September 27, 1960, was under the impression process had been personally served July 30, 1960, on both defendants.

Judge Walker found as a fact "that the defendant Eloise G. Leonard was not served with summons or other process on July 30th." Nothing in the record indicates she was at any time served with any process.

"When a court of general jurisdiction undertakes to grant a judgment in an action where it has not acquired jurisdiction of the parties by voluntary appearance or the service of process the judgment is absolutely void and has no effect. It may, therefore, be disregarded and treated as a nullity everywhere." *Monroe v. Niven,* 221 N.C. 362, 364, 20 S.E. 2d 311; *Jones v. Jones,* 243 N.C. 557, 563, 91 S.E. 2d 562, and

cases cited. "Notice and an opportunity to be heard are prerequisites of jurisdiction (citations), and jurisdiction is a prerequisite of a valid judgment. (Citation). The Legislature is without authority to dispense with these requirements of due process, . . ." *Comrs. of Roxboro v. Bumpass*, 233 N.C. 190, 195, 63 S.E. 2d 144.

Does G.S. 1-113, when properly interpreted, purport to authorize a judgment by default or otherwise against Eloise G. Leonard? If so, it would seem violative of constitutional guaranties as to due process of law. For decisions bearing upon the constitutionality of provisions of "Joint Debtor Acts," see 50 L.R.A. 595 *et seq.* We consider the original purpose and history of the statute now codified as G.S. 1-113 in the light of this legal principle: "If a statute is susceptible of two interpretations, one constitutional and the other not, the former will be adopted." *Nesbitt v. Gill, Comr. of Revenue*, 227 N.C. 174, 181, 41 S.E. 2d 646, and cases cited.

G.S. 1-113, in pertinent part, provides: "Defendants jointly or severally liable. — Where the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows: 1. If the action is against defendants jointly indebted upon contract, he may proceed against the defendants served, unless the court otherwise directs, and if he recovers judgment it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all and the separate property of the defendants served, and if they are subject to arrest, against the persons of the defendants served."

G.S. 1-114 provides: "Summoned after judgment; defense. — When a judgment is recovered against one or more of several persons jointly indebted upon a contract in accordance with the preceding section, those who were not originally summoned to answer the complaint may be summoned to show cause why they should not be bound by the judgment, in the same manner as if they had been originally summoned. A party so summoned may answer within the time specified denying the judgment, or setting up any defense thereto which has arisen subsequent to such judgment; and may make any defense which he might have made to the action if the summons had been served on him originally."

G.S. 1-115 provides: "Pleadings and proceedings same as in action. — The party issuing the summons may demur or reply to the answer, and the party summoned may demur to the reply. The answer and reply must be verified in like cases and manner and be subject to the same rules that apply in an action, and the issues may be tried and

judgment given in the same manner as in action and enforced by execution if necessary."

"In the absence of statute to the contrary, whenever two or more persons are *jointly* liable, so that if an action is commenced against any less than the whole number the nonjoinder of the others will sustain a plea in abatement, a judgment against any of those so *jointly* bound merges the entire cause of action. The cause of action being *joint,* the plaintiff cannot be allowed to sever it against the objection of any of the defendants. By taking judgment against one, he merges the cause of action as to that one, and puts it out of his power to maintain any further suit, either against the others severally or against all combined." (Our italics) Freeman on Judgments, Fifth Edition (1925), Vol. II, § 567; Annotation: 1 A.L.R. 1601; *Rufty v. Claywell, Powell & Co.,* 93 N.C. 306.

"At common law in actions *ex contractu,* the general rule is, if the contract be *joint* the plaintiff must sue all the persons who either expressly or by implication of law made the contract. . . . In such actions brought against some only of several persons who should have been *jointly* sued, the defendants must plead the non-joinder in abatement, there being no other way of taking advantage of it, unless it appear on the face of the declaration or some other pleading of the plaintiff that the party omitted is still living, as well as that he *jointly* contracted, in which case the defendant may demur, etc." (Our italics) *Merwin v. Ballard,* 65 N.C. 168 (1871).

In discussing "Joint Debtor Acts," Freeman *op. cit.,* § 569, states: "In some states, however, statutes have been enacted by which, in effect, liabilities otherwise joint have been made joint and several. Where such is the case, an unsatisfied judgment against one obligor cannot merge or extinguish the liability of another." Decisions cited in support of this statement include *Rufty v. Claywell, Powell & Co., supra.*

In *Rufty,* three individuals, partners, were named as defendants in an action instituted February 10, 1880, to recover on a promissory note "given on 30 September, 1878." Process for one (Claywell) was not served. A consent (compromise) judgment was entered against "the defendants" at Spring Term 1881. In July 1883, plaintiff "sued out a summons under sec. 223 of The Code (now incorporated in G.S. 1-114) against the partner Claywell." This Court held the issuance of said summons in July 1883 constituted the commencement of a new action and as such was barred by the statute of limitations.

Rufty was decided at October Term 1885. The ground of decision (with references in parentheses inserted by us) is set forth in the opinion of Smith, C. J., as follows:

"The preceding section (222) of The Code (of 1883) makes separate provisions for prosecuting the action on liabilities that are joint and liabilities that are several, and it is to the former (222(1), now G.S. 1-113(1)) that the four following sections (223, 224, 225 and 226, now incorporated in G.S. 1-114 and G.S. 1-115) apply. Under the rules of pleading, according to our former system, if the action was upon a joint contract and the plaintiff took judgment against a part only of those liable, there could be no recovery in a subsequent suit against those omitted, for the reason that the contract was merged in the judgment, while not being parties to the judgment, they were not bound by its rendition.

"It was otherwise as to contracts that created a several liability, and to such, as in case of *torts,* a judgment against one or more, left their separate liabilities in force, and then exposed to a subsequent action in like manner as if no judgment had been rendered against the others.

"To obviate the legal consequences of a judgment against some of the joint obligors in extinguishing, through the merger, the cause of action against the others, is the manifest purpose of this innovating legislation introduced in the new system of pleading and practice. Such is the view taken by Mr. Freeman in his work on Judgments, and in our opinion it is a correct view. Secs. 231, 233, 234. (Third Edition, 1881.)

"In this State contracts, whether made by copartners or other joint obligors, were made several by statute, and the plaintiff could sue one or more at his election without impairing his right to proceed against the others afterwards. Rev. Code, ch. 31, sec. 84 (of 1854). This enactment was not introduced in C. C. P. (of 1868), and hence the principle governing contracts as construed at common law being restored, the necessity arose of providing the remedy contained in that Code. The omitted section, which in *Merwin v. Ballard,* 65 N.C. 168, was decided to have been repealed, was enacted at the session of the General Assembly of 1871-'72, ch. 24, sec. 1 (Public Laws, 1871-'72), and now constitutes sec. 187 of The Code (of 1883).

"The result is to render contracts joint in form, several in legal effect, and to neutralize, if not displace, those provisions which operate only upon contracts that are joint and pursuant to which the present proceeding is conducted.

"That the contract possesses the two-fold quality of being *joint* as well as *several* in law, cannot render available provisions which, in terms, are applicable to such as are *joint* only. It is solely to remove the resulting inconveniences of an action prosecuted to judgment against part of those whose obligation is joint only, that the remedy is provided, and it becomes needless when the obligation is several also. Such is the construction adopted in the courts of New York. *Stannard v. Mattin,* 7 How. Pr. 4; *Lakey v. Kingan,* 13 Abb. Pr. 192.

"We are then constrained to regard the issue of the summons against the appellee as the beginning of a new suit, and the action as open to every defense which could be set up if there had been no previous recovery of the other partners."

In *Davis v. Sanderlin,* 119 N.C. 84, 25 S.E. 815, this factual situation was considered: "The plaintiffs in a former action had procured a summons to be issued by Gilliam, J. P., against all three of the partners, including the defendant Mebane, for the same cause of action, and they had recovered judgment against the other defendants only, the defendant Mebane not having been served with the summons. No part of that judgment had been paid when the last action was brought against the defendant Mebane." It was held that plaintiffs' remedy against Mebane was by new action, not by motion (summons) under the statute now codified as G.S. 1-114. The following from the opinion of Montgomery, J., is pertinent.

"The procedure by motion is only to be had in cases where the contract is *joint only,* and not in cases where the contract is *joint and several,* as in the case at bar. The contract in the case before us is several (section 187 of The Code), and it does not merge in the judgment as it would have done if the contract had been joint only. Section 223 of The Code refers to contracts *joint only.*" (Our italics).

In accordance with the decisions cited, it is our opinion, and we so decide, that G.S. 1-113(1) applies to obligations that are "joint only," not to obligations that are "joint and several." This appears equally true with reference to G.S. 1-114 and G.S. 1-115. Hence, the judgment below cannot be upheld as authorized by G.S. 1-113(1). The obligation (note) sued on herein is alleged to be and its provisions declare it to be the joint and several obligation of the obligors. Indeed, the default judgment now under consideration provided that plaintiff recover of the defendants, "jointly and severally," etc.

Plaintiff cites *Guano Co. v. Willard,* 73 N.C. 521; *Hanstein v. Johnson,* 112 N.C. 253, 17 S.E. 155, and *Hancock v. Southgate,* 186 N.C. 278, 119 S.E. 364.

In *Guano Co. v. Willard, supra,* the facts were as follows: In a prior action, Willard, although named in the summons, was not served. The complaint demanded judgment against R. F. Morris and the firm of R. F. Morris & Son. It was not alleged that Willard was a partner. Nor did the plaintiff demand judgment against property in which Willard had an interest. In the action then before the court, the plaintiff alleged Willard was a silent partner. This Court, after considering the statutory provision now codified as G.S. 1-113(4), held the action against Willard a new action and as such barred by the statute of limitations.

In *Hanstein v. Johnson, supra,* the decision is to the effect that, while a creditor and also each partner has a right to demand that partnership (joint) property be applied to the satisfaction of partnership debts, each partner is severally bound to the creditor for the full amount of his claim.

In *Hancock v. Southgate, supra,* while the statute now codified as G.S. 1-113(1) is quoted, it is not discussed or applied. There, plaintiff sued four individuals as partners trading as Southgate Packing Company to recover for merchandise allegedly sold to said partnership on order of G. D. Potter, allegedly a partner and general manager. The only answer was filed by defendant T. S. Southgate. He denied there was a partnership and asserted that "Southgate Packing Company is an unincorporated entirety *(sic),* owned exclusively by T. S. Southgate." The jury found the defendants were partners as alleged and that the partnership was indebted to plaintiffs. As stated by Clarkson, J.: "The only question involved in this appeal is the liability of T. S. Southgate."

We find nothing in the decisions cited by plaintiff in conflict with the rule established in *Rufty v. Claywell, Powell & Co., supra,* and *Davis v. Sanderlin, supra,* namely, that G.S. 1-113(1) applies to joint obligations only and does not apply to joint and several obligations.

For the reasons stated, the court (clerk) was not authorized by G.S. 1-113(1) to enter judgment against defendant Eloise G. Leonard. Having failed to acquire jurisdiction by service of process or otherwise, the judgment as to her is void and should be vacated. Hence, as to her, the judgment of the court below is reversed.

As to defendant H. L. Leonard, affirmed.

As to defendant Eloise G. Leonard, reversed.

RUFUS MACON BROWN v. EDWIN HOYLE HALE, GEORGE KELLY JOHNSON AND JOSEPH G. BANKS, T/A BANKS USED CARS.

(Filed 16 December 1964.)

1. Automobiles § 41e—

The evidence tended to show that defendant employees were driving the defendant employer's vehicles back to his garage, that one of the vehicles became disabled and the other vehicle was used to push it along the outer lane of a four-lane highway, and that when the pushing vehicle overheated and also became disabled both vehicles were permitted to stand in the outer lane without lights, notwithstanding an eleven foot paved shoulder on the right. *Held:* The evidence is sufficient to be submitted to the jury on the issue of defendants' actionable negligence.

2. Negligence § 26—

Nonsuit for contributory negligence is proper when and only when this defense appears so clearly from plaintiff's own evidence that no other inference or conclusion may reasonably be drawn therefrom.

3. Automobiles § 10—

The question of liability for a rear collision between a standing and a moving vehicle must be determined upon the facts of each particular case.

4. Automobiles § 42d—

Evidence tending to show that plaintiff was traveling within the speed limit of 60 miles per hour on a four-lane highway, following a tractor-trailer, both traveling in the righthand lane for traffic moving in their direction, that the tractor-trailer suddenly swerved to its left, revealing for the first time to plaintiff the presence of defendant's vehicles standing without lights in the middle of the righthand lane, and that defendant immediately applied his brakes, but did not turn left, and crashed into the rear of the standing vehicle, *held* not to show contributory negligence as a matter of law. G.S. 20-141(e).

APPEAL by plaintiff from *Shaw, J.*, March 1964 Civil Session of GUILFORD, Greensboro Division.

Action and cross action growing out of a collision of automobiles.

Subsequent to our decision on former appeal, *Brown v. Hale*, 259 N.C. 480, 130 S.E. 2d 868, which affirmed an order vacating a judgment by default and inquiry, the case came on for trial on issues raised by the pleadings.

Plaintiff alleged the collision was caused by the actionable negligence of defendants and seeks to recover damages for personal injuries. Defendants, in a joint answer, denied negligence and conditionally pleaded contributory negligence; and defendant Banks, trading as Banks Used Cars, asserted a cross action, alleging the negligence of plaintiff was the sole proximate cause of the collision, for damages to the (his) Ford and Chevrolet cars involved in the collision.

At the conclusion of all the evidence, the court entered judgment of involuntary nonsuit as to plaintiff's action. (Note: The judgment contains no reference to the alleged cross action of Banks.) Plaintiff excepted and appealed.

Frazier & Frazier, Vernon Hart and William P. Pearce, Jr., for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter and Jack W. Floyd for defendant appellees.

BOBBITT, J. The only question is whether plaintiff's action should have been nonsuited.

Uncontradicted evidence tends to show: The collision occurred March 13, 1962, about 8:00 p.m., on a portion of Interstate Highway No. 85 approximately three miles west of the Durham County-Orange County line. Interstate 85 has four (each 12 feet wide) concrete traffic lanes. The two lanes for westbound traffic are separated from the two lanes for eastbound traffic by a 50-foot grass median. Adjoining on the north the outer (right) concrete lane for westbound traffic is an 11-foot wide hard surface (asphalt) shoulder. All vehicles referred to in the evidence were proceeding or headed west on the portion of Interstate 85 for use by westbound traffic. The front of the 1962 Buick operated by plaintiff struck the rear of the 1960 Chevrolet operated by defendant Johnson at a time when the 1960 Chevrolet was in position to push the 1959 Ford operated by defendant Hale. The 1960 Chevrolet and the 1959 Ford were owned by defendant Banks; and, when the collision occurred, the operators of these cars were acting in the course of their employment as agents of Banks. Approaching (proceeding west) the point of collision, Interstate 85 is a straight road for approximately one mile. East of the point of collision an overhead bridge crosses Interstate 85. From this bridge to the point of collision, Interstate 85 is upgrade and the estimated distance according to one witness was seven-tenths of a mile and, according to another, one-half mile. The weather was clear. The night was dark. There were no lights in the area except lights on motor vehicles. The maximum speed limit on Interstate 85 at the time and place of the collision was 60 miles per hour.

The following facts, *inter alia,* are disclosed by evidence offered by defendants. Banks, Johnson and Hale had gone from Aulander, N. C., to High Point, N. C., to attend a car auction sale, traveling in Banks' said 1960 Chevrolet. Banks bought two used cars, the 1959 Ford involved in the collision and a 1957 Chevrolet. On their return from

High Point, Banks drove the 1957 Chevrolet, Johnson the 1960 Chevrolet and Hale the 1959 Ford. At or near "a Phillips 66 station on old 70 going into Durham," Banks left Johnson and Hale with the understanding he would meet them later "at a restaurant out on the Wake Forest Road."

Although contradicted by other evidence, there was evidence tending to show the matters set forth in the following numbered paragraphs.

1. When the 1962 Buick operated by plaintiff approached and struck the rear of the 1960 Chevrolet, the 1960 Chevrolet and the 1959 Ford, occupied by their respective operators, were stopped in the outer (right) concrete traffic lane, just over (north of) the white line dividing the outer and the inner traffic lanes, without lights or other warning of their presence.

2. Johnson and Hale, on their return from High Point, had traveled east on Interstate 85. They "pulled off" at a service station located some two miles east of the scene of collision when the 1959 Ford "became disabled." When they left the service station, "they started pushing it (1959 Ford) again" and "got on the westbound lane (of Interstate 85) by mistake." After traveling "a couple of miles," the 1960 Chevrolet pushing the 1959 Ford, the 1960 Chevrolet "began to run hot and stalled and stopped in the westbound traffic lane." It (1960 Chevrolet) "became disabled also . . . both cars were disabled at that time." (The foregoing is based on the testimony of the investigating patrolman as to statements made by Johnson and Hale at the scene of collision.)

In our opinion, the evidence referred to in the two preceding paragraphs, when considered in the light most favorable to plaintiff, was sufficient to require submission of an issue as to defendants' actionable negligence.

Judgment of involuntary nonsuit on the ground of contributory negligence should be granted when, and only when, the evidence, when considered in the light most favorable to plaintiff, establishes plaintiff's contributory negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. This rule, repeatedly restated, is clear. Its application, at times, is difficult. Complete reconciliation of all the decided cases would tax the ingenuity of the most discriminating analyst.

". . . no factual formula can be laid down which will determine in every instance the person legally responsible for a rear-end collision on a highway at night between a standing vehicle and one that is moving." Stacy, C. J., in *Tyson v. Ford,* 228 N.C. 778, 781, 47 S.E. 2d 251.

As stated by Seawell, J., in *Cole v. Koonce,* 214 N.C. 188, 191, 198 S.E. 637: "Practically every case must 'stand on its own bottom.'"

Plaintiff's testimony is the evidence most favorable to him. His testimony, summarized except when quoted, is set out below.

Plaintiff was returning to his home in Greensboro from a visit to Oxford. He entered the Durham Bypass from "Route 15" and thereafter entered Interstate 85, "the superhighway." Upon reaching Interstate 85, he was behind a tractor-trailer truck, referred to hereafter as T/T, which had entered the bypass from a road leading from the western section of Durham. He followed this T/T, both vehicles traveling at a speed of "about 55 or 60 miles an hour," "for about four miles before the accident." At first, the T/T was "a good 500 feet or better" ahead of plaintiff, but plaintiff "picked up on" the T/T and then "just followed behind" it. The distance plaintiff was behind the T/T as they proceeded along Interstate 85 varied "from 100 to 500 feet."

Just before reaching the overhead bridge, the T/T overtook another tractor-trailer proceeding in the outer (right) lane for westbound traffic; and the T/T pulled to its left, passed in the inner (left) lane and after passing pulled back into the outer (right) lane. Plaintiff, *then* "150 to 200 feet" behind, followed the T/T. When the T/T and plaintiff got back into the outer (right) lane, plaintiff continued behind the T/T at a distance of "100 to 150 feet," both traveling at a speed of "50 to 60 miles per hour," until the T/T swerved to its left as set out below.

Approaching the point of collision, plaintiff "could not see anything past this tractor-trailer (T/T) down the road ahead of (him)." He could not see under it or around it. The only thing he could see was the back of "a boxed-in tractor-trailer," probably 12 feet high, with doors on the back and flaps over the back wheels.

The following excerpts indicate the gist of plaintiff's testimony as to what occurred immediately preceding the collision.

Plaintiff testified: "The tractor-trailer truck that was ahead of me swerved into the left lane, did not give any signal indicating that it was going to swerve or turn, it just all of a sudden, it just turned out across the road. Immediately prior to the collision my lights were on low beam. I didn't have time to raise my beams or do anything. When I saw them cars I hit my brake and hit the car. I would say that I was maybe 100-150 feet from the vehicle I struck when I first observed it."

Again: "As I traveled this 100 to 150 feet from the first time I saw the car, I didn't turn my wheels to the left or to the right but went straight into the rear end of the car. I think that is exactly what I done — I hit him right in the back."

Again: "I saw the stopped Chevrolet automobile, or whatever it was, for a distance of 100 to 150 feet, that was the first time that I saw it. It came into view when the tractor-trailer ahead of me pulled out to its left, it just ripped out and when the tractor-trailer got out from in front of me was the very first time that I saw it. I don't know whether it would have made any difference if the car had had lights on it or didn't have lights on it, I didn't see any lights, if it had been any, I could have seen it. I don't know if I would have seen it one minute quicker if it had been lights or if it hadn't had light. It wasn't any lights on it — I just couldn't say."

Again: "At the time the truck pulled to the left, I would say I was only 100 to 150 feet behind him going uphill. The tractor-trailer, when it swerved to the left, never did give a signal, it just whipped to the left. The tractor-trailer had lights on the back of it, but I never saw him hit his brakes, nor did the brake lights go on. I didn't see anything, it was so sudden, frankly, I couldn't say whether he hit the brakes or not. He cut to the left. If he put on brake lights, I would have seen them, and I do not recall seeing any. No, he didn't put them on, I'd have seen them."

According to his testimony, plaintiff's speed was 50-60 miles per hour. This did not exceed the maximum speed limit. Plaintiff's negligence, if any, with reference to speed, depended upon whether his speed was greater than was reasonable and prudent under the conditions then existing. G.S. 20-141(a).

According to his testimony, plaintiff was driving 50-60 miles per hour behind a T/T also going 50-60 miles per hour. His negligence, if any, with reference to following too closely, depended upon whether he was following the T/T more closely than was reasonable and prudent, with due regard for the safety of others and due regard to the speed of traffic upon and conditions of the highway. G.S. 20-152.

According to his testimony, plaintiff was 100-150 feet from the 1960 Chevrolet when (by reason of the movement of the T/T) it came within the range of plaintiff's vision. It seems clear plaintiff could not have stopped within this distance. See Am. Jur. 2d Desk Book, Doc. Nos. 173-176, pp. 453-456. Even so, since the effective date of Chapter 1145, Session Laws of 1953, now incorporated in G.S. 20-141(e), plaintiff's inability to stop within the range of his vision was not contributory negligence *per se*. The facts relating thereto were for consideration by the jury in determining the issue of contributory negligence. *Burchette v. Distributing Co.*, 243 N.C. 120, 124, 90 S.E. 2d 232; *Beasley v. Williams*, 260 N.C. 561, 566, 133 S.E. 2d 227, and cases cited.

In relation to the conditions then existing, factual questions for determination include the following: (1) Could plaintiff reasonably infer that the T/T swerved to the left to pass a moving rather than a stopped vehicle? (2) Could plaintiff reasonably assume that his traffic lane was not blocked by a disabled or stalled car, especially on a "superhighway" where an 11-foot hard surface shoulder was available for stopping cars without blocking a traffic lane? (3) Did plaintiff, by failing to turn to the left or to the right, fail to exercise due care to avoid the collision?

Clearly, the evidence, even that offered by plaintiff, would support a jury finding that plaintiff was guilty of contributory negligence. Even so, although a borderline case, we are of opinion, and so decide, that the contributory negligence issue was for jury determination under appropriate instructions.

Having reached the conclusion the evidence required submission of the issues of negligence and contributory negligence, the judgment of involuntary nonsuit is reversed.

Reversed.

JUDITH BAUMANN CUSHING v. CHARLES CROWE CUSHING.

(Filed 16 December 1964.)

1. Process § 7—

A husband coming into this State to visit his child pursuant to a decree entered in the state of his residence is not immune to service of process in the wife's action for alimony without divorce instituted in this State, neither G.S. 8-68 nor G.S. 15-79 being applicable.

2. Same—

The fact that the wife has process served on her husband while he is at her home pursuant to a decree of another state authorizing him to have the custody of the child of the marriage for a specified time provided he return the child to the wife's home in this State by a specified hour on a particular date, is not fraud and will not warrant the court in setting aside the service on motion, since the husband was not induced to come into this State by any false representation or fraudulent promise.

3. Abatement and Revival § 3—

In order to be a proper basis for abatement, a prior action must be pending in a court of competent jurisdiction in this State, and when it appears that the prior action was pending in another state and also that it was

pending in an inferior court without jurisdiction of the action, the court properly refuses defendant's plea in abatement on both grounds.

4. Divorce and Alimony § 3—

Cruelty and indignities, like other matrimonial offenses, may be condoned, and while violation of the conditions of condonation revive the original offenses, the acts constituting and surrounding the breach of the conditions of forgiveness must be alleged with the same particularity required in stating the original matrimonial offenses.

5. Same—

While condonation is an affirmative offense and ordinarily must be alleged and proved by defendant, it is ground for demurrer when the complaint itself alleges cohabitation subsequent to the indignities relied on as the basis of the cause of action.

6. Divorce and Alimony § 16—

The complaint in an action for alimony without divorce on the ground that defendant offered such indignities to the person of plaintiff as to render her condition intolerable and her life burdensome, is demurrable when it appears upon the face of the complaint that plaintiff resumed cohabitation after a prior separation occasioned by the misconduct of defendant and fails to allege with sufficient particularity either the acts constituting the breach of condition of condonation or the acts of the husband occurring thereafter constituting the basis of a cause of action.

7. Divorce and Alimony § 22—

The court has jurisdiction to enter orders relating to the support and custody of the children of the marriage in an action for alimony without divorce under G.S. 50-16, notwithstanding the complaint as to the cause of action for such alimony is demurrable.

APPEAL by defendant from *Martin, S. J.*, March 26, 1964 Civil "A" Session of BUNCOMBE.

On November 1, 1963, under the provisions of G.S. 50-16 and G.S. 7-279(6), plaintiff instituted this action in the General County Court of Buncombe County against her husband, a resident of South Carolina. She asked for alimony and for custody and support of the minor child of the marriage. Defendant was personally served with summons in North Carolina on November 2, 1963. The chronology of pertinent events, before and after the institution of this action, follows:

Plaintiff and defendant were married on September 5, 1959. One child, a girl, was born to them on November 1, 1962. About the middle of March 1963, the parties moved their residence to Columbia, South Carolina. A few days afterwards plaintiff left defendant and went to Asheville to her parents, with whom the child had been staying while the parties were moving to Columbia. After a separation of two weeks, plaintiff, of her own accord, returned to defendant with the child. The

parties lived together until April 12, 1963, when they came to an "agreement that the marriage wasn't working." On that day, plaintiff and the child returned to Asheville, where they have since lived.

On October 14, 1963, plaintiff filed a petition in the County Court of Richland County, South Carolina, in which petition she alleged that she was a resident of North Carolina; that she was living separate and apart from defendant, her husband, at his insistence; that he was inadequately supporting her and their child. She prayed the court to require defendant to support them. Upon defendant's motion, the judge of the Richland County Court transferred the cause to the Juvenile-Domestic Relations Court of Lexington County, South Carolina. To plaintiff's petition defendant thereafter filed an answer, in which he alleged that plaintiff had deserted him without cause, but that, notwithstanding, he had been adequately providing for the child. On October 21, 1963, plaintiff and her attorney, together with defendant and his attorney, appeared before the judge of the Juvenile-Domestic Relations Court of Lexington County pursuant to a "rule to show cause and order," and the judge held a hearing. On November 1, 1963, the judge entered an order adjudging that plaintiff was entitled to support for herself and the minor child *pendente lite* and directing that defendant pay the sum of $150.00 monthly for that purpose until further order. He ordered, in addition, that defendant was "to have reasonable rights of visitation with his minor child" and specifically directed that on November 2, 1963, defendant should be allowed to take the child from the home of plaintiff between noon and 5:00 p.m.

On November 1, 1963, the same day the South Carolina order was entered, plaintiff instituted this action in the Buncombe General County Court. On November 2, 1963, in accordance with the South Carolina order, defendant came to Asheville to visit the child. When he returned the child to plaintiff at her father's house at 5:00 p.m., the sheriff "appeared from the place in which he had theretofore been concealing himself" and proceeded to serve him with summons, notice of motion, and complaint in this action. The complaint alleged, *inter alia,* that defendant had treated plaintiff "with disdain" and refused to talk to her; that he carried on a flirtation with and was unusually attentive to another woman; that he told plaintiff he no longer loved her; and that early in March 1963, defendant suggested to a common friend that he commit adultery with plaintiff so defendant could get a divorce immediately and thus solve his problems. Thereafter, defendant entered a special appearance and moved to quash the service upon him for that he was "exempt from service of the summons." This motion was denied on November 22, 1963. Defendant excepted and filed "answer and

plea in abatement." In the answer he denied that plaintiff had a cause of action against him as alleged in her complaint. He alleged, on the contrary, that plaintiff had abandoned him without reason because she preferred the home of her parents, "persons of wealth and means," to his more modest home and income. As a plea in abatement he set up the action pending in the Juvenile-Domestic Relations Court of Lexington County, South Carolina. On December 2nd, defendant filed an "amended motion on special appearance to set aside the return of summons" upon the ground that service had been obtained in a "fraudulent, deceitful, and deceptive manner."

On November 5, 1963, defendant's attorney advised the Juvenile-Domestic Relations Court of Lexington County by letter that defendant had been served with process on November 2nd in North Carolina. Plaintiff's counsel advised the South Carolina court, also by letter, that plaintiff would contest the jurisdiction of that court. Nevertheless, the Juvenile-Domestic Relations Court set the case down for hearing on the merits on November 13, 1963. At the appointed time, defendant and his attorney appeared, but plaintiff and her attorney did not. "Upon consideration of the record" the court directed defendant to pay $150.00 monthly *for the support of his minor child* until the further order of the court. The South Carolina order contains this further provision: "All questions as to custody status and the status of the marriage relationship are reserved until such time as the petitioner appears in this court."

On December 12, 1963, this cause came on to be heard before Honorable Burgin Pennell, judge of the Buncombe General County Court, upon plaintiff's motion for alimony *pendente lite,* custody, and support of the minor child. Judge Pennell, after hearing the testimony of the parties and of plaintiff's father, on December 19th entered an order in which he found that defendant had, as alleged and set forth in the complaint, offered such indignities to plaintiff as to render her life intolerable, all without any adequate provocation on her part; that plaintiff is the proper person to have the control and custody of the minor child. He awarded plaintiff, during the pendency of this action, exclusive custody and control of the child and ordered defendant to pay into the office of the Clerk of the Superior Court the sum of $42.50 a week for plaintiff's support and $17.50 a week for the support of the child. Defendant appealed to the Superior Court, assigning as error the failure of the judge to vacate the service of process and to sustain his plea in abatement, and the entry of judgment against him. The appeal was heard in the Superior Court on March 26, 1964, by Martin, S. J., who entered an order affirming the County Court in all respects and re-

manding the case to it for further proceedings. From this order defendant appeals here. In this Court defendant demurred *ore tenus* to the complaint for that plaintiff has failed to set out with particularity defendant's acts of cruelty and indignities upon which she bases her action and, further, for that she has not alleged such circumstances leading up to the acts complained of as to negative adequate provocation upon her part.

Lee & Allen for plaintiff.
Sanford W. Brown for defendant.

SHARP, J. The questions raised by this appeal are: (1) Was the service of summons and notice had upon defendant in North Carolina invalid? (2) Did the pendency of the South Carolina action between these parties for the same cause abate this action? (3) Should the demurrer *ore tenus* be sustained? These questions will be discussed and answered *seriatim*.

(1) Defendant was not immune from service of process when he came into North Carolina to see his child. He did not come into the State as a witness in obedience to a summons, G.S. 8-68; nor had he been brought into the State by extradition based on a criminal charge of nonsupport, G.S. 15-79.

With reference to service of process obtained by trickery or artifice, the rule is that if a person is induced by fraud to come within the jurisdiction of a court for the purpose of obtaining service of process on him, the service will be set aside upon timely motion. *Electric Co. v. Light Plant,* 185 N.C. 534, 118 S.E. 3; *accord., Wyman v. Newhouse,* 93 F. 2d 313 (2d Cir.), 115 A.L.R. 460, *cert. den.* 303 U.S. 664, 82 L. Ed. 1122, 58 S. Ct. 831; 14 Am. Jur., *Courts* § 185 (1938); 23 Am. Jur., *Fraud and Deceit* § 98 (1939); 42 Am. Jur., *Process* § 35 (1942).

It is patent that, in order to have him served with summons in this action, plaintiff took advantage of the South Carolina visitation order, which attracted defendant into North Carolina, but the record is untainted with evidence that she decoyed him into the State by any false representation or fraudulent promise. So far as the evidence reveals, she made *no* representation to him, either express or implied. The Juvenile-Domestic Relations Court — presumably at defendant's insistence — ordered plaintiff to permit him to take the child from her home from noon until 5:00 p.m. on November 2, 1963. She complied with the order of the court — and arranged to have the sheriff waiting. The service of a writ, otherwise lawful, does not become unlawful because the desire to effect service was the sole motive for lawful acts tending to

create the opportunity. *Jaster v. Currie,* 198 U.S. 144, 49 L. Ed. 988, 25 S. Ct. 614; 42 Am. Jur., *Process* § 36 (1942). The first question is answered in the negative.

If the manner in which plaintiff secured service upon defendant in this case seems unsporting, perhaps it will appear less so when we note that the Juvenile-Domestic Relations Court of Lexington County had no jurisdiction to award plaintiff either alimony or support for the child. Its judgment was unenforceable. Therefore, in instituting this action in a court of competent jurisdiction, she was not forum-shopping.

(2) The South Carolina court involved is an inferior court of very limited jurisdiction. On March 12, 1963, the Supreme Court of South Carolina in *McCullough v. McCullough,* 242 S.C. 108, 130 S.E. 2d 77, held that the Juvenile and Domestic Relations Court of Lexington County was without jurisdiction in an action instituted by a wife against her husband, on the grounds of desertion, for support for herself and two minor children. The court raised the question of jurisdiction *ex mero motu* when the husband appealed from an order changing the amount of support which he had initially been directed to pay. The court said:

> We have searched the statute which creates and empowers this court and fail to find anything therein which would vest jurisdiction of the subject matter of this action in that court. The only section of the statute which even mentions "support proceedings" is Section 15-1311.8. . . .

CODE OF S. C. (1962) § 15-1311.8 has to do with adoption proceedings and proceedings under the Uniform Reciprocal Enforcement of Support Act.

Furthermore, at no time since April 12, 1963, has the minor child of the parties been in the State of South Carolina. "Any action as it relates to the custody of a child is in the nature of an *in rem* proceeding, and the child must be present in the State and within the jurisdiction of a court of competent jurisdiction before such court may render a valid decree awarding its custody." Denny, J. (now C. J.), in *Richter v. Harmon,* 243 N.C. 373, 377, 90 S.E. 2d 744, 747; *accord, Hoskins v. Currin,* 242 N.C. 432, 88 S.E. 2d 228; *Coble v. Coble,* 229 N.C. 81, 47 S.E. 2d 798.

Where another action pending between the same parties for the same cause is made the basis of a plea in abatement, the former action must be pending (a) *in a court of competent jurisdiction* and (b) *within this State,* in order to bar the second action. *McDowell v. Blythe Brothers Co.,* 236 N.C. 396, 72 S.E. 2d 860; 1 MCINTOSH, NORTH CAROLINA

PRACTICE AND PROCEDURE, § 1236(4) (1956 ed.). There are two reasons, therefore, why defendant's plea in abatement cannot be sustained. The second question is likewise answered in the negative.

(3) The allegations of the complaint are insufficient to support any award of alimony to plaintiff, and the demurrer *ore tenus* must be sustained with respect thereto. Plaintiff has based her action for alimony without divorce upon the indignities section of G.S. 50-7, which G.S. 50-16 incorporates. She is required, therefore, not only to set out with particularity those of her husband's acts which she contends constituted such indignities as to render her condition intolerable and her life burdensome but also to show that those acts were without adequate provocation on her part. *Ollis v. Ollis,* 241 N.C. 709, 86 S.E. 2d 420; *Pollard v. Pollard,* 221 N.C. 46, 19 S.E. 2d 1; 2 LEE, NORTH CAROLINA FAMILY LAW § 141 (3d ed., 1963). Whether the benefits the courts derive from this exacting rule exceed the burdens it imposes upon both court and pleader is debatable. Too often it so distends pleadings that they strain both patience and belief, yet it is a rule so very old that the years have barnacled it in numberless cases upon our practice. *White v. White,* 84 N.C. 340; *Harrison v. Harrison,* 29 N.C. 484.

Although Pennell, J., was *arguendo,* correct in holding plaintiff to have alleged sufficiently a cause of action based on indignities committed by defendant prior to March 15, 1963, *Coble v. Coble,* 55 N.C. 392, 395, yet the complaint avers that after a separation of two weeks, plaintiff returned to defendant and lived with him until April 12, 1963. Cruelty and indignities, like other matrimonial offenses, may be condoned. *Gordan v. Gordon,* 88 N.C. 45; *accord., Lady D'Aguilar v. Baron D'Aguilar,* 1 Hagg. Ecc. 773, 162 Eng. Rep. 748 (Ecc. Adm. P. & D. 1794); 1 Lee, *op. cit. supra* §§ 82, 87. Nothing else appearing, the resumption of marital relations after a separation imports a condonation of previous offenses. Annot., Condonation of cruel treatment as defense to action for divorce or separation, 32 A.L.R. 2d 107, 133 (1959). Condonation, of course, is forgiveness upon condition; and, if the condition is violated, the original offense is revived. *Gordon v. Gordon, supra; accord., Lady D'Aguilar v. Baron D'Aguilar, supra.* To establish a breach of condition and revival of former offenses after she returned to defendant, plaintiff alleges:

> (A)lmost immediately the same situation as hereinbefore alleged and set forth became evident again and . . . during this period when both the plaintiff and defendant had pledged themselves to attempt a reconciliation, the said defendant treated this plaintiff with cold and disdainful indifference, never according her any love

or affection, and never at any time permitting her to be anything more than a domestic servant in the household. . . .

Since these allegations neither particularize defendant's alleged acts of misconduct nor attempt to describe plaintiff's preceding behavior, they are not enough to revive the old grounds for relief, even though less may be sufficient to destroy condonation than to found an original suit. *Lady D'Aguilar v. Baron D'Aguilar, supra* at 781, 162 Eng. Rep. at 753.

Ordinarily, condonation is an affirmative defense to be alleged and proved by the party relying upon it. *Blakely v. Blakely,* 186 N.C. 351, 119 S.E. 485. Unless allegations of condonation "affirmatively appear from the complaint, the complaint need not allege that complainant has not condoned . . . the misconduct complained of. . . ." 27A C.J.S., *Divorce* § 109 (1959). Where, however, as here, the complaint alleges cohabitation subsequent to the indignities relied upon, it must, in order to survive a demurrer, allege, as well, with the same particularity required in the first instance, the acts constituting and surrounding the breach of forgiveness. The complaint, touching upon plaintiff's claim for alimony, is therefore demurrable for condonation appearing upon its face, revival of the original cause not also sufficiently there appearing. *Brooks v. Brooks,* 226 N.C. 280, 285, 37 S.E. 2d 909, 912.

By specific provisions in the statute, in an action instituted by the wife under G.S. 50-16, the court may enter orders relating to the support and custody of the children of the marriage irrespective of the rights of the wife and husband between themselves in such proceeding. Accordingly, the judgment of the Superior Court, affirming the order of the Buncombe General County Court, is affirmed insofar as it pertains to the support and custody of the minor child of the parties, but is reversed insofar as it awards alimony.

Affirmed in part;

Reversed in part.

FIRST UNION NATIONAL BANK OF NORTH CAROLINA AND J. E. BROYHILL, TRUSTEES UNDER THE WILL OF T. H. BROYHILL, DECEASED v. R. T. BROYHILL, OTIS L. BROYHILL, ETHEL BROYHILL STEVENS, LILLIE BROYHILL BLACKWELDER, PATRICIA BROYHILL HUDSON, VIRGINIA BROYHILL COBB, LINDA BROYHILL HOGAN, ROBERT J. STEVENS, JR., THOMAS H. STEVENS, CHARLES E. STEVENS, MARY BLACKWELDER, BARBARA ANN BLACKWELDER, THOMAS H. BROYHILL, II, OTIS L. BROYHILL, JR., MINOR, DELL M. BROYHILL, MINOR, WILLIAM T. BROYHILL, MINOR, AND ALL OTHER PERSONS WHOSE NAMES ARE UNKNOWN, IN BEING OR WHO MAY BE IN BEING, INCLUDING UNBORN GRANDCHILDREN OF T. H. BROYHILL, DECEASED, WHO HAVE OR MAY HAVE ANY INTEREST IN THE ESTATE OF T. H. BROYHILL, DECEASED.

(Filed 16 December 1964.)

1. Trusts § 6—

A trustee does not have power to sell property of the trust estate unless he is authorized to do so by the trust instrument, either expressly or by implication from language necessarily requiring the exercise of such power to accomplish the purpose of the trust or to the discharge of powers or duties expressly conferred upon the trustee.

2. Wills § 27—

The intention of the testator as gathered from the entire instrument is the primary object in interpreting a will, and must be given effect unless contrary to some rule of law or at variance with public policy.

3. Trusts § 6— Power of trustees to sell will not be inferred from mere convenience or ease of administration.

The will in question conferred upon the executor power to sell property of the estate for specified purposes but conferred no specific power in the trustees of the trust set up in the instrument to sell the assets of the trust or to reinvest them. The trust directed the trustees to divide the assets of the trust equally among the beneficiaries in kind as well as in value, with limited power to invade the *corpus*. *Held:* The will does not confer upon the trustees by implication power to sell the land, the mere fact that part of the realty brought no income and that division of the estate would be easier and the administration of the trust more convenient if the trustees had the power of sale being insufficient for this purpose.

APPEAL by plaintiffs from *Huskins, J.*, March 1964 Session of CALDWELL.

Action, pursuant to the Declaratory Judgment Act, G.S. 1-253, for construction of a will with respect to trustees' alleged power of sale of real estate.

T. H. Broyhill, late of Caldwell County, died 19 November 1955. His will, dated 31 October 1955, was admitted to probate 25 November 1955. He was survived by widow, four children and twelve grandchildren.

Item VII of the will creates a trust, the pertinent portions of which are as follows (some parts summarized):

"I give, devise and bequeath all of the residue and remainder of my property, both real and personal . . . to my brother, J. E. Broyhill, and the Union National Bank of Lenoir, North Carolina (predecessor of First Union National Bank of North Carolina), as co-trustees, to be held and administered by said trustees for the following uses and purposes:

"(a) The trustees shall divide said trust assets into four equal shares and trusts and in making such division, the trustees shall divide said assets equally among said four shares in kind as well as in value in so far as is practicable. One of said four equal shares shall be held for each of my children (naming them — all survived the testator and all are now living) . . . Each of said four equal shares of the trust assets shall be held, administered and treated by the trustees as a separate, distinct and independent trust . . .

"(b) Each of my said four children shall receive the entire net income earned by his or her share or trust for and during the natural life of each such child. . . . In addition . . . the trustees, in their exclusive discretion, have the power to invade and pay out of the principal of each child's trust from the assets of such child's trust such amount or amounts as may be necessary to provide each such child with sufficient funds to provide for said child's reasonable maintenance and support and the health of each such child, provided, however, that said trustees shall take into consideration other resources which each such child shall have available to him or her and the income therefrom before invading the principal of the child's trust . . ." (The power to invade the principal is limited to $5000 or 5% of the principal — whichever is larger — in any one year.)

"(d) Upon the death of each of my said four children the trustees shall continue to hold and administer the trust established herein for each said deceased child for the issue of said deceased child on a *per stirpes* basis. . . ." (Income is to be accumulated. Trustees may disburse to grandchildren who are minors such amounts as may be necessary for proper maintenance, support, health and education. Accumulated income to be paid to grandchild at age 21, and distribution of the trust fund ⅓ at age 25, ½ of balance at age 30, and remainder at age 35).

The trustees promptly qualified and entered upon their duties. Property of the value of $1,183,812.64 (value for estate tax purposes) came into the hands of the trustees — $545,842.11 personal property, $597,725.52 real estate. The property was divided and four trusts created. According to 1958 inventories, each trust had property of the value of $295,953.16 — $146,521.78 personal property, $149,431.38 real estate. (Real estate was not actually divided; an undivided share in each tract was assigned to each trust.) According to the 1958 inventories the personal property in each trust consists of $9,870.22 cash, one-fourth interest in a promissory note of $764.13, and common stocks. The real estate consists of a one-eighth undivided interest in an office building, and interests in commercial and industrial sites, residential building lots, land on which a golf course is located, and mountain timber lands. There are 29 tracts. The annual income from all real estate is about $11,655; some of the real estate does not produce income.

Testator, prior to his death, made 8 sales of real estate in each of the years 1953, 1954 and 1955. The trustees have made 9 sales of real estate, with court approval, since testator's death. The remaining tracts are not individually susceptible of equitable partition because of the number of parties interested and the nature of the property, but the tracts could be allotted to claimants so as to make reasonably equal shares as to value.

Plaintiffs construe the provisions of the will as indicating an intention on the part of the testator that they, the trustees, have power and authority to sell and convey real estate without the necessity of court proceedings, supervision and approval. Defendants, children and grandchildren of testator, take a contrary view. Jury trial was waived, and the cause was submitted to the judge on the pleadings, stipulations, and documentary and parol evidence. It was adjudged that the "Trustees . . . have no power and authority, express or implied in said will, to sell the assets of the trust." Plaintiffs appeal.

Kennedy, Covington, Lobdell & Hickman; Clarence W. Walker; and Marshall E. Cline for plaintiffs.

Fate J. Beal for defendants Mary Caroline Blackwelder and Barbara Ann Blackwelder.

W. T. Carpenter, Jr., Guardian ad Litem.

MOORE, J. This will confers upon the trustees no express power of sale. This the plaintiffs concede. The question is whether such power is conferred by implication.

Applicable principles are succinctly stated in *Hall v. Wardwell*, 228 N.C. 562, 46 S.E. 2d 556, as follows:

"In the absence of authority conferred by the will, . . . a trustee under a testamentary trust has no authority to convey the fee in the land devised. But the power to convey need not be expressly conferred. It may be implied from the context of the will. 54 A.J., 349. It is purely a question of testamentary intent. *Tippett v. Tippett*, 7 A. (2d), 612; 3 Bogert, Trusts and Trustees, pt. 2,558.

"The implication may result from language necessarily requiring the exercise of the power, from the statement of purposes, or the conferring of other powers or duties to which the power of sale is essential. 54 A.J., 349."

Trustees assert that power of sale is implied in the instant case from the purposes of the trusts and the duties imposed on them as trustees, and they call attention to the following facts and the inferences they draw therefrom. Testator knew that a large part of the real estate produced no income. He bequeathed to his children, the primary objects of his bounty, income from the trust estate. He intended that property producing no income be sold and invested to the end that his children enjoy maximum income benefits. Authority is conferred to invade the *corpus* of the trust to meet the unanticipated needs of the children if income proves insufficient; this presupposes liquid assets readily available for distribution. There is only a small amount of cash, and less than half of the trust estate consists of stocks. At testator's death his youngest child was 43 years of age, his youngest grandchild 10. He knew that distributions of the trust assets must of necessity soon be made to the grandchildren. These assets will be distributed to twelve or more persons; each person might receive distributions at four different times under the terms of the trust; and distributions to the different beneficiaries will be made at different times because of the difference in their ages. Division and distribution of the land in kind is impractical. Sales pursuant to judicial proceedings are expensive, slow and difficult.

If the trustees had power of sale, to be exercised in accordance with their discretion, the administration of the trust would unquestionably be easier. But the matters of ease and simplicity of administration are not controlling on this appeal. Nor is our problem whether the real estate, or any portions thereof, may be sold. Courts of equity have general, inherent, exclusive supervisory jurisdiction over trusts and the administration thereof, and may authorize whatever is necessary to be done, including sales of land, to preserve a trust, effectuate its pur-

poses and protect the interests of the beneficiaries. *Trust Co. v. Rasberry,* 226 N.C. 586, 39 S.E. 2d 601.

The question for determination is: Did testator intend to confer upon the trustees power of sale? "The intention of the testator as gathered from the entire instrument is the primary object in interpreting a will, and must be given effect unless contrary to some rule of law or at variance with public policy . . ." 4 Strong: N. C. Index, Wills, § 27, pp. 502-3, and cases cited therein.

From the inventory of the trust estate it is obvious that testator was successful in business and had wide experience in matters of property and investments. It is quite apparent that his will was drafted by a competent and skilled attorney. Testator was not inadvertent to the value and use of powers of sale. In Item V of the will he authorized and empowered the executors to sell the Mayview Manor property and gave explicit directions. Item IX conferred upon the executors the power "to sell all or any part of any property . . . , including real estate, at public or private sale for cash or on credit and on such terms and conditions as may seem expedient to them," for specified purposes. Yet, he conferred upon the trustees no power of sale, but provided that the trustees "divide said assets equally among the four shares *in kind* as well as in value." Power to invade the *corpus* is strictly limited. There is no direction that the trustees invest and reinvest the assets of the trust estate as was the case in *Hall v. Wardwell, supra; Bank v. Edwards,* 193 N.C. 118, 136 S.E. 342; *Powell v. Woodcock,* 149 N.C. 235, 62 S.E. 1071; *Foil v. Newsome,* 138 N.C. 115, 50 S.E. 597. The trustees are not given broad discretion with respect to the purposes of the trust and the invasion of the *corpus* as in *Hall v. Wardwell, supra; Dillon v. Cotton Mills,* 187 N.C. 812, 123 S.E. 89; *Ripley v. Armstrong,* 159 N.C. 158, 74 S.E. 961. The instant case is more nearly in accord with *Morris v. Morris,* 246 N.C. 314, 98 S.E. 2d 298; *Brinn v. Brinn,* 213 N.C. 282, 195 S.E. 793; *Jarrell v. Dyer,* 170 N.C. 177, 86 S.E. 1031; *Crudup v. Holding,* 118 N.C. 222, 24 S.E. 7. In our opinion no power of sale was conferred, expressly or by implication, upon the trustees by the will of T. H. Broyhill.

Affirmed.

SHERMAN WILSON AND WIFE, EARLINE WILSON v. T. C. HOYLE, JR., TRUSTEE, CAMERON-BROWN COMPANY, A. N. McCOY, AND WIFE, ERNESTINE McCOY, AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION, AND J. KENNETH LEE, TRUSTEE.

(Filed 16 December 1964.)

1. Judgments § 38; Pleadings § 8.1—

The court has discretionary power to determine a plea of *res judicata* prior to trial on the merits.

2. Judgments § 38; Pleadings § 30—

Judgment of dismissal entered upon consideration of the pleadings in the action, the judgment roll in a prior action, and stipulations as to identity of the parties and of subject matter, is not a judgment on the pleadings but a determination of the plea of *res judicata.*

3. Judgments § 30—

Judgment in a prior action between the parties attacking the validity of a deed of trust and the foreclosure thereof and adjudicating that the purchaser at the foreclosure obtained good title *held* to bar a subsequent action between the parties attacking the foreclosure on the ground that the signatures to the deed of trust were forgeries, even though the question of forgery was not raised in the prior action, since such question was within the scope of the pleadings in the prior action and one which the parties in the exercise of reasonable diligence could and should have brought forward.

APPEAL by plaintiffs from *Gamble, J.*, March 4, 1964, Civil Session of ROCKINGHAM.

Action instituted March 4, 1963, to remove a cloud from title to a tract of land in Reidsville and Williamsburg Townships, Rockingham County, particularly described in the complaint and referred to hereafter as the subject lands. After the particular description, the complaint describes the subject lands as being "the same lands conveyed to plaintiffs herein by deed from W. C. Falkener, *et ux,* Margaret Falkener, dated February 2, 1961, and recorded in Book 562, at page 619," Rockingham County Registry.

Plaintiffs alleged they owned the subject lands in fee simple but do not have possession thereof; that defendants McCoy claim an estate or interest therein adverse to plaintiffs; and that "said alleged claim of the defendants" is based solely on the following: ". . . defendants McCoy have obtained their purported title to said lands by and through *mesne* conveyances based upon a purported foreclosure of a certain alleged Deed of Trust recorded in Book 526 at page 121 in the Office of the Register of Deeds of Rockingham County, that this purported Deed of Trust bearing the date of August 10, 1958 purports to be a conveyance from plaintiffs herein to T. C. Hoyle, Jr., Trustee, for

Cameron-Brown Company; that this document was not signed or executed by the plaintiffs herein but that their purported signatures were affixed to said document by a person or persons unknown."

Plaintiffs alleged the subject lands were conveyed (by recorded deed) to defendants McCoy by J. Kenneth Lee, Trustee, and that defendants McCoy executed a (recorded) deed of trust on October 27, 1962, to J. Kenneth Lee, Trustee, for the American Federal Savings & Loan Association. (Note: The complaint gives no additional particulars as to either of these instruments.)

After alleging there is a forged instrument in the chain of title of defendants McCoy, to wit, the alleged purported deed of trust recorded in Book 526, page 121, said Registry, plaintiffs alleged: "That defendants McCoy have obtained a purported Judgment granting them title to and possession of the described premises, confirming a purported foreclosure of a Deed of Trust in the chain of title; that these plaintiffs have made no conveyance, valid or otherwise of their property and are therefore entitled to the possession and enjoyment of same."

Defendants McCoy, the only defendants served or attempted to be served with process, answered as follows:

Defendants McCoy asserted their ownership in fee simple of the subject lands:

(1) By purchase from J. Kenneth Lee, Trustee, pursuant to foreclosure of deed of trust recorded February 7, 1961, in Book 564, page 271, said Registry, executed by W. C. Falkener and wife, Margaret E. Falkener, as security for a debt of $6,000.00 to American Federal Savings & Loan Association.

(2) Under judgment entered November 26, 1962, in Rockingham Superior Court, in an action instituted January 29, 1962, by the plaintiffs herein against defendants McCoy and others entitled, *Sherman Wilson and wife, Earline Wilson v. A. N. McCoy and wife, Ernestine McCoy; American Federal Savings & Loan Association and J. Kenneth Lee, Trustee.*" They attached to their answer herein documents they alleged to be copies of judgments entered in said prior action. They alleged said judgments constituted *res judicata* and a bar to the present action.

The cause came on for hearing on the plea of *res judicata* asserted by defendants McCoy.

The judgment entered by Judge Gambill, after describing the subject lands and summarizing the pleadings herein, recites that "the

question of title to the real estate was put in issue" in said prior action, entitled as above, and continues and concludes as follows:

". . . and that judgment was rendered by Honorable Walter E. Crissman, Judge Presiding at the November Civil Term of Court, 1962, in which the Court entered as part of its judgment, 'That the foreclosure of the property described in this proceeding and described in paragraph #2 of the complaint foreclosing the Deed of Trust in Deed Book 567, page 271 in the Office of the Register of Deeds of Rockingham County, and which was a Deed of Trust on the land in question from W. C. Falkener, *et al,* to J. Kenneth Lee, Trustee, was valid in all respects and that the deed from J. Kenneth Lee, Trustee, to A. N. McCoy, conveyed complete and legal title to said property to A. N. McCoy and that plaintiffs, Sherman Wilson and wife, Earline Wilson, owned no interest in said property,' that said judgment was recorded in the office of the Clerk of Superior Court of Rockingham County and is a final judgment; that plaintiffs, by and through their attorney, Stedman Hines of the law firm of Hines, Dettor & Strange, Attorneys of record, stipulated that the plaintiffs, Sherman Wilson and wife, Earline Wilson, and A. N. McCoy and wife, Ernestine McCoy are the identical plaintiffs and two of the identical defendants in the case now pending and which is the subject of this controversy as in the case which Judge Walter Crissman entered judgment at the November Civil Term of Court for 1962, and that the land in controversy as described above in this judgment and in this pending legal action is the same land in controversy in the previous legal action entitled *'Sherman Wilson and wife, Georgia Earline Wilson v. A. N. McCoy and wife, Ernestine McCoy; American Federal Savings & Loan Association and J. Kenneth Lee, Trustee';* that the Court finds as a fact from the stipulations of the parties and from the judgment dated November 26, 1962, of Judge Walter E. Crissman that title to the real estate was put in issue and that the defendants, A. N. McCoy and wife, Ernestine McCoy, have been adjudicated the owners in fee simple of said land described above and that the plaintiffs are estopped from attacking the title of the defendants, A. N. McCoy and wife, Ernestine McCoy, in the above described lands;

"It is therefore, ORDERED, ADJUDGED AND DECREED that the plaintiffs, Sherman Wilson and wife, Earline Wilson, are hereby estopped from asserting title to the land described above in this Judgment as against the defendants, A. N. McCoy and wife, Ernestine Mc-

Coy, and that the defendants, A. N. McCoy and wife, Ernestine McCoy, are hereby declared owners in fee simple of land described in this Judgment; that the costs be taxed against the plaintiffs."

Plaintiffs excepted "(t)o the signing of the foregoing judgment" and appealed. Based thereon, plaintiffs' sole assignment of error is that "(t)he Court erred in signing the Judgment because it is erroneous in law."

Hines & Dettor for plaintiff appellants.
Bethea, Robinson & Moore for defendant appellees.

BOBBITT, J. It was appropriate for Judge Gambill, in the exercise of his discretion, to determine the plea of *res judicata,* a plea in bar, prior to trial on the merits of plaintiffs' alleged cause of action. *Jones v. Mathis,* 254 N.C. 421, 425, 119 S.E. 2d 200, and cases cited.

In our view, the record does not support plaintiffs' contention that Judge Gambill entered judgment on the pleadings. The stipulations referred to in the judgment established the identity of parties and of subject matter in the two actions. The judgment refers to and quotes from Judge Crissman's judgment in the prior action. It contains a finding of fact that Judge Crissman's said judgment resolved the issue of title raised in the prior action by adjudicating defendants McCoy to be the owners in fee simple of the subject lands. Plaintiffs did not except to any recital, stipulation or finding of fact set forth in Judge Gambill's judgment. It is manifest the hearing before Judge Gambill was on the pleadings herein, the judgment roll in the prior action and the stipulations as to identity of parties and subject matter.

Judge Crissman's judgment of November 26, 1962, in the record before us, discloses that the cause of action alleged by plaintiffs in the prior action was an attack on the deed of trust recorded in Book 564, page 271, said Registry, executed by W. C. Falkener and wife, Margaret E. Falkener, and on the regularity of the foreclosure thereof by J. Kenneth Lee, Trustee; and that defendants McCoy asserted title and right to possession under deed executed and delivered by J. Kenneth Lee, Trustee, to A. N. McCoy pursuant to said foreclosure. Judge Crissman adjudged the validity of said deed of trust to J. Kenneth Lee, Trustee, and the validity of the foreclosure thereof, "and that the deed from J. Kenneth Lee, Trustee, to A. N. McCoy conveyed complete and legal title to said property to A. N. McCoy and that the plaintiffs Sherman Wilson and wife, Georgia Earline Wilson, own no interest in said property." (Note: Subsequently, the subject lands were conveyed by deed dated November 29, 1961, recorded in Book 576,

page 84, said Registry, executed and delivered by A. N. McCoy to A. N. McCoy and wife, Ernestine B. McCoy.) It was also ordered that the Sheriff of Rockingham County immediately eject plaintiffs from the subject lands and put defendants McCoy in possession thereof. It was also ordered that "the matter of determining what damages, if any, the defendants, A. N. McCoy and wife, Ernestine McCoy are entitled to receive from the plaintiffs is hereby continued to the next term of civil court of Rockingham County." (Note: According to their answer, defendants McCoy, at March 1963 Regular Civil Session in said prior action, were awarded judgment against plaintiffs for damages in the amount of $590.00 for the period plaintiffs were in wrongful possession of the subject lands.)

Plaintiffs did not appeal from the adverse judgment(s) in said prior action.

Plaintiffs' brief contains this statement: "Examination of the first action, judgment therein appearing on R. p. 12, would have shown that such judgment was based solely on alleged invalidities in foreclosure proceedings and that the theory of forgery of the Deed of Trust to be foreclosed was not raised."

Plaintiffs contend their present action is not barred because they are attacking ownership of the subject lands by defendants McCoy on different grounds from those they asserted in said prior action. The contention is without merit. While plaintiffs' allegations herein concerning an instrument alleged to be a forgery are vague, the instrument is alleged to be a deed of trust bearing date of August 10, 1958, purportedly executed by plaintiffs. Grounds, if any, for attack on the title of defendants McCoy on account of any matters relating to such a deed of trust existed and were available to plaintiffs when the prior action was instituted and adjudicated.

A final judgment, which adjudicates upon the merits the issues raised by the pleadings, "estops the parties and their privies as to all issuable matters contained in the pleadings, including all material and relevant matters within the scope of the pleadings, which the parties, in the exercise of reasonable diligence, could and should have brought forward." *Bruton v. Light Co.*, 217 N.C. 1, 7, 6 S.E. 2d 822, and cases cited; *King v. Neese*, 233 N.C. 132, 136, 63 S.E. 2d 123, and cases cited; *Hayes v. Ricard*, 251 N.C. 485, 494, 112 S.E. 2d 123; *Bowen v. Murphrey*, 256 N.C. 681, 683, 124 S.E. 2d 882.

In the prior action, the ultimate issue was whether plaintiffs or defendants McCoy were owners in fee simple of the subject lands. A final judgment adverse to plaintiffs was entered. Such judgment is *res judicata* and constitutes a bar to the present action.

Affirmed.

CHARCOAL STEAK HOUSE OF CHARLOTTE, INC. v. LAWRENCE STALEY.

(Filed 16 December 1964.)

1. Trademarks and Tradenames—

Generic words and phrases are *publici juris* and may not be monopolized.

2. Unfair Competition—

If generic words or descriptive terms are used for so long or so exclusively by a particular business as to connote the business in the public mind, the use of such words by another business may be restrained as constituting unfair competition when, under the circumstances, their use tends to confuse the public and amounts to the selling of goods by one person as the goods of another, but, even so, another may use such words when he adds thereto his own name or other words creating a dissimilarity sufficient to preclude confusion in the public mind.

3. Same—

Plaintiff operated a restaurant under the name "Charcoal Steak House." Thereafter defendant instituted a business under the name of "Staley's Charcoal Steak House" with the word "Staley's" in letters larger than those of the rest of the tradename. *Held:* Defendant's tradename was sufficiently dissimilar to obviate public confusion, and, there being no evidence of bad faith or any attempt on defendant's part to deceive, either in his business sign or the location of the business, plaintiff is not entitled to enjoin the use by defendant of the tradename.

APPEAL by plaintiff from *Farthing, J.*, May 18, 1964 Schedule "A" Civil Session of MECKLENBURG.

In this action plaintiff seeks permanently to enjoin defendant from using the name Charcoal Steak House in Mecklenburg County and to have the court decree that plaintiff is entitled to the use of that name in that area, to the exclusion of defendant.

Plaintiff alleges that since November 11, 1955, it has operated in Charlotte an "elite restaurant" under the name Charcoal Steak House; that, as a result of advertising and public-relations promotion, it has created "a conscious connection in the public mind between the name Charcoal Steak House" and plaintiff's place of business; that on February 13, 1964, defendant erected upon a location four blocks from plaintiff's restaurant a sign reading "Coming Soon Staley's Charcoal Steak House"; that defendant seeks to take advantage of plaintiff's advertising, name, and reputation; that the name and the location chosen by defendant for his place of business in Charlotte will confuse the public; and that it will cause plaintiff irreparable damage "in both business and reputation." Answering, defendant alleges that for many years he has operated a steak house in Winston-Salem, under the

name Staley's Charcoal Steak House; that in his advertising he gives more prominence to the name Staley's than to the other three words in the name of his restaurant; that the name Charcoal Steak House is merely descriptive of the establishment, and Staley's identifies it. He prays that plaintiff's action be dismissed.

Plaintiff's evidence offered at the trial on the merits tends to show these facts: In 1955, it incorporated under the name Charcoal Steak House of Charlotte, North Carolina, and opened a restaurant at 1800 Morehead Street, Charlotte, where it erected a sign calling its place of business "Charcoal Steak House." It was not the first steak house in Charlotte; the Ranch House and the Steak House were in business there already. At the present time six restaurants in Charlotte have the words *steak house, house of steaks,* or *charcoal* in their trade names. In 1961, after plaintiff had been in business for six years, it added to its sign the word *Swain's* in smaller lettering. This sign, plaintiff's only one, has a white background with black lettering. Mr. Elbert Swain owns a controlling interest in plaintiff corporation. He controls, also, Swain's Charcoal Steak House in Raleigh; in Greensboro; in Columbia, South Carolina; and in Jacksonville, Florida. Throughout North Carolina there are a number of restaurants using the phrase *steak house* in their respective business names.

On February 13, 1964, defendant erected at a location approximately four blocks from plaintiff's place of business, at or near the intersection of Wilkinson Boulevard and West Morehead Street, a sign proclaiming "Coming Soon Staley's Charcoal Steak House." The sign has a solid black background with gold lettering, and the lettering in the word *Staley's* is larger than that in the other five words.

To show the efforts it has made since its incorporation to make the words *charcoal steak house* synonymous in the public mind with its place of business, plaintiff offered in evidence forty-one exhibits. Thirty-two of these show the words *charcoal steak house* to have been used exclusively in its advertising, promotion, correspondence, and business relationship with its customers, suppliers, and others. Nine exhibits show the word *Swain's* to have been used in conjunction with the words *charcoal steak house,* with *Swain's* being in print smaller than that of the predominating words *charcoal steak house.* At the close of plaintiff's evidence, defendant's motion for judgment as of nonsuit was allowed, and plaintiff appeals.

Plumides and Plumides and Richard L. Kennedy for plaintiff.
Fleming, Robinson & Bradshaw for defendant.

SHARP, J. This appeal presents only one question: Taking all the evidence as true, does it entitle plaintiff to an injunction restraining defendant from using the words *charcoal steak house* in his business name?

We are concerned here with a trade name. "Whether the name of a (business) . . . is to be regarded as a trade-mark, a trade name, or both, is not entirely clear under the decisions. To some extent the two terms overlap, but there is a difference more or less definitely recognized, which is, that, generally speaking, the former is applicable to the vendible commodity to which it is affixed, the latter to a business and its good will." *American Foundries v. Robertson,* 269 U.S. 372, 380, 70 L. Ed. 317, 321, 46 S. Ct. 160, 162. At common law generic, or generally descriptive, words and phrases, as well as geographic designations, may not be appropriated by any business enterprise either as a tradename or as a trademark. Such words are the common property and heritage of all who speak the English language; they are *publici juris.* If the words reasonably indicate and describe the business or the article to which they are applied, they may not be monopolized. *Union Oyster House v. Hi Ho Oyster House,* 316 Mass. 543, 55 N.E. 2d 942; AMDUR, TRADE-MARK LAW AND PRACTICE 112 (1st ed. 1948); 52 Am. Jur., *Trademarks, Tradenames, and Trade Practices* §§ 57, 60 (1944); 87 C.J.S., *Trade-marks, Trade-names and Unfair Competition* §§ 33, 34 (1954); Annot., Protection of descriptive word or phrase as trademark or on the ground of unfair competition, L.R.A. 1918A, 961.

Notwithstanding this rule, equity will always protect a business from unfair competition and the public from imposition. *Cab Co. v. Creasman,* 185 N.C. 551, 117 S.E. 787. Unfair competition amounts to this: "One person has no right to sell goods as the goods of another, nor to do other business as the business of another, and on proper showing (one) will be restrained from so doing." *Dyment v. Lewis,* 144 Iowa 509, 513, 123 N.W. 244, 245, 26 L.R.A. (N.S.) 73, 79.

Although a generic word or a geographic designation cannot become an arbitrary trademark, it may nevertheless be used deceptively by a newcomer to the field so as to amount to unfair competition, *Cleveland Opera Co. v. Cleveland Civic Opera Ass'n.,* 22 Ohio App. 400, 154 N.E. 352, and the prohibition against any right to the exclusive use of such a word or designation has been modified by the "secondary meaning" doctrine. This was fashioned to protect the public from deception, *Surf Club v. Tatem Surf Club,* 151 Fla. 406, 10 So. 2d 554, and is but one facet of the law of unfair competition.

When a particular business has used words *publici juris* for so long or so exclusively or when it has promoted its product to such an extent

that the words do not register their literal meaning on the public mind but are instantly associated with one enterprise, such words have attained a secondary meaning. This is to say, a secondary meaning exists when, in addition to their literal, or dictionary, meaning, words connote to the public a product *from a unique source.* It has been suggested, however, that when a descriptive word or phrase has come to mean a particular *entrepreneur,* the term *secondary meaning* is inaccurate because, in the field in which the phrase has acquired its new meaning, its so-called secondary meaning has become its primary, or natural, meaning. *G. & C. Merriam Co. v. Saalfield,* 198 F. 369 (6th Cir.).

The law will afford protection against the tortious appropriation of tradenames and trademarks alike. *American Foundries v. Robertson, supra* at 380, 70 L. Ed. at 321, 46 S. Ct. at 162. To establish a secondary meaning for either, a plaintiff must show that it has come to stand for his business in the public mind, that is, "that the primary significance of the term in the minds of the consuming public is not the product but the producer." *Kellogg Co. v. Nat. Biscuit Co.,* 305 U.S. 111, 118, 83 L. Ed. 73, 78, 59 S. Ct. 109, 113. But even though generic, or descriptive, words, when used alone, have come to have a secondary meaning, "a competitor may nevertheless use them if he accompanies their use with something which will adequately show that the first person or his product is not meant." *Union Oyster House v. Hi Ho Oyster House, supra* at 544, 55 N.E. 2d at 943. For a full discussion of the legal principles and the collected cases, see Annot., Doctrine of secondary meaning in the law of trademarks and of unfair competition, 150 A.L.R. 1067 (1944).

In *Union Oyster House, supra,* the Massachusetts court held that the words *oyster house* are in common use in the English language and denote a restaurant in which the serving of oysters is featured. The court dismissed plaintiff's suit to enjoin defendant from using the words *oyster house* in its business name. The difference between that case and this one is only the difference between an oyster house and a steak house. Here, plaintiff's manager testified: "The term *steak house* means to me a place that features steaks. The term *charcoal steak* means to me how the steak is prepared or was prepared by the method of using charcoal in preparation." The manager's understanding is ours and, we believe, also that of the general public. The name Charcoal Steak House is no more original than it is unusual or fanciful; it is literally descriptive of the product which both plaintiff and defendant stress in their respective restaurants. How else could defendant describe his restaurant to the public, or plaintiff its? Throughout the country the term *charcoal steak house* is found in the name of so many restaurants

giving emphasis to steaks that we may take judicial notice of its meaning and common usage, even though, unlike *oyster house,* it has not yet been defined, *qua* noun, in dictionaries.

Plaintiff states in its brief: "It is uncontroverted . . . that the words *charcoal steak house* are in their primary sense descriptive, they are *publici juris,* and all the world may use them; but is is the contention of the plaintiff appellant that the words as used by it have come to have a secondary meaning in regard to its business within the area of Charlotte, Mecklenburg County, North Carolina." Undoubtedly this is an accurate statement of the law, so far as it goes, and of what plaintiff contends. Although plaintiff employed the name Charcoal Steak House in Charlotte before defendant came to town, it did not originate the name, nor was it the first to use it in the area. Merely to be the first to use a descriptive name, even if it acquires a secondary meaning, does not give the first user an unqualified right to engross it. Even if the words *charcoal steak house* had acquired a secondary meaning so as specifically to connote plaintiff's restaurant in Charlotte, plaintiff still would not be entitled to have defendant restrained from making *any* use whatever of words admittedly *publici juris.* All plaintiff could reasonably ask of the court is that defendant be required to do what he has already done, namely, so designate his restaurant as to prevent reasonably intelligent and careful persons from being misled. When defendant affixed his name, Staley's, to his identifying sign in letters larger than those of "Charcoal Steak House," he created a dissimilarity which should preclude any confusion culminating in injury to any of plaintiff's rights. *Surf Club v. Tatem Surf Club, supra.*

Nothing in the record suggests the probability that the public will confuse the two restaurants. Unfair competition is "the child of confusion." *Cleveland Opera Co. v. Cleveland Civic Opera Ass'n., supra.* The evidence fails even to hint at any bad faith or any attempt on defendant's part to deceive, either in his business sign or in his location. And, all the while, plaintiff remains at its old stand — surely its satisfied customers will be able to find their way back. Should they wend their way to defendant's restaurant, also, for the sake of variety or comparison, any loss to plaintiff will be *damnum absque injuria.* Within our competitive economy there is, in the Charlotte area, indeed "room for good service by both." *Bingham School v. Gray,* 122 N.C. 699, 30 S.E. 304. As Denny, J. (now C. J.), said in *Extract Co. v. Ray,* 221 N.C. 269, 273, 20 S.E. 2d 59, 61: "The test (of unlawful competition) is simple and lies in the answer to the question: Has plaintiff's legitimate business been damaged through acts of the defen-

dant's which a court of equity would consider unfair?" In this case the answer is, No.

The judgment of nonsuit is

Affirmed.

CALVIN T. RICE, EMPLOYEE v. UWHARRIE COUNCIL BOY SCOUTS OF AMERICA, EMPLOYER, AND UTICA MUTUAL INSURANCE COMPANY, CARRIER.

(Filed 16 December, 1964.)

1. Master and Servant § 83; Admiralty—

Where the contract of employment is made in this State, the employer's business is in this State, and the contract of employment does not specifically provide for services exclusively outside this State, *held*, the North Carolina Industrial Commission has jurisdiction of a claim for injury even though it occurs on the high seas provided it arises out of and in the course of employment, G.S. 97-36, since the Longshoremen's and Harbor Workers' Act is applicable only to injuries arising on navigable waters which may not validly be provided for by State Law. 33 U.S.C.A. 901-950.

2. Master and Servant § 54—

Injury to a Scout executive by accident while on a fishing trip on the high seas while attending an executive's conference arises out of and in the course of his employment when the executive is directed to attend the conference with all expenses paid by the Council, and the Council prepares an agenda of recreational projects, including deep sea fishing, and impliedly requires each executive to select one of the projects as an aid to his advancement and better qualifications to carry on his work in scouting.

APPEAL by defendants from *Gwyn, J.*, June 1, 1964 Non-Jury Civil Session, GUILFORD Superior Court, Greensboro Division.

This proceeding originated before the North Carolina Industrial Commission upon a compensation claim filed by Calvin T. Rice, employee, against the Uwharrie Council Boy Scouts of America, employer, and Utica Mutual, the insurance carrier.

The parties stipulated that on August 23, 1961, the plaintiff, claimant, and the Council, employer, were subject to, and bound by, the provisions of the North Carolina Workmen's Compensation Act; that the employee-employer relationship existed between them; that the Utica Mutual Insurance Company was the insurance carrier. The employer denied, however, that the plaintiff was acting as an employee at the time of his injury on August 22, 1961. The Hearing Commissioner

made findings of fact but denied compensation upon the sole ground the evidence showed the injury by accident occurred on the high seas; that the North Carolina Industrial Commission had no jurisdiction of the claim.

Upon review, the Full Commission made these findings:

"1. On August 23, 1961, plaintiff was employed by defendant employer as a District Scout Executive and had been so employed for almost three years. Plaintiff was a resident of Lexington, North Carolina, his contract of employment was made in North Carolina, defendant employer had a place of business in North Carolina and plaintiff's contract of employment was not expressly for services exclusively outside of North Carolina.

"2. A Scouting Executive Conference was held at Jekyll Island, Georgia, from August 20, 1961, to August 25, 1961. Scouting executives from Region 6, composed of North Carolina, South Carolina, Georgia, Florida and the Panama Canal Zone, attended the conference.

"3. Plaintiff along with other scout executives from the Uwharrie Council attended the conference. Plaintiff's travel expense, meals and lodging were paid by defendant employer. Various instructional programs were conducted during the conference. Wednesday afternoon, August 23, 1961, was set aside for recreation such as surf bathing, golf and deep sea fishing.

"4. Plaintiff and other scout executives, including some from Uwharrie Council, elected to go deep sea fishing. The boat departed shortly after noon and went to a place on the ocean over a wrecked ship where it anchored.

"5. A chock for the anchor on the boat pulled loose and struck plaintiff on the right leg below the knee fracturing same. Plaintiff was hospitalized at Brunswick, Georgia from August 23 to September 8 and then in Lexington Memorial Hospital under the care of Dr. Earl W. Shafer. Plaintiff reached the end of the healing period on April 24, 1962, and has 10% permanent loss of use of his right leg. Plaintiff was paid his regular salary while he was out of work from August 23, 1961, to February 1, 1962, and sustained no wage loss.

"6. That plaintiff sustained, as described above, an injury by accident arising out of and in the course of his employment with defendant employer."

Upon the basis of its findings, the Commission entered an award allowing compensation. Judge Gwyn, of the Superior Court, affirmed the Commission's award. The defendants appealed from his judgment.

Charles W. Mauze for plaintiff appellee.

Smith, Moore, Smith, Schell & Hunter by Bynum M. Hunter for defendant appellants.

HIGGINS, J. The evidence fully sustains the findings made by the Full Commission. The defendants contend, however, that No. 6 is a mixed finding of fact and conclusion of law which they may challenge upon the ground (1) the accident occurred on the navigable waters of the United States; and (2) the accident and injury did not arise out of and in the course of the claimant's employment.

In support, the defendants contend the plaintiff's remedy must be under the Longshoremen's and Harbor Workers' Act, 33 U.S.C.A. 901-950. The defendants cite *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, 8 L. Ed. 2d 368. However, § 903(a) of the Act provides for coverage for injuries on navigable waters, "But only if the disability or death results from an injury arising on the navigable waters of the United States *and if* recovery . . . through Workmen's Compensation proceedings may not validly be provided by State law." Unless the remedy under Maritime Law is exclusive, the claimant may proceed under State law. Workmen's Compensation, Vol. 2, Schneider (3rd Ed.) 245. The claimant seeks to assert rights under his contract of employment as an Executive of the Uwharrie Council. The proper forum is the North Carolina Industrial Commission. *Johnson v. Lumber Co.*, 216 N.C. 123, 4 S.E. 2d 334; *Carlin Construction Co. v. Heaney*, 299 U.S. 541. Hence, if a valid award may be made under the North Carolina Workmen's Compensation Act, we may dismiss from consideration the Longshoremen's Act. Double coverage is not intended. The claim does not arise under Maritime Law, but under an employment contract made in North Carolina by residents of that State. *Warren v. Dixon & Christopher Co.*, 252 N.C. 534, 114 S.E. 2d 250.

The North Carolina Workmen's Compensation Act, G.S. 97-36, after the 1963 Amendment, provides coverage for accidents happening outside this State under the same rules as if the accident happened in this State, provided: (1) the contract of employment was made in this State; (2) the employer's business is in this State; (3) the contract of employment did not expressly provide for services exclusively outside this State. The amendment, Ch. 450, § 2, Session Laws of 1963, struck out the requirement that the plaintiff should be a resident of this State.

The only question, therefore, is whether the claimant sustained injury by accident arising out of and in the course of his employment as a District Scout Executive, Uwharrie Council Boy Scouts of America.

The evidence discloses the quadrennial conference of the Scout Executives for the States of North Carolina, South Carolina, Georgia, and Florida, and for the Panama Canal Zone was called for August 20-25 to be held at Jekyll Island, Georgia. "A Scout Executives' Conference is the training course for professional scouting." The claimant was one of four executives of the Uwharrie Council directed to attend and in the words of the Chief Executive Officer of the Council, "Unless a person was ill it was practically compulsory that he be there." The Uwharrie Council paid the expenses, consisting of transportation, lodging, meals at the Conference and en route. The Council prepared the agenda of the Conference, including recreation or free time activities. The claimant and many others elected to go deep sea fishing. While the claimant appears to have paid his fee of $5.00 for the fishing trip, nevertheless, others in attendance were reimbursed for this expense by the employer. Of this activity, Mr. B. W. Hackney, Jr., Executive of the Uwharrie Council and claimant's superior officer, testified. "The entire recreation program or free time aspect was discussed at the conference. I discussed it personally with them. As to the instruction or direction I gave the staff members with regard to the recreational activity, in any conference that the staff attends it also behooves me as the Council Executive to point out the value of participation in the social activity that is a part of the conference program. Sometimes we listed it as recreational and sometimes as free time because at those conferences the aspect that is most valuable to these men during this recreation occurs through their meeting other scouting executives who are in the market for personal advancement. While we don't specifically say that you have to take part in this activity or that activity, they are certainly instructed to participate in one of the many that are provided for at any of our conferences that we attend."

Mr. Howard T. Smith, District Scout Executive for another Council, was on the fishing trip with claimant. He testified: "The recreational program of the conference was a planned part of the program. As to who planned it, in the bulletins that we have received prior to our attendance it was listed in there from the Regional Office. As to whether I was required to participate in the recreational program, the Council for which I work felt it would be excellent and they stated before we went that we should take part in it."

The evidence disclosed that Boy Scouts of America has "A fishing merit badge. . . . As to the part fishing plays in the exploration pro-

gram of scouting, in the older boys' program they may set up a depot involving nothing but fishing if they so desired. It is left largely to the individual boys."

The evidence and findings permit the inference the employer impliedly required participation in the scheduled activities, including the fishing trip, not merely for the purpose of furnishing amusement and entertainment for the employee, but as an aid to his advancement and better qualification to carry on his work in scouting. Larsen, in his work on Compensation Law, Vol. 1, § 2200, pp. 328-329, says that under such circumstances injuries suffered by employees in recreational activities are compensable. See, also, *Perry v. Bakeries Co.*, 262 N.C. 272, 136 S.E. 2d 643. That case certainly does not conflict with the decision here. Mr. Perry entered the swimming pool entirely on his own after the social hour provided by his employer was over.

We think the evidence and findings based thereon in this case are sufficient to permit the inference that the plaintiff's injury arose out of and in the course of his employment. *Cole v. Guilford County*, 259 N.C. 724, 131 S.E. 2d 308. The judgment of the Superior Court is

Affirmed.

ROBERT CUNNINGHAM, MARGARET CUNNINGHAM EDWARDS, FRANCES CUNNINGHAM HARDY, EVELYN CUNNINGHAM SUTTON, RAY CUNNINGHAM, ERVIN CUNNINGHAM, THELBERT CUNNINGHAM, JAMES CUNNINGHAM, RUBY CUNNINGHAM MEWBORN, MARJORIE CUNNINGHAM PRICE, AND LAURA CUNNINGHAM THRIFT v. ALICE BLAND BRIGMAN ALIAS ALICE BLAND CUNNINGHAM, AND WACHOVIA BANK AND TRUST COMPANY, EXECUTOR OF THE ESTATE OF LEON CUNNINGHAM.

(Filed 16 December, 1964.)

1. Declaratory Judgment Act § 1—

The right of the alleged widow to dissent, upon which depends the share to be taken by the beneficiaries of testators' will, is a proper controversy for determination under the Declaratory Judgment Act. G.S. 1-255.

2. Wills § 60—

The right of the widow to dissent is based upon a valid marriage.

3. Marriage § 2—

If, at the time of the marriage, either party has a spouse living who has not been validly divorced, the marriage is void.

4. Same; Judgments § 18—

A void marriage or divorce may be collaterally attacked at any time and no legal rights flow therefrom.

5. Estoppel § 5—

Estoppel is for the protection of innocent persons and they only may claim its benefits.

6. Same—

Heirs of the testator by a prior marriage may not be estopped to attack his second marriage on the ground that testator continued to live with the second wife after ascertaining there might be some question about the validity of the divorce obtained by his second wife, since the testator had no part in procuring the decree, and the second wife may not assert the estoppel.

7. Wills § 60; Pleadings § 8—

In an action in which the rights of the parties are dependent upon the right of the widow to dissent from the will, the widow may not set up a cross action for services rendered testator in the event it be determined she was not lawfully married to testator and therefore could not dissent, since such cause does not arise out of any rights under the will.

APPEAL by defendant Alice Bland Cunningham from *Fountain, J.*, April, 1964 Civil Session, LENOIR Superior Court.

The plaintiffs instituted this civil action for the purpose of having the Superior Court determine and fix by declaratory judgment the rights of the parties under the will of Leon Cunningham. The plaintiffs are children of the testator. The Wachovia Bank and Trust Company is the trustee and executor. Whether Alice Brigman, alias Alice Bland Cunningham, is the testator's widow is the principal controversy in the proceeding.

Item IV of the will provides:

> "That my wife, Alice B. Cunningham, and I had each been previously married and each have children by such prior marriages and agreed that upon marriage to each other that the properties of each shall go to our respective child or children who survive, in such manner as we might each select, free from any claim or right on the part of the other. That this agreement was reached due to the fact that we each have independent estates. That notwithstanding this agreement, it is my intent and purpose to leave to my said wife some provisions for her continuing welfare, and to this end my said Trustee shall, from the income of the trust estate, pay over to my said wife the sum of Seventy-Five ($75.00) Dollars monthly during the term of the trust, with said payments to

begin as of the date of my death; the monthly payment to cease in the event of my wife's remarriage."

The remainder of the estate, valued at $200,000.00, was left in trust for the plaintiffs. Alice Bland Cunningham filed a dissent to the will.

In short summary, the plaintiffs allege that at the time a purported marriage took place between the testator and Alice Bland Brigman on December 31, 1952, the testator believed Alice Bland Brigman had obtained a valid divorce from her husband. Although she had obtained a decree of divorce on January 8, 1952, from the General County Court of Wilson County, the decree was, and is, void. The divorce action was instituted in the Superior Court of Greene County. The defendant Brigman was served by publication upon the basis of an affidavit by appellant that he was a nonresident of the State of North Carolina, when, to her knowledge he was then residing in the City of Kinston, Lenoir County, North Carolina. On appellant's motion and without notice, the Clerk of the Superior Court of Greene County entered an order on January 8, 1952, purporting to transfer the cause from the Superior Court of Greene County to the General County Court of Wilson County where the case was tried and judgment of absolute divorce was entered on that same day, January 8, 1952. The defendant Brigman was never legally served with process and did not appear at any stage of the divorce proceeding.

The Bank, as executor and trustee, filed an answer denying sufficient information either to admit or to deny the allegations of the complaint. The appellant filed a demurrer which Judge Morris overruled. Thereafter, she filed an answer in which she alleged that her divorce was valid, her marriage to the testator was regular and lawful; that she, as the widow, had the right to dissent from the will.

As a further defense, she alleged that the testator investigated her divorce proceeding and was advised "that there might be some question as to the validity of her divorce," but with that knowledge he continued to live with her as his wife until his death. By reason of his conduct the plaintiffs, his heirs at law, are estopped to assert the invalidity of the divorce decree or to deny that she is now his widow.

By way of cross action she alleged that if it be determined that she is not the "lawful widow" of the testator, she rendered valuable services to him under the belief that she was lawfully married to him and that the services so rendered were reasonably worth $60,000.00 which she is entitled to recover from the estate.

Upon the plaintiff's motion, the court struck from the defendant's answer so much thereof as attempted to allege the plaintiffs were estop-

ped to deny the validity of appellant's divorce upon the ground that the testator had continued to live with her after he ascertained "that there might be some question as to the validity of her divorce." The court also struck the entire counterclaim for services rendered. By this appeal, the rulings on the motions to strike are here for review.

White & Aycock by Chas. B. Aycock for plaintiff appellees.

Wallace & Langley by F. E. Wallace, Jr., for Wachovia Bank & Trust Co., Executor of the Estate of Leon Cunningham, appellee.

J. Harvey Turner for defendant Alice Brigman Cunningham appellant.

HIGGINS, J. The purpose of the action is to have the Court declare the rights of the parties arising under the will of Leon Cunningham. By the terms of the will, the plaintiffs are given the entire estate except the $75.00 per month to be paid to the appellant by the trustee during the life of the trust, and then by the testator's children thereafter during her life, or until she remarries. She filed a dissent to the will. This controversy presents a proper proceeding for declaratory judgment. G.S. 1-255; *Joyce v. Joyce,* 260 N.C. 757, 133 S.E. 2d 675; *Little v. Trust Co.,* 252 N.C. 229, 113 S.E. 2d 689.

The right to dissent from a testator's will is given to his widow. That right has its foundation in a valid marriage. If either of the parties to the marriage contract has a living spouse, a valid divorce is a prerequisite to another marriage. Consequently, in the absence of a valid divorce, the appellant is disqualified to enter into a contract of marriage so long as her former husband lives. A void decree of divorce, like any other void judgment, is a nullity. It may be attacked collaterally at any time. Legal rights do not flow from it. *Ivery v. Ivery,* 258 N.C. 721, 129 S.E. 2d 457; *Reid v. Bristol,* 241 N.C. 699, 86 S.E. 2d 417; *Monroe v. Niven,* 221 N.C. 362, 20 S.E. 2d 311.

The appellant's plea of estoppel is insufficient to give validity either to a void divorce decree or to an invalid marriage. All she alleges is that, subsequent to the purported marriage, her husband, after investigation, ascertained there might be some question about the validity of her divorce, and thereafter continued to live with her. Estoppel is for the protection of innocent persons. They, only, may claim its benefits. 31 C.J.S., Estoppel, § 75, p. 453. The appellant procured the divorce. If the judgment is void, the testator had no knowledge of it. He had no part in procuring it. *Wilmington Furniture Co. v. Cole,* 207 N.C. 840, 178 S.E. 579. The court's order striking the alleged defense was not error.

If it be conceded the appellant states a cause of action for services rendered the testator under the mistaken belief she was lawfully married to him, such cause does not arise out of any rights under the will; hence the cross action is a misjoinder. *Johnson v. Scarborough,* 242 N.C. 681, 89 S.E. 2d 420, and cases cited. The motion to strike the cross action is in effect a demurrer to that cross action. The motion to strike was properly allowed.

This opinion has dealt with pleadings only. At the trial, the parties will have opportunity to be heard with respect to the validity of the appellant's divorce, and the legality of her subsequent marriage contract with the testator. After the issues are resolved, the court may then declare and determine the rights of the parties under the will. The orders entered in the court below are

Affirmed.

WILLIAM CARL CORRELL, PLAINTIFF v. BOYCE ALLEN GASKINS, DEFENDANT.

(Filed 16 December, 1964.)

1. Trial § 33—

The trial court is required to relate and apply the statutory as well as the common law to the variant factual situations having support in the evidence.

2. Automobiles § 6—

It is negligence or contributory negligence *per se* to stop a motor vehicle even partly on the hard surface at nighttime without lights, since the statute, G.S. 20-134, prescribes the standard of care, and the failure to exercise the prescribed care is actionable if the proximate cause of injury.

3. Automobiles § 46—

Where defendant's evidence is to the effect that plaintiff's vehicle was standing partly on the hard surface at nighttime without lights when defendant's vehicle ran into its rear, defendant is entitled to an instruction to the effect that if the jury should find by the greater weight of the evidence that defendant violated the statute and such violation was a proximate cause of the collision to answer the issue of contributory negligence in the affirmative, and an instruction which leaves the issue of contributory negligence to be determined on the basis of the common law principle of due care must be held for prejudicial error.

APPEAL by defendant from *Crissman, J.,* May 1964 Session of ROWAN.

Action and cross action growing out of a rear-end collision that occurred January 24, 1963, on a hard surface road (Washington Lane) in a rural residential district in the Kannapolis area of Rowan County when the right front of defendant's 1960 Chevrolet struck the left rear of plaintiff's 1950 Chevrolet.

Uncontradicted evidence tends to show: It was about 6:30 a.m. and dark when the collision occurred. Both plaintiff and defendant were going to work. Plaintiff turned from Moose Road into Washington Lane. He proceeded thereon approximately 500 feet and stopped, as was his custom, to pick up a man (Privette) who worked with him. Privette's house was on plaintiff's right side of Washington Lane. Plaintiff, who was waiting for Privette, was the only occupant of his car when the collision occurred. Defendant, traveling on Washington Lane, stopped at its intersection with Moose Road (the dominant highway) and thereafter continued along Washington Lane until his car collided with plaintiff's car. Washington Lane, from said intersection to the point of collision, was straight and level. No other cars were approaching or in front of defendant as he traveled from said intersection to the point of collision. There were no street lights in the area. The maximum speed limit was 35 miles per hour.

Two witnesses testified Washington Lane was paved to a width of approximately 18 feet. Another testified it was "about 16 to 18 feet wide."

Plaintiff's version: When stopped in front of Privette's house, plaintiff's car was "at least" 50% off "the tar and gravel," and as far on the dirt (right) shoulder as he could get "without going into the side ditch." He put his car in neutral and "pulled up" the emergency brake. When he stopped, no car was "following immediately behind (him)." Prior to and at the time of the collision the headlights and taillights on his car were burning.

Defendant's version: After leaving said intersection, defendant drove in his right traffic lane with his lights on low beam at a speed of 20-25 miles per hour. Suddenly, his lights picked up a "dark, dull looking car, without any lights whatsoever," a short distance ahead. Defendant, when he saw the car, "slammed on the brakes, and bam! — that was it." Plaintiff's car "was about ninety per cent on the pavement, with just the right wheels off the edge of the pavement." No lights were burning on plaintiff's car as defendant approached and collided with it.

Issues of negligence, contributory negligence and damages, relating to plaintiff's action, were answered in favor of plaintiff. The jury did not reach issues relating exclusively to defendant's cross action.

From judgment for plaintiff in accordance with the verdict, defendant appeals.

Kesler & Seay for plaintiff appellee.
Kluttz & Hamlin for defendant appellant.

BOBBITT, J. Defendant's assignments of error, based on exceptions duly taken, challenge the sufficiency of the court's instructions relating to the contributory negligence issue.

G.S. 1-180 requires the trial judge, when instructing the jury, to relate and apply the law to the variant factual situations having support in the evidence. *Westmoreland v. Gregory,* 255 N.C. 172, 177, 120 S.E. 2d 523, and cases cited. This requirement applies to the statutory law as well as to the common law. *Pittman v. Swanson,* 255 N.C. 681, 685, 122 S.E. 2d 814, and cases cited; *Greene v. Harmon,* 260 N.C. 344, 132 S.E. 2d 683. The question presented by defendant's assignments is whether the court's instructions relating to the contributory negligence issue substantially comply with these requirements.

Defendant pleaded, *inter alia,* as contributory negligence, the violation by plaintiff of G.S. 20-129 and of G.S. 20-134. A violation of these statutory provisions is negligence *per se. Scarborough v. Ingram,* 256 N.C. 87, 89, 122 S.E. 2d 798, and cases cited; *Melton v. Crotts,* 257 N.C. 121, 125, 125 S.E. 2d 396, and cases cited. In an oft-cited decision, Barnhill, C. J., stated a well-established rule as follows: ". . . when the plaintiff relies on the violation of a motor vehicle traffic regulation as the basis of his action . . . , unless otherwise provided in the statute, the common law rule of ordinary care does not apply. The statute prescribes the standard, and the standard fixed by the Legislature is absolute." *Aldridge v. Hasty,* 240 N.C. 353, 360, 82 S.E. 2d 331; Strong, N. C. Index, Vol. 1, Automobiles § 6, and cases cited. The rule is equally applicable where a defendant relies upon such statutory violation as a basis for his plea of contributory negligence.

Defendant was entitled to an instruction, even in the absence of request therefor (*Westmoreland v. Gregory, supra,* and cases cited), in substance, as follows: If the jury find by the greater weight of the evidence that plaintiff stopped his car and permitted it to stand, without lights, on the paved portion of Washington Lane in defendant's (right) lane of travel, such conduct on the part of the plaintiff would constitute negligence *as a matter of law;* and if the jury find by the greater weight of the evidence that such negligence was a proximate cause of the collision and plaintiff's injuries, the jury is instructed to answer

the contributory negligence issue, "Yes." The court failed to give such an instruction.

The court, in a general review of defendant's contentions as to contributory negligence, stated defendant contended, *inter alia,* that plaintiff violated G.S. 20-129; and in connection therewith the court read G.S. 20-129(a) and also G.S. 20-134. (Note: The court also read G.S. 20-154(a) and G.S. 20-161(a). It would seem that G.S. 20-154(a) refers to a different factual situation.) While the jurors were instructed to answer the contributory negligence issue, "Yes," if they found by the greater weight of the evidence "that the plaintiff on this occasion was negligent as the Court has defined negligence, or was in violation of either of the statutes that I read in your hearing of this occasion," and that such negligence or such statutory violation was a proximate cause of the collision and plaintiff's injuries, no instruction purporting to relate G.S. 20-129 or G.S. 20-134 (or G.S. 20-154(a) or G.S. 20-161(a)) to the facts in evidence was given. In short, the legal task of applying the relevant statutory provisions to the facts in evidence was committed to the jury.

Of course, we cannot determine with certainty the adverse effect, if any, the indicated deficiency in the charge had or may have had on the jury's verdict. It is noted, however, that the court stated plaintiff's contentions with reference to the contributory negligence issue as follows:

"Now the plaintiff says that you ought to answer the first issue yes and the second issue no. Plaintiff says he was not negligent in any way, that he didn't do anything that an ordinarily prudent man wouldn't have done under the same or similar circumstances. The plaintiff says and contends that, from this evidence and by its greater weight, that he was sitting there with all the lights on as he should be, and that he was as close to the ditch as he could get without getting in the ditch, and that he was sitting there waiting for his rider, and that, if the defendant didn't see him, it was because he was not looking and was not keeping a proper lookout, and that he was there to see him and that he had all the lights on and that, *even if he hadn't had the lights on, that it wasn't his fault, that it was the fault of the defendant in not seeing what he ought to have seen there;* and so the plaintiff says and contends he was not negligent and that you ought not to find there was any negligence on his part; and, therefore, you ought to answer this no and go ahead on with the third issue." (Our italics).

The foregoing instruction, in our view, would seem to indicate that the contributory negligence issue was for determination on the basis of common-law principles as to due care. Hence, we are constrained to

hold that the failure to give an instruction applying G.S. 20-129 and G.S. 20-134 to the evidence, substantially as indicated above, constitutes prejudicial error for which defendant is entitled to a new trial.

In view of the conclusion reached, we need not discuss whether the evidence now before us was sufficiently definite to require an instruction applying G.S. 20-161 thereto or questions raised by assignments of error directed to rulings on evidence. These questions may not arise at the next trial.

New trial.

WILLIAM TUTTLE v. KERNERSVILLE LUMBER COMPANY, A CORPORATION.

(Filed 16 December, 1964.)

Master and Servant § 10—

A contract of employment which provides that if the employee should quit he would forfeit all bonus rights, while if he should be discharged the employer would pay 10 per cent of his bonus, calculated to the date of his discharge, *is held* terminable at will, there being no definite term, notwithstanding the contention of the employee that his employment was to be permanent as long as his work was satisfactory, since ordinarily any contract of employment is based upon the services being satisfactory, and a contract for permanent employment implies only an indefinite general hiring, terminable at will.

APPEAL by plaintiff from *McConnell, J.*, 20 January Session 1964 of FORSYTH.

This is a civil action instituted by the plaintiff to recover damages for his alleged wrongful discharge as an employee of defendant company.

Prior to August 1962 the plaintiff had been employed by Wilson Lumber Company in Rural Hall, North Carolina, for approximately 25 years. In August 1962 the plaintiff was contacted by two salesmen, who worked for a third party and who called on the Wilson Lumber Company and the Kernersville Lumber Company. These salesmen informed the plaintiff that the defendant company was interested in talking to someone about assuming the duties as manager of defendant company.

Thereafter, plaintiff, according to his testimony, contacted John W. Lain, president of defendant company, and entered into negotiations

concerning his employment as general manager of Kernersville Lumber Company. About 15 August 1962, Mr. Lain employed the plaintiff effective 17 September 1962. Plaintiff returned to his former employer and worked until 15 September 1962. Plaintiff further testified that during his negotiations with Mr. Lain it was agreed, verbally, that plaintiff would "have a permanent job as long as my work was satisfactory."

On 1 September 1962, the following agreement was entered into:

"September 1, 1962. We the undersigned, do enter into the following agreement to become effective September 17, 1962:

"William Tuttle is hereby employed by the Kernersville Lumber Company with the following salary agreement:

"a salary of One Hundred and Twenty-Five Dollars ($125.00) per week will be paid with a bonus of Five Hundred Dollars ($500.00) to be paid on or before December 20, 1962.

"after January 1, 1963, should matters prove satisfactory to all involved, a bonus of 10% of the net profit before taxes will be paid, unless Mr. Tuttle voluntarily terminates employment, upon which occasion he would forfeit all bonus rights. This bonus would be paid about March 1964. However, should Mr. Tuttle be discharged, his 10% bonus will be figured to date and paid within 60 days.

/s/ John W. Lain, President
/s/ William Tuttle"

The plaintiff went to work with defendant company on 17 September 1962 and worked until 22 December 1962, at which time defendant company terminated plaintiff's employment. In accordance with the above agreement, defendant paid plaintiff, including the $500.00 bonus, through December 1962.

The cross examination of the plaintiff tends to show that plaintiff's services were not altogether satisfactory. However, on 28 December 1962, Mr. Lain, president and general manager of defendant company, gave the plaintiff a letter of recommendation, addressed "To Whom It May Concern." In this letter, Mr. Lain stated that he considered Mr. Tuttle to be a man of "fine character and standing"; that he had "found him hard working and honest in his dealings." Mr. Lain then stated that his health had improved and there was no need for training an additional manager for the firm.

At the close of plaintiff's evidence the defendant moved for judgment as of nonsuit. The motion was allowed. Plaintiff appeals, assigning error.

White & Crumpler, Harrell Powell, Jr., Edward R. Green and Fred G. Crumpler, Jr., for plaintiff.

Booe, Mitchell & Goodson for defendant.

DENNY, C.J. The plaintiff contends that under his agreement with the defendant company he is entitled to employment by defendant company for life or as long as his work is satisfactory, citing *Fisher v. John L. Roper Lumber Co.*, 183 N.C. 485, 111 S.E. 857; *Jones v. Carolina Power & Light Co.*, 206 N.C. 862, 175 S.E. 167; *Dotson v. F. S. Royster Guano Co.*, 207 N.C. 635, 178 S.E. 100; and cases from other jurisdictions.

In *Fisher v. Lumber Co., supra,* the plaintiff employee had a bona fide claim for personal injuries suffered while in the employment of the defendant. The plaintiff was preparing to bring suit for damages. A compromise agreement was reached upon condition that the defendant would give the plaintiff employment such as he was then capable of doing, and pay him a living wage for the support of himself and family for life. This compromise agreement was held valid and enforceable.

Likewise, in the case of *Dotson v. Guano Co., supra,* the contract of employment for life was based on the settlement of a claim for personal injuries sustained by the plaintiff while in the employment of defendant. This contract was also upheld.

In *Jones v. Light Co., supra,* the evidence tended to show that on 25 September 1926 the plaintiff, an experienced motorman or conductor, was induced by defendant's agent and superintendent to leave his employment and home in Spartanburg, South Carolina, and to come to Asheville, North Carolina, to break a strike (the operators of the street cars in Asheville then being out on strike), under a promise of "permanent employment for the term of at least ten years"; that plaintiff remained in the employment of defendant until 24 January 1932 when he was discharged without cause. This agreement of employment was upheld as not being void for indefiniteness.

However, in the instant case, in our opinion, the agreement entered into between the plaintiff and the president of the defendant corporation fixed the terms upon which the contract might be terminated. If the plaintiff voluntarily quit, he was to forfeit all bonus rights; on the other hand, should the defendant discharge the plaintiff, the defendant was required to pay the ten per cent bonus calculated to the date of discharge and to pay such bonus to plaintiff within sixty days.

Plaintiff contends that his agreement with Mr. Lain, president of defendant corporation, was to the effect that plaintiff would "have a permanent job as long as my work was satisfactory."

We understand that ordinarily any contract of employment is based upon the services being satisfactory. Even so, we think under the facts in this case the contract was nothing more than one of indefinite hiring, terminable at will. *Malever v. Jewelry Co.*, 223 N.C. 148, 25 S.E. 2d 436.

In the last cited case the plaintiff employee left his work in Fayetteville to accept employment with the defendant in Charlotte on a "regular permanent basis." The court below sustained a judgment as of nonsuit. On appeal, Stacy, C.J., speaking for the Court, said: "While it is suggested in plaintiff's testimony that the inducement to give up his job in Fayetteville was sufficient consideration to support the agreement for permanent employment, still the agreement itself is for no definite time, and there is no business usage or other circumstance appearing on the record which would tend to give it any fixed duration. * * *

"The general rule is, that 'permanent employment' means steady employment, a steady job, a position of some permanence, as contrasted with a temporary employment or a temporary job. Ordinarily, where there is no additional expression as to duration, a contract for permanent employment implies an indefinite general hiring, terminable at will." See also *Howell v. Commercial Credit Corp.*, 238 N.C. 442, 78 S.E. 2d 146; 35 Am. Jur., Master and Servant, § 24, page 460; 56 C.J.S., Master and Servant, § 31, page 412, *et seq.*

In the last cited authority it is stated: "As a general rule employment contracts which in some form purport to provide for permanent employment as where the agreement is for the employee to have a permanent position or permanent employment or employment for life, or the employee is hired to fill a 'permanent vacancy,' or where the employment is to be for as long as the master is operating, as long as the employee desires the position, or as long as the employee satisfactorily performs his duties, are terminable at will by either party where they are not supported by any consideration other than the obligation of service to be performed on the one hand and wages or salary to be paid on the other. Where, however, the employee gives consideration in addition to his services, as where he relinquishes a claim for personal injuries or gives some other thing of value, a contract for permanent employment, or as long as the services are satisfactory, is not such an indefinite contract as to come within the rule. * * *"

The judgment of the court below is
Affirmed.

CUSTOM CRAFT FURNITURE, INC., AND PENNSYLVANIA LUMBERMENS MUTUAL INSURANCE COMPANY v. FRED L. GOODMAN, T/A J. L. GOODMAN & SON.

(Filed 16 December, 1964.)

Negligence §§ 24a, 26—Evidence held insufficient to show negligence on part of defendant's agent in starting fire on ground glazed with lacquer from plaintiff's plant.

The evidence tended to show that defendant's employee, in the discharge of work on plaintiff's machinery, was directed by plaintiff's foreman to cut designated holes in the base plate of the machinery, that the machinery was on defendant's truck which was standing at plaintiff's plant on ground glazed with lacquer from mist from the exhaust ducts of plaintiff's plant, that plaintiff's employees helped defendant's agent move the machinery so that he could get to the base plate with his acetylene torch, and did not warn him of the danger although the torch was burning for some two minutes prior to the fire causing the damage in suit. *Held:* Nonsuit was proper, either on the ground that the evidence fails to show actionable negligence on the part of defendant's agent or affirmatively shows contributory negligence on the part of plaintiff.

APPEAL by plaintiffs from *Huskins, J.*, April Session 1964 of CATAWBA.

This is a civil action to recover damages sustained by plaintiffs which resulted from a fire at the manufacturing plant of Custom Craft Furniture, Inc. (hereinafter called Craft), at Hickory, North Carolina. The fire occurred during the daylight hours on 19 May 1962, resulting in a loss of $91,656.05, which was only partially covered by insurance.

The plant of Craft was equipped with a spray room. There were exhaust fans in the room which forced gasses containing lacquer used in painting furniture out of the spray room through large ducts to the outside of the building. There was an air compressor, used in the spraying operation, in a small room adjoining the main building and about 20 feet from the nearest exhaust duct. Some vibration developed in the base of the compressor.

On 19 May 1962, G. E. Spencer, machine room foreman of Craft, who had held this position for a period of 12 to 14 years, was engaged in detaching the air compressor from the concrete floor to which it was bolted. Spencer, who was in charge of work in the compressor room,

discovered that he could not remove the bolts from the compressor. He thereupon called the defendant Goodman about cutting the bolts. Goodman maintained a machine shop at Hickory, with trucks carrying acetylene equipment, and "held himself, and his agents, servants and employees out to the public as highly trained specialists in the art of metal working."

Goodman, who was familiar with the furniture plant of Craft, in response to Spencer's request for assistance, asked Spencer if there was any danger in the compressor room, and Spencer replied that there was water on the floor, and, in his opinion, there was no danger in cutting the bolts in the compressor room. Goodman then sent C. R. Craig, one of his employees, with a warning to be careful, to cut the bolts from the compressor base.

Craig arrived at the plant and without incident cut the bolts from the compressor base. Spencer and several other Craft employees "saw fire fly in the area and sparks all around where the flame was cutting the metal." Spencer then requested Craig to weld an angle iron to the base of the compressor. Craig informed him that he could do a better job at defendant's plant. Craig then carried the compressor base to the plant of defendant where the angle iron was welded to the base as requested.

When Craig returned to the furniture factory with the compressor base with the angle iron welded thereto, Spencer then requested Craig to cut four holes in the base of the compressor plate. Craig backed the truck to within three to five feet of the compressor room door, and some of Spencer's helpers moved the compressor base so that it stuck out over the bed of the truck. While Spencer marked the places where he wanted Craig to cut the holes, Craig got the equipment ready and lit the acetylene torch.

Craig's truck was parked about 20 feet from the nearest exhaust fan or vent. The truck was parked on a hard glazed substance which, unknown to Craig, was lacquer mist which had been distributed over the area by the exhaust fans. There was no grass near the rear of the truck. Spencer returned to the compressor room before Craig actually started cutting the holes. Craig testified: "When the flame was adjusted, I applied it to the metal and proceeded to heat it, and when I got the metal hot enough to be molten, reddish glow, I applied excess oxygen to it and intentionally blew it out of the frame onto the ground. When it hit the ground, the substance on the ground caught fire. It was a fast fire. As soon as I noticed it through my cutting glasses, I raised my glasses up and looked down, at which time the

fire was already about two or three feet high * * *." This fire spread into and all over the Craft plant and destroyed it.

While Spencer testified that he knew the area around the compressor room was dangerous because of the lacquer mist, and that no smoking was allowed in the area, no one gave Craig any indication of the danger in the area. The area did not appear to be dangerous to anyone who knew nothing about the presence of the lacquer mist on and in the ground, as indicated by the testimony of Floyd Killian who stated that while he had worked for the factory around eight years he did not know the area was dangerous. According to the evidence, when the fire started, Mr. Spencer said: "There is no use to try to put the fire out, because that is lacquer and it burns just like gasoline."

The evidence further tends to show that craig was operating his acetylene torch for at least two minutes before the fire started; that several of the employees, according to the evidence, knew of the cutting operation but no one notified Craig of the dangerous condition in the area where he was working although they testified they knew that such dangerous condition existed.

At the close of plaintiffs' evidence the defendant moved for judgment as of nonsuit. The motion was allowed. Plaintiffs appeal, assigning error.

Willis & Sigmon, James C. Smathers for plaintiffs.
Patrick, Harper & Dixon, Marshall V. Yount for defendant.

DENNY, C.J. The appellants contend that Craft's loss was occasioned by the fact that the defendant sent an inexperienced and incompetent welder to its plant to perform the services requested on 19 May 1962. In our opinion, there is no merit to this contention. There is not a scintilla of evidence on this record tending to show that Craig did not remove the four bolts that held the compressor to the concrete floor in the compressor room in exactly the manner Craft's foreman expected the work to be performed. Nor is there any evidence tending to show that the manner and method being used in cutting the holes in the base of the compressor at the time the fire started, was not the usual and proper method for doing such work.

The plaintiff Craft suffered its damages not as the result of the method used in undertaking to do the work, but from the fact that the work was undertaken at a place and in an area that Craft's foreman and at least several of the employees working under him, knew to be an extremely dangerous fire hazard; in fact, so dangerous, that Craft prohibited smoking in the area. Yet, notwithstanding this fact, Craft's foreman and employees, without warning Craig of the fire

hazard, permitted him to proceed to use an acetylene torch to cut the holes in the base of the compressor frame. Furthermore, the employees helped Craig move the compressor base to the rear of the truck so that the portion thereof where the holes were to be cut, extended over the rear end of the truck bed. After the compressor base had been so placed, the foreman marked the places where he wanted the holes cut.

The defendant contends that he should not be held liable for acts done pursuant to the direction of Craft's foreman, which acts were done without the knowledge or consent of the defendant.

In the case of *Snow v. DeButts,* 212 N.C. 120, 193 S.E. 224, this Court said: "A master cannot be held liable for the unauthorized act of a servant on the ground that the servant did the act with the intent to benefit or serve the master. *Daniel v. R. R.,* 136 N.C. 517 (48 S.E. 816); *Marlowe v. Bland,* 154 N.C. 140 (69 S.E. 752)."

General employment of an agent or a servant is not necessarily a sufficient basis of liability to third persons when the damages result from directions or instructions given by someone other than the principal or master. *Shapiro v. Winston-Salem,* 212 N.C. 751, 194 S.E. 479; *Wadford v. Gregory Chandler Co.,* 213 N.C. 802, 196 S.E. 815.

In 57 C.J.S., Master and Servant, § 566, page 292, it is said: "If a hired vehicle is used for a purpose different from that stipulated in the contract, the driver is not the agent of the owner in using it at the direction of the hirer."

In the case of *Jackson v. Joyner,* 236 N.C. 259, 72 S.E. 2d 589, it is said: "* * * (W)here a servant has two masters, a general and special one, the latter, if having the power of immediate direction and control is the one responsible for the servant's negligence. 35 Am. Jur., Master and Servant, Sec. 541."

In our opinion, it is unnecessary to determine whether or not the above position of the defendant is controlling on this appeal. Be that as it may, we have reached the conclusion that when all the evidence adduced in the trial below is considered in the light most favorable to the plaintiffs, it fails to establish actionable negligence on the part of the defendant.

On the other hand, if, for the sake of argument, it should be conceded that the defendant was negligent, the contributory negligence of Craft's agents, servants and employees is so clearly established by the evidence as to prevent recovery on behalf of these plaintiffs.

The judgment of the court below is

Affirmed.

MONROE S. CAMPBELL T/A MONROE'S DRIVE-IN v. NORTH CAROLINA STATE BOARD OF ALCOHOLIC CONTROL, VICTOR ALDRIDGE, DR. CLEON W. GOODWIN, AND C. J. MABRY, JR., MEMBERS.

(Filed 16 December, 1964.)

1. Administrative Law § 3—

The rules of evidence are not so strictly enforced in proceedings before an administrative board as they are in a court of law, and findings of a board will not be disturbed if such findings are supported by competent evidence, even though there be evidence that would support contrary findings and even though incompetent evidence may also have been admitted.

2. Intoxicating Liquor § 2—

The 1959 Amendment to G.S. 18-78.1 does not have the effect of requiring actual knowledge of the sale of beer to a minor by a licensee before his license may be revoked or suspended, since the word "knowingly" as used in the amendment refers only to permitting the consumption on the premises of a forbidden beverage and does not apply to the provisions relating to the selling, offering for sale, or possession of the beverages.

APPEAL by plaintiff, petitioner, from *Walker, S. J.*, April 20, 1964 Regular Non-Jury Civil Session, WAKE Superior Court.

Monroe S. Campbell, t/a Monroe's Drive-In, filed a petition for a judicial review of a final administrative decision of the State Board of Alcoholic Control suspending for 60 days his retail license to sell beer at his place of business at 1605 Bessemer Avenue, Greensboro.

The hearing officer, pursuant to written notice, held a hearing on October 23, 1962, at which numerous witnesses testified both for the Board and for the petitioner. The testimony is set out in the record. A school girl, 16 years of age, testified that on the night of September 15, 1962, at about 8:45 p.m., she purchased two king-size Budweiser beers from one of the curb boys at the Monroe Drive-In. Again, in about one hour, she returned to the Drive-In and purchased two more beers. She paid the curb boy 70 cents on each occasion after he delivered the beers to her parked automobile beside the drive-in. Her story was corroborated by a girl companion.

When the girl, somewhat intoxicated, returned home at 11:30 p.m., her father observed her condition, then contacted the police who conducted an investigation. The girls identified two of petitioner's curb service boys that delivered the beer and took the money.

The respondent offered testimony of the two boys whom the girls identified. Each denied he made any sale or that he was on duty during the night of September 15. There was other impressive evidence that neither of the boys was at work at the time the girls claimed to

have made the purchases. However, the girls' testimony was unequivocal.

The hearing officer made detailed findings of fact, among them, that the two curb boys identified by the girls sold the beer to a girl 16 years of age. There was evidence that this is the third offense charged against the petitioner. One of the prior hearings resulted in a reprimand, the other in a license suspension for 45 days. The hearing officer found (1) the petitioner's agents made the sale of beer to a girl 16 years of age; (2) the petitioner allowed improper practices on his licensed premises; and (3) failed to give the premises proper supervision. The State Board of Alcoholic Control approved the hearing officer's findings and ordered the petitioner's license suspended for 60 days.

On the petitioner's appeal to the Superior Court of Wake County, Judge Walker entered judgment that the rights of the petitioner have not been prejudiced; that the procedure followed is neither arbitrary nor capricious; and that the administrative findings are supported by competent evidence which in turn sustained the suspension order. The petitioner appealed.

Hoyle, Boone, Dees & Johnson by J. Sam Johnson, Jr., for petitioner appellant.

T. W. Bruton, Attorney General, George A. Goodwyn, Staff Attorney for the State.

HIGGINS, J. The petitioner's counsel entered numerous objections to the admission of testimony before the hearing officer. Some of these objections would have merit in a court proceeding. For example: after the girl testified in detail about the purchase of the beer, her companion was permitted to corroborate her by saying she had heard that testimony and it was in accordance with her recollection. However, the rules of evidence before administrative boards permit more latitude than is customary in court proceedings. This Court has held that if there is any competent evidence to support a finding of fact by the administrative agency, such finding is conclusive on appeal, although the evidence would have supported a finding to the contrary. Even the introduction of incompetent evidence cannot be held prejudicial where the record contains sufficient competent evidence to support the findings. *Blalock v. Durham,* 244 N.C. 208, 92 S.E. 2d 758; *Gant v. Crouch,* 243 N.C. 604, 91 S.E. 2d 705.

In addition to the objections to the incompetency of evidence, the petitioner stressfully contends that Mr. Campbell had no actual knowl-

edge as to what went on and that such knowledge is made necessary by the 1959 amendment to G.S. 18-78.1 before he may be held responsible. He further contends that the amendment relaxed the statutory restrictions which this Court approved in *Boyd v. Allen,* 246 N.C. 150, 97 S.E. 2d 864. Comparison of the statute before and after the amendment does not require or permit the construction contended for by the petitioner. Before the amendment the section provided: "No holder of a license . . . or any servant, agent, or employee of the licensee, shall do any of the following upon the licensed premises: . . . (5) Sell, offer for sale, possess, or permit the consumption on the licensed premises of any kind of alcoholic liquors, the sale or possession of which is not authorized under his license."

After the amendment (Ch. 745, Session Laws of 1959), Subsection (5) reads: "Sell, offer for sale, possess, or knowingly permit the consumption on the licensed premises of any kind of alcoholic liquors the sale or possession of which is not authorized by law." Consequently, it appears by the punctuation that the word "knowingly" does not modify sell, offer for sale, or possess, but does modify "permit the consumption on the premises." The purpose obviously is to prevent the sale, offer to sell, possession, or knowingly permit the consumption on the premises of a forbidden beverage. The proprietor is responsible if he knowingly permits another to drink on his premises even if he carried his own beverage.

Judge Walker was correct in holding the findings of fact were supported by competent evidence which in turn sustained the order of revocation. The judgment is

Affirmed.

BETTY JO ALLEN BLACK BY HER NEXT FRIEND, H. R. ALLEN v. CLARK'S GREENSBORO, INC.

(Filed 16 December, 1964.)

1. Corporations § 26; Principal and Agent § 9—

Evidence that immediately after plaintiff left defendant's store a man with a badge stopped plaintiff in defendant's parking lot and requested to see plaintiff's pocketbook for the purpose of ascertaining if plaintiff had taken property belonging to the store, and that shortly thereafter the man with the badge was in conference with executives of defendant, *held* sufficient to warrant a finding that the man was acting as defendant's agent and within the scope of his employment.

BLACK *v.* CLARK'S GREENSBORO, INC.

2. False Imprisonment § 1—

False imprisonment is the illegal restraint of a person, and while actual force is not required, there must be an implied threat of force, at least, which compels a person to remain where he does not wish to remain or go where he does not wish to go, since if the person consents there can be no restraint.

3. Same— Evidence held to show that plaintiff voluntarily submitted to inspection of pocketbook and was not restrained.

Evidence tending to show that immediately after plaintiff left defendant's store and was getting into a friend's car in defendant's parking lot two men approached the car, one of whom showed a badge to the driver and asked to see defendant's pocketbook, that the men had insufficient warrant to arrest plaintiff, but that plaintiff voluntarily emptied her pocketbook, that there was nothing incriminating in her possession, and that immediately thereafter she went to the store and interviewed the manager, *held* not to show that plaintiff was arrested or imprisoned but rather that plaintiff voluntarily submitted to the inspection without fear that any incriminating evidence would be discovered.

PARKER, J., dissents.

APPEAL by plaintiff from *Shaw, J.*, February 17, 1964 Session, GUILFORD Superior Court, Greensboro Division.

Civil action to recover damages for false imprisonment. The defendant's answer denied all material allegations of the complaint, except the defendant's residence and incorporation.

The plaintiff's statement of the case on appeal fairly presents the controversy:

"The plaintiff, through her next friend, instituted this action alleging that she suffered great mental anguish, great embarrassment and humiliation when she was detained against her will for approximately five (5) minutes by the defendant through its agents.

"The plaintiff introduced evidence which she contends tends to show that on or about December 5, 1962, she, in company with two other persons, visited the defendant's store in Greensboro, North Carolina, where she purchased certain articles of merchandise, paying for each and every item at the check-out counter. The plaintiff further introduced evidence which she contends tends to show that after leaving the defendant's store and getting into an automobile owned by one of her companions, in the defendant's parking lot, two men, alleged to be the defendant's agents, approached the car, one of them showed a badge, detained the driver, and asked to see plaintiff's pocketbook; that plaintiff handed her pocketbook to the man, who examined it and told plaintiff to take a bracelet out of the pocketbook and hand it to him;

that the man examined the bracelet, inquired as to where it was purchased, and after the plaintiff explained that she had owned it about one year and had purchased it at a Sarah Coventry party, the man returned the bracelet to plaintiff and walked away.

"After the introduction of the evidence for the plaintiff, the motion of the defendant for judgment of nonsuit was overruled. The defendant did not put on evidence and renewed its motion for judgment of nonsuit. After further argument, the Court granted the motion, ruling that there was no evidence sufficient to be submitted to the jury. The plaintiff excepted and appealed to this Court."

E. L. Alston, Jr., for plaintiff appellant.
Sapp & Sapp, by Armistead W. Sapp, Jr., for defendant appellee.

HIGGINS, J. Immediately after the incident in the parking lot, the plaintiff went to the head, first of the Sports Department, then to the head of the Cosmetics Department in the defendant's store. Thereafter, she went to the office of the manager, who at the time was in conference with the man who had displayed the badge in the parking lot. The manager showed familiarity with what had taken place. "I explained to the manager the way the two men came out to the car and asked to see our pocketbooks. . . . he (the manager) told me they had to have precautions like that. I told him I knew that; I was working at Sears at the time. . . . but I didn't understand why they had to go about it the way and in the manner in which they did."

The evidence, while insufficient to identify the man with the badge as a public officer, nevertheless is sufficient to warrant the finding that he was acting as the defendant's agent and within the scope of his employment. Under such circumstances, the principal is responsible for the agent's tort. *Parrish v. Mfg. Co.,* 211 N.C. 7, 188 S.E. 817.

We must concede the evidence was insufficient to warrant the plaintiff's arrest. If the man with the badge (type not shown) and his companion actually arrested and imprisoned the plaintiff, such arrest was without probable cause and the plaintiff's restraint was unlawful. " 'False imprisonment is the illegal restraint of the person of any one against his will.' Ashe, J., *State v. Lunsford,* 81 N.C. 528. It generally includes an assault and battery and always, at least, a technical assault. *State v. Reavis,* 113 N.C. 677, 18 S.E. 388. Involuntary restraint and its unlawfulness are the two essential elements of the offense. *Riley v. Stone, supra;* 25 C.J.S. 443; 11 R.C.L. 791. Where no force or violence is actually used, the submission must be to a reasonably ap-

prehended force. *Powell v. Fiber Co., supra,* (150 N.C. 12, 63 S.E. 150)." *Parrish v. Mfg. Co.,* 211 N.C. 7, 188 S.E. 817.

Restraint must be lawful, or it must be consented to, otherwise it is unlawful. *Hales v. McCrory-McLellan Corp.,* 260 N.C. 568, 133 S.E. 2d 225. "It generally includes an assault and battery, and always, at least, a technical assault. *Hoffman v. Hospital,* 213 N.C. 669, 197 S.E. 161. A false arrest is one means of committing a false imprisonment . . . 35 C.J.S. 502; *Mobley v. Broome,* 248 N.C. 54, 102 S.E. 2d 407."

"Force is essential only in the sense of imposing restraint. . . . The essence of personal coercion is the effect of the alleged wrongful conduct on the will of plaintiff. There is no legal wrong unless the detention was involuntary. False imprisonment may be committed by words alone, or by acts alone, or by both; it is not necessary that the individual be actually confined or assaulted, or even that he should be touched. 19 Cyc., pp. 319 and 323. Any exercise of force, or express or implied threat of force, by which in fact the other person is deprived of his liberty, compelled to remain where he does not wish to remain, or to go where he does not wish to go, is an imprisonment. . . . The essential thing is the restraint of the person. This may be caused by threats, as well as by actual force, and the threats may be by conduct or by words. If the words or conduct are such as to induce a reasonable apprehension of force, and the means of coercion are at hand, a person may be as effectually restrained and deprived of liberty as by prison bars." *Hales v. McCrory-McLellan Corp., supra.*

The plaintiff's circumstances and conduct indicate she was without fear the defendant's agents would find any articles in her pocketbook for which she had not paid. She freely passed the pocketbook to the man with the badge and at his request freely opened it, permitted the examination, and removed for his inspection the bracelet and explained where and when she bought it. She knew the agent would not find any incriminating evidence against her. She had nothing to fear, and, hence, she was not disturbed by the search. She was disturbed, however, by the implication that the defendant's agents suspected her of shoplifting. Her conduct bears out this appraisal. After the officers completed the search, the plaintiff and her friends returned immediately to the store, plaintiff interviewed, first, the manager of the sports department, then the manager of the cosmetics department, and immediately thereafter called on the manager in his office. Under the circumstances here disclosed, there is no sufficient evidence to warrant a finding that the plaintiff was under arrest or was imprisoned. The plaintiff was a passenger in her friend's vehicle. All she did, or was requested to do, was to open her pocketbook and submit it and the brace-

let for inspection. The evidence does not disclose that she objected to the examination, but complied willingly. The judgment of nonsuit is Affirmed.

PARKER, J., dissents.

NORTH CAROLINA STATE HIGHWAY COMMISSION v. YORK INDUSTRIAL CENTER, INC.; KELLOGG SWITCHBOARD & SUPPLY COMPANY; CHARLES H. YOUNG AND A. L. PURRINGTON, JR.; TRUSTEES, AND RALEIGH SAVINGS & LOAN ASSOCIATION.

(Filed 16 December, 1964.)

Eminent Domain §§ 7a, 10—

Under the 1959 Amendment to G.S. 136, Art. 9, upon the filing of complaint by the Highway Commission and a declaration of a taking and the deposit with the court by the Commission of its estimate of fair compensation, the Commission acquires title, and may not thereafter take a voluntary nonsuit. Nor may the Commission assert the right to take a nonsuit on the ground that, contrary to the averment in its complaint and its declaration of a taking, it had not taken any property from the condemnee. G.S. 1-209.2, Article I, § 17, of the Constitution of North Carolina.

APPEAL by defendant, York Industrial Center, Inc., from *Martin, S. J.*, July 27, 1964 Civil Session of WAKE.

Plaintiff, on May 16, 1961, filed with the Clerk of the Superior Court of Wake County its complaint seeking a determination of the amount it should pay for property rights taken from defendants. Contemporaneously with the filing of the complaint, it filed a "notice of taking" and deposited with the court its estimate of fair compensation for the property taken.

On May 19, 1961, York Industrial Center, Inc. (York) filed its answer. It asserted ownership of the rights taken, and joined with plaintiff in asking for the appointment of commissioners to determine that question.

On July 31, 1964, the court, on motion of plaintiff and over York's objection, entered a judgment of nonsuit. York excepted and appealed.

Manning, Fulton & Skinner and Jack P. Gulley for defendant appellant.

Attorney General Bruton, Assistant Attorney General Lewis, Trial Attorney Rosser, Young, Moore & Henderson, and J. Allen Adams for plaintiff appellee.

RODMAN, J. The only question for decision is the right of plaintiff to have the action dismissed. In support of that right, it points to G.S. 1-209.2, which says: "The petitioner in all condemnation proceedings authorized by G.S. 40-2 or by any other statute is authorized and allowed to take a voluntary nonsuit."

The statute on which plaintiff relies was enacted in 1957. Needless to say, it should not be interpreted in such manner as to render it unconstitutional, if a reasonable constitutional interpretation can be given.

The right of a petitioner in a condemnation proceeding to submit to a voluntary nonsuit, at any time prior to the vesting of title in condemnor, had been judicially recognized prior to the enactment of c. 400, S.L. 1957, now G.S. 1-209.1 and 209.2. *Light Co. v. Manufacturing Co.*, 209 N.C. 560, 184 S.E. 48; *State v. Hughes*, 202 N.C. 763, 164 S.E. 575.

Prior to 1959, the Highway Commission was, when necessary to acquire title by condemnation, directed to act under the provisions of c. 40, entitled "Eminent Domain," G.S. 136-19 (1944 edition).

In proceedings instituted pursuant to the provisions of c. 40, "[t]he title of the landowner is not divested unless and until the condemnor obtains *a final judgment* in his favor *and* pays to the landowner *the amount of the damages fixed by such final judgment.*" *Topping v. Board of Education*, 249 N.C. 291 (299), 106 S.E. 2d 502.

The Legislature, by c. 1025, S.L. 1959, amended by c. 1084, S.L. 1961, now codified as Art. 9 of c. 136 of the General Statutes (Vol. 3B), rewrote the law regulating the procedure which the Highway Commission should use in condemning property subsequent to July 1, 1960. Compare the second paragraph of G.S. 136-19 as these sections appear in Vol. 3 (1944 edition) and in Vol. 3B (1964 edition). Formerly the property owner's title was divested by decree in a special proceeding, G.S. 40-11; and then only when fair compensation had been ascertained and paid as directed by decree confirming the award. *Topping v. Board of Education, supra.*

Since July 1, 1960, title is divested by a civil action, G.S. 136-103. "Upon the filing of the complaint and the declaration of taking and deposit in court, to the use of the person entitled thereto, of the amount of the estimated compensation stated in the declaration, title to said land or such other interest therein specified in the complaint and the declaration of taking, together with the right to immediate possession

hereof shall vest in the State Highway Commission and the judge shall enter such orders in the cause as may be required to place the Highway Commission in possession, and said land shall be deemed to be condemned and taken for the use of the Highway Commission and the right to just compensation therefor shall vest in the person owning said property or any compensable interest therein at the time of the filing of the complaint and the declaration of taking and deposit of the money in court, and compensation shall be determined and awarded in said action and established by judgment therein." G.S. 136-104.

Now the right to compensation rests in the person who owned the land immediately prior to the filing of the complaint and declaration of taking. He has nothing he can sell pending ascertainment of fair compensation. Formerly, since his title was not divested until compensation was paid, he could sell, G.S. 40-26. The person who owned when the award was confirmed was the person to be compensated. *Liverman v. R. R.*, 109 N.C. 52, 13 S.E. 734. The Highway Commission, when it files its complaint, must file a memorandum of its action with the register of deeds where the land lies, G.S. 136-104. This has the same effect as a conveyance of the property.

To permit the Highway Commission to decide, subsequent to a taking (here three years after the taking), that it did not want the property it had taken, and for that reason refuse to pay, would do violence to the provisions of Art. 1, sec. 17, of our Constitution. We hold G.S. 1-209.2 does not permit condemnor to avoid payment of compensation by taking a nonsuit after title to the property has vested in condemnor.

Appellee, in its brief, asserts it had the right to submit to a nonsuit because it had not in fact taken any property from York; it had merely, in the exercise of the police power, prescribed the manner in which defendants might have access to a controlled access highway. *Snow v. Highway Commission*, 262 N.C. 169, 136 S.E. 2d 678; *Moses v. Highway Commission*, 261 N.C. 316, 134 S.E. 2d 664.

The answer lies in the language of the complaint and the declaration of taking. These expressly assert a taking. We can not hold as a matter of law that this assertion is erroneous, because the description of what was purportedly taken demonstrates nothing was in fact taken.

York is only entitled to fair compensation for such of his property, if any, as the Commission has taken, G.S. 136-109. Neither the Commission's, nor the owner's, estimate of the value is conclusive.

Reversed.

STATE OF NORTH CAROLINA v. JAMES A. FOX, DOCKET NO. 5477.
AND
ALBERT R. SAMPSON, DOCKET NO. 5478.

(Filed 16 December, 1964.)

Constitutional Law § 20; Trespass § 10—

In accordance with mandate of the Supreme Court of the United States, conviction of defendant of trespass in wilfully refusing to leave a restaurant after being requested to do so by the management, is reversed on the ground that the inspection form of the State Board of Health providing for toilet facilities separate for each race constitutes State action depriving the operator of the restaurant of freedom of choice as to patrons he could serve.

ON remand from the Supreme Court of the United States.

PER CURIAM. Defendants, Negroes, were in April 1960 convicted in Wake County Superior Court of trespassing after being forbidden, a misdemeanor, G.S. 14-134. They appealed to this Court. We found "No Error." See opinion filed 3 February 1961, reported 254 N.C. 97, 118 S.E. 2d 58.

Defendants thereafter applied to the Supreme Court of the United States for *certiorari*. That Court, on June 22, 1964, granted the writ, vacated the judgment, and remanded the case "to the Supreme Court of North Carolina for consideration in the light of *Robinson v. Florida*, ... U.S. ....., 12 L. Ed. 2d 771, 84 S. Ct. ....., decided this date." 12 L. Ed. 2d 1032, 84 S. Ct. 1901.

The North Carolina State Board of Health, in 1958, exercising the authority given it by Art. 5, c. 72, of the General Statutes, promulgated an "Inspection Form for Restaurants and Food Handling Establishments." This inspection report makes provisions for toilet facilities "for each sex and race." It is, we think, apparent that the majority of the Supreme Court of the United States was of the opinion that the regulations promulgated by the North Carolina State Board of Health, like the regulations promulgated by the Florida State Board of Health, were sufficient to constitute state action depriving the operator of a restaurant of a freedom of choice with respect to the patrons he could serve.

The conclusion reached by the Supreme Court of the United States is binding on us; hence we reserve the judgments rendered at the April 1960 Term of the Superior Court of Wake County, and hold the Superior Court erred in overruling defendants' motions for nonsuit.

Reversed.

RICHARD COUTURE, INC., T/D/B/A JEUNESSE, ET AL, PLAINTIFFS V. A. C. ROWE, T/D/B/A BABS PARKER, ET AL, DEFENDANTS.

(Filed 16 December, 1964.)

1. Corporations § 29—

Funds collected on accounts receivable due a corporation may not be used to pay the individual debts of the principle incorporator, which debts were incurred by the incorporator in connection with other personal businesses operated by him.

2. Execution § 16—

All claimants to payment out of a particular fund should be given notice and an opportunity to be heard in proceedings under G.S. 1-353.

APPEAL by plaintiffs from *Walker, S. J.*, July-August 1964 Session of RANDOLPH.

This is an appeal from a judgment affirming an order of the Clerk denying the motion of plaintiffs for an order directing Paul Smith to apply moneys in his hands to judgments held by plaintiffs against A. C. Rowe and Town Modes, Inc.

Miller and Beck for plaintiff appellants.

Ferree, Anderson & Ogburn and Deane F. Bell for defendant appellees.

PER CURIAM. A. C. Rowe said in affidavits authorizing rendition of judgments for accounts payable that he did business under these names: Rowe's Men's Shop and Babs Parker. He was also president of Town Modes, Inc. Based on confessions of indebtedness, judgments were rendered in favor of three creditors against A. C. Rowe, t/d/b/a Rowe's Men's Shop; in favor of two creditors against A. C. Rowe, t/d/b/a Babs Parker; in February 1964, judgment by default final was rendered in favor of Schaefer Tailoring Company against A. C. Rowe, t/d/b/a Rowe's Tailoring Company. In April 1963, two judgments were entered against Town Modes, Inc. These judgments were based on confessions signed by A. C. Rowe, as president of Town Modes, Inc. The two judgments against Rowe, trading as Babs Parker, amounted to $330.08; the three against Rowe, trading as Rowe's Men's Shop, amounted to $2,148.24; and the one against Rowe, trading as Rowe's Tailoring Company, amounted to $843.16. The judgments against Town Modes, Inc. amounted to $400.08.

After executions were returned unsatisfied, the Clerk, on motion of the judgment creditors, made an order as authorized by G.S. 1-353, requiring A. C. Rowe to submit to an examination with respect to his

properties available for payment of the judgments. Thereafter, Paul Smith was required to disclose what properties he had belonging to the judgment debtors.

On June 12, 1964, the Clerk made an order in which he recited that Rowe and Smith had been examined as required by his orders. Based on the testimony of Rowe, he made findings, summarized as follows: Rowe had no tangible assets which could be applied to the judgments; Rowe's Tailoring Company and Town Modes, Inc. were destroyed by fire. Rowe estimated these businesses had accounts receivable aggregating $65,000. He delivered such records as he had showing debts owing these concerns to Paul Smith, Manager of Credit Bureau of Asheboro. Based on the testimony of Smith, the Clerk found that Rowe, in April 1963, delivered to Smith "certain accounts receivable of A. C. Rowe, trading and doing business as Rowe's Tailoring, and certain accounts receivable of Town Modes, Inc.; that he was instructed by letter of Roy R. Christiansen, an alleged agent of the Insurance Company of North America, to collect these accounts receivable." Collections have been made on receivables of Rowe's Tailoring Company in the amount of $1,971.54, and on accounts receivable of Town Modes, Inc. in the amount of $5,765.35. Drafts for the amounts collected were sent to the Insurance Company of North America. It refused to accept the drafts and returned the same to Smith, who now has "in his possession the sum of $1,971.54, collected on the accounts receivable of A. C. Rowe, trading and doing business as Rowe's Tailoring * * * and the sum of $5,765.35, collected on the accounts receivable of Town Modes, Inc."

It appears from the findings that Smith has collected more than enough to pay the claims of plaintiffs, judgment creditors. The principal amounts originally owing them were less than $4,000. Smith has collected in excess of $7,500, but judgment creditors of Rowe have no right to use moneys collected for, and belonging to, Town Modes, Inc. The fact that Rowe was president of that corporation gives his creditors no right to use that corporation's money to pay Rowe's debts. The assets of Town Modes, Inc. should, of course, be applied on its debts. Rowe's stock, if any, in Town Modes, Inc., or any sum owing to him by that corporation, may be applied to the payment of his personal obligations.

The finding that the accounts receivable were delivered by Rowe to Smith for collection would, if nothing else appeared, have sufficed for an inference that Smith was to collect for the parties to whom the accounts were payable; but there is a clear inference that there is, or may be, another bona fide claimant to these funds. That claimant ought to be made a party to the proceeding. Its rights ought not to be jeopardiz-

ed by not having an opportunity to be heard. The court should then, upon evidence which the parties may desire to present, make a specific finding with respect to the ownership of the funds and its applicability to the payment of the amounts owing by judgment debtors. Until the facts have been ascertained, no proper judgment can be rendered. The cause is remanded to the Superior Court of Randolph County for a determination of the facts necessary to fix the rights of the parties.

Remanded.

HENRY LANCE MOORE, BY HIS NEXT FRIEND, CLYDE H. MOORE v. CHARLES THOMAS BROOKS, BY HIS GUARDIAN AD LITEM CARROLL F. GARDNER, AND SEBERT MONROE BROOKS.

AND

WILLIAM ALEX MILLER, BY HIS NEXT FRIEND, THERON O. MILLER v. CHARLES THOMAS BROOKS, BY HIS GUARDIAN AD LITEM CARROLL F. GARDNER, AND SEBERT M. BROOKS.

(Filed 16 December, 1964.)

Automobiles § 41n—

Plaintiff passengers were injured when defendant driver struck a mule on the highway at nighttime while driving 50 to 55 miles per hour. The evidence tended to show that the driver avoided striking one mule by swerving to the left, then drove back on his right side of the highway without slackening speed and did not see the second mule until too late to avoid the collision. *Held:* The evidence was sufficient to be submitted to the jury on the issue of negligence.

APPEAL by defendants from *McLaughlin, J.*, September, 1964 Civil Session, SURRY Superior Court.

The two minor plaintiffs, through their respective Next Friends, instituted these civil actions to recover damages they sustained by reason of the actionable negligence of Charles Thomas Brooks in the operation of a family purpose automobile owned by the defendant Sebert M. Brooks. The plaintiffs were guest passengers in the vehicle when the driver wrecked it on Rural Road No. 1001, west of Dobson, in Surry County. The driver, according to his own evidence, was driving at night, 50 to 55 miles per hour, "When I first saw the mule it was four or five car lengths, or possibly six in front of me and I then swerved to the left. I did not run off the highway. Just as I came around that mule and then drove back into my lane, I was right on the other one before I saw it. That mule was standing facing west in

my lane of the highway and I was right on top of the second mule when I saw it and hit it."

The highway patrolman testified he found debris all over the road. The mule had been knocked or carried 231 feet and the automobile had stopped 282 feet from the debris. The mule was killed. The vehicle was a total loss. The two plaintiffs were injured.

The jury found the defendant was negligent and awarded the plaintiff Moore $5,000.00, and the plaintiff Miller $3,500.00, for their injuries. From judgments on the verdict, the defendants appealed.

Blalock & Swanson by C. Orville Light for plaintiff Henry Lance Moore, appellee.

James J. Randleman and M. Neil Finger for plaintiff William Alex Miller, appellee.

Barber & Gardner by John C. W. Gardner, Wilson Barber for defendant appellants.

PER CURIAM. The evidence permitted an inference of speed in excess of that warranted by conditions on the highway. After discovering the first mule in the road, the driver did not reduce speed, but whipped around the mule back into his traffic lane and was "on top of the second mule" before he saw it. Up to that time he had not reduced speed.

The evidence fully justified the jury's findings. Assignments of error other than to the failure to nonsuit are formal and require no discussion. In the judgments below, we find

No error.

WILLIAM EUGENE WISE, ADMINISTRATOR OF THE ESTATE OF LUTUS WISE, DECEASED v. HOWARD TARTE.

(Filed 16 December, 1964.)

Automobiles § 45—

Nonsuit *held* proper upon evidence tending to show that intestate had poor eyesight and walked into the highway in the path of defendant's car, and that defendant did not have time or opportunity to avoid the accident after he discovered or should have discovered that intestate was insensible to the danger.

WISE *v.* TARTE.

APPEAL by plaintiff from *Braswell, J.*, March 1964 Session of COLUMBUS.

Plaintiff seeks compensation for the alleged negligent killing of Lutus Wise (intestate) on the afternoon of July 24, 1960. Defendant's motion for nonsuit, made at the conclusion of plaintiff's evidence, was allowed. Plaintiff excepted and appealed.

James L. Cole, Edward L. Williamson, Benton H. Walton, III, for plaintiff appellant.

Johnson, McIntyre, Hedgpeth, Biggs & Campbell for defendant appellee.

PER CURIAM. The evidence taken in the most favorable aspect for plaintiff would permit a jury to find these facts: Defendant was, on Sunday, July 24, 1960, driving westwardly on U.S. 74 from Wilmington toward Whiteville. It was a clear day. He reached Delco about 6 p.m. The road from that point for more than a mile to the west, the direction in which defendant was traveling, was straight and practically level. It was paved, 22 feet in width, with 8 foot shoulders on each side. The road crosses Livingston's Creek .8 of a mile west of Delco. A filling station, on the north side of the highway, is 150-175 feet east of Livingston's Creek Bridge. A railroad is to the south of and parallels the highway. There is a ravine between the highway and the railroad. Intestate came from the ravine to the south shoulder of the highway east of the bridge. He stopped at, or near, the edge of the road. He looked both to the west and to the east. He called to someone at the filling station. He then started across the highway.

Defendant, traveling at 50 miles per hour, saw intestate come from the ravine, stop at the edge of the shoulder, look in each direction and then start across the highway. Defendant had passed the filling station, and was 120 feet from the bridge, when intestate came to the highway.

Intestate was struck in the northern lane. The right front headlight was broken by the impact. Glass from the headlight marked the point of impact. Defendant skidded his car for a distance of 69 feet, 39 feet before he struck intestate and 30 feet beyond the point of impact. The car stopped with the front end on the bridge.

Intestate's "eyesight wasn't what you would call perfect, but he could see." Defendant did not know intestate prior to the collision. There was nothing to inform him that intestate's vision was not perfect.

Plaintiff's contributory negligence is patent. *Blake v. Mallard,* 262 N.C. 62, 136 S.E. 2d 214. In fact, plaintiff specifically pleads his intestate's negligence but, he would avoid its effect by asserting defendant had the last clear chance to avoid the unfortunate results of intestate's negligence.

Defendant's duty to act arose only after he knew, or in the exercise of due care should have known, the pedestrian was insensible to danger. *Jenkins v. Thomas,* 260 N.C. 768, 133 S.E. 2d 694. If liability is to be imposed, he must then have a "clear chance" to avoid injury. Here, the evidence fails to show such an opportunity.

The judgment is

Affirmed.

IN THE MATTER OF THE WILL OF MRS. LALAH IRENE PERKINS ISLEY.

(Filed 16 December, 1964.)

Wills §§ 17, 22—

Notwithstanding that proof of the formal execution of a paper writing in accordance with statute raises a *prima facie* presumption that the paper writing is a will, and notwithstanding that the burden is upon caveator to establish mental incapacity relied on by him, the writing is not established as a will until the verdict of the jury does so, and reference in the court's instruction to the paper writing as the "alleged will" is not an expression of opinion by the court that the paper writing was not in fact a valid will.

BOBBITT, J., took no part in the consideration or decision of this case.

APPEAL by the propounder of a paper writing, purporting to be the last will and testament of Lalah Irene Perkins Isley, from *Armstrong, J.,* March 23, 1964, Session of GUILFORD (Greensboro Division).

Caveat proceedings.

Mrs. Lalah Perkins Isley, late of Guilford County, died 24 July 1963. Her purported will, dated 24 August 1960, was admitted to probate in common form on 23 September 1963. The paper writing undertakes to give to Mrs. Isley's brother, Aubrey Alphonso Perkins, the greater part of the estate. Mrs. Lalah Perkins Isley Mercer, daughter and only child of Mrs. Isley, filed a *caveat* in October 1963, alleging, *inter alia,* that at the time of the execution of the paper writing Mrs. Isley was without mental capacity to make a will. Prior to the *caveat*

proceedings the Wachovia Bank and Trust Company was appointed trustee of the estate of Aubrey Alphonso Perkins, propounder, because of his incompetency. The trustee is acting on behalf of the propounder in this proceeding.

The jury found that Mrs. Isley lacked mental capacity to make a valid will, and judgment was entered declaring said paper writing is not the will of Mrs. Isley. Propounder appeals.

Roberson, Haworth & Reese for Propounder.

Smith, Moore, Smith, Schell & Hunter and James G. Exum, Jr., for Caveator.

PER CURIAM. Several times in the charge the judge referred to the paper writing as the "alleged will." Propounder insists this was prejudicial error and amounted to an expression of opinion that it was not in fact a valid will. We do not agree. The propounder's contention arises from a misinterpretation of the following statement from *In re Broach's Will,* 172 N.C. 520, 90 S.E. 681; "The formal execution (of the paper writing) having been formally proven, it was *prima facie* the will of the deceased, and the caveators were called on to put on evidence to impeach it." This means that, when in *caveat* proceedings there is proof of the formal execution of the paper writing in accordance with the requirements of the statute, the paper writing is to be admitted in evidence, and such proof makes it *prima facie* the will of deceased and will justify, but not compel, a jury verdict that it is the will of deceased; to overcome this *prima facie* showing caveator must produce evidence to impeach it. The real contest in the instant proceeding was on the issue of mental capacity. The court correctly placed the burden of this issue on caveator. It was for the jury to say whether the paper writing was "the will" of deceased. Until the jury verdict was in, it was "the paper writing," "the alleged will" or "purported will." There was no expression of opinion and the jury could not have been misled.

The court's explanation of the expression "natural objects of deceased's bounty" is in substantial compliance with that heretofore approved by this Court. *In re Will of Franks,* 231 N.C. 252, 259, 56 S.E. 2d 668. The court did not abuse its discretion in overruling the motion to set aside the verdict.

No error.

BOBBITT, J. took no part in the consideration or decision of this case.

JACK HOWARD v. CURTIS W. WOOD AND GLENDA WOOD.

(Filed 16 December, 1964.)

Automobiles § 39—

Where there is testimony of witnesses that immediately before the accident they heard tires "squealing" and evidence further tending to relate skid marks on the road to plaintiff's motorcycle, testimony of an officer as to where the skid marks began and stopped is competent, it being for the jury to determine whether the marks were made by defendant's vehicle.

APPEAL by plaintiff from *Phillips, E. J.*, April 13, 1964, Special Civil Session of GUILFORD (High Point Division).

Plaintiff sues to recover damages suffered by him because of the alleged negligence of defendant, Glenda Wood, in the operation of a family purpose automobile owned by her father and codefendant, Curtis W. Wood. Defendants plead contributory negligence.

The accident occurred on the morning of 3 August 1963 in the City of High Point where Hodgin Street (servient) makes a "T" intersection with English Road (dominant). The Wood automobile proceeded south on Hodgin, stopped at the intersection, and was in the act of making a left turn into English Road. Plaintiff was operating his motorcycle west on English Road and, in attempting to pass to the rear of the Wood automobile, lost control and was thrown from the motorcycle and injured. There is conflicting evidence as to whether the motorcycle came in contact in any way with the rear of the automobile.

The jury found defendants negligent and plaintiff contributorily negligent. Accordingly, judgment was entered denying recovery. Plaintiff appeals.

Silas B. Casey and Haworth, Riggs, Kuhn & Haworth for plaintiff.

Smith, Moore, Smith, Schell & Hunter and Richmond G. Bernhardt, Jr., for defendants.

PER CURIAM. All assignments of error relate to evidence of a skid mark.

Over the objection of plaintiff, the investigating officer, who arrived at the scene shortly after the accident, was permitted to testify that there was a skid mark in the north lane of English Road, ending about the center of the intersection and extending back to the east 132 feet; it "went toward the shoulder of the road and back to a point just about midways of the intersection of Hodgin Street." The motorcycle was found 20 to 25 feet west of the intersection. When objection was inter-

posed the Judge said: "He may tell anything that he saw there. It is a question for the jury as to what vehicle, if any, made them. He may tell where they began and where they stopped." Upon a later objection the judge stated: "It is a question for the jury to say whether or not your client made them. . . . He can describe any he saw there."

Plaintiff had testified: ". . . when I applied my brakes it skid me to this side of the road (pointing to a chart) sideways . . . the front wheel is sliding sideways and the other wheel would be forward. That is what is called sliding sideways. . . . My motorcycle was in a straight line." Plaintiff said he saw no skid marks and none were there a few days later when he returned from the hospital. Plaintiff's witness, Coe, who was near the scene at the time of the accident, had testified: "I heard a skid, something like a skidding motorcycle . . ., something like a car skidding . . ." The occupants of the Wood automobile and a by-stander, all testifying for defendants, stated they heard tires "squealing," "squalling." Plaintiff testified he went on the shoulder at one point; the officer testified the mark veered toward the shoulder and then back toward the center.

The testimony was admissible. The evidence was sufficiently related to the operation of the motorcycle to permit the jury to find that the mark was made by the motorcycle. Furthermore, the evidence corroborates the testimony of witnesses. *Hatcher v. Clayton,* 242 N.C. 450, 88 S.E. 2d 104. A witness who investigates an accident may describe to the jury the signs, marks and condition found at the scene. *Shaw v. Sylvester,* 253 N.C. 176, 116 S.E. 2d 351. The judge was correct in stating that it was for the jury to determine whether the mark was made by the motorcycle. *Tyndall v. Hines Co.,* 226 N.C. 620, 39 S.E. 2d 828. The witness could not be permitted to draw conclusions. If plaintiff desired special instructions with reference to the legal effect of this evidence, he should have made proper request therefor in apt time.

No error.

STATE OF NORTH CAROLINA v. JAMES THOMAS LEACH AND ARTHUR LEROY LEGETTE.

(Filed 16 December, 1964.)

Criminal Law § 107—

Where defendant introduces evidence of an alibi, it is prejudicial error for the court to fail to charge the law applicable thereto.

SENTER *v.* CORE.

APPEAL by defendants from *Burgwyn, J.*, September 1964 Criminal Session of DURHAM.

Defendants were jointly charged in one bill of indictment with the crime of common-law robbery. The State's evidence tended to show that on the night of August 24, 1964, sometime before 10:50 p.m., on a dark street in Haiti in the City of Durham, the two defendants "jumped" the prosecuting witness, Clarence Spencer; that while defendant Leach held Spencer, defendant Legette took his pocketbook containing $20.00; and that both defendants then ran. Each defendant denied his guilt of the crime charged and offered evidence tending to show him, at the time of the alleged robbery, in the company of other persons at another place so far distant that he could not have been involved in it. The jury returned a verdict of guilty as charged. From a judgment of imprisonment in the State's prison each defendant appeals.

Attorney General Bruton and Assistant Attorney General Richard T. Sanders for the State.

Rudolph L. Edwards for James Thomas Leach defendant.

Lina Lee S. Stout for Arthur Leroy Legette defendant.

PER CURIAM. Although defendants' primary defense was an alibi, his Honor inadvertently failed to charge on this substantive feature of the case. Defendants are entitled to have had the court apply the law to their evidence with respect to alibi. Under the authority of *State v. Gammons,* 258 N.C. 522, 128 S.E. 2d 860, and *State v. Spencer,* 256 N.C. 487, 124 S.E. 2d 175, defendants have the right to a new trial and it is so ordered.

New trial.

IOLA G. SENTER v. MAE McKOY CORE.

(Filed 16 December, 1964.)

Automobiles §§ 41l, 42k, 45—

Nonsuit held proper in this action to recover for injuries sustained when plaintiff stepped from behind a parked car on a rainy night and was struck by defendant's car immediately after another car had passed in the opposite direction, either upon the principle question of liability or upon the ground of contributory negligence, there being insufficient evidence to bring into play the doctrine of last clear chance.

SENTER *v.* CORE.

APPEAL by plaintiff from a judgment of compulsory nonsuit entered at the close of all the evidence by *Mallard, J.*, May 1964 Civil Session of DURHAM.

C. Horton Poe, Jr., for plaintiff appellant.

Bryant, Lipton, Bryant & Battle by Victor S. Bryant, Jr., for defendant appellee.

PER CURIAM. Plaintiff's evidence shows the following facts: On 9 November 1962 she was 60 years old and resided at 811 Buchanan Boulevard in the city of Durham. This boulevard runs north and south and her residence is situate on its west side about 225 feet north of its intersection with Markham Avenue. This boulevard is paved and is about 30 feet wide in front of her house. Parking of automobiles is permitted on its east side and not on its west side. About 5 p.m. on this day she came out of her house to cross the boulevard to where her brother was sitting in his automobile parked near the curb on the east side of the boulevard headed north a short distance north of the front of her house, to go to a grocery store. It was raining and dark. She had on a gray winter coat and was carrying a large black umbrella. She stood at the curb in front of her house, looked to the left, and saw an automobile approaching from the north going south. She waited for this automobile to pass. She then looked to the south and saw no approaching automobile. She then proceeded to cross the boulevard to her brother's automobile, walking straight in an easterly direction. When she reached about the center of the boulevard, she looked south to her right and saw a dim light of an automobile about 225 or 250 feet to the south headed north on the boulevard. She testified on direct examination: "When she was about one step from the rear of her brother's motor vehicle she was struck by an automobile driven by the defendant, Mae McKoy Core, and that the impact caused her to roll over and over on the pavement." She testified on cross-examination in respect to the automobile that struck her: "I saw the car one time and after that, I did not look back at it again." Defendant's automobile came to a stop about five or eight feet beyond her brother's automobile. While she was lying on the pavement, defendant came to her and said she was sorry, she did not see her. When defendant's automobile stopped on the boulevard, it had its parking lights turned on. Plaintiff offered no direct testimony as to the speed of defendant's automobile.

Defendant's evidence shows these facts: She was driving her automobile north on Buchanan Boulevard at a speed of about 20 miles an hour. It was raining and the street was wet. She had her headlights on.

She was meeting an automobile. When it passed her, plaintiff walked from behind it about two feet in front of her automobile. She applied her brakes and stopped in two or three feet.

It seems that plaintiff was crossing the boulevard at a place where there was no marked crosswalk. Considering plaintiff's evidence, and so much of defendant's evidence as is favorable to her or tends to clarify or explain evidence offered by her not inconsistent therewith, in the light most favorable to plaintiff, and ignoring defendant's evidence which tends to establish another and different state of facts or which tends to contradict or impeach the evidence presented by plaintiff, it is our opinion, and we so hold, that plaintiff has failed to make out a case of actionable negligence against defendant. *Grant v. Royal*, 250 N.C. 366, 108 S.E. 2d 627. We are also constrained to hold that the motion for judgment of compulsory nonsuit should have been sustained, if not upon the principal question of liability, then upon the ground of contributory negligence. There is no evidence in the record to bring into play the doctrine of last clear chance, according to the statement of that doctrine in *Wade v. Sausage Co.*, 239 N.C. 524, 80 S.E. 2d 150.

The judgment of compulsory nonsuit below is

Affirmed.

LULA MAE SMITH v. PEGGY SUE JONES AND IVAN JONES.

(Filed 16 December, 1964.)

Automobiles § 42g—

Evidence favorable to plaintiff tending to show that she stopped before entering an intersection with a dominant highway, looked both ways and did not see any approaching traffic, and then drove into the intersection and was struck by defendant's car, which was traveling on the dominant highway in a direction from which it could not have been seen by plaintiff until it was some 145 to 150 feet from the intersection, with evidence of physical facts tending to show defendant was traveling at excessive speed, *held* not to disclose contributory negligence as a matter of law.

APPEAL by plaintiff from *Gambill, J.*, 23 March Civil Session 1964 of SURRY.

This is a civil action to recover for personal injuries and property damage sustained by plaintiff, alleged to have been caused by the negligence of defendants.

The collision involved occurred on 8 October 1962 in the Town of Mt. Airy, North Carolina, about 3:00 p.m., at the intersection of Rockford and Haymore Streets. Rockford Street runs generally north and south while Haymore Street runs east and west. The plaintiff was traveling west on Haymore Street and the defendant, Peggy Sue Jones, was traveling south on Rockford Street, driving a car owned by her father, the male defendant.

The plaintiff testified that she stopped her car in obedience to a stop sign at the intersection of said streets; that three cars passed going north up the hill on Rockford Street; that when these cars passed, she looked to the north and to the south and then again to the north and saw no traffic approaching on Rockford Street; that she proceeded to enter the intersection and had traveled about 30 feet; that as the front of her car reached the western edge of Rockford Street it was struck on its right side by the car driven by the *feme* defendant.

The evidence tends to show that Rockford Street is 30 feet wide, and in approaching this intersection on said street from the north, a motorist must drive over a hill; that in entering this intersection from Haymore Street a motorist driving west on said street could only see to the north on Rockford street approximately 150 feet. The evidence further tends to show that the car driven by the *feme* defendant skidded 69 feet before the impact. The debris caused by the impact was found twelve feet from the northwest intersection of the curb line of said streets.

A police officer testified that looking north from the northern edge of Haymore Street up Rockford Street, it is approximately 145 feet to the crest of the hill.

At the close of plaintiff's evidence the defendants moved for judgment as of nonsuit. The motion was allowed. Plaintiff appeals, assigning error.

Folger & Folger for plaintiff appellant.
Deal, Hutchins & Minor, Edwin T. Pullen for defendant appellees.

PER CURIAM. We concede this is a very close case. Even so, in view of the fact that a motor vehicle approaching the intersection involved from the north of Rockford Street cannot be seen until it arrives at or near the crest of the hill, approximately 145 to 150 feet from the intersection, we think the evidence of the plaintiff, when considered in the light most favorable to her, as it must be on a motion for nonsuit, is sufficient to carry the case to the jury.

We think there is a substantial difference between the factual situation in the case of *Howard v. Melvin*, 262 N.C. 569, 138 S.E. 2d 238, and the present case. There, the evidence tended to show that plaintiff had stopped at a stop sign 39 feet away from the intersection with the dominant highway, and proceeded to enter the intersection without looking again to see if any traffic was approaching from either direction. The evidence further tended to show that had the plaintiff looked before entering the intersection, he had a clear view for one-quarter to one-half mile to the south, the direction from which the car was traveling that collided with his truck.

The judgment below is

Reversed.

STATE v. WILL BROWN, JR.

(Filed 16 December, 1964.)

APPEAL by defendant from *Mallard, J.*, January-February 1964 Regular Criminal Session of DURHAM.

Criminal prosecution on bill of indictment charging defendant with the first degree murder of Joe Lyne Blumell. Upon call of the case for trial, the solicitor announced that the State would not ask for a verdict of guilty of murder in the first degree, but would ask for a verdict of guilty of murder in the second degree.

Evidence was offered by the State and by defendant.

The jury returned a verdict of "guilty of murder in the second degree." Judgment imposing a prison sentence was pronounced.

Defendant excepted and appealed.

Attorney General Bruton and Deputy Attorney General McGalliard for the State.

Marshall T. Spears, Jr., for defendant appellant.

PER CURIAM. There was plenary evidence that defendant intentionally shot Blumell on December 6, 1963, between 10:00 and 11:00 p.m., on Roxboro Street (near its intersection with Canal Street) in Durham, North Carolina, and that Blumell died at Duke Hospital on December 7, 1963, at 12:45 a.m., as the result of bullet wound(s) so inflicted.

Upon the evidence and instructions, whether defendant was guilty of murder in the second degree, or guilty of manslaughter, or not guilty, was submitted for jury determination. The evidence was amply sufficient to support the verdict. A full and careful consideration of the record discloses no error prejudicial to defendant. The court instructed the jury fully as to all legal principles and contentions favorable to defendant. Hence, the verdict and judgment will be upheld.

Defendant, an indigent, was represented in the superior court by two court-appointed counsel. After trial and conviction, defendant requested that said counsel be discharged and that the court appoint other counsel to prosecute his appeal. Under these circumstances, the court permitted said court-appointed trial counsel to withdraw and appointed Marshall T. Spears, Jr., Esquire, as counsel for defendant to perfect and prosecute his appeal. Mr. Spears has served only as appellate counsel.

No error.

RICHARD LANE BROWN, III (UNMARRIED) AND CHARLES PALMER BROWN (UNMARRIED), PETITIONERS v. ROBERT MARTIN BOGER AND WIFE, EVELYN BOGER; NANCY GROVES BOGER FORTE AND HUSBAND, KENNETH EUGENE FORTE; AND CABARRUS BANK & TRUST COMPANY AND M. A. BOGER, TRUSTEES UNDER THE WILL OF IDA GROVES BOGER, DEFENDANTS.

(Filed 15 January, 1965.)

1. Partition § 6—

Whether land should be actually partitioned or sold for partition is a question of fact for decision of the clerk, subject to review by the judge, and is not an issue of fact for a jury.

2. Same—

The mere fact that actual partition would entail more time and expense than a sale for partition is, without more, insufficient basis to deny a tenant in common his right to have partition in kind.

3. Same—

A tenant in common is entitled to actual partition unless actual partition will cause substantial and material injury to some or all of the cotenants, and an "injury" which will justify an order of sale is such a substantial injustice or material impairment as would render it unconscionable to require the cotenants to submit to actual partition, G.S. 46-22, and each case must be determined on its own facts.

4. Same—

The court must find the essential facts to support its order of sale for partition, and while the court's findings are conclusive if supported by competent evidence and its discretionary determination will not be disturbed in the absence of some error of law, if the court's findings are insufficient to support its conclussion that actual partition cannot be had without material injury to some or all of the cotenants, its order of sale must be vacated and the cause remanded for further proceedings.

5. Same—

A finding that timber was offered for sale from the tract in question in separate parcels and then as a whole, and brought a higher price as a whole than in separate parcels, is irrelevant to the question of whether a tenant in common is entitled to sale for partition, since the advantages of cutting and removing timber from an entire tract are dissimilar to the advantages of selling the fee in a tract of land as a whole or in parts.

6. Evidence § 35—

Nonexpert opinion is not competent when the jury is as well qualified as the witness to draw inferences and conclusions from the facts which the witness may relate, and therefore testimony of a witness that a tract would bring a better price if sold as a whole than if sold in smaller tracts is incompetent.

7. Evidence § 41; Partition § 6—

In proceedings to have land sold for partition a witness may not testify that the property could not be divided without injury to some or all of the tenants in common, since this is the ultimate question for decision by the court after findings of fact by the court sufficient to support the conclusion. Whether the court can accept as "satisfactory proof" of such injury evidence patently incompetent but not objected to, *quaere?*

8. Partition § 6—

The fact that it would be more convenient and easy to sell for partition than to actually partition the land because of its varying character, is not ground for denying actual partition.

9. Same—

The court's findings to the effect that it was to the best interest of the tenants in common that the land be sold as a whole and that a lower price would be received from a sale of the tract in those parcels which could be allotted in an actual partition, without a finding as to how much less the land would bring if sold in parcels, *held* insufficient to support the court's conclusion that an actual partition could not be had without injury to some or all of the parties interested.

APPEAL by defendants from *McConnell, J.,* October 1963 Civil Session of STANLY.

This is a special proceeding for the sale of land for partition. The *locus in quo* consists of about 1250 acres in one tract. Plaintiffs, Richard

Lane Brown, III and Charles Palmer Brown, own seven-tenths undivided interest in fee; defendants Robert Martin Boger and Nancy Grover Boger Forte own three-tenths undivided interest in fee.

Plaintiffs allege that "the nature and size of said lands is such that an actual partition thereof cannot be made without injury to the several persons interested therein; that in the opinion of your petitioners *(sic)* a large (larger) amount can be realized from the sale of said lands as a whole rather than by selling the same in separate tracts." Defendants, on the other hand, aver that the land "can be divided among the tenants in common without injury to any of them," and defendants own a three-tenths undivided interest in an adjoining tract of 57.4 acres.

There is no serious conflict in the evidence with respect to the material facts, but witnesses for plaintiffs and defendants draw conflicting conclusions from the facts.

The land is situate in Stanly County, 6 miles from Albemarle, 6 miles from Badin, 30 miles from Concord and 48 miles from Charlotte. The boundaries are irregular; the shape, as nearly as it can be described, is somewhat oval with projecting corners all around; the north-south axis is somewhat longer than the east-west axis. It is bounded on the north and northeast by Mountain Creek which is the boundary, for a distance of about 2000 feet, between this land and Morrow Mountain State Park. Mountain Creek flows into a lake formed by Carolina Power and Light Company's dam across the Pee Dee River. The lake backs water into Mountain Creek. The *locus in quo* is about 1000 yards from the lake proper, and at one point is about 300 yards from the Raleigh-Charlotte highway. There is an unpaved public road running east and west through the property; it dead-ends just to the east of the property at Clodfelter Section where there are 12 or 15 homes. School buses use the road to transport children from Clodfelter Section to and from school. An electric power line crosses the property making electricity available.

The land in question is known as the Groves Property (named for a former owner, and ancestor of defendants). It is a composite of 8 tracts, all of which were acquired by Groves: Maner tract, 252 acres, is the northwest portion; Bolich tract, 301.25 acres, the northeast portion; Wade tract, 301.4 acres, east-central and southeast; Hamilton tract, 50.2 acres, south; Texas tract, 244.8 acres, southwest; Marks tract, 102.5 acres, Thompson tract, 47.2 acres, and Kirk tract, 19.9 acres, west. There are 50 to 60 acres of open cultivated land on the Maner tract; there was formerly a large acreage under cultivation on this tract and tenants formerly lived there and made a living farming

it; it is fairly level and was productive. The Bolich tract was at one time "a good size farm." Stony Mountain is on the Wade tract; it is rough and rocky. Mr. Hamilton lived on the Hamilton tract and did some farming on a small acreage, his main occupation was carpenter. Tenant farmers have lived on the Texas tract and made their living there; 11 bales of cotton, 400 bushels of corn and other crops were made one year; it was good land for cotton, that's the reason it was called "Texas." At one time a family lived on the Marks tract and farmed it and made a living there. A family farmed the Thompson tract at one time. Six acres of the Kirk tract was at one time under cultivation; this tract could be used for any purpose.

All of the farm land, except the 50 or 60 acres on the Maner tract, was allowed to grow up many years ago. The timber on the Groves property was cut and removed in 1950 and 1951. It was offered in tracts, but brought more as a whole. It sold for $155,000. There is no "saw" timber on the land now, except oak, and oak has very little value. There is a young growth of pine on part of the land. After the pine timber was cut in 1951 hardwood took over a part of the area formerly in pines because of poor reseeding and because hardwood is more progressive. The land is generally rough, but it has all grades of land which can be found in Stanly County, from the roughest to very good farm land. 200 to 250 acres could be cleared and used for farming and grazing. But some witnesses thought this not feasible. It is woodland and is suitable for recreational purposes, including deer and quail hunting. A part of the property could be developed for residential purposes.

Two tracts of land, containing 44.7 acres and 4.4 acres, owned by persons other than the parties hereto, lie inside the Groves property. The 57.4-acre tract, in which defendants have a three-tenths interest, lies at and projects into the central-western portion of the Groves property. This tract has a residence on it.

In addition to the Morrow Mountain State Park and the Clodfelter section, there are other developed properties adjoining and near the Groves property. About one-half mile away is the River Haven Development in which is located about 42 houses. The Methodist Church is constructing a youth center nearby. There are a number of homes and farms on lands adjoining. A new subdivision nearby, containing 96 lots, is being developed and 4 homes have been built there.

Ida Groves Boger owned a three-tenths undivided interest in the Groves property. She died in 1956 and willed her interest to trustees, in trust for defendants until they attained age 25. Robert Martin Boger is over 25, and is a physician and resides in Atlanta, Georgia. Nancy

Groves Boger Forte is not yet 25, her trustees are Cabarrus Bank and Trust Company and M. A. Boger, Jr., her father. The trustee bank received a number of bids for defendants' interest in the Groves property, and purported to give Malcolm Palmer "a refusal to purchase the property." M. A. Boger, Jr., trustee, did not know this and, when he found out about it, did not approve. Defendants do not wish to sell their interest; they want the property divided and to hold their share. The Groves property "is down next to Morrow Mountain and they aren't making any more land down there."

Plaintiffs acquired their seven-tenths interest in February 1962 from some of the Groves heirs. They attempted to get an option from all of the owners, including defendants. The option price was $50,000, about $40 per acre. Defendants would not sell. A 75-acre tract, located within a mile of the Groves property, having no outlet and as rough on the average as the *locus in quo*, was sold for hunting purposes in 1963 at the price of $100 per acre. The old Kirk place, which adjoins the Groves property, sold at public auction at the price of $65 per acre. Mr. Boone's place, which also adjoins the Groves property and is about the same kind of land, sold for $12,375; it contains about 200 acres. Mr. Furr owns 234 acres adjoining the Groves property; he was offered $75 per acre, but would not sell. One of plaintiffs' witnesses testified that the Groves property is worth $65 per acre.

Twelve witnesses testified for plaintiffs in substance as follows: Groves property would be difficult to divide because it is rough land, is irregular in contour, and contains different types and grades of land. It cannot be equitably divided, without injury to some or all of the tenants in common. W. C. Lowder, Vice-president of a corporation which owns large tracts of lands, stated: "The only way you can divide land is to sell it and divide the money. You can divide money equally. In my opinion that applies to land everywhere, absolutely." The property would bring more as a whole than divided into two tracts. About twelve persons, firms and organizations have contacted a realtor in an effort to purchase the Groves property, they are not interested in buying a part.

Eight witnesses testified for defendants in substance as follows: In their opinion the property could be equitably divided without injury to any of the parties. A number of people have said they would be interested in a part of the land, but are not financially able "to swing the entire deal."

The cause came on for hearing before the clerk of superior court on 3 October 1963. After hearing evidence, the clerk found facts and

ordered that the property be sold as a whole at public sale. Defendants excepted and appealed to superior court.

The judge heard evidence and found facts in pertinent part as follows:

"4. . . . the tract of land . . . consists of approximately 1250 acres and is located about six miles east of Albemarle on a rural road which enters the property on the north side and comes to a dead-end near the south side thereof; that said land is bounded on the north and northeast by Mountain Creek and the property known as Morrow Mountain State Park; that all sawable timber on said tract of land was sold and cut during the years 1950 and 1951, and there is no sawable timber now standing upon the lands with the exception of some scattered hardwood, but small timber is growing on part of the lands; that a large part of said land is mountainous and not accessible by vehicles; that said land, with the exception of two fields containing approximately 60 acres which are open for cultivation, is extremely rough; that at one time, many years ago, there were smaller open fields, but these have grown up and are not now open for cultivation.

"5. . . . when the timber was sold from said land in 1950, said timber was offered for sale in separate parcels and then as a whole, and brought a higher price as a whole than in separate parcels.

"6. . . . the tract of land sought to be sold . . . is not suitable for residential purposes and cannot be used profitably for farming, and the highest and best use for said land is for recreational and conservation purposes.

"7. . . . all of the parties to this action are absentee owners and a sale will not displace any of the parties.

"8. . . . there is nothing in the evidence to show that the respondents are not financially able to bid on the property in order to assure that it brings an adequate price at a public sale thereof.

"9. . . . the following named persons or organizations have indicated an interest in the purchase of said tract of land as a whole: (naming seven). . . . no interest has been indicated by any person, firm or corporation in the purchase of any less than the whole 1250-acre tract.

"10. . . . from an economic standpoint it is in the best interest of the petitioners . . . that the lands be sold as a whole, and an actual partition of said lands will cause financial detriment to those who want to sell, the court being of the opinion and finding as a fact that the pe-

titioners will receive more from the sale of the lands as a whole than they will be able to receive from the sale of that portion of the lands which would be allotted to them in an actual partition. . . .

"11. From the foregoing findings of fact and from a full consideration of all the evidence offered by the petitioners and the defendants, it appears to the court by satisfactory proof that an actual partition of the lands cannot be made without injury to some or all of the parties interested. . . ."

The judge ordered a public sale of the land as a whole, affirmed the order of the clerk and remanded the cause to the clerk for further proceedings in accordance with the order.

Defendants appeal.

D. D. Smith and Hobart Morton for defendant appellants.

Richard L. Brown, Jr. and S. Craig Hopkins for petitioner appellees.

MOORE, J. Defendants except to and assign as error the findings of fact and conclusions of law set out in numbered paragraphs 6, 7, 9, 10 and 11 of the judgment below. They say and contend that the evidence does not support the findings of fact and the findings of fact do not support the conclusions of law.

For a clear understanding of the problem presented, a brief review of the legal principles involved is essential.

"At common law and in equity as well, in proceedings for partition of land, the cotenants were entitled to partition in kind if they so demanded, regardless of the difficulty or inconvenience of doing so. Only by consent of parties did the courts have power to order a sale of the land and a division of proceeds among the common owners." 40 Am. Jur., Partition, § 83, p. 72. "By original equitable jurisdiction, independent of any statute, if all of the parties *sui juris* were willing, the court had power to decree a sale; and this, even though infants might be among the parties interested. But where one of the parties *sui juris* refused his consent, the court had no option but to proceed with the ordinary mode of partition." 4 Pomeroy's Equity *Jurisprudence*, 5th Ed., § 1390, pp. 1018, 1019. See also 4 Thompson on Real Property, § 1828, p. 308. It seems that courts of equity gradually assumed authority to order sales of land for partition in instances of extreme hardship, without statutory sanction, and in cases where one or more cotenants did not consent. Whether the courts of equity had such authority became a matter of concern to the courts and the General As-

sembly of North Carolina early in the Nineteenth Century. In *Mineral Co. v. Young,* 220 N.C. 287, 17 S.E. 2d 119, we find the following: "Although there is authority for the view that partition by sale of lands could formerly be made under the equitable jurisdiction of the courts, 17 Am. & Eng. Enc. Law, 785; *Wolfe v. Galloway,* 211 N.C. 361, 190 S.E. 213, statutes authorizing such sale have been regarded as innovations upon the common law and in derogation thereof. 2 Tiffany, Real Property (3d Ed., 1939), 325; 17 Am. & Eng. Enc. Law, 785; *Hale v. Thacker,* 12 S.E. (2d), 524 (W. Va.). In this State statutory relief of that sort apparently derives from the statute of 1812, chapter 847, Laws of North Carolina, Potter, Vol. 2, the preamble of which indicates both the origin and nature of the relief as follows: 'Whereas doubts exist as to the power of courts of equity to order a sale of real estate in cases of partition, where an equal and advantageous division cannot be made. *Be it enacted, &c,*' and there follows the grant of the power." The statute of 1812 provides "That it shall and may be lawful for any court of equity in cases of application for a division of real estate, when it shall be suggested and made to appear to the satisfaction of the court, that an actual partition cannot be made without injury to some or all of the parties interested, to order a sale of the property upon such terms as such court shall deem just and reasonable." 2 Potter: Laws of North Carolina, Ch. 847, p. 1239. So, in this jurisdiction prior to 1868, partition between tenants in common was a matter to be determined by a court of equity. *Haddock v. Stocks,* 167 N.C. 70, 83 S.E. 9. In a case in equity, *Windley v. Barrow,* 55 N.C. 66 (1854), it is declared: *"Prima facie,* each party interested in a tract of land, is entitled to an actual partition, and it is incumbent on him who asks for a sale to show, that his interest will be promoted by it, and that no loss will be worked by it to any other party. *Davis v. Davis,* 2 Ire. Eq. 607 (37 N.C. 607)." Further: "In cases of partition, a court of equity does not act merely in a ministerial character, but it administers its relief *ex equo et bono,* according to justice and equity."

Procedures have changed but not substantive principles. Partition of land is by special proceeding. G.S. 46-3; G.S. 46-22. Whether land should be divided in kind or sold for partition is a question of fact for decision of the clerk of superior court, subject to review by the judge on appeal; it is not an issue of fact for a jury. *Ledbetter v. Pinner,* 120 N.C. 455, 27 S.E. 123; *Talley v. Murchison,* 212 N.C. 205, 193 S.E. 148. G.S. 46-22 provides that "Whenever it appears by satisfactory proof that an actual partition of lands cannot be made without injury to some or all of the parties interested, the court shall order a sale of the property described in the petition, or any part thereof." The general

rule (interpreting the statutes) presently applied is: "A tenant in common is entitled, as a matter of right, to a partition of the land to the end that he may have and enjoy his share therein in severalty, unless it is made to appear that an actual partition cannot be had without injury to some or all of the interested parties." *Seawell v. Seawell,* 233 N.C. 735, 65 S.E. 2d 369; *Hyman v. Edwards,* 217 N.C. 342, 7 S.E. 2d 700. There is unanimity of opinion and decision that partition of land in kind is a matter of right. *Mineral Co. v. Young, supra; Barber v. Barber,* 195 N.C. 711, 143 S.E. 469; *Trull v. Rice,* 85 N.C. 327; *Windley v. Barrow, supra.* But this right of actual partition may not be so used as to injure another. *Trull v. Rice, supra.* The burden is upon those alleging the necessity and desirability of a sale to establish the necessary requisites. *Seawell v. Seawell, supra; Wolfe v. Galloway, supra; Windley v. Barrow, supra.* "As between a partition in kind or sale of land for division, the courts and statutes favor a partition in kind, if it can be accomplished equitably and fairly, since this does not disturb the existing form of inheritance or compel a person to sell his property against his will, which, it has been said, should not be done except in cases of imperious necessity. . . . it is no objection to a partition in kind that some of the cotenants prefer a sale to a partition. . . ." 68 C.J.S., Partition, § 125, pp. 186, 187; 4 Pomeroy's Equity *Jurisprudence,* 5th Ed., § 1390, p. 1019; 4 Thompson on Real Property, § 1828, p. 310; *Tuggle v. Davis,* 165 S.W. 2d 844, 143 A.L.R. 1087 (Ky. 1942); *Owings v. Talbott,* 90 S.W. 2d 723 (Ky. 1936).

It is essential to a sale of land for partition that it be established that an actual division in kind cannot be made without *injury to some or all* of the cotenants. G.S. 46-22. By "injury" to a cotenant is meant substantial injustice or material impairment of his rights or position, such that it would be unconscionable to require him to submit to actual partition. 68 C.J.S., Partition, § 127, p. 190. Since partition in kind is favored, such partition will be ordered, even though there may be some slight disadvantages in pursuing such method. *Ibid.,* p. 192. A sale will not be ordered merely for the convenience of one of the cotenants. *Ibid.,* p. 190. The physical difficulty of division is only a circumstance for the consideration of the court. *Mineral Co. v. Young, supra.* On the question of partition or sale the determinative circumstances usually relate to the land itself, and its location, physical condition, quantity, and the like. 68 C.J.S., Partition, § 127, p. 193. "The test of whether a partition in kind would result in *great prejudice* to the cotenant owners is whether the value of the share of each in case of a partition would be *materially less* than the share of each in the money equivalent that could probably be obtained for the whole." (Emphasis added). 4

Thompson on Real Property, § 1828, p. 309. But many considerations, other than monetary, attach to the ownership of land. *Hale v. Thacker,* 12 S.E. 2d 524 (W. Va. 1940). No exact rule is possible of formulation to determine the question whether there should be a partition in kind or a partition by sale. The determination must be made on the facts of the particular case. 68 C.J.S., Partition, § 127, p. 190. There should be a partition in kind unless such partition will cause material and substantial injury to some or all of the parties interested.

The court has no authority to order a sale of land for partition without satisfactory proof of facts showing that an actual partition will cause injury to some or all of the cotenants. *Wolfe v. Galloway, supra.* The essential facts must be found by the court. *Seawell v. Seawell, supra.* The findings of the judge are conclusive and binding if there is any evidence in the record to support them. *West v. West,* 257 N.C. 760, 127 S.E. 2d 531. The judge has reasonable discretion in making the determination, and his decision will not be disturbed in the absence of some error of law. *Tayloe v. Carrow,* 156 N.C. 6, 72 S.E. 76.

In the instant case there is no finding that the 1250 acres of land cannot be divided so that seven-tenths in value could be allotted to plaintiffs and three-tenths in value to defendants. And if such finding had been made, it would not find support in any probative evidence in the record. At most the evidence would justify a finding that an actual division of the land would entail more time and expense than a smaller tract of uniform condition and value — a circumstance to be considered by the court, but which standing alone would be insufficient basis for a partition by sale.

The crucial finding of fact is set out in numbered paragraph 10: "That from an economic standpoint it is in the best interest of the petitioners . . . that the lands be sold as a whole, and an actual partition of said lands will cause financial detriment to those who want to sell, the Court being of the opinion and finding as a fact that the petitioners will receive more from the sale of the lands as a whole than they will be able to receive from the sale of that portion of the lands which would be allotted to them in an actual partition thereof." Based upon this finding the judge concluded "that an actual partition of the lands cannot be made without injury to some or all of the parties interested."

It is extremely doubtful that there is "satisfactory proof" of the matters set out in paragraph 10 of the judgment. Plaintiffs paid at the rate of $40 per acre in 1962 for seven-tenths interest in the Groves property. Plaintiffs' witness Hearne, testifying in October 1963, stated that the property was worth $65 per acre. A 75-acre tract, similar in

character to the subject property and located about a mile therefrom, was sold in 1963 at the price of $100 per acre. A tract adjoining the Groves property sold at public auction for $65 per acre. A 200-acre tract, similar in character to the Groves property and adjoining it, sold for $60 per acre. The owner of a 234-acre tract, which adjoins the subject property, refused an offer of $75 per acre. The court found as a fact that seven persons, organizations and corporations have, since plaintiffs bought shares of the property, indicated an interest in purchasing the property as a whole, but there is no finding and no evidence to support a finding as to what they would be willing to pay. The court also found "that no interest has been indicated by any person, firm or corporation in the purchase of any less than the whole 1250-acre tract of land." This is contrary to uncontradicted evidence in the record. The trustee bank received, without request therefor, a number of bids for defendants' interest in the land and purported to give to a person "a refusal to purchase." A number of persons expressed an interest in part of the subject land, but are not financially able "to swing the entire deal." The court further found as a fact "that when the timber was sold from said lands in 1950, said timber was offered for sale in separate parcels and then as a whole, and brought a higher price as a whole than in separate parcels." This finding is irrelevant. The considerations which would cause a purchaser to buy a large rather than a small tract of timber, to be cut and removed from the land, have no relation to the considerations which would cause one to purchase land on which there is no "sawable" timber of value. The evidence discussed in this paragraph does not support the finding that the *locus in quo* would sell at a better price as a whole than if divided and offered in separate tracts.

A number of plaintiffs' witnesses were permitted, without objection, to express the opinion that the property would bring a better price if sold as a whole than if sold in smaller tracts. The witnesses were not offered as experts and no effort was made to qualify them as such. No factual basis was laid for the opinion. One or more of the witnesses stated that they knew of no person interested in buying less than the whole tract. ". . . opinion is inadmissible whenever the witness can relate the facts so that the jury (here the judge) will have an adequate understanding of them and the jury is as well qualified as the witness to draw inferences and conclusions from the facts." Stansbury: North Carolina Evidence, § 124, pp. 243-4. It is true that "If opinion evidence is admitted without objection it is entitled to consideration by the jury, and must be considered by the judge in a ruling upon a motion to nonsuit." *Ibid.*, p. 284. But it is assumed that when the court is trier of

the facts it will not consider incompetent evidence or be mislead by that which is inconclusive. *Bizzell v. Bizzell,* 247 N.C. 590, 101 S.E. 2d 668. *Quaere:* May a judge, as trier of the facts, accept as "satisfactory proof," of a matter alleged and essential to the determination of the question presented, opinion evidence patently incompetent, though not objected to? Though the answer to this query is not necessary for decision in the case at bar, it would seem that the answer is "no," unless the failure to object be deemed an admission of the truth of the opinion. We note further that witnesses were permitted to state that the property could not be divided without injury to some or all of the cotenants. Thus they were permitted to draw a conclusion upon the facts and the law as to the ultimate question for decision by the court. Such opinions prove nothing. Proof must be presented and facts found by the judge which will, after proper application of legal principles, support such conclusion before even the judge may make such determination.

Even if the findings of fact in paragraph 10 of the judgment are supported by evidence, these findings are insufficient to support the conclusion that an actual partition cannot be made without injury to some or all of the tenants in common. If the land will bring more as a whole, how much more? Will the difference be so material and substantial as to make an actual partition unjust and inequitable? The findings do not answer these questions. There is much more involved here than competitive bidding, how property can be sold to best advantage, or how to assure plaintiffs of the most profit on their investment. It is the policy of the law that land owned in common be divided and that the cotenants hold their shares of the land in severalty and enjoy the possession and fruits thereof, unless an actual partition will work a substantial inequity and injustice.

Extensive research has failed to bring to light a case factually comparable in which a sale for partition was allowed. *Hale v. Thacker, supra,* is factually similar; those desiring a sale contended that the property would sell for a better price as a whole. The court stated: ". . . the record falls far short of a showing which justifies a sale of the land in question. . . . the owner of a share in land which can be conveniently partitioned has the right to be the judge of his own interest, and he has the right to insist upon his common-law right to partition in kind, so long as that right is not exercised in such a way as to unduly prejudice the rights of his co-owners. It is well known that many considerations, other than monetary, attach to the ownership of land, and courts should be, and always have been, slow to take away from owners of real estate their common law right to have the same

set aside to them in kind." See also *Trowbridge v. Donner,* 40 N.W. 2d 655 (Nev. 1950).

The cause is remanded to superior court for a rehearing on the question whether an actual partition can be made without injury to some or all of the parties interested, and for further proceedings in accordance with law.

Error and remanded.

STATE OF NORTH CAROLINA v. CEPHUS DIXON McNEIL, NATHAN SYLVESTER WALLER, JAMES EUGENE WALLER, LARRY EUGENE LEAK, AND BOBBY WHITE FERRELL.

(Filed 15 January, 1965.)

1. Constitutional Law § 32—

A defendant charged with a felony is entitled to representation in the trial court in both the State and Federal jurisdictions, but such right does not justify the court in forcing counsel upon a defendant who wants none. Fourteenth Amendment to the Constitution of the United States.

2. Same—

An indigent defendant has no right to select his own counsel and must accept experienced and competent counsel appointed by the court in the absence of any substantial reason for replacement, and when a defendant states he does not want court appointed counsel after the court has made clear that the court would not appoint other counsel, he waives counsel. The mere fact that court appointed counsel had not prosecuted appeals from prior convictions of the defendant when defendant thought he should have done so is not ground for replacement.

3. Same—

It is not required that waiver of counsel be in writing. G.S. 15-4.1.

4. Same—

Speculation as to whether defendant would have been better off had he not discharged his court appointed counsel and represented himself is irrelevant to the question of whether he had voluntarily waived counsel by discharging his count appointed counsel.

5. Criminal Law § 159—

Exceptions and assignments of error not brought forward and discussed in the brief deemed abandoned. Rule of Practice in the Supreme Court No. 28.

6. Criminal Law § 71—

The fact that a defendant who had voluntarily given himself up at police headquarters made a confession after he had been truthfully told by

a police officer that defendant had been implicated by others in the commission of the crime under investigation does not render the confession involuntary.

7. Criminal Law § 48—

Where defendant promptly denies an accusation of guilt the principle of an implied admission by silence does not come into play, and evidence of the circumstances of the accusation is incompetent.

APPEAL by defendants Cephus Dixon McNeil, James Eugene Waller, and Bobby White Ferrell from *Copeland, S. J.*, September 1964 Criminal Session of DURHAM.

Criminal prosecution on an indictment charging Cephus Dixon McNeil, Nathan Sylvester Waller, James Eugene Waller, Larry Eugene Leak, and Bobby White Ferrell on 15 March 1964 at and in Durham County with the robbery of Ben F. Green of $160 in cash money United States currency and of a pistol of the value of $185, all the property of Ben F. Green, by the use and threatened use of firearms, to wit, a sawed-off shotgun and pistol, whereby the life of Ben F. Green was endangered or threatened, a violation of G.S. 14-87.

When the case was called for trial, all the defendants were in court in their own proper persons and with their attorneys, all members of the Durham County Bar, and all apparently appointed by the court to represent them. Cephus Dixon McNeil was represented by Standish S. Howe; Nathan Sylvester Waller was represented by C. C. Malone, Jr.; James Eugene Waller was represented by R. Roy Mitchell, Jr.; Larry Eugene Leak was represented by W. G. Pearson, II; and Bobby White Ferrell was represented by W. Paul Pulley, Jr.

Before pleading to the indictment, Bobby White Ferrell stated to the court that he did not desire the services of W. Paul Pulley, Jr., the lawyer appointed for him by the court. Whereupon, the court, not in the presence of the panel of prospective jurors who had been summoned to the court to act as jurors, after due inquiry, found as a fact that W. Paul Pulley, Jr., is a graduate of the law school of the University of North Carolina and has practiced law at the Durham and Wake County Bars since that time, and is well qualified to practice law. Bobby White Ferrell, after making the above statement, signed under an oath a waiver of right to have counsel appointed for him. Whereupon, the court permitted Bobby White Ferrell to dismiss his court-appointed attorney, W. Paul Pulley, Jr.

Before pleading to the indictment, Cephus Dixon McNeil stated to the court that he did not desire the services of Standish S. Howe, the lawyer appointed for him by the court. Whereupon, the court, not in

the presence of the panel of prospective jurors who had been summoned to the court to act as jurors, after due inquiry, found as a fact that Standish S. Howe is a graduate of the Duke University law school, has been practicing law in this State for the last thirteen years, and is well qualified to practice law. Whereupon, the following colloquy took place between the court and Cephus Dixon McNeil:

"COURT: 'All right. Let me ask you a few questions. I take it you do not want a lawyer. Is that what you want?'

"DEFENDANT: 'I want one, but I don't want Mr. Howe.'

"COURT: 'Then, your position is that you had rather have nobody rather than Mr. Howe; is that correct?'

"DEFENDANT: 'Yes, sir. I tell you why. I am getting along and don't seem like the lawyer is doing me no good. He talks against me. I tell him what to say and he says other things.'

"COURT: 'You understand you are not an attorney?'

"DEFENDANT: 'Yes, sir.'

"COURT: 'You wish to discharge him?'

"DEFENDANT: 'Yes, sir.'

"COURT: 'Let the record so show, and the court hereby releases Mr. Howe as your attorney.' "

After this had occurred, all the defendants pleaded not guilty. While the jury was being selected, and before it had been empanelled, Nathan Sylvester Waller, *in propria persona,* and through his attorney, C. C. Malone, Jr., withdrew his plea of not guilty and tendered to the State a plea of *nolo contendere.* Whereupon, the court examined Nathan Sylvester Waller, who stated that the plea of *nolo contendere* was free and voluntary on his part, that he fully understood the consequences of his plea, and the punishment therefor, and that he still wished to enter a plea of *nolo contendere.* The State accepted his plea, and it was entered upon the minutes of the court.

After the jury had been selected and empanelled and during the presentation of the State's evidence, Larry Eugene Leak stated to the court *in propria persona* and through his attorney, W. G. Pearson, II, that he wished to change his plea from not guilty to *nolo contendere.* Whereupon, the court examined the defendant who stated that his plea of *nolo contendere* was made freely and voluntarily on his part without fear or compulsion from anyone, and that he fully understood the consequences of his plea. His plea of *nolo contendere* was accepted by the State and recorded in the minutes of the court.

The jury returned as their verdict that the defendants Cephus Dixon McNeil, James Eugene Waller, and Bobby White Ferrell are guilty as charged in the indictment.

From judgments of imprisonment imposed on each one of them, defendants McNeil, James Eugene Waller, and Bobby White Ferrell appeal to the Supreme Court.

Attorney General T. W. Bruton and Assistant Attorney General Richard T. Sanders for the State.

Rudolph L. Edwards for defendant Cephus Dixon McNeil.

R. Roy Mitchell, Jr., for defendant James Eugene Waller.

Anthony M. Brannon for defendant Bobby White Ferrell.

PARKER, J. When McNeil appealed to the Supreme Court, Judge Copeland found that he was an indigent, and, pursuant to the provisions of G.S. 15-4.1, appointed Rudolph L. Edwards of the Durham County Bar to prosecute his appeal in the Supreme Court. When Bobby White Ferrell appealed to the Supreme Court, Judge Copeland found that he was an indigent, and, pursuant to the provisions of G.S. 15-4.1, appointed Anthony M. Brannon of the Durham County Bar to prosecute his appeal in the Supreme Court. Roy R. Mitchell, Jr., has continued his services as counsel for defendant James Eugene Waller in the prosecution of his appeal in the Supreme Court. The case on appeal and the briefs of attorneys for the three appealing defendants have been mimeographed at public expense in the same form as is done by any defendant in this State who is well able financially to prosecute his appeal.

The State's evidence shows these facts: Ben F. Green about 9:30 p.m. on Sunday, 15 March 1964, was preparing to close a grill he operated at 1201 Juniper Street in the city of Durham. He was alone. He turned off all the lights except one. His TV was on. Bobby White Ferrell knocked at the door. He paid him "no mind." There is no evidence Ferrell came in the grill or what door he knocked at. Two or three minutes later, he cut off the TV and the remaining light and went out the back door with his pistol in one hand and a pan of dog food in the other. When he got outside, he put his pistol in his pocket and turned round to lock the door. At that time two men, one of whom was Cephus Dixon McNeil, grabbed him from behind. While two men held him, McNeil ran in front of him in the light, and said: "Get his pocketbook, get his pocketbook," and grabbed his pistol. Then McNeil said, "make him hush hollering," and hit him once or twice with a pistol on the side of his head. He kept tussling and every time he whirled round,

McNeil pointed a pistol at him, and looked like he was trying to shoot him, but McNeil was scared he would shoot one of his companions. The men grabbed his pocketbook containing $160, his driver's license and receipts, and ran off. He had known NcNeil five or six years, knew his twin brother Clarence, and knew them apart. Three big lights made it bright as day, and McNeil was the one who held the pistol on him. He never told Lt. Haithcock of the Durham Police Force that Ferrell robbed him; he told him Ferrell was there.

The State called as its second witness detective A. L. Hight of the Durham Police Force. Over the objection and exception of Ferrell, the court permitted Hight to testify that defendant Leak, in the presence of two other detectives of the Durham Police Force and of defendant Ferrell and of Clarence McNeil, twin brother of defendant McNeil, made the following statement:

> "Bobby White Ferrell was a lookout, that he, James Eugene Waller, Cephus McNeil and Nathan Waller waited for Mr. Green to close and come out, whereupon they grabbed and robbed him, with Nathan Waller carrying the sawed-off shotgun at this time. That James Eugene Waller was the one who took Mr. Green's pistol and when they left they went to Cephus McNeil's home to divide the money and that it was later that Bobby White Ferrell came to the house where he was given $5.00 for his part."

The court instructed the jury not to consider this statement against defendants McNeil and James Eugene Waller. The solicitor then asked Hight what Ferrell said about Leak's statement. Hight replied:

> "Bobby Ferrell never made any comment to the statement except the fact that he denied it, and he told us that we were the detectives and we could find out the best way we could."

Then the solicitor asked Hight: "I ask you whether he ever denied it at that time?" Hight replied:

> "No, sir. He never denied participating in them, but he was real hard to get along with, and he told us that we were the detectives, we could find out the best way we could about it."

Detective Hight then testified, without objection, that defendant McNeil on 1 May 1964 made the following statement in the interrogation room in the Police Department in the presence of another police detective:

"[H]e and Larry Leak and James Waller and Nathan Waller, along with Bobby Ferrell, robbed a colored man that operated Green Sport Shop on Juniper Street. Cephus stated to me that they got approximately $75 from the colored man. He stated that they divided the money between the four of them. He stated they each received 18 or 20 dollars each. Cephus said the boy they called 'Hero,' who is Bobby Ferrell.

* * *

"'Hero,' who is Bobby Ferrell, got $5.00 for his part in participating in this robbery. Cephus also stated to me and Lt. Haithcock that during this robbery they took a .32-caliber pistol that they had taken from a white man at another robbery in Raleigh, North Carolina. He stated they carried both of these guns with him at the time he went. He stated he kept both these guns in his room in New York City until he found out the FBI was looking for him and when he heard that they were looking for him he took both of the guns and threw them in the River near the Brooklyn Bridge and he stated he had not seen the guns since this time, and he was arrested in New York City and brought back.

* * *

"He stated that he didn't, didn't mind confessing to what he had done, that he didn't mind talking to us about it, but that he would rather not sign anything."

After all the statement had been admitted without objection, defendant McNeil objected to it. Judge Copeland instructed the jury that they should not consider defendant McNeil's statement against the other defendants.

Detective Hight further testified that defendant James Eugene Waller on 7 May 1964 voluntarily came to the Durham Police Headquarters, and voluntarily gave himself up. Hight told him he had been implicated in these robberies by other persons who participated in these robberies, and did he want to make any statement in reference to these robberies he had been implicated in. Hight said he took a few notes as Waller spoke, and these were not signed by Waller. The record then states: "After more discussion the Court found the 'confession' voluntary and to this the defendant James Eugene Waller excepts and assigns as error No. 1." The record is as bare of what the "more discussion" was as old Mother Hubbard's cupboard, when she went to it "to get her poor dog a bone." Judge Copeland instructed the jury that they should not consider Waller's statement against the other

defendants, but consider it against Waller alone. Hight then testified that Waller said in effect that he, Larry Leak, Nathan Waller, Cephus McNeil, and Bobby White Ferrell went to the Green Sport Shop, waited for a while, robbed Mr. Green as he closed, left and then went to Cephus McNeil's house to divide the money.

After Hight had testified, defendant McNeil recalled him for further cross-examination. He testified in substance: They found the shotgun introduced in evidence underneath the garage immediately back of defendant McNeil's house. The informant said it was there, and they went there and found it.

CEPHUS DIXON McNEIL'S APPEAL

McNeil's first assignment of error is that the trial court did not appoint counsel to represent him at his trial after he had discharged his previously court-appointed counsel, Standish S. Howe.

McNeil was charged in the indictment with the commission of a serious felony in a State court. By virtue of the Fourteenth Amendment to the United States Constitution, he was entitled to representation in the trial court. *Gideon v. Wainwright* (1963), 372 U.S. 335, 9 L. Ed. 2d 799, 93 A.L.R. 2d 733.

Before his trial the superior court judge, recognizing McNeil's constitutional right and acting under the provisions of G.S. 15-4.1, appointed Standish S. Howe of the Durham County Bar to represent him in the trial court. Howe, according to the unchallenged findings of fact of Judge Copeland, is a graduate of the law school of Duke University, has practiced his profession for the last thirteen years, and is a well-qualified lawyer. In defendant McNeil's brief it is stated that Standish S. Howe's professional competency is not challenged.

Before pleading to the indictment McNeil stated to the court that he did not want Mr. Howe as his lawyer, that he wanted a lawyer, but he did not want Mr. Howe, that he had rather have nobody than have Mr. Howe, that he wanted to discharge him. McNeil stated the reason he did not want Mr. Howe as follows: "I am getting along and don't seem like the lawyer is doing me no good. He talks against me. I tell him what to say and he says other things."

Before the instant case was argued in the Supreme Court, Rudolph L. Edwards, attorney for defendant McNeil, filed in the Supreme Court a motion suggesting a diminution of the record in order to add thereto an affidavit of Standish S. Howe, McNeil's discharged court-appointed lawyer, and attached to the motion the affidavit. The Attorney General of North Carolina did not resist it, and this Court allowed the motion. Standish S. Howe's sworn affidavit states in sub-

stance, except when quoted: He represented the defendant McNeil in two criminal trials in the Durham County superior court. In one of these cases defendant McNeil was tried with four other defendants for armed robbery on 24 March 1964, was convicted and received a sentence of from 20 to 30 years. In the other case he was convicted of common law robbery on 6 December 1963 and received a sentence of not less than 2 nor more than 10 years. Before the trial of the instant case began, McNeil informed him that he did not want him as his counsel. This was brought to the attention of Judge Copeland. Judge Copeland took McNeil, Howe, and the court reporter into his chambers. Judge Copeland asked McNeil if he wanted court-appointed counsel. McNeil said he did not want Howe as his counsel. Judge Copeland advised McNeil that he must accept the lawyer appointed by the court or have no lawyer at all. McNeil repeated that he did not want Howe as his lawyer. The judge then entered an order dismissing Howe as McNeil's attorney. In the instant trial there were five defendants. He had conferred with W. G. Pearson and C. C. Malone, court-appointed attorneys for two of the defendants. "We wanted to stop these trials if we could, because the defendants had something like 15 different bills of indictment against them, and it appeared that every time the State tried the defendants and obtained a conviction against them, the State was ready to try them again on another offense, and the sentences might be tacked on to each other." Pearson and Malone were able to get their clients, Larry Eugene Leak and Nathan Sylvester Waller, to plead *nolo contendere,* and they received 10 to 20 years concurrent sentences. If McNeil had not discharged him, he would have advised that he plead *nolo contendere* with the hope of a concurrent sentence and that there would be a stop to these trials. McNeil pleaded not guilty and received a sentence of 15 to 25 years to run at the expiration of sentences he was serving, and the court recommended that he be confined in a maximum security prison unit. He did not perfect appeals to the Supreme Court that McNeil thought he should have, and this was the basis of the dissatisfaction between them. He told McNeil if he did not want him as his lawyer to tell the judge about it, and perhaps the judge would appoint another lawyer to represent him. If McNeil had kept him as his lawyer, and if he had followed his advice to plead *nolo contendere* as Pearson's and Malone's clients did, he might have received a lighter sentence.

The trial court permitted McNeil to discharge Howe as his lawyer, and he went to trial without a lawyer.

The United States Constitution does not deny to a defendant the right to defend himself. Nor does the constitutional right to assistance

of counsel justify forcing counsel upon a defendant in a criminal action who wants none. *Moore v. Michigan,* 355 U.S. 155, 2 L. Ed. 2d 167; *Carter v. Illinois,* 329 U.S. 173, 91 L. Ed. 172; *United States v. Johnson,* 6 Cir. (June 1964), 333 F. 2d 1004.

In *Johnson v. United States,* 8 Cir., 318 F. 2d 855, *cert. den.* 375 U.S. 987, 11 L. Ed. 2d 474, the Court said:

> "It is equally well settled that a defendant charged with a federal crime may waive his right to representation by counsel 'if he knows what he is doing and his choice is made with eyes open.' *Adams v. United States ex rel McCann,* 317 U.S. 269, 279, 63 S. Ct. 236, 241-242, 87 L. Ed. 268; *Johnson v. Zerbst,* 304 U.S. 458, 468-69, 58 S. Ct. 1019, 82 L. Ed. 1461; *Hayes v. United States,* 8 Cir., 296 F. 2d 657, 668; *Lipscomb v. United States,* 8 Cir., 209 F. 2d 831, 834; *Glenn v. United States,* 5 Cir., 303 F. 2d 536, 540; *Igo v. United States,* 10 Cir., 303 F. 2d 317, 318; *Arellanes v. United States,* 9 Cir., 302 F. 2d 603, 610; *Watts v. United States,* 9 Cir., 273 F. 2d 10, 12."

We think this statement is equally true of a defendant charged with crime in a state court.

The facts in the *Johnson* case, 318 F. 2d 855, are helpful here. Johnson was charged with a federal offense. The trial court appointed Mr. Joseph L. Flynn, a competent, experienced and able trial attorney of the Missouri Bar, to represent him in his trial. Mr. Flynn stated to the court in substance that Johnson did not want him to represent him, that he wanted to represent himself, that he had told Johnson what he considered the law to be, and by reason thereof he preferred to represent himself. The judge said to Johnson: "You say you do not want Mr. Flynn to represent you?" Johnson replied: "No, sir, he has had six months and he has done nothing. * * * I believe Mr. Flynn would do it the best he could, but he doesn't understand the points that I want." The judge replied in part: "The Court has appointed a lawyer for you and a good lawyer. If you do not want this lawyer to represent you, you have a perfect right to try your own case, but I am not going to appoint another lawyer for you." Johnson said: "Well, I would like to see that my constitutional rights—." The judge interrupted him saying "I have done all I can do for you. I am not going to appoint another lawyer. If you want Mr. Flynn to withdraw, all right, but I am not going to appoint another lawyer." Johnson, after further colloquy, said he did not want Mr. Flynn to represent him. Johnson went to trial without counsel, was found guilty by a jury, and receiv-

ed a prison sentence consecutive with a prison sentence he was serving. The Court said:

> "Defendant was fully informed as to the court's view that Mr. Flynn was in a position to competently represent the defendant and that if defendant insisted on Mr. Flynn's release, no other attorney would be appointed to represent him. With such knowledge defendant unequivocally informed the court that he insisted upon Mr. Flynn's release.
>
> * * *
>
> "The trial court committed no error in determining defendant has waived his constitutional right to be represented by counsel."

In *Campbell v. State of Maryland* (1963), 231 Md. 21, 188 A. 2d 282, defendant was convicted in the criminal court of Baltimore of armed robbery and carrying a deadly weapon, and appealed. Prior to his trial appellant requested the court to appoint another lawyer for him in lieu of his court-appointed counsel. When asked whether there was a good reason for a change of lawyers, he replied: "That is all right." He assigned as error the refusal of his request. The Court in a *per curiam* opinion said:

> "He now claims error in the refusal of his request. In the absence of any substantial reason for replacement of counsel (none was advanced here), an indigent defendant must accept counsel appointed by the court, unless he desires to present his own defense. *Brown v. United States,* 105 U.S. App. D.C. 77, 264, F. 2d 363, 367; *cf. Murray v. Director,* 228 Md. 658, 660, 179 A. 2d 878. But even if the question raised had any merit, it was plainly waived by appellant."

In *People v. Terry* (1964), 36 Cal. Rptr. 722, defendant was convicted in the superior court of petty theft and appealed. The District Court of Appeal held that where the trial court made it clear that defendent must choose between representation by his court-appointed counsel or by himself, when he expressed an unfounded dissatisfaction with his court-appointed lawyer merely because the court-appointed lawyer wanted him to plead guilty of something he was not guilty of, and defendant in at least three statements made it clear that he elected to defend himself, defendant properly waived the right of counsel at his trial.

In 157 A.L.R. 1225 *et seq.*, there is an annotation entitled "Right of defendant in criminal case to discharge of, or substitution of other

counsel for, attorney appointed by court to represent him." Therein it is said:

> "The right to such discharge or substitution is to this extent relative, and the authorities seem united in the view that if there is fair representation by competent assigned counsel, proceeding according to his best judgment and the usually accepted canons of criminal trial practice, no right of the defendant is violated by refusal to accede to his personal desire in the matter."

Mr. Howe, court-appointed lawyer for McNeil, is a well-qualified lawyer, and admitted to be such in McNeil's brief. When McNeil informed Judge Copeland that he wanted to discharge him as his attorney, Judge Copeland made it absolutely clear to him that he must have Howe as his lawyer in his trial or have no lawyer at all. After the judge's statement, McNeil said he did not want Howe as his lawyer, that he wanted to discharge him, that he wanted a lawyer but he did not want Howe. It is common knowledge of the Bench and Bar, who are engaged in criminal trials, that not infrequently convicted criminal offenders sentenced to prison have no good opinion of the services of their lawyers who defended them. It is also generally known to Bench and Bar that defendants, who have had extensive experience in the courts, as the record shows McNeil has had, think they should tell their lawyers what to say, and their lawyers do not say it, because to do so would ruin the defendants. There is no evidence before us that McNeil, in his two former trials referred to in Howe's affidavit, told the trial judge in those cases he wanted to appeal. Competent and experienced lawyers do not advise an appeal when they are confident there is no error in the trial. The mere fact that Howe did not appeal those two cases, when McNeil thought he should have an appeal, does not militate against Howe's professional competency to have defended him properly in the instant case. An indigent defendant in a criminal action, in the absence of statute, has no right to select counsel of his own choice to defend him, and we have no statute in North Carolina that gives him the right to select counsel. In the absence of any substantial reason for replacement of court-appointed counsel, an indigent defendant must accept counsel appointed by the court, unless he desires to present his own defense. McNeil, according to the record before us, had had experience before as a defendant in criminal trials. In the instant case we think McNeil had no substantial reason to have the court appoint another lawyer to represent him in the trial, when he had discharged Howe, after having been unequivocally told by Judge Copeland that if he discharged Howe he would not appoint another lawyer

to represent him, and that in discharging Howe he knew what he was doing and understandingly waived his constitutional right to have counsel. His counsel insists he did not waive the assistance of counsel, because he did not sign a written waiver. G.S. 15-4.1 states a "defendant may waive the right to counsel in all cases except a capital felony by a written waiver executed by the defendant * * *." The statute does not say he must sign a written waiver. Unquestionably in a criminal action a defendant can waive his right to counsel in North Carolina without signing a written waiver. Howe's statement in his affidavit to the effect that if McNeil had kept him as his lawyer, and if he had followed his advice to plead *nolo contendere,* as Pearson's and Malone's clients did, he might have received a lighter sentence, is pure speculation. If he had continued as his counsel, there is nothing to suggest that McNeil would have accepted his advice and entered a plea of *nolo contendere.* The record shows that Ferrell, who discharged his lawyer, represented himself, and pleaded not guilty, received the same sentence as the defendants represented by Pearson and Malone. It is probable that McNeil received a heavier sentence because, after his conviction, the State offered evidence of his prior criminal record, which it would seem from the judge's sentence was worse than that of McNeil's codefendants.

Defendant McNeil's other two assignments of error brought forward and discussed in his brief are overruled. They are without merit, present no new question, and require no discussion.

McNeil's assignments of error in the record, which have not been brought forward and discussed in his brief, are taken as abandoned by him. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783, 810.

In McNeil's trial we find no error.

JAMES EUGENE WALLER'S APPEAL

James Eugene Waller states in his brief that the only question presented by him is whether his confession was voluntary as a matter of law, and "if this Court finds that the confession obtained by this defendant appellant was free and voluntary, then his conviction must stand." This appellant relies upon *S. v. Anderson,* 208 N.C. 771, 182 S.E. 643, which is patently distinguishable. In the *Anderson* case it was held the confession was not competent, because it appeared from the testimony of a State witness that the confession was obtained by falsely telling the confessor that his codefendants had talked, and that he had better confess. Here appellant Waller on 7 May 1964 voluntarily came to Durham Police Headquarters and gave himself up.

Hight told him he had been implicated in these robberies by other persons who participated in these robberies, and did he want to make any statement in reference to these robberies he had been implicated in. There is not a scintilla of evidence in the record that such statement by Hight was false: in fact the record affirmatively shows the statement was true, because Leak and McNeil on 1 May 1964 had previously implicated appellant Waller. After this statement, appellant Waller made a confession. It appears from the record it was made freely and voluntarily. There is no evidence to the contrary. It was competent and properly admitted in evidence against him. In his trial we find no error.

BOBBY WHITE FERRELL'S APPEAL

Ferrell assigns as error the admission in evidence against him, over his objection and exception, of the extra-judicial confession of defendant Leak incriminating him, as above set forth. When the statement was made, detective Hight testified Ferrell promptly denied it. All this amounts to is an accusation by Leak, which Ferrell promptly denied. Under such circumstances the principle of admission by silence does not come into play. It is true detective Hight then testified Ferrell "never denied participating in them [the robberies]." This later statement of Hight is obscure, but it seems by Hight's use of the word "them" he was referring to other robberies McNeil and the other codefendants of Ferrell had stated to him that all of the defendants in this case were implicated in. We are fortified in our opinion by the statement in the affidavit of Standish S. Howe, above set forth, which states in part: "We wanted to stop these trials if we could, because the defendants had something like 15 different bills of indictment against them." We think Leak's extra-judicial confession incriminating Ferrell under the circumstances here was not competent in evidence against Ferrell, and its admission was error, *S. v. Herring,* 200 N.C. 308, 156 S.E. 538; *S. v. Bryant,* 235 N.C. 420, 70 S.E. 2d 186, which entitles him to a new trial.

The result reached is this: In McNeil's case, no error; in James Eugene Waller's case, no error; in Ferrell's case, new trial.

STATE OF NORTH CAROLINA v. BOBBY LEWIS ELAM.

(Filed 15 January, 1965.)

1. Criminal Law § 71—

During an investigation prior to arrest and indictment, defendant was advised that he had the legal right not to make any statement and that he had a right to have counsel and to telephone anyone he desired. Defendant was apprised of the purport of the investigation and defendant repeatedly stated he did not desire counsel. *Held:* An incriminating statement then made by defendant is competent as a voluntary confession, there being no inducement by promise or threat, and its admission does not constitute a denial of defendant's right to counsel, since, if defendant had any such right under the circumstances, he intelligently and understandingly waived it.

2. Constitutional Law § 32—

The statute prescribing the right of an indigent defendant charged with a felony to representation by counsel does not apply to preliminary examination prior to arrest and prior to indictment. G.S. 15-4.1.

3. Criminal Law § 71—

Where, upon objection by defendant's counsel to the introduction in evidence of defendant's extrajudicial confession, defendant's counsel in the absence of the jury cross-examines the officer in regard to the voluntariness of defendant's statement and counsel makes no indication that defendant desired to offer any evidence in rebuttal, objection to the admission of the confession on the ground that defendant had not offered any evidence is untenable.

4. Same—

The trial court's finding that defendant's extrajudicial confession was freely and voluntarily made will not be disturbed on appeal when the court's finding is supported by plenary competent evidence.

5. Criminal Law § 101—

Defendant's confession of guilt of the crime charged, together with evidence *aliunde* of the *corpus delicti* is sufficient to overrule defendant's motion to nonsuit.

ON *certiorari* from *May, S. J.*, 13 July 1964 Assigned Criminal Session of WAKE.

Criminal prosecution on an indictment containing two counts: The first count charges that Bobby Lewis Elam on 20 March 1964, about the hour of 4:00 a.m. in the night of the same day, did feloniously and burglariously break and enter the dwelling house of Calvin Berry Bagwell, actually occupied by Calvin Berry Bagwell at the time, with intent to commit larceny therein; the second count charges Bobby Lewis Elam at the same time and place with the larceny of $500 in United States money, the property of Calvin Berry Bagwell, which was in Bagwell's dwelling house.

The indictment was found by the grand jury at the June 1964 "A" Session of Wake superior court. On 23 June 1964 the court found that the defendant was an indigent, and appointed Earl R. Purser, an attorney at law practicing at the Wake County Bar, to represent him.

Plea: Not Guilty. Verdict: On the first count, guilty of a non-burglarious breaking and entering the dwelling house of another with intent to commit a felony or other infamous crime therein, and on the second count, guilty as charged. The judgment of the court was that defendant be imprisoned for a term of not less than seven years nor more than ten years in each case, the said sentences to run concurrently.

Defendant did not appeal to the Supreme Court. On 18 August 1964 he filed a petition for a writ of *certiorari* in this Court by his present counsel of record, requesting permission to have the trial of his case reviewed in this Court. In this petition he states in substance: His prison sentences were put into immediate effect and, due to his imprisonment, he was unable to confer with counsel as to the advisability of his appealing. About 28 July 1964 he appealed to his family to procure for him a lawyer. After the time for making appeal entries in the record had expired, his family, particularly his father, on 8 August 1964 employed the firm of Yarborough, Blanchard & Tucker to file a petition in this Court for a writ of *certiorari* in order to have a review by this Court of his trial. Attached to the petition for a writ of *certiorari* is a copy of the record proper. We allowed the petition for *certiorari* on 1 September 1964.

Attorney General T. W. Bruton and Deputy Attorney General Harry W. McGalliard for the State.

Yarborough, Blanchard & Tucker for defendant appellant.

PARKER, J. The State's evidence shows these facts: In March 1964 Calvin Berry Bagwell, his wife, and children lived in a dwelling house situate at 1300 Wake Forest Road. He was in the Safety Taxi Company business. He kept in his house in a green box money for his payroll, and also a small box containing money for his wife's use for domestic purposes, which was kept in the dining room under a little bench. Bobby Lewis Elam during that time lived across the road from him at 1225 Wake Forest Road. Elam had visited his house more than fifty times, had had meals there, had dated his daughter for a long period of time, knew where these money boxes were kept, and that he kept money in these boxes at night. Elam knew when he fixed his payroll he put his money for the payroll in the green box, carried it

upstairs, and put it under his bed. Elam had been in his home when he put money in these boxes.

On the night of 19 March 1964 there was company at his house. After they left, he closed up his house, put the lock on the door on the north side and fastened to it a chain latch or chain lock which reached from the wall over to the door. Elam had put that latch on the door. After doing this, about 12:15 a.m. he went upstairs to his room and went to bed. A few minutes later his wife and children came upstairs. Upstairs there is a bedroom for his daughters, one for his little boy, one for his wife and himself, and one for another little boy. On this night all four bedrooms were occupied. His daughter Ruby was sleeping in bed with his youngest daughter. The steps to the upstairs are covered with carpet. His wife brought up the green money box containing the money for his payroll, put it under his bed, and gave it a little kick. In this box he had about $447 in money. He went to sleep and when he awakened the next morning and went downstairs, he found that the door on the north side of his house had been broken open, the chain lock on it was broken off, and the door was standing open about a foot and a half. The screen door had been unlocked. The door on the south side of his house was open also. He looked for his money box under the bed and found that it was gone. Later during the morning a policeman brought the green money box to his home. He opened the box. The box had some of his papers in it, but all the money was gone. When he went to bed that night, there was in the small box in the dining room about $10 in change and a $100 bill and some checks and papers. It was locked. The next morning he found that this box was gone. About twenty minutes after the policeman returned the box in which he kept money for his payroll, police officers brought in this money box. It had been broken open, and the money was gone.

On the night his money was stolen he had worked approximately twelve hours that day. He heard nothing between 12:15 a.m. and 6:00 a.m. on 20 March 1964.

R. L. Bunn is a detective sergeant with the Raleigh Police Department. He was assigned the job of investigating the break-in of Calvin Berry Bagwell's house. He talked with defendant on 6 May 1964 in a room in the detective bureau of the Raleigh Police Department. Bunn was asked by the prosecuting officer, "What conversation did you have at the time?" Defendant's counsel objected and stated that he would like to examine Bunn in respect to this conversation. Whereupon, the court directed the jury to retire to its room, and in the absence

of the jury defendant's counsel cross-examined Bunn, who testified as follows:

"I first introduced myself to Mr. Elam, advised him what he was doing there, and then advised him of his rights, that he did not have to make a statement. I told him that I was an officer of the law. I told him that he did not have to make a statement, that he was entitled to call friends, attorneys, anyone he desired. He was asked if he wanted to confer with anyone or make a phone call; he said he had no one that he wanted to talk to. He did not say that he wanted to talk to a lawyer. He stated that he did not want to talk to one and I specifically asked him if he wanted to talk to an attorney. He said that he did not. That was the first thing I said to him after introducing myself to him. I told him that I was Detective Sergeant R. L. Bunn, detective with the Raleigh Police Department. I was not dressed in uniform at that time; I was dressed in a suit. I did not tell him that he was under arrest. I told him that he was under investigation. I told him what he was under investigation for. I did not have him in custody at that time. He could have walked out if he had wanted to. If he had started walking out the door I would have restrained him. He was not in my custody. There were two other warrants, different charges on file for his arrest for worthless checks. As far as the charge of burglary he could have left. No warrant had been issued at that time. I did not make a statement to him that it would be better for him to make a statement if he would; if he didn't it would go hard on him. I did not make the statement to him that if he did not tell me what happened that I was going to charge him with all those checks and also three charges of breaking and entering. He did not ask to make a telephone call prior to the time that I interrogated him.

"He did not make any request or reference to a bond. I did not tell him that if he would tell me the truth I would get the charges cut. I did not tell him that if he'd tell the truth I'd get him out under bond. I told him about the seriousness of the charge on which I was investigating him. I did tell him that he was entitled to a lawyer if he wanted one. He stated that he did not.

"I interrogated him approximately two and a half hours, between two and a half and three hours. It was not a continuous interrogation. We talked about his stay in different parts of the country, friends of his, his family; it was not all interrogation.

During that time he was allowed to use the telephone. He did not use the telephone. He did not ask to use one."

Bunn testified thereafter in substance on direct examination by the prosecuting officer for the State: After Elam had told about what he had done in breaking in Bagwell's house, he asked to talk with Robert Hedrick, solicitor of the Raleigh city court. Hedrick came to the room in the detective bureau. Elam told him what he had told Bunn, and asked him could he have the charges reduced if he would enter a plea to a lesser offense. Hedrick told him he did not have that authority. Elam asked Hedrick if he could have a bond. Hedrick told him he had no authority to set a bond for him on a capital charge. Elam told Hedrick he was aware of the seriousness of the charge, and he understood it carried a death penalty.

On recross-examination by defendant's counsel, Bunn testified in substance: Hedrick told Elam he had a right to have counsel. Elam had a cousin with the Raleigh Police Department, detective sergeant L. T. Williams. He asked Elam if he would like to talk to Williams, and he replied no. He asked Elam if he wanted him to contact his father with whom he had talked several times, and Elam replied no.

On redirect examination Bunn testified in substance: Prior to this time Elam had been charged with breaking in Bagwell's home, and had entered a plea to a lesser offense in the Raleigh city court. On another occasion Elam had been charged with breaking and entering Bagwell's house, and had been permitted to enter a plea to a lesser offense. Elam had talked with Hedrick on that occasion.

At this point Judge May found as a fact that the statement made by Elam to Bunn was made freely and voluntarily, and that the statement was made without any inducements, promises, or offer of reward, or threats or coercion, and overruled defendant's objection. Defendant assigns this as error.

After Judge May ruled the statement competent, the jury was called back into the courtroom, and Bunn testified in substance: He introduced himself to Elam as a police officer of the Raleigh Police Department and informed him that he was there on a charge of burglary of Bagwell's house at 1300 Wake Forest Road. He told Elam he did not have to make a statement, that he was entitled to counsel, and that he could make a telephone call if he so desired. Elam replied he did not want an attorney and did not want to call anyone. Elam first said that he knew nothing about the breaking-in of Bagwell's house, that it was news to him. They then discussed a trip Elam had made to New York City and how he got the money to make the trip. After about two and one-half to three hours of conversation, Elam said that about 4:00

a.m. on 20 March 1964 he parked his car on the west side of the street in front of the Bagwell house, that he went to the door on the north side of Bagwell's house, jimmied the lock with a screwdriver, and took the screwdriver and pried the chain night latch, that he had installed, loose from the wall. He then opened the door and went in the house. He then went upstairs to see the daughter of Bagwell. When he saw her in bed with another girl, he was afraid to wake her up for fear someone else in the house would wake up. As he started to leave, he recalled the Bagwell family handling money on various occasions when he was there and one box being kept under the bed. He then eased into Mr. Bagwell's room and took the box under the bed. He carried it downstairs, and then took the box in the dining room. He then went out the door he had opened. He left the small box in the garage in the rear of the house. The larger box that he had taken from under the bed he threw from his car on Brookside Drive after taking the cash. He got a very small amount of money out of the box he took from the dining room. He got between $300 and $400 out of the box that he took from under Bagwell's bed. The next day he made a trip to New York City and spent the money. Sergeant M. L. Stephenson and Robert Hedrick were present when defendant made this statement. He said that on prior occasions he had climbed in the window by means of a ladder to see Bagwell's daughter. That he had been drinking a considerable amount of alcoholic beverages before breaking into Bagwell's house, but that he was not drunk. After Elam had made this statement, he served a warrant on him charging him with burglary.

Robert Hedrick testified as a witness for the State that he went to a room in the office of the detective bureau to talk to Elam "as a result of sergeant Bunn coming to him." He was then asked by the prosecuting officer: "And when you talked to him, what was your conversation?" Defendant objected. The court overruled the objection, and defendant excepted and assigns as error the admission in evidence of this conversation. Hedrick testified in substance: When he walked in the room, Bunn said Elam wanted to talk to him. He asked Elam if he knew what he was charged with. Elam said he did. He asked him if he knew he was charged with first degree burglary. Elam said he did. He told Elam what the penalty might be. Elam stated this had been explained to him. He asked Elam if he had counsel, or if he wanted to talk to counsel. Elam replied he had no counsel, and did not wish to talk with a lawyer. Elam said Bunn had explained to him that he did not have to make a statement unless he desired. Elam then stated to him that he had broken into and entered the house of Bagwell and taken the money boxes therein. (What he told Hedrick is in substantial

accord with what Bunn testified Elam told him, which is set forth above, and its repetition here would be supererogatory.) He told Elam there was nothing he could do for him, that he would be in his court strictly for a preliminary hearing. That if probable cause was found in his court, the trial would be in the superior court. That any help he might get as to pleading to a lesser offense would have to be from the solicitor for the State in the superior court, and he advised him to talk to the solicitor for the State. His purpose in going to see Elam was not to get a statement from him. There are few people who want to talk to him, but if a person wants to talk to him, he talks to him. He asked Elam some questions. He advised Elam of his constitutional rights. He prosecuted Elam at the probable cause hearing in the city court, and Mr. Purser appeared for Elam.

Defendant contends that his extrajudicial confessions of guilt to Bunn and Hedrick were incompetent and should have been excluded, because his extrajudicial confessions were "elicited in violation of the defendant's constitutional right of counsel," when he was interrogated by Bunn and to a small degree by Hedrick in respect to a felonious and burglarious breaking and entry into Bagwell's home and to the larceny of money therefrom before a warrant had been taken out against him on these charges and before he had been indicted on these charges. The first count in the indictment here charges a capital offense. Defendant in support of his position relies upon *Escobedo v. Illinois,* 378 U.S. 478, 12 L. Ed. 2d 977, a five-to-four decision; *Hamilton v. Alabama,* 368 U.S. 52, 7 L. Ed. 2d 114; *S. v. Simpson,* 243 N.C. 436, 90 S.E. 2d 708; and G.S. 15-4.1.

The facts in the *Escobedo* case are entirely different from the facts in the instant case. In the *Escobedo* case the trial court admitted in evidence incriminating statements made by Escobedo during a long police interrogation conducted before defendant was formally indicted for murder. The police during this interrogation did not inform him that he had the right to remain silent, denied his repeated requests to consult with his attorney who was in the building during part of the interrogation, and informed defendant that they had convincing evidence of his guilt. The Supreme Court of Illinois affirmed the conviction. The Supreme Court in an opinion by Mr. Justice Goldberg, expressing the views of five members of the Court, held that under the particular circumstances obtaining, the police investigation having been one focused on the accused as a suspect rather than a general investigation, the refusal to honor the accused's requests to consult with his attorney constituted a denial of his right to benefit of counsel under the 6th and 14th Amendments to the Federal Constitution, and that

the statements should not have been admitted in evidence. It would seem the *Escobedo* case, as we interpret it, does not hold that once an accused becomes a suspect and, presumably, is arrested, any admission made to the police thereafter is inadmissible in evidence where the accused has intelligently and understandingly stated repeatedly to the police that he did not want the benefit of counsel. Our view in this respect is fortified by a statement in the dissenting opinion of Mr. Justice White, joined in by Mr. Justice Clark and Mr. Justice Stewart, which is as follows: "At the very least the Court holds that once the accused becomes a suspect and, presumably, is arrested, any admission made to the police thereafter is inadmissible in evidence unless the accused has waived his right to counsel."

In *Crooker v. California,* 357 U.S. 433, 2 L. Ed. 2d 1448, five members of the Court held that the due process clause of the 14th Amendment is not violated by the use in a state prosecution for murder of a confession merely because it occurred while the accused was without counsel as a consequence of a previous denial by the police of his requests therefor, where, after termination of police interrogation, the accused, through both arraignment and trial, was represented by his own counsel, and the sum total of the circumstances during the time he was without counsel was a voluntary confession by a college-educated man with law school training who knew of his right to keep silent.

The case of *Cicenia v. LaGay,* 357 U.S. 504, 2 L. Ed. 2d 1523, was a prosecution for murder. The facts were these: On 17 March 1947 Charles Kittuah, the owner of a small dry goods store in Newark, New Jersey, was shot and killed during the course of a robbery. The crime remained unsolved until 17 December 1949, when the Newark police obtained information implicating Cicenia and two others. Cicenia received a message to report to police headquarters. He sought the advice of a lawyer, who advised him to report as requested. He did so, and arrived at police headquarters at 9:00 a.m. on December 18. About 2:00 p.m. the same day Cicenia's father, brother, and the lawyer arrived at the police station. The lawyer immediately asked to see Cicenia, but this request was refused by the police. He repeated this request at intervals throughout the afternoon and well into the evening, but without success. During this period Cicenia, who was being questioned intermittently by the police, asked to see his lawyer. These requests were also denied. Lawyer and client were not permitted to confer until 9:30 p.m., by which time Cicenia had made and signed the written confession to the murder of Kittuah. This confession was admitted in evidence against him in his trial for murder. The majority opinion written by Mr. Justice Harlan, expressing the views of five

members of the Court, stated: "The contention that petitioner had a constitutional right to confer with counsel is disposed of by *Crooker v. California,* 2 L. Ed. 2d 1448, decided today. [We summarized the *Crooker* case above.] * * * In contrast, petitioner would have us hold that any state denial of a defendant's request to confer with counsel during police questioning violates due process, *irrespective of the particular circumstances involved.* Such a holding, in its ultimate reach, would mean that state police could not interrogate a suspect before giving him an opportunity to secure counsel. Even in federal prosecutions this Court has refrained from laying down any such inflexible rule. [Citing authority.] Still less should we impose this standard on each of the 48 states as a matter of constitutional compulsion." (Emphasis ours.) The Supreme Court affirmed the judgment below.

The majority opinion in the *Escobedo* case states: "In any event, to the extent that Cicenia or Crooker may be inconsistent with the principles announced today, they are not to be regarded as controlling. * * * *We hold only* that when the process shifts from investigatory to accusatory — when its focus is on the accused and its purpose is to elicit a confession — our adversary system begins to operate, *and, under the circumstances here,* the accused must be permitted to consult with his lawyer." (Emphasis ours.) As we interpret the *Escobedo* case, it does not modify or overrule what is stated in effect in the *Cicenia* case that there is no inflexible rule that the state's denial of an accused's request to confer with counsel during police questioning before being formally charged with a criminal offense in a warrant or an indictment violates due process, irrespective of the particular circumstances.

In *Massiah v. United States,* 377 U.S. 201, 12 L. Ed. 2d 246, the Court held that as of the date of the indictment the prosecution is disentitled to secure admissions from the accused.

Bunn, during his interrogation of Elam before he was formally charged with the offenses here, repeatedly stated to Elam that he did not have to make a statement, that he had a right to the benefit of counsel, that he could use the telephone to call his friends or counsel or anyone that he wished, and Elam repeatedly stated in the presence of Bunn and Hedrick that he wanted no counsel, that he did not wish to call anyone over the telephone, and that he understood that he did not have to make a statement unless he so desired. It is plain from all the circumstances shown by the evidence that Elam knew he was being interrogated about a capital offense, knew the penalty for such an offense, and understandingly and intelligently said repeatedly that he wanted no counsel, and did not want to call counsel or anyone else. "The constitutional right [to counsel], of course, does not justify forcing counsel

upon an accused who wants none." *Moore v. Michigan*, 355 U.S. 155, 2 L. Ed. 2d 167, 172. We hold that under the circumstances here surrounding the making of the extrajudicial confessions of guilt by defendant as shown by the evidence he was not denied the constitutional right to the benefit of counsel, because, if he had any such right, he intelligently and understandingly waived it. *Johnson v. Zerbst*, 304 U.S. 458, 82 L. Ed. 1461; *Johnson v. United States*, 8 Cir., 318 F. 2d 855, *cert. den.* 375 U.S. 987, 11 L. Ed. 2d 474; *S. v. Roux*, 263 N.C. 149, 139 S.E. 2d 189; *S. v. McNeil, ante*, p. 260, 139 S.E. 2d 667.

G.S. 15-4.1 reads in part: "When a defendant charged with a felony is not represented by counsel, before he is required to plead the judge of the superior court shall advise the defendant that he is entitled to counsel. If the judge finds that the defendant is indigent and unable to employ counsel, he shall appoint counsel for the defendant but the defendant may waive the right to counsel in all cases except a capital felony * * * but a defendant without counsel cannot plead guilty to an indictment charging a capital felony." In our opinion, and we so hold, this statute has no application to the interrogation of Elam here by the police before he was formally charged with the offenses here charged against him.

Defendant's contention that Elam's extrajudicial confessions were admitted without a proper preliminary inquiry is overruled. When sergeant Bunn was asked by the prosecuting officer for the State what conversation he had with Elam, Elam's lawyer objected and the trial judge sent the jury to their room. Whereupon, Elam's lawyer, Mr. Purser, cross-examined and recross-examined Bunn at length in respect to the circumstances surrounding the making of the extrajudicial confessions of guilt by Elam. After this was finished, there is nothing in the record to indicate that defendant desired to offer any evidence in rebuttal of Bunn's testimony. Certainly, there is nothing to indicate that the trial judge refused to hear any evidence by defendant in rebuttal. "It was not the duty of the court to call upon the defendant to offer evidence." *S. v. Smith*, 213 N.C. 299, 195 S.E. 819. When Hedrick testified as to Elam's incriminatory statements, there was no request by Elam for a preliminary inquiry, and there was no need of one because all of this had been fully gone over in the cross-examination of Bunn by defendant's counsel.

Hamilton v. Alabama, supra, and *S. v. Simpson, supra,* relied on by defendant, are cases holding that a defendant in a capital case, when it is tried on the merits, must have counsel. They are not in point here.

The trial judge's finding of fact that the extrajudicial confessions by Elam were free and voluntary is supported by plenary competent evi-

dence, and will not be disturbed on appeal. He properly admitted them in evidence. *S. v. Davis,* 253 N.C. 86, 116 S.E. 2d 365, *cert. den.* 365 U.S. 855, 5 L. Ed. 2d 819; *S. v. Marsh,* 234 N.C. 101, 66 S.E. 2d 684; *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572; Strong's N. C. Index, Vol. 1, Criminal Law, § 71.

Defendant's assignment of error to the court's denial of his motion for judgment of compulsory nonsuit is overruled. The State offered this evidence, *aliunde* of defendant's extrajudicial confessions, of the *corpus delicti:* The testimony of Calvin Berry Bagwell in respect to the front door of his house having been broken open, and in respect to the larceny from within his house of two boxes containing money, and that police officers returned to him his money boxes empty of the money he had in them the night before his house was broken into and entered. In addition, defendant testifying for himself said on direct examination: "I am familiar with Mr. Bagwell's residence * * *. I was familiar with part of the upstairs of the [Bagwell] house." *S. v. Crawford,* 260 N.C. 548, 133 S.E. 2d 232.

All defendant's assignments of error are overruled. In the trial we find

No error.

STATE v. WINFRED R. STINSON.

(Filed 15 January, 1965.)

1. Criminal Law § 127—

A judgment of nonsuit has the force and effect of a verdict of not guilty of the charge contained in the indictment. G.S. 15-173.

2. Criminal Law § 26—

No person may be twice put in jeopardy for the same offense, but the burden is upon defendant to prove his plea of former jeopardy and show that the prior prosecution was for the same offense, both in law and in fact.

3. Same—

In a prosecution for the larceny of certain property from a named individual, plea of former jeopardy based upon a nonsuit for variance entered in a prior prosecution on an indictment charging larceny of the same property but laying the ownership of the property in a nonexistent corporation, is properly denied by the court upon an examination of the two indictments without introduction of evidence by defendant or submission of issues to the jury.

4. Criminal Law § 71—

Evidence to the effect that defendant, while in jail, requested to see a specified police officer and made a confession to such officer when the officer went to the jail in response to defendant's request, and that the officer made no promises or threats of any kind, supports the court's finding that the confession was freely and voluntarily made.

5. Same—

Where a defendant charged with a crime makes an extrajudicial confession to a police officer while defendant is confined in jail, it is not required that defendant be warned that anything he said might be used against him.

6. Criminal Law § 48—

Where defendant tells his confederate to go ahead and tell the truth and that he would stop him if he lied, and the confederate recounts the circumstances of the commission of the offense, including statements directly implicating defendant, defendant's failure to deny the accusation of guilt is competent.

7. Criminal Law § 34—

Where the State's evidence tends to show larceny of property and flight of the participants by automobile immediately after the larceny, evidence of the prior larceny of the automobile in another state is competent as tending to show the existence of a plan or design to commit the larceny charged.

8. Criminal Law § 157—

Where defendant introduces evidence, only the correctness of the motion to nonsuit made at the close of all the evidence will be considered on appeal. G.S. 15-173.

9. Criminal Law § 101—

Where the State introduces evidence of the *corpus delicti* in addition to defendant's confession of guilt, defendant's motion to nonsuit is correctly denied notwithstanding defendant's evidence in conflict.

APPEAL by defendant from *Hall, J.*, June 1964 Session of ALAMANCE.

Criminal prosecution on an indictment, found by the Grand Jury at the June 1964 Session, containing two counts charging that defendant and one Donald L. Stinson on 12 January 1963 (1) did unlawfully, wilfully and feloniously break and enter into a certain shop and dwelling in Alamance County, owned and occupied by R. W. Messer, with intent to steal, take and carry away merchandise, chattels and money kept therein, the property of the said R. W. Messer; and (2) on the same date and in the same place did feloniously steal, take and carry away a McCaskey Cash Register and $440 in cash money, all of the value of $1,035, and all the property of the said R. W. Messer.

Before pleading to the indictment, defendant, who was represented by his present counsel of record, entered a plea of former acquittal. In support of his motion, defendant offered the following evidence: At the May 1964 Criminal Session he was tried upon an indictment, found by the Grand Jury at the March 1963 Session of Alamance County superior court, charging him, Leonard Lee Stinson, and Donald Lee Stinson with the identical offenses charged in the indictment in the instant case, except that in the indictment found at the March 1963 Session there was a third count charging receiving stolen property knowing it to have been stolen, and except that in the same indictment in all three counts the ownership of the property was laid in Stop and Shop Super Market, a corporation. This indictment was offered in evidence. At the conclusion of the State's evidence in the case tried at the May 1964 Criminal Session, defendant made a motion for judgment of nonsuit, which the court allowed. Testimony of R. W. Messer was to the following effect: He operated in the city of Burlington a business known as Stop and Shop Super Market. He owns it personally: it is not a corporation. He knows of no business known as Stop and Shop Super Market, Incorporated. At the May 1964 Criminal Session, he appeared in court and testified about a breaking and entry into his store and of articles missing therefrom. In that case, the present defendant was one of the defendants. The breaking and entering that he testified about at the May 1964 Criminal Session is the same breaking and entering that he is presently in court to testify about. The indictment in the instant case was introduced in evidence. The court overruled defendant's plea of former acquittal. In addition, the court entered a written order finding the following facts: At the May 1964 Criminal Session defendant was tried by the same judge for offenses growing out of the same transactions as the offenses alleged in the present indictment. In the previous indictment the ownership of the property therein described was laid in Stop and Shop Super Market, a corporation, and at the May 1964 Criminal Session the same judge allowed defendant's motion for judgment of nonsuit at the conclusion of the State's evidence, for the reason that the ownership of the property was laid in a corporation and the proof showed that the property was owned by an individual, R. W. Messer, and consequently, there was a fatal variance between allegation and proof. In the indictment in the instant case, the ownership of the property is laid in R. W. Messer. Defendant has never been tried, acquitted or placed in jeopardy for the offenses with which he now stands charged in the indictment in the instant case. Wherefore, he ordered that the defendant's plea of former acquittal be overruled.

The State offered no evidence in reply.

Whereupon, defendant entered a plea of not guilty. Verdict: Guilty as charged in the indictment.

From a judgment of imprisonment, defendant appeals to the Supreme Court.

Attorney General T. W. Bruton, Deputy Attorney General Harry W. McGalliard, Assistant Attorney General Richard T. Sanders, and Andrew A. Vanore, Jr., Staff Attorney for the State.

Paul H. Ridge for defendant appellant.

PARKER, J. When at defendant's trial at the May 1964 Criminal Session a judgment of nonsuit was entered by the court on his motion, it had "the force and effect of a verdict of 'not guilty' as to such defendant" of the charges averred in the indictment on which he was being tried. G.S. 15-173; *S. v. Smith,* 236 N.C. 748, 73 S.E. 2d 901.

If there is anything settled beyond reconsideration in the criminal jurisprudence of England and America, it is that no one shall twice be put in jeopardy for the same offense, both in law and in fact. *S. v. Hicks,* 233 N.C. 511, 64 S.E. 2d 871; *Ex parte Lange,* 18 Wall. (U.S.) 163, 21 L. Ed. 872.

Defendant has the burden of proof on his plea in bar of former acquittal to show that he had been formerly acquitted for the same offense, both in law and in fact. *S. v. Jesse,* 20 N.C. 95; *S. v. Nash,* 86 N.C. 650; *S. v. White,* 146 N.C. 608, 60 S.E. 505; *S. v. Bell,* 205 N.C. 225, 171 S.E. 50; *S. v. McIntosh,* 260 N.C. 749, 133 S.E. 2d 652.

Defendant assigns as error that the court denied his plea of former acquittal; that the court erred in finding that "defendant has never before been tried, acquitted or placed in jeopardy for the offenses wherewith he now stands charged in the present bill of indictment"; and in refusing to submit an issue to the jury of former acquittal as tendered by him.

The case of *S. v. Law and Kelly,* which was before this Court twice on appeal, is apposite. On the first appeal, 227 N.C. 103, 40 S.E. 2d 699, defendants were found guilty on an indictment charging them in one count with the larceny of an automobile, the property of the city of Winston-Salem; and, in a second count, with receiving the automobile, the property of the city of Winston-Salem, knowing it to have been feloniously stolen, and appealed from judgments of imprisonment imposed in accord with the verdict. The record disclosed that on the night of 15 April 1946, Oscar Morrison, a police officer of the city of Winston-Salem, discovered an automobile on one of the city streets

from which a five-gallon container full of nontax-paid whisky had just been taken and which had evidently been transported therein contrary to law. He took possession of the automobile, drove it to the city lot and parked it for the night. The automobile was stolen from the city lot during the night, and there is evidence, circumstantial and presumptive, tending to connect defendants with its disappearance. The opinion, for a unanimous Court, written by Chief Justice Stacy, states:

> "The question for decision is whether there is a fatal variance between the indictment and the proof. *Stare decisis* would seem to require an affirmative answer.
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> "Conceding that the automobile in question, even if originally the property of one of the defendants, was the subject of larceny while in the custody of the officer who had seized it under authority of law, still it does not follow that its ownership was properly laid in the City of Winston-Salem. The City had no property right in it, special or otherwise. Only the officer who seized the property was authorized to hold it, take and approve bond for its return 'to the custody of said officer,' and to hold it subject to the orders of the court. G.S., 18-6. A conviction under the present bill would not perforce protect the defendants against another prosecution with the right to the property laid in the seizing officer or in the custody of the law. *S. v. Bell,* 65 N.C. 313. The City of Winston-Salem, no doubt, owns a number of automobiles, such as would fit the description in the bill, but none of these was stolen. 'The object of an indictment is to inform the prisoner with what he is charged, as well to enable him to make his defense as to protect him from another prosecution for the same criminal act.' *S. v. Carlson,* 171 N.C. 818, 89 S.E. 30.
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> "Usually a fatal variance results, in larceny cases, where title to the property is laid in one person and the proof shows it to be in another. *S. v. Jenkins,* 78 N.C. 478. 'In all cases the charge must be proved as laid.' *S. v. Bell, supra.*
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> "The present conviction will be set aside, the demurrer to the evidence sustained, and the solicitor allowed to send another bill, if so minded."

On the second appeal, 228 N.C. 443, 45 S.E. 2d 374, defendants were found guilty on an indictment charging them, in one count, with the larceny of an automobile, the property of one Oscar Morrison; and, in

a second count, with receiving the same automobile knowing it to have been feloniously stolen, and appealed from judgments of imprisonment imposed in accord with the verdict. The evidence for the prosecution tends to show that on the night of 15 April 1946 Oscar Morrison and Holt Neal, police officers of the city of Winston-Salem, took possession of an automobile on Mickey Mill Road in the eastern section of the city, which they thought had been used in the illegal transportation of nontax-paid whisky, and drove it to the city lot where it was parked for the night. During the night the automobile was stolen from the city lot, and there is evidence, circumstantial and presumptive, tending to connect the defendants with its disappearance. The unanimous opinion of the Supreme Court was delivered again by Chief Justice Stacy. The opinion states:

> "The case was here at the Fall Term, 1946, on an indictment which laid the ownership of the property in the City of Winston-Salem. The officer who seized the property was alone entitled to hold it, or approve bond for its return, and it was suggested the right to the property should be laid in the seizing officer or in the custody of the law. 227 N.C. 103."

The Court held that Oscar Morrison, one of the seizing officers, was entitled to hold the automobile and to approve bond for its return, thus he had a special interest therein and consequently there was no fatal variance. The verdict and judgments were upheld.

The case of *S. v. Hicks,* which was before this Court twice on appeal, is also apposite. On the first appeal, 233 N.C. 31, 62 S.E. 2d 497, defendant and Chesley Morgan Lovell were tried upon two indictments, one of which charged Hicks and Lovell with conspiring to damage a building owned by the Jefferson Standard Broadcasting Company by the use of dynamite or other high explosive; and the other charged them with conspiring "to maliciously commit damage and injury to and upon the real property of the Jefferson Standard Broadcasting Company," and "to wantonly and wilfully injure the personal property of the Jefferson Standard Broadcasting Company, to-wit: Radio broadcasting equipment." Defendant Lovell pleaded guilty as charged in both indictments. The two indictments were consolidated for trial. Hicks pleaded not guilty to both indictments. The jury returned a verdict of not guilty as to him as to the charge of conspiracy to damage a building owned by the Jefferson Standard Broadcasting Company, but "Guilty of conspiracy to damage real property." From judgment on the verdict, Hicks appealed. The proof was to the effect that Hicks and Lovell conspired to maliciously commit damage and injury to the

property of the Duke Power Company. The Court held that there was a fatal variance between the allegations in the indictment and the proof, and that this question may be raised by motion for judgment as of nonsuit. The Court's opinion closed with this language: "The motion for judgment as of nonsuit should have been allowed with leave to the solicitor to secure another bill of indictment, if so advised." On the second appeal, 233 N.C. 511, 64 S.E. 2d 871, this case was a criminal prosecution for conspiracy tried upon a two-count indictment. The first count charged that the defendant conspired "with Chesley Morgan Lovell and other persons to the State unknown" to violate G.S. 14-127 by maliciously committing damage and injury upon the real property of the Duke Power Company, and the second count charges that the defendant conspired "with Chesley Morgan Lovell and other persons to the State unknown" to commit a misdemeanor denounced by G.S. 14-160 by wantonly and wilfully injuring the personal property of the Duke Power Company, to wit: "electrical transformers and other equipment of said Duke Power Company * * * located upon and near the property of the Jefferson Standard Broadcasting Company." Before pleading to the indictment in that case, defendant filed a plea of former acquittal setting forth the indictments in the case on his former appeal and the result of the former trial and the indictment in this case, and concluding from these matters that the crimes described in the indictment in the present case are identical with those charged against him in the indictments on his former trial, and that by reason thereof his acquittal upon those indictments constituted a bar to the present prosecution. Defendant tendered these two issues: (1) Has the defendant been formerly acquitted of the charge contained in the first count of the indictment in the instant case? (2) Has the defendant been formerly acquitted of the charge contained in the second count of the indictment in the present case? He prayed the court to submit the issues to the jury before the submission of the general issue of guilt, and to allow him to offer evidence before the jury on the trial of the issues to establish the identity of the two counts in the present indictment with the offenses charged in the previous indictments. The trial judge "refused to submit to the jury the two issues tendered by the defendant * * * and * * * held, as a matter of law, that there was no former acquittal or former jeopardy involved in this case." The defendant reserved exceptions to the rejection of his plea of former acquittal, and pleaded not guilty to the indictment. The action was then tried on the merits before a petit jury. This is a summary of the case made out by the State's testimony: The Jefferson Standard Broadcasting Company operates Radio Station WBT, which has offices

in the city of Charlotte and a transmission station in a rural section of Mecklenburg County. The transmission station is located on a 19-acre tract owned by the Broadcasting Company and is operated by means of electric power transmitted to it by the Duke Power Company through a transformer substation situated on the same land at a distance of 730 feet from the transmission station. The transformer substation is maintained and operated by the Duke Power Company, which placed it upon the 19-acre tract under a written contract binding the Jefferson Standard Broadcasting Company and specifying that the four transformers are the property of the Duke Power Company. There is evidence showing that defendant Hicks and Chesley Morgan Lovell entered into a conspiracy to blow up the transformers at the transformer station situated on the 19-acre tract, and that defendant Hicks agreed to pay Chesley Morgan Lovell $250 for so doing; that seven days later defendant Hicks caused a supply of dynamite to be concealed behind a signboard near Columbia, South Carolina, and notified Lovell of that fact by telephone; that Lovell took the dynamite into his possession, carried it from South Carolina to Mecklenburg County, North Carolina, where he entered upon the 19-acre tract at night on 21 January 1962, for the purpose of dynamiting the transformers pursuant to his agreement with Hicks. He was unable to accomplish his object because he was apprehended by the officers. Defendant offered evidence tending to show that he was not acquainted with Lovell and did not conspire with him or any other person to do any injury to the property of the Jefferson Standard Broadcasting Company, the Duke Power Company, or any other person. Defendant Hicks was found guilty as charged in the indictment, and from terms of imprisonment he appealed to the Supreme Court. In the opinion for a unanimous Court written by Ervin, J., finding no error in the trial, he states:

> "Several criteria have been prescribed by the authorities for determining in diverse situations whether two indictments are for the same offense. The one applicable on the present record is the 'same-evidence test,' which is somewhat alternative in character. It is simply this: Whether the facts alleged in the second indictment, if given in evidence, would have sustained a conviction under the first indictment [Citing authority.] or whether the same evidence would support a conviction in each case [Citing authority.].
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> "Whether the facts alleged in the second indictment, if given in evidence, would have sustained a conviction under the first is al-

ways to be determined by the court from an inspection of the two indictments. *S. v. Nash, supra* [86 N.C. 650, 41 Am. Rep. 472]. Whether the same evidence would support a conviction in each case is to be determined by a jury from extrinsic testimony if the plea of former jeopardy avers facts *dehors* the record showing the identity of the offense charged in the first with that set forth in the last indictment. *S. v. Bell, supra* [205 N.C. 225, 171 S.E. 50].

"When these rules are laid alongside the case at bar, it is clear that the judge rightly refused to submit to the jury the two specific issues tendered by the defendant and rightly rejected the plea of former acquittal. The plea merely set forth the several indictments and the result of the former trial, and drew the legal conclusion from these bare matters that the defendant was being twice put in jeopardy for the same offense. It did not aver any facts *dehors* the record showing the identity of the crimes charged in the former indictments with those described in the present one. These things being true, the plea was insufficient, for it revealed on its face the nonidentity of the several offenses. The defendant's legal standing would not be bettered a whit, however, on this phase of the case if his plea of former acquittal had gone beyond the record and invoked the extrinsic testimony. This is so because evidence of a conspiracy to damage or injure property owned or used by the Duke Power Company will not support a conviction of a conspiracy to damage or injure property owned or used by the Jefferson Standard Broadcasting Company."

Applying the rules of law laid down in the cases of *Law* and *Hicks,* it is clear that if evidence was introduced by the State showing that defendant feloniously broke and entered a building occupied by R. W. Messer with intent to commit larceny of the merchandise, chattels and moneys therein, the property of R. W. Messer, and the larceny by him of a cash register and of money, the property of R. W. Messer, that such evidence will not support a conviction for the same offenses in respect to the property of Stop and Shop Super Market, a corporation, for a corporation is for most purposes an entity distinct from its stockholders (13 Am. Jur., Corporations, § 6), and capable of owning property. The offenses charged in the two indictments are not the same, in law and in fact. This was a question to be determined by the court from an examination of the two indictments. The evidence *dehors* the indictments offered by defendant on his plea of former acquittal would not support a conviction on the two indictments, consequently there was no question to be submitted to the jury. *S. v. Hicks,*

233 N.C. 511, 64 S.E. 2d 871; *S. v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424. This is not a case where a person has a name by reputation by which he is as well known as any other. The challenged finding of fact, or more properly conclusion of law, by Judge Hall in his order overruling defendant's plea of former acquittal is correct. His further finding in such order that on the former trial the judgment of nonsuit was entered by reason of a fatal variance between the allegations in the indictment and the proof is not material. This finding was not prejudicial to defendant, and he has not challenged it in his assignments of error.

Further, a valid indictment is an essential of jurisdiction. *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166. If it should be contended that no crime is charged in the first indictment for the reason there is no corporate entity in existence entitled Stop and Shop Super Market, a corporation, that would not bar a further prosecution on a valid warrant, because such a warrant would not support a plea of former jeopardy in a subsequent trial on a valid indictment. *S. v. Sossamon,* 259 N.C. 378, 130 S.E. 2d 640; *S. v. Barnes,* 253 N.C. 711, 117 S.E. 2d 849; *S. v. Morgan, supra.*

The trial judge correctly refused to submit to the jury the issues tendered by defendant of former acquittal and correctly rejected his plea of former acquittal.

R. O. Spoon, a sergeant on the Burlington police force, testified for the State in substance as follows, except when we quote: In January 1964 he received a note to contact the defendant at the county jail. He went to the jail and found the defendant playing cards with some of the prisoners. Defendant was aware of the charge against him. He asked him if he wanted to see him. Defendant replied, "Yes." He and defendant went into another cell. Defendant wanted to get a message to his aunt and to some people in West Burlington and he wanted to talk to Leonard Stinson and Donald Stinson, and wanted to know if he would take him to Hillsboro to see them. Defendant said he wanted to see Leonard and Donald Stinson and see if they would testify for him. He told him to let his conscience be his guide. They talked about the breaking and entering at the Stop and Shop Super Market. Defendant said: "You know and I know that I was there, I am guilty, but I want to talk to Donald and Leonard before I make up my mind how I am going to plead." Defendant had no lawyer at that time. He did not tell defendant that anything he might say might be used against him in court. He promised the defendant nothing and made no threats of any kind against him. The court found as a fact that the confession made by defendant was free and voluntary, and it was admitted in

evidence over defendant's objection and exception. Defendant assigns as error the admission of this confession. The finding by the judge that the confession was free and voluntary is supported by competent evidence. Sergeant Spoon, under the circumstances, was not required to warn defendant that anything he said might be used against him, for the reason that such "warning is not required in an extra-judicial conference between officers and a person charged with crime who is under no constraint to answer." *S. v. Grier,* 203 N.C. 586, 166 S.E. 595. Defendant's assignment of error is overruled upon authority of *S. v. Davis,* 253 N.C. 86, 116 S.E. 2d 365, *cert. den.* 365 U.S. 855, 5 L. ed. 2d 819; *S. v. Marsh,* 234 N.C. 101, 66 S.E. 2d 684; *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572; Strong's North Carolina Index, Vol. 1, Criminal Law, § 71.

J. Lacy Thomas, a detective in the Burlington Police Department, was present in the office of the Burlington Police Department with several officers and with Donald Stinson and defendant a few days after the breaking and entry and larceny in this case. Over the objection and exception of defendant, Thomas testified in substance as follows, except when we quote: Defendant "told Donald Stinson to go ahead and tell the truth, and if he lied in any way, he would stop him." Whereupon, Donald Stinson stated that sometime about three o'clock on the morning of 12 January 1963 he and defendant and Leonard Stinson, with Leonard driving a 1958 Oldsmobile, went to the grocery store on Trollinger Street. This automobile was one defendant had stolen in South Carolina. He got out of the automobile and using a hammer broke the glass in the front door of the building and entered the building, while Leonard and defendant circled the block. He took out of the building a cash register and $250 in money. Defendant did not deny his statement. Defendant merely said: "You little son-of-a-bitch. I wouldn't have told on you." Defendant assigns as error the admission of this statement as to what Donald Stinson said, and particularly the statement that he had stolen the automobile in South Carolina. R. W. Messer testified as a State's witness to the effect that his grocery business was located at 223 Trollinger Street.

S. v. Kelly, 216 N.C. 627, 6 S.E. 2d 533, is helpful. This case was a prosecution for murder committed in the perpetration of a robbery. One of the defendants objected to the testimony of a witness to the effect that the defendant had admitted he was an escaped prisoner and had escaped from prison with one of the other participants in the crime. It appeared that the statement was made to the witness during, and constituted a part of, a conversation with the witness in which the defendant made a voluntary confession which had been admitted in evi-

dence. The Court held that the exception was untenable since the whole of the conversation should be admitted in evidence in its entirety.

Under circumstances set forth in the record, we think the statement of Donald Stinson, including that in respect to the larceny of the automobile by defendant, was properly admitted in evidence for the following reasons: (1) The defendant "told Donald Stinson to go ahead and tell the truth, and if he lied in any way he would stop him." (2) When Donald Stinson, pursuant to such statement of the defendant, implicated defendant in the offenses charged, and in the larceny of an automobile in South Carolina, Donald Stinson's statement called for a reply, there was an opportunity for a reply by defendant, and defendant's reply was not a denial, but was a mere statement: "You little son-of-a-bitch, I wouldn't have told on you." *S. v. Temple,* 240 N.C. 738, 83 S.E. 2d 792. (3) Donald Stinson's statement in respect to the larceny of the automobile in South Carolina tends to show the existence of a plan or design to commit the offenses charged, and to provide a get away. Stansbury, North Carolina Evidence, 2d Ed., § 92. Defendant's evidence shows that they got away as far as the State of Maryland, where they had a wreck with the Oldsmobile and were apprehended by officers.

The other assignments of error to the admission of the evidence have been examined and are overruled. They do not merit detailed discussion.

Defendant assigns as error the denial of his motion for judgment of compulsory nonsuit made at the close of all the evidence offered by him and the State. The only question raised by this assignment of error is whether the court erred in the denial of the motion made by defendant at the close of all the evidence. G.S. 15-173; *S. v. Leggett,* 255 N.C. 358, 121 S.E. 2d 533. The State's evidence tends to show that on 12 January 1963 a grocery store owned and operated by R. W. Messer at 223 Trollinger Street in Burlington was broken into in the nighttime, and that there was stolen therefrom a McCaskey cash register and $440 in cash money, all the property of R. W. Messer. It also tends to show that defendant told Sergeant Spoon, "I am guilty." The defendant's evidence tends to show the following facts: Donald Stinson, Leonard Stinson, and defendant on the night of 12 January 1963 went to Messer's grocery store on Trollinger Street in the city of Burlington, that when they arrived there defendant was drunk and passed out in the back seat, that Donald Stinson got out of the car and broke and entered this grocery store, that he brought out a cash register and money, that defendant got none of the money that came from the

grocery store, and that they left Burlington and went to Maryland where they had a wreck with the Oldsmobile car and were arrested. Leonard Stinson is now serving a prison sentence for breaking and entering this grocery store. Donald Stinson has been tried and convicted a number of times for felonious breaking and entry and larceny. The State offered evidence in rebuttal to this effect: The three officers of the Burlington police force had conversations with Leonard Stinson, Donald Stinson, and Winfred Stinson about this case, and that none of them stated to them that when the store was broken into and entered and the goods therein stolen that defendant Winfred Stinson was passed out drunk in the automobile. A consideration of the State's evidence and the defendant's evidence shows that it was amply sufficient to carry the case to the jury and to support the verdict of guilty as rendered by the jury.

Defendant's assignments of error to the charge are too attenuate to invalidate the trial. All defendant's assignments of error are overruled. No error is shown sufficient to warrant disturbing the verdict and judgment below.

No error.

J. P. RICHARDS, EMPLOYEE v. NATIONWIDE HOMES, EMPLOYER, SHELBY MUTUAL CASUALTY CO., CARRIER.

(Filed 15 January, 1965.)

1. Master and Servant § 90—

A person seeking to recover benefits under the N. C. Workmen's Compensation Act has the burden of proving that he comes within the purview of the Act.

2. Master and Servant § 48—

A subcontractor may be an independent contractor as to certain parts of the work and merely an employee in regard to other parts, but in his character as an independent contractor he is not covered by the Compensation Act and the court has no jurisdiction to apply its provisions to him in such instance. G.S. 97-2.

3. Same—

The provisions of G.S. 97-19 do not impose liability on the employer for injuries received by an independent contractor or a subcontractor personally when the injuries arise in the performance of the independent employment.

4. Same—

Whether an injured person is an independent contractor or a subcontractor who is an independent contractor or an employee within the meaning of the Compensation Act is to be determined by the common law test in the absence of pertinent statutory provisions.

5. Master and Servant § 3—

An independent contractor is ordinarily one who undertakes to produce a given result at a stipulated price without the supervision or control of the person employing him except as to the result of the work.

6. Courts § 2—

A challenge to jurisdiction may be made at any time, and if the court finds at any stage of the proceeding that it is without jurisdiction it should dismiss the proceeding.

7. Master and Servant § 93—

Jurisdictional findings of the Industrial Commission are not conclusive on appeal to the Superior Court, and where the appeal is based upon exceptions to the findings of the Industrial Commission that plaintiff was an employee and not an independent contractor, it is the duty of the Superior court on appeal to review the evidence and make independent findings therefrom in respect to the controverted jurisdictional fact.

8. Master and Servant § 48— Evidence held to disclose that claimant was an independent contractor and not an employee.

Evidence disclosing that claimant signed a contract for the performance of labor necessary to the construction of a house for a lump sum according to plans and specifications and materials furnished by defendant, defendant having contracted with the owner of the lot for a completed residence, that defendant's agent checked two or three times a week to see if claimant was following the plans and specifications, notified him of any changes therein, but did not give orders as to what time work should begin or how long work should continue during the day, or exercise any control in the manner in which the work was performed, etc., *is held* to disclose that claimant was a subcontractor who was an independent contractor in the performance of the work and therefore was not covered by the Compensation Act for an injury suffered by him personally.

APPEAL by claimant from *Hubbard, J.*, January 1964 Session of NEW HANOVER.

Claim for compensation under the North Carolina Workmen's Compensation Act.

Nationwide Homes entered into a contract with W. C. Graham to construct a house for him. Nationwide Homes then on 23 November 1961 entered into a written contract with claimant to build this house. This written contract is as follows:

"SUB-CONTRACT AGREEMENT

"THE AGREEMENT, made this 23 day of November, 1961, NATIONWIDE HOMES hereinafter known as the CONTRACTOR and J. P. Richards with mailing address , hereinafter known as the SUB-CONTRACTOR.

"WITNESSETH: That the CONTRACTOR and the SUB-CONTRACTOR for the consideration, hereinafter named, agree as follows:

"1. The SUB-CONTRACTOR agrees to do and complete in a satisfactory manner, all labor on a house size 20′ x 36′ known as Chicago in printed brochure of the CONTRACTOR. More specifically to include a completed house on the outside including two coats of paint. Also to include: Moving all finish materials into house after completion

"Framing to be on (24″) XXX Centers.

"2. The SUB-CONTRACTOR further agrees to guard materials from damage waste and pilfering. And to turn in all delivery tickets.

"3. The SUB-CONTRACTOR further agrees to completely clean up ready for inspection after completion of work.

"4. Upon a satisfactory final inspection, the CONTRACTOR agrees to pay the SUB-CONTRACTOR for all work, the total sum of $302.40.

"5. The SUB-CONTRACTOR warrants that he is licensed to do SUB-CONTRACT work or has regularly worked as a SUB-CONTRACTOR.

"6. The SUB-CONTRACTOR warrants that he carries Workmen's Compensation insurance or authorizes the CONTRACTOR to deduct *3%* to help offset cost of same.

"7. The SUB-CONTRACTOR further agrees to complete the house within 20 days after he has been authorized by the CONTRACTOR to commence work. Failure to do so automatically gives the CONTRACTOR the right to have the work completed and deduct expenses of same from contract amount as stated above. The SUB-CONTRACTOR will advise the CONTRACTOR and the CUSTOMER when he will have the job ready for final inspection.

"WITNESS our signatures and seals this 23 day of November, 1961.

"Telephone No. RO-3-6829 SUB-CONTRACTOR /s/ J. P. Richards
NATIONWIDE HOMES Wilmington N. C. Inc.
BY /s/ A. G. Truelove, Jr.

"Authorize to commence work. 23 November 1961

"Name of Sub-Contractor's Insurance Company: _____

Policy No. _____

"Job Name Waterman Carl Graham — #3"
"NW-16-A

On 22 November 1961 claimant signed the following Sub-contractor's Workmen's Compensation Form:

"SUB-CONTRACTOR'S WORKMEN'S COMPENSATION FORM

"Date 22 November 1961 Brunswick County, North Carolina
City or County & State

"It is understood and agreed that I ~~(we)~~, the am ~~(are)~~ an individual ~~(a Partnership)~~ engaged in the carpentry contracting business.

"In entering into a contractual relationship with Nationwide Homes to build for that corporation certain homes to their specifications as agreed in the contract, I ~~(we)~~ understand that, in respect to Workmen's Compensation insurance as required by the Workmen's Compensation Law of *North Carolina* (State), such Workmen's Compensation insurance as is carried by Nationwide Homes does not apply to injuries sustained by me ~~(us)~~, (an) independent contractor~~(s)~~. The Workmen's Compensation insurance carried by Nationwide Homes does apply to injuries sustained by any employees that may be engaged by me ~~(us)~~ in the completion of the contract.

"Signed: "/s/ J. P. Richards Witness: /s/ A. G. Truelove, Jr."

On 29 November 1961 claimant fell when he was nailing ceiling joists in the construction of this house, and as a result sustained injuries. At the hearing before the hearing commissioner, the parties entered into two stipulations: (1) Shelby Mutual Casualty Company was compensation carrier for Nationwide Homes, the alleged employer. (2) On 29 November 1961 claimant sustained an injury by accident. The hearing commissioner, upon the facts found by him, which included the written agreement entered into by and between claimant and Nationwide Homes, concluded that claimant was an independent contractor, and not an employee, and denied compensation. From such decision, claimant appealed to the Full Commission.

The Full Commission hearing the appeal consisted of the chairman, a commissioner, and a deputy commissioner. The Full Commission, with a commissioner dissenting, entered an order finding that claimant in his work was supervised by Nationwide Homes, concluded that he was an employee of Nationwide Homes at the time he was injured, and at such time was not an independent contractor or a subcontractor, and awarded compensation. From such order defendants appealed to the superior court, assigning as error the following findings of fact by the Full Commission as not supported by any competent evidence: (1) Claimant was an employee of Nationwide Homes, and sustained an injury by accident arising out of and in the course of his employment; (2) plaintiff was supervised by an employee of Nationwide Homes, who would tell him how he wanted the house built, gave claimant the plans, and if there were any alterations to be made, he would supervise such operations; and (3) claimant was an employee of Nationwide Homes when he was injured, and was not at such time an independent contractor or a subcontractor. Defendants further assigned as error the failure of the Full Commission to find that claimant was an independent contractor. Defendants also assigned as error the finding as to claimant's average weekly wage. Defendants also assigned as error the conclusion of the Full Commission that on 29 November 1961 claimant was employed by Nationwide Homes, and on said date sustained an injury by accident arising out of and in the course of his employment with Nationwide Homes, as being erroneous in that it is contrary to law and is not supported by any competent evidence. Defendants further assigned as error the award to claimant made by the Full Commission.

When the appeal came on to be heard by Judge Hubbard, the parties stipulated that he might find the facts, and render judgment in or out of the county, and in or out of session. Upon consideration of the

record and arguments of counsel, Judge Hubbard entered judgment, as set forth below:

FINDINGS OF FACT

"1. On or about November 23, 1961, plaintiff and Nationwide Homes entered into a contract for the construction of a house. Plaintiff agreed to complete a house according to certain specifications and Nationwide Homes agreed to pay him a lump sum of $302.40 upon satisfactory final inspection. The contract did not reserve to Nationwide Homes any control over the method or manner of Plaintiff's performance of the work.

"2. On or about November 22, 1961, Plaintiff and Nationwide Homes executed a 'Sub-Contractor's Workman's Compensation Form' in which it was stated that Plaintiff was an individual engaged in the carpentry contracting business and that Plaintiff understood he would not personally be covered by Workman's Compensation Insurance.

"3. The plans and specifications for the house to be constructed by Plaintiff were furnished Plaintiff by A. G. Truelove, Jr., Division Manager for Nationwide Homes. At the request of the purchaser of the house, Truelove changed the plans and specifications during the course of the work so as to eliminate a partition wall and reduce the house from three bedrooms to two. Mr. Truelove exercised no other supervision over the manner or method of construction.

"4. Plaintiff was assisted in the work by a Mr. Shingleton, Plaintiff hired Mr. Shingleton himself and paid him out of the lump-sum contract price which Plaintiff was to receive.

"5. Plaintiff furnished his own tools, selected his own hours of work, was free to come and go as he pleased, to accept other employment if he chose to do so, and was not subject to discharge because he selected one method of doing the work rather than another.

"6. Plaintiff was engaged in an independent business, calling or occupation. He was not in the regular employ of Nationwide Homes. He had the independent use of his skill, knowledge, or training in the execution of his work and was subject to no control by Nationwide Homes, provided only that he completed the work according to the plans and specifications within the agreed time limit.

"7. On November 29, 1961, Plaintiff fell and received an injury during the course of his work on the house he was building for Nationwide Homes."

CONCLUSIONS OF LAW

"1. Plaintiff was an independent contractor and not an employee at the time of the injury and the accident giving rise thereto.

"2. The employer-employee relationship did not exist between plaintiff and Nationwide Homes at the time of the accident.

"3. The Industrial Commission is without jurisdiction over Plaintiff's alleged claim.

"4. The record disclosed that Plaintiff was paid a lump sum of $302.40 to complete a house within 20 days, that out of this sum Plaintiff paid Mr. Shingleton an undisclosed sum to assist him; the record therefore does not support the Commission's finding that Plaintiff's average weekly wage was $85.00."

Whereupon, he ordered that the proceeding be remanded to the Industrial Commission with direction that it be dismissed.

From this judgment claimant appeals.

J. Harvey Turner for claimant appellant.

Poisson & Barnhill by M. V. Barnhill, Jr., for defendant appellees.

PARKER, J. Claimant has one assignment of error and that is "that the court erred in signing and entering the judgment."

The parties stipulated that claimant on 29 November 1961 sustained an injury by accident. The decisive question presented for decision is whether claimant at the time he sustained his injury by accident was an employee of Nationwide Homes, as contended by claimant, or an independent contractor, as contended by defendants, or a sub-contractor, who was an independent contractor as to his contractor Nationwide Homes when he was injured.

A person who seeks to recover benefits under our Workmen's Compensation Act must come within its terms, and must be held to proof that he is in a class embraced in the Act. *Hayes v. Elon College,* 224 N.C. 11, 29 S.E. 2d 137.

An injured person is entitled to compensation under our Act only if he is an employee of the party from whom compensation is claimed

at the time of his injury or death. G.S. 97-2; *Scott v. Lumber Co.*, 232 N.C. 162, 59 S.E. 2d 425; *Hart v. Motors*, 244 N.C. 84, 92 S.E. 2d 673.

An independent contractor is not a person included within the terms of our Act, and the Industrial Commission has no jurisdiction to apply the Act to a person who is not subject to its provisions. *Hayes v. Elon College, supra; Perley v. Paving Co.*, 228 N.C. 479, 46 S.E. 2d 298; *Hart v. Motors, supra.*

A subcontractor employed to do certain work may be an independent contractor as to certain parts of the work and merely a servant or employee of the one employing him as to the residue of the work. When a subcontractor is an independent contractor, the relation of master and servant, or employer and employee, does not exist between the contractor and subcontractor. *Greer v. Construction Co.*, 190 N.C. 632, 130 S.E. 739; 57 C.J.S., Master and Servant, §§ 582, 583. In the *Greer* case, the Court said:

> "One for whom work is done is not the master or employer of him who has contracted to do the work when by virtue of the terms of the contract, the latter is an independent contractor; nor does the relationship exist between a contractor and his subcontractor when the latter is an independent contractor."

G.S. 97-19 of our Act imposes liability, under certain specified circumstances, on the principal contractor or employer for injuries and death to employees of his independent contractor or of his subcontractor, but the provisions of G.S. 97-19 do not extend to his independent contractor personally or to his subcontractor personally when he is an independent contractor. *Greene v. Spivey*, 236 N.C. 435, 73 S.E. 2d 488; *Bryson v. Lumber Co.*, 204 N.C. 664, 169 S.E. 276; *Francis v. Franklin Cafeteria*, 123 Conn. 320, 195 A. 198; *Centrello's* Case, 232 Mass. 456, 122 N.E. 560; *Miles v. West Virginia Pulp & Paper Co.*, 212 S.C. 424, 48 S.E. 2d 26, 32; *Houston Fire & Casualty Ins. Co. v. Farm Air Service*, Tex. Civ. App., 325 S.W. 2d 860, *rehearing denied* 1 July 1959; 99 C.J.S., Workmen's Compensation, § 107, f, pp. 370-71.

In the absence of pertinent statutory definitions, whether a person is an independent contractor, or a subcontractor who is an independent contractor, or an employee within the meaning of our Workmen's Compensation Act is to be determined by the application of the ordinary common law tests. *Scott v. Lumber Co., supra; Hayes v. Elon College, supra;* 58 Am. Jur., Workmen's Compensation, § 138.

In *Bryson v. Lumber Co., supra,* the Court said:

> "Generally speaking, an independent contractor is one who undertakes to produce a given result, but so that in the actual execu-

tion of the work he is not under the orders or control of the person for whom he does it, and may use his own discretion in matters and things not specified. [Citing authority.]

"One who represents another only as to the results of a piece of work, and not as to the means of accomplishing it, is an independent contractor and not a servant or employee. *Powell v. Const. Co.,* 88 Tenn. 696."

In *Scott v. Lumber Co., supra,* the Court said:

"An independent contractor is one who exercises an independent employment, and contracts to do specified work for another by his own methods without subjection to the control of his employer, except as to the result of his work. His one indispensable characteristic is that he contracts to do certain work, and has the right to control the manner or method of doing it. The test to be applied in determining whether the relationship of the parties under a contract for the performance of work is that of employer and employee, or that of employer and independent contractor is whether the party for whom the work is being done has the right to control the worker with respect to the manner or method of doing the work, as distinguished from the right merely to require certain definite results conforming to the contract. If the employer has the right of control, it is immaterial whether he actually exercises it."

A challenge to jurisdiction may be made at any time. *Baker v. Varser,* 239 N.C. 180, 79 S.E. 2d 757; *Spaugh v. Charlotte,* 239 N.C. 149, 79 S.E. 2d 748; *Miller v. Roberts,* 212 N.C. 126, 193 S.E. 286; *Johnson v. Finch,* 93 N.C. 205, 208. If a court finds at any stage of the proceedings that it is without jurisdiction over the subject matter of a proceeding or case, it cannot enter a judgment in favor of either party; it can only dismiss the proceeding or case for want of jurisdiction. *Burgess v. Gibbs,* 262 N.C. 462, 137 S.E. 2d 806; *In re Davis,* 248 N.C. 423, 103 S.E. 2d 503; *Henderson County v. Smyth,* 216 N.C. 421, 5 S.E. 2d 136; *Branch v. Houston,* 44 N.C. 85; *New Orleans & Bayou Sara Mail Co. v. Fernandez,* 12 Wall (U.S.) 130, 20 L. Ed. 249; *Corbett v. Boston & M. R. Co.,* 219 Mass. 351, 107 N.E. 60, 12 A.L.R. 683.

When a defendant-employer challenges the jurisdiction of the Industrial Commission, the findings of fact made by the Commission, on which its jurisdiction is dependent, are not conclusive on the superior court, but the superior court has the power, and it is its duty, on appeal, to consider all the evidence in the record, and to make therefrom

independent findings of jurisdictional facts. "This is necessary, to prevent the court from being forced into an act of usurpation, and compelled to give a void judgment." (*Branch v. Houston, supra*). *Hart v. Motors, supra; Aylor v. Barnes,* 242 N.C. 223, 87 S.E. 2d 269; *Buchanan v. Highway Commission,* 217 N.C. 173, 7 S.E. 2d 382; *Young v. Mica Co.,* 212 N.C. 243, 193 S.E. 285; *Francis v. Wood Turning Co.,* 204 N.C. 701, 169 S.E. 654; *Aycock v. Cooper,* 202 N.C. 500, 163 S.E. 569; Strong's North Carolina Index, Vol. 3, Master and Servant, § 93, pp. 290-91.

"As a general rule the court will not accept as conclusive findings of fact of the Commission concerning a jurisdictional question, but will weigh evidence relating thereto and make its own independent findings of fact." 100 C.J.S., Workmen's Compensation, § 763, (7), p. 1216. In 58 Am. Jur., Workmen's Compensation, § 533, it is stated: "It is well established that findings of fact entering into the establishment of jurisdiction of a compensation commission or other tribunal to make an award are subject to review by the courts."

These facts appear in the record: On 22 November 1961 claimant signed what is entitled a "Sub-contractor's Workmen's Compensation Form," which is marked defendant's Exhibit A, in which he states in substance that he is an individual engaged in the carpentry contracting business, and that in entering into a contractual relationship with Nationwide Homes to build for it certain homes to their specifications as agreed in the contract, he understands that, in respect to workmen's compensation insurance as required by the North Carolina Workmen's Compensation Act, such workmen's compensation insurance as is carried by Nationwide Homes does not apply to him, an independent contractor, that such insurance does apply to injuries sustained by any employees that may be engaged by him in the completion of the contract. Claimant's signature to this form was witnessed by A. G. Truelove, Jr., District Supervisor for Nationwide Homes. It is true claimant testified he did not read this form before he signed it. However, there is no evidence that he was illiterate, and there is no evidence that it was misrepresented to him, or that he was prevented from reading it. Mr. Truelove, a witness for the defendants, testified: "I am sure that I explained the meaning of Exhibit A to Mr. Richards before he signed it. * * * I told him Exhibit A meant that he and Mr. Saunders were working together. I told him that they had built the other house together; and I told him whichever one signed this would not be protected; and anybody else working on the job would be protected by Workmen's compensation but that whoever signed this contract would not be protected by Workmen's Compensation." On 23 November 1961

claimant entered into the subcontract agreement heretofore set forth. It is crystal clear from the "Sub-contractor's Workmen's Compensation Form" signed by claimant, and from the subcontract agreement entered into by and between him and Nationwide Homes, that he was engaged in an independent business, to wit, "carpentry contracting business," and that he was not in the regular employ of Nationwide Homes; that he contracted to construct a certain specified house at a fixed price; that he had the right to control the manner and method of doing the work without subjection to the control of Nationwide Homes except as to the result of his work, to wit, that it was to be done in a satisfactory manner. Claimant's subcontract agreement with Nationwide Homes reserved to Nationwide Homes no control whatever as to the manner or method of claimant's doing the work.

Claimant testified in substance, except when quoted: He had built one other house for Nationwide Homes of the same type as the house in the instant case. In respect to the house in the instant case, A. G. Truelove, Jr., District Supervisor of Nationwide Homes, told him how he wanted it built, gave him the plans, and if there were any alterations or additions to be made he would advise him. He had a written contract to build this house. Truelove saw that all the materials were on the job and if he needed anything extra, Truelove would order it. On the job in the instant case Truelove said if there were any additional changes inside, they would get together and go ahead and do it, and they did. He cut it from a three bedroom to a two bedroom house, and moved a bathroom over enough to accommodate the space he had left. Truelove told him to do that. That was a variation from the specifications first called for. "As far as I know, that was about it insofar as Mr. Truelove supervising or telling me what changes to make or how to vary workmanship or things like that. Mr. Truelove came around to look at the house and check on the work two or three times a week. When he did come around, he would look the job over and see if it was okay. If things weren't going okay, I am sure he would have said something." Mr. Truelove told him what to do, and he did it. Claimant testified in substance on cross-examination: Truelove gave him the plans and specifications, came by to check and see if he was following the plans and specifications, and notified him of any changes in the plans and specifications. He did not tell him what time to go to work, nor how long to work during the day. He did not tell him what tools to use. He supplied his own tools. He did carpentry work for anybody that asked him. Joe Shingleton helped him build the house, and he paid him out of the contract price.

A. G. Truelove, Jr.,. District Supervisor for Nationwide Homes testified in substance for defendants: He told claimant what changes W. C. Graham wanted made in the house.

It is stated in Strong's North Carolina Index, Vol. 3, Master and Servant, § 3, p. 189: "But where it is admitted or established that the contract provided that the party was to do certain work in accordance with plans and specifications furnished by the owner for a stipulated sum, the contract creates the relationship of principal and independent contractor as a matter of law."

The case of *Brown v. Truck Lines,* 227 N.C. 299, 42 S.E. 2d 71, relied on by claimant, is clearly distinguishable. Claimant contends that in that case there was a contract similar to the one in the instant case, and that the Court held that under that contract the relationship was that of employer-employee. The contracts in the two cases are entirely different. In the *Brown* case a carrier licensed to transport goods by truck in interstate commerce leased a vehicle from an owner not so licensed and attached its plates to the vehicle while engaged in transporting goods in interstate commerce. Under such circumstances the Court held that the contract of lease will be presumed to have been made in contemplation of the pertinent Federal Statutes and regulations of the Interstate Commerce Commission, requiring retention of control over the vehicle by the franchise owner, and drivers of such vehicle, as a matter of public policy, will be held employees of the carrier and not independent contractors for the purpose of determining liability of the carrier. In its opinion the Court said:

> "The operation of the truck was in law under the supervision and control of the interstate franchise carrier and could be lawfully operated only by those standing in the relationship of employees to the authorized carrier. Brown had no franchise right independent of the defendant."

Tested by the standard set forth in *Bryson v. Lumber Co., supra,* and in *Scott v. Lumber Co., supra,* we are of opinion that the evidence in the record fully supports Judge Hubbard's independent findings of fact, and that these findings of fact support his conclusions of law that claimant at the time of his injury by accident was an independent contractor and not an employee of Nationwide Homes, and that consequently the Industrial Commission was without jurisdiction over his claim, and these in turn support his judgment remanding the proceeding to the Industrial Commission with direction that it should be dismissed, though Judge Hubbard would have been more technically accurate if he had designated claimant a subcontractor who was an in-

dependent contractor in constructing the house in the instant case. The judgment of Judge Hubbard is

Affirmed.

OLDHAM & WORTH, INC. v. JOHN BRATTON, JR., AND WIFE, MICHELLE T. BRATTON, AND JOHN M. CANNON.

(Filed 15 January, 1965.)

1. Appeal and Error § 22—

An appeal from a judgment of nonsuit, entered without specific findings of fact in a trial by the court under agreement of the parties, presents the question whether the evidence, taken in the light most favorable to plaintiff, will support findings of fact upon which plaintiff could recover.

2. Master and Servant § 3—

An agreement under which a contractor obligates himself to construct a residence on a cost plus basis in accordance with plans and specifications, leaving to the contractor decision as to where materials should be purchased, who should be employed as workmen, and to what extent, if any, the contractor would subcontract the work, the owner being concerned only with the final result, creates the relation of owner and independent contractor.

3. Contracts § 14—

Where a contractor for the construction of a house is an independent contractor, the person furnishing materials solely on the basis of the contractor's credit may not hold the owner liable on the theory that the contractor was an agent for the owner in purchasing the materials.

4. Laborers' and Materialmen's Liens § 3—

Where the owner receives no notice of amounts due a material furnisher but pays the contractor upon monthly applications for reimbursement for labor and materials, with the material furnisher's invoices attached, with nothing to indicate that the contractor had not paid the materialman for the items listed thereon, the owner is not liable to the material furnisher under the provisions of G.S. 44-8.

5. Same—

Where the contract is terminated solely for financial inability of the contractor to complete performance, provisions of the contract referring to the owner's right to terminate the contract and the rights and obligations of the owner in the event of such termination, are inapplicable.

6. Appeal and Error § 41—

Where decision as to nonsuit is not based in whole or in part on evidence admitted over plaintiff's objection, the admission of such evidence cannot be prejudicial to plaintiff.

7. Trial § 56—

The rules of evidence are not so strictly enforced where jury trial is waived.

8. Judgments § 7—

A tender of judgment which is not made until after nonsuit has been entered and plaintiff has appealed therefrom and the session of court has expired, does not comply with G. S. 1-541.

9. Husband and Wife § 3—

Where the wife does not sign the contract for the construction of a residence and there is no evidence that the husband was her agent in signing the contract, or that she had any dealings in regard thereto, the wife is not a party to the agreement and she is not liable thereon.

10. Laborers' and Materialmen's Liens § 3—

The owner may be held liable for material furnished after the owner had agreed with the material furnisher to pay for same.

APPEAL by plaintiff from *Hobgood, J.*, First Regular April 1964 Civil Session of WAKE.

Action to recover $1,774.90 for materials furnished by plaintiff and used in the construction of a residence on Lakeview Drive, Raleigh, N. C., owned by defendants Bratton.

The materials were furnished by plaintiff on order of defendant Cannon and used by Cannon in part performance of a written contract dated July 24, 1961. While the contract recites it is between Cannon (Contractor) and "Mr. and Mrs. John Bratton, Jr." (Owner), it was not signed by defendant Michelle T. Bratton (Mrs. John Bratton, Jr.). Unless otherwise stated, "Bratton" refers to defendant John Bratton, Jr.

The two documents constituting the contract are on printed forms issued by The American Institute of Architects. One is entitled "A FORM OF AGREEMENT BETWEEN CONTRACTOR AND OWNER . . . for use when the cost of the work plus a fee forms the basis of payment," referred to hereafter as the Contract. It incorporates by reference a separate document entitled, "THE GENERAL CONDITIONS OF THE CONTRACT FOR THE CONSTRUCTION OF BUILDINGS." (Note: In the portions quoted below, the italicized words and figures are typed, all others are printed.) The Contract designates Holloway-Reeves and Associates, Raleigh, N. C., as Architect.

The Contract, by reference, identifies the original "Drawings" and "Specifications" and modifications thereof. In Article 1 of the Contract, "(t)he contractor agrees to provide all the labor and materials and to

do all things necessary for the proper construction and completion of the work shown and described" on said Drawings and in said Specifications.

Article 4 of the Contract, entitled "Fee for Services," provides: "In consideration of the performance of the contract, the Owner agrees to pay the Contractor, in current funds as compensation for his services hereunder *Four Thousand Dollars ($4,000.00)* which shall be paid as follows: *At the completion and acceptance of the work hereunder.*"

Article 5 of the Contract, entitled "Costs to be Reimbursed," in part, provides: "The Owner agrees to reimburse the Contractor in current funds all costs necessarily incurred for the proper execution of the work and paid directly by the Contractor, such costs to include the following items, . . . (a) All labor directly on the Contractor's pay roll . . . (i) Materials, supplies, equipment and transportation required for the proper execution of the work . . . *(x) The total costs to be reimbursed as described in Article 5 shall not exceed $69,614.76.*"

Article 12 of the Contract, entitled "Applications for Payment," in part, provides: "The Contractor shall, between the first and seventh of each month, deliver to the Architect a statement, sworn to if required, showing in detail and as completely as possible all moneys paid out by him on account of the cost of the work during the previous month for which he is to be reimbursed under Article 5 hereof, with original pay rolls for labor, checked and approved by a person satisfactory to the Architect, and all receipted bills."

Cannon began construction the last of July, 1961. In January, 1962, Cannon ceased construction and notified Bratton he could not complete the job. Thereafter, the residence was completed pursuant to a contract between Bratton and a different contractor.

The Architect, pursuant to Article 5, submitted five documents to Bratton, each entitled "Certificate for Payment," dated and for amounts as follows: (1) September 12, 1961, $2,052.52; (2) October 9, 1961, $3,852.22; (3) November 9, 1961, $6,622.29; (4) December 11, 1961, $5,038.52; and (5) January 19, 1962, $1,005.77 ($541.00 to be paid directly to M. R. Peebles, masonry contractor, and $464.77 to be paid to Cannon). Each certificate bears this (printed) provision: "Provided that neither the Owner nor any agent of the Owner has received any notice of any sort from any source indicating that the Contractor has failed to pay any sub-contractor, laborer, or materialman, the following amount is authorized for immediate payment." Bratton paid to Cannon the full amount called for by each of the first four certificates. In accordance with the (last) certificate dated January 19, 1962, Bratton paid $464.77 to Cannon and $541.00 to Peebles. Hence, Brat-

ton paid to Cannon a total of $18,030.32. He paid another contractor $58,850.00 to complete the job.

The amount of each "Certificate for Payment" is the aggregate of items of labor and materials shown on a list (attached to the certificate) submitted by Cannon to the Architect. Each such attached list, except that attached to the (last) certificate of January 19, 1962, includes numbered invoices for materials purchased by Cannon from plaintiff. The list attached to the certificate of January 19, 1962, covers only items for labor performed in January, 1962.

Plaintiff alleged "the terms" of the Contract of July 24, 1961, "made the defendant Cannon the agent of the defendants Bratton for the construction of said residence," and that the purchases by Cannon from plaintiff were made "in the course of said agency and employment" by defendants Bratton. Plaintiff also alleged defendants Bratton, "in violation of the requirements of G.S. 44-8," failed and neglected to pay any sums whatsoever directly to plaintiff for materials it had furnished as shown on statements submitted by Cannon to the Architect.

A motion by defendants Bratton that plaintiff be required to make an election as to the theory on which it contended defendants Bratton were liable was heard at October 1962 Special Term. McConnell, J., ruled that plaintiff had asserted two inconsistent theories of liability and was required to elect. Plaintiff excepted to the ruling requiring such election; but, in compliance therewith, plaintiff elected to proceed on the theory that plaintiff's cause of action against defendants Bratton was "for breach of a direct contract between them."

An order was entered permitting defendants Bratton to amend (supplement) their answer by adding thereto a "First Further Answer and Affirmative Defense." Plaintiff excepted. When defendants Bratton filed said further answer and defense, plaintiff demurred thereto orally. The court overruled plaintiff's said demurrer and plaintiff excepted.

When the case was called for trial, a jury trial was waived. At the conclusion of plaintiff's evidence, the court allowed the motion of defendants Bratton for judgment of nonsuit.

The judgment entered (dated April 16, 1964) concludes as follows: "NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff be, and it is hereby nonsuited as to the defendants John Bratton, Jr. and wife Michelle T. Bratton and that the said cause be and it is hereby dismissed as to them.

"The defendant John M. Cannon having then stated that he did not desire to offer any evidence and that he personally had incurred the obligations to plaintiff in the amount sued for by plaintiff, the court advised plaintiff's counsel that it was prepared to enter judgment for

plaintiff against the defendant Cannon. Thereupon, plaintiff stated that consistent with its theory of the case that the defendant Cannon acted only as the agent of the defendants Bratton it desired to take a voluntary nonsuit as to the defendant Cannon.

"NOW, THEREFORE, the plaintiff having submitted to voluntary nonsuit as to the defendant Cannon, IT IS ORDERED, ADJUDGED and DECREED that the plaintiff be nonsuited as to the defendant Cannon.

"The costs of this action shall be taxed to the plaintiff."

Plaintiff excepted and appealed. "Appeal Entries" are dated April 16, 1964.

Thereafter, "Tender of Judgment" dated April 27, 1964, and served on plaintiff's counsel and filed April 28, 1964, is in words and figures as follows: "Pursuant to the provisions of G.S. 1-541 the defendants John Bratton, Jr. and wife Michelle T. Bratton hereby offer in writing to the plaintiff to allow judgment to be taken against them in the sum of $72.16 with interest from January 17, 1962, together with the costs of this action as taxed by the clerk." Plaintiff made no response thereto.

Vaughan S. Winborne for plaintiff appellant.
Joyner & Howison for defendant appellees Bratton.

BOBBITT, J. Where, upon waiver of jury trial in accordance with G.S. 1-184, the court makes no specific findings of fact but enters a judgment of involuntary nonsuit, the only question presented is whether the evidence, taken in the light most favorable to plaintiff, would support findings of fact upon which plaintiff could recover. *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E. 2d 508, and cases cited; *DeBruhl v. Harvey & Son Co.*, 250 N.C. 161, 167, 108 S.E. 2d 469.

Since the evidence was fully developed, whether there was error in the order relating to an election is immaterial if the evidence, when considered in the light most favorable to plaintiff, is insufficient to support a recovery on any theory.

The total of $1,774.90 plaintiff seeks to recover consists of (1) $1,702.74 for materials sold prior to January 1, 1962, and (2) the $72.16 for materials sold during January 1962 for which defendants Bratton tendered judgment. There was evidence plaintiff has not received payment of any part of said $1,774.90 from any source.

Plaintiff's invoices for materials sold and delivered prior to January 1, 1962, were made out to J. M. Cannon, "(f)or use on the Bratton Job," and plaintiff's ledger sheet (Exhibit #1) shows the items covered

by said invoices (a total of $1,702.74) were charged to J. M. Cannon in connection with the "Bratton Job—Lakeview Dr."

Plaintiff contends Cannon purchased the materials ($1,702.74) as agent for defendants Bratton. All the evidence is to the effect that these materials were sold and charged by plaintiff to Cannon on the basis of credit extended by plaintiff to Cannon.

Plaintiff's (then) Vice President, George W. Worth, who acted for plaintiff in its dealings with Cannon with reference to materials furnished for Cannon's use on the Bratton job, testified: "Mr. Cannon had purchased over a great many years a great quantity of materials from Oldham & Worth and during those years Oldham & Worth had constantly extended credit to him." Referring specifically to the Bratton residence, Worth testified: "My firm sold him (Cannon) materials for the construction of that house . . ." Referring to the items (a total of $1,702.74) shown on Exhibit #1, Worth testified: "Oldham & Worth intended to make each one of the sales to Mr. Cannon. I had no dealings with anybody else in connection with those sales. I sent statements for the amount of those sales to J. M. Cannon. . . . At no time between August 3, 1961 (the date of the first entry on Exhibit #1), through December 31, 1961, did I make any claim whatsoever upon Mr. John Bratton, Jr., or his wife Michelle T. Bratton for any of" said items.

Worth testified: "It was only after Mr. Cannon got in financial difficulties and called a meeting of his creditors early in 1962 that I made any effort to bill materials to Mr. and Mrs. Bratton." Again: "At the time of the creditors' meeting I did not know the terms of the contract between Mr. Cannon and the Brattons." (Note: Bratton testified said (first) meeting of Cannon's creditors was held January 11, 1962.)

During the period from August 3, 1961, through December 31, 1961, plaintiff was selling Cannon materials for use on other jobs. Worth testified: "I was looking to him for payment of those materials, just as I was for payment for the materials on this job." Payments were made by Cannon to plaintiff during said period. Cannon did not direct the application thereof. Plaintiff credited them "to the oldest account."

Bratton wanted the construction on his residence to go forward. According to Worth, Bratton agreed to pay for three items, a total of $72.16, for materials delivered in January, 1962. These three items were invoiced and charged to defendants Bratton and appear on Exhibit #2 (ledger sheet). According to Worth, one item ($12.36) was for material delivered January 3, 1962, and two items (a total of $59.80) were for material delivered January 17, 1962.

At said first meeting of Cannon's creditors, one of the terms of a proposed agreement was "that the owners of the two projects would pay Mr. Cannon's payroll and would also pay the brick mason's payroll." (Note: The certificate of payment dated January 19, 1962, is for January labor.) Later in January, after a second meeting of Cannon's creditors, "everything came to a dead halt."

The extensive provisions of the contract of July 24, 1961, which define the status of the Contractor, the Owner and the Architect, did not make Cannon the agent of defendants Bratton for the construction of the Bratton residence. On the contrary, these provisions clearly identify and establish Cannon's status as that of independent contractor. Legal principles distinguishing an independent contractor from an agent are set forth in many of our decisions. *Hayes v. Elon College,* 224 N.C. 11, 29 S.E. 2d 137, and cases cited; *Cooper v. Publishing Co.,* 258 N.C. 578, 129 S.E. 2d 107, and cases cited; *Richards v. Nationwide Homes, ante,* 295, 139 S.E. 2d 645, and cases cited. Reference is made to *Pumps, Inc. v. Woolworth Co.,* 220 N.C. 499, 17 S.E. 2d 639, for application of these legal principles in a similar factual situation. Restatement of these well-settled legal principles is unnecessary.

Cannon was engaged in an independent business or occupation. He was a general contractor of long experience. His contractual obligation was to construct the Bratton residence in accordance with the Drawings and Specifications. Where he would purchase materials, whom he would employ as workmen, and to what extent, if any, he would sub-contract the job, were for decision by Cannon. Bratton was concerned only with the final result, namely, the construction and completion of the residence in accordance with the Drawings and Specifications. It is noted that this was Bratton's first experience in connection with the construction of a residence.

It seems appropriate to consider plaintiff's alternative contention, namely, that defendants Bratton are liable to him on account of payments made by Bratton to Cannon as authorized by the Architect's said certificates without first determining Cannon had made actual payment of the items he listed on the statements he submitted to the Architect.

Under G.S. 44-8, it was Cannon's duty before he received payment from Bratton to show the amount, if any, he then owed plaintiff for materials used on the Bratton job. He did not do so.

As a basis for progress payments, Cannon, under Article 12 of the Contract, was required to submit statements to the Architect covering "all moneys *paid out by him* on account of the cost of the work during the previous month for which he (was) to be reimbursed under Article

5." (Our italics). The Architect accepted Cannon's statements as correct in respect of the work he had done. As indicated, each certificate of the Architect authorized payment "(p)rovided that neither the Owner nor any agent of the Owner has received any notice of any sort from any source indicating that the Contractor has failed to pay any subcontractor, laborer, or materialman." Bratton had no knowledge or notice that plaintiff had not been paid for materials Cannon had purchased from plaintiff and covered by numbered invoices listed on the statements submitted by Cannon to the Architect.

Until said meeting of Cannon's creditors on January 11, 1962, Bratton had no notice that Cannon was indebted to plaintiff for materials it had sold and delivered to him for use on the Bratton job. Worth testified: "As to my not making any effort to collect any monies from Mr. Bratton until after the first of 1962, I expect that if I had said to Mr. Cannon anything about whether he was getting payments on Mr. Bratton's bill he would have cut me off immediately as a customer. As to why I didn't do it, nobody does it."

No notice was given by plaintiff to Bratton. See G.S. 44-9. Plaintiff relies on G.S. 44-8. The question is whether Bratton became liable for amounts due by Cannon to plaintiff because he made payments to Cannon without first ascertaining that the items listed on Cannon's statements to the Architect as a basis for progress payments had not in fact been paid. The answer is, "No."

G.S. 44-8, in substance, is a codification of Section 1, Chapter 67, Laws of 1887. Its legal significance, in a factual situation similar to that now under consideration, was settled in *Pinkston v. Young,* 104 N.C. 102, 10 S.E. 133 (1889).

In *Pinkston v. Young, supra,* the action was to enforce a lien against the property of defendant for the amount owing on account of materials sold and delivered by plaintiffs to a contractor (Linthicum) for use and used in constructing a house for defendant. Defendant had paid the contractor. The contractor had failed to notify defendant in the manner provided in the 1887 Act that he was indebted to plaintiffs for such materials.

Referring to provisions of the 1887 Act now codified as G.S. 44-8 and G.S. 44-12, this Court, in opinion by Merrimon, J. (later C. J.), said: "It is further provided, that if any such contractor or architect shall fail to furnish such itemized statement, he shall be guilty of a misdemeanor, and, upon conviction, fined or imprisoned, or both, in the discretion of the court. This stringent provision is directed against, not the owner of the property, but the contractor. The purpose is to compel the latter to supply the itemized statement, so that the laborer

may be benefited, have his right facilitated, and the owner of the property may be reasonably protected. There is no liability created on the part of the latter if the itemized statement is not supplied to him; he cannot compel the contractor to furnish him with it, nor is he presumed to know that he has not paid the laborer or mechanic, or that he owes him any particular sum. It may be, that the contractor has paid him or secured the sum due him to his satisfaction. It would be alike unreasonable and unjust to create such liability on the part of the owner of the property in the absence of the statement required. It would tend strongly to prevent such owners from improving their property, and such a purpose cannot be attributed to the Legislature, in the absence of some language or provision making it manifest."

In *Pumps, Inc. v. Woolworth Co., supra,* the contractor had furnished the defendant-owner a *false* affidavit to the effect all bills for labor and material had been paid. It was held that plaintiff, which furnished a pump to the contractor, was not entitled to recover from the defendant-owner. The following excerpt from the opinion of Barnhill, J. (later C. J.), is pertinent:

"While it is true that when a contractor furnishes a list of laborers and materialmen *to whom he is indebted,* the owner must retain a sufficient part of the contract price to satisfy such claims, (citations) the burden is on plaintiff to show that such notice was so given by the contractor or that the owner was notified directly by him. There is no lien until and unless the statutory notice either under C.S. 2439 (G.S. 44-8), or under C.S. 2440 (G.S. 44-9), has been given. *Pinkston v. Young, supra.*

"Such notice or itemized statement must be filed in detail specifying the material furnished or labor performed and the time thereof. It must further show *the amount due and unpaid* so as to put the owner on notice that such amount is demanded. (Citations). Neither invoices furnished under the contract nor statements made by the contractor to enable him to procure what is due, nor mere knowledge of the owner of the existence of the debt is sufficient to charge him with liability. (Citations)" (Our italics).

True, Cannon did not attach to the statements he submitted to the Architect as a basis for progress payments an affidavit that he had paid the items shown thereon. Nor did he expressly declare that he had made such payments. On the other hand, nothing appears thereon to indicate Cannon had not paid the items listed thereon. Article 12 of the Contract expressly provides such statements shall consist solely of items the contractor has paid. Hence, the Architect and Bratton had

reasonable grounds to assume Cannon had made such payments. Be that as it may, Cannon gave no notice of unpaid amounts due plaintiff within the purview of G.S. 44-8.

The Contract was terminated solely on account of Cannon's inability, for lack of finances, to perform it. He advised Bratton by letter to this effect. Consequently, the provisions of Article 22 of said General Conditions and of Article 15 of the Contract do not apply. They refer to the "Owner's Right to Terminate Contract" and rights and obligations of the owner as a result of such termination.

We perceive no prejudicial error in respect of the orders (1) permitting defendants Bratton to file a further answer and defense and (2) overruling plaintiff's demurrer to such further answer and defense. Too, these orders have no bearing on whether the evidence offered by plaintiff was sufficient to withstand nonsuit.

Nor do we perceive prejudicial error in respect to the court's rulings on evidence. Decision as to nonsuit is not based in whole or in part on evidence admitted over plaintiff's objections. Too, the rules of evidence are not so strictly enforced where jury trial is waived. *Bizzell v. Bizzell,* 247 N.C. 590, 604, 101 S.E. 2d 668; *Everette v. Lumber Co.,* 250 N.C. 688, 694, 110 S.E. 2d 288.

With reference to the tender of judgment referred to in our preliminary statement: G.S. 1-541, in pertinent part, provides: "The defendant, at any time before the trial or verdict, may serve upon the plaintiff an offer in writing to allow judgment to be taken against him for the sum or property, or to the effect therein specified, with costs." Here, the judgment of nonsuit had been entered, plaintiff had appealed therefrom and the session of court had expired by limitation before the tender was made. Suffice to say, such tender was not authorized and is not in compliance with G.S. 1-541. On appeal, we consider the status of the case when presented to and passed upon in the superior court.

Defendant Michelle T. Bratton did not sign the Contract. There is no evidence she had any dealings with plaintiff or participated in negotiations with Cannon. Nor is there evidence or presumption that her husband was her agent. *Pitt v. Speight,* 222 N.C. 585, 24 S.E. 2d 350; *Air Conditioning Co. v. Douglass,* 241 N.C. 170, 84 S.E. 2d 828.

As to defendant Michelle T. Bratton, the judgment of nonsuit is affirmed in its entirety.

As to defendant John Bratton, Jr., the judgment of nonsuit is affirmed as to the items for materials sold and delivered by plaintiff to Cannon prior to January 1, 1962, to wit, a total of $1,702.74; but as to the three items, a total of $72.16, the judgment of nonsuit is reversed.

There was evidence sufficient to support a recovery by plaintiff for these items, to wit, testimony that defendant John Bratton, Jr., in January, 1962, by agreement with plaintiff, became obligated to pay therefor.

It is ordered that the costs on this appeal be taxed as follows: One-half to plaintiff and one-half to defendant John Bratton, Jr.

As to defendant Michelle T. Bratton: Affirmed.

As to defendant John Bratton, Jr.: Affirmed in part and reversed in part.

VIOLA GILLIKIN v. LINDA GILLIKIN BURBAGE.

(Filed 15 January, 1965.)

1. Parent and Child § 2—

Neither a parent nor his personal representative can sue an unemancipated child for a personal tort, even though liability is covered by insurance, but complete emancipation removes the bar to action between a parent and child for personal torts.

2. Parent and Child § 1—

The emancipation of a child may be partial, in which event the parent relinquishes the right to the child's earnings for a certain period or for certain purposes or under certain circumstances, without disturbing other mutual rights and duties; or complete, in which event the parent surrenders all rights to the services and earnings of the child as well as the right to custody and control of his person.

3. Same—

Emancipation is not presumed but the burden is upon the parent or person asserting emancipation to prove it.

4. Same—

The execution of a formal contract is not required to accomplish the complete emancipation of a minor but the intent and purpose of the parent to emancipate the child may be expressed either in writing or orally, or inferred from the surrounding circumstances or conduct of the parent inconsistent with parental care and control.

5. Same—

The fact that a minor child living with her parents would not knowingly transgress their wishes, deferred to their advice, and provided her mother with transportation whenever it was requested, does not in itself negate emancipation.

6. Same—

Evidence that a minor child lived in the home of her parents, deferred to their advice and did not knowingly transgress their wishes, but that she worked and supported herself, that she paid her share of the living expenses, purchased a car with her own earnings, that her wages were entirely her own, and that she came and went at her own pleasure, etc., *held* sufficient to be submitted to the jury on the issue of the child's complete emancipation.

7. Automobiles § 47—

Evidence that a passenger was standing beside a car with the door open and that the driver permitted her foot to slip from the clutch while the automobile was in gear with the engine running, so that the car lurched forward, swinging the door back against the passenger to her injury, is sufficient evidence, in the absence of explanation, of lack of proper care under the circumstances.

8. Damages § 3—

Plaintiff has the burden of showing that defendant's negligence was the proximate cause of the particular injuries for which plaintiff seeks recovery, and when a layman can have no well formed knowledge as to whether a particular injury resulted from the accident there can be no recovery of damages therefor without expert medical testimony of causation.

9. Same—

Testimony of plaintiff that when the door of defendant's car hit her the blow twisted her body and knocked her against the side of the car, together with testimony of a physician that when he examined plaintiff some time after the accident she had a ruptured disc and that a ruptured disc usually occurs as a result of some acute movement which produces a marked flexion, *held* to leave in speculation whether the accident caused the ruptured disc, and the testimony in regard to the ruptured disc should have been stricken on motion.

10. Same—

Where the only evidence that plaintiff's injury was permanent and would continue to cause her pain and suffering is testimony of a physician that a condition such as plaintiff's usually improves but could recur, the testimony is insufficient to be submitted to the jury on the question of the permanency of the injury, and it was error for the court to admit in evidence the mortuary table and instruct the jury thereon in regard to the award of the present cash value of future damages.

APPEAL by defendant from *Copeland, S. J.*, April-May 1964 Civil Session of CARTERET.

Civil action for personal injuries sustained by plaintiff when she was struck by the door of defendant's automobile. Plaintiff is the mother of defendant, who, at the time of the acts complained of, was nineteen years of age and unmarried, and was living in the home of her father and mother. Plaintiff alleges that on June 12, 1962, defendant was

emancipated; that defendant owned an automobile in which she had just transported plaintiff as a guest; that immediately after plaintiff had dismounted from the vehicle, defendant negligently released the clutch and thus caused the automobile to lurch forward and the door to strike plaintiff's body; that the blow resulted in serious and permanent injuries to plaintiff.

Plaintiff's evidence tends to show these facts: Defendant graduated from high school in May 1961. She then advised her parents that she felt able to go out on her own and make her own living. They consenting, defendant left the family home for the home of a sister in Virginia, where, unsuccessfully seeking employment, she remained about two months. Defendant then returned to her parents' home, where she remained as a "guest" until she found employment in Morehead City. There, she worked for about three months with two different employers. During these months defendant's father did not know where she was working nor how much money she was making. About January 1, 1962, defendant became a secretary at Hardesty Motors and worked there continuously up through the time of the accident in suit. Defendant's wages were entirely her own, and her father did not list her as a dependent on his income-tax return after the year 1961.

After going to work at Hardesty Motors, defendant purchased a two-door, standard-transmission, 1956 Ford, which she was operating on June 12, 1962, the day of the accident. Defendant had paid for the automobile herself, and it was solely hers. She alone had made all the arrangements for its purchase and signed the necessary papers. Defendant's father did not drive her automobile, nor did he ride to and from work with her.

In the home, defendant came and went at her pleasure, selected her own companions, and was not subject to any curfew. Her father did not known where she went, so that there was never any reason for him to forbid her to go anywhere. She never did anything, however, which she knew to be contrary to her parents' wishes. She helped round the house and never "defied a request" from her mother. Including defendant, there were three occupants of the home, and she had an agreement with her parents whereby she paid one-third of the living expenses. Defendant married in January 1963. With her husband she continues to live in the home of her parents.

About 1:00 p.m. on June 12, 1962, at plaintiff's request, defendant drove her to a nearby store in defendant's automobile. Upon arriving, defendant stopped the car on the shoulder of the highway, the car's engine still running and the transmission in gear; and plaintiff got out. When defendant spoke to her, plaintiff turned toward defendant. As

plaintiff stood, listening to defendant, between the opened right door and the door frame, defendant's foot slipped off the clutch. The automobile lurched forward, and the door came back suddenly against plaintiff's right hip. The blow "kind of twisted (her) body and knocked (her) against the side of the car." The vehicle moved only a very short distance, and plaintiff was not knocked to the ground. Because the store was closed, plaintiff re-entered the automobile, and she and defendant returned to their home.

Plaintiff developed soreness almost immediately. Hoping that her condition would improve, she took aspirin for her discomfort. On June 17th she discerned a bruise approximately six inches in diameter on her right hip. On June 18th she went to a physician, Dr. DeWalt, and complained of pain and impairment of locomotion. Dr. DeWalt admitted her to the hospital, where she remained twelve days, a part of the time in traction. X-rays revealed no fractures. A week after her release from the hospital, she was again re-admitted for five days.

During the next five months, plaintiff visited Dr. DeWalt at intervals. At the time of the trial Dr. DeWalt was practicing in Chapel Hill. He did not testify. In January 1963 plaintiff consulted Dr. Webb about her back. On that date plaintiff was complaining of pain radiating down into her left hip and leg, and Dr. Webb found spasm in the muscles on both sides of her spine. It was Dr. Webb's opinion, admitted over defendant's objection and exception, that plaintiff then had a ruptured disc in the interspace between the fourth and fifth lumbar vertebrae and that "a ruptured disc usually occurs with some acute movement which produces a marked flexion, that is, bending forward or extension of the spinal column."

In September 1963, Dr. Webb, while treating plaintiff for a stomach disorder, caused x-rays to be made of her abdomen and coincidentally discovered that plaintiff was suffering from scoliosis, or a curvature of the spine usually congenital, and that there were some osteoarthritic changes in the spine not abnormal for a person of plaintiff's age, fifty-eight. Her medical bills totaled $462.50.

Before the accident here complained of, plaintiff's health was good, and she had had no back trouble. She had done all her own housework and had helped in the garden. Since the accident plaintiff has been in continual pain. She must sleep on a board, and she rests but poorly. She cannot stoop to retrieve objects from the floor, and she has difficulty raising herself from a sitting position and climbing steps. She takes medicine daily and must rest frequently. In the home she is obliged to restrict her efforts to a little cooking and dishwashing.

Asked if he had an opinion as to whether plaintiff's condition would improve with regard to pain, Dr. Webb answered, "In my opinion, sir, I think these conditions usually do improve. It is also my opinion that they can re-occur." The mortuary table, admitted over defendant's objection, indicated a life expectancy of 17.3 years for plaintiff.

Defendant offered no evidence. Her motion for judgment as of nonsuit, made at the close of the evidence, was overruled. The jury in answer to appropriate issues, found: (1) defendant was an emancipated minor on June 12, 1962; (2) plaintiff was injured by defendant's negligence; and (3) plaintiff is entitled to recover of defendant $5,462.50. Judgment was entered upon the verdict, and defendant appeals.

Wheatly & Bennett by C. R. Wheatly, Jr. and E. Glenn Kelly for plaintiff.

Dupree, Weaver, Horton & Cockman by F. T. Dupree, Jr., and Jerry S. Alvis for defendant.

SHARP, J. Defendant's first assignment of error relates to the failure of the court to sustain her motion for nonsuit.

It is the rule in North Carolina, and the majority of the other states, that an unemancipated minor child cannot maintain a tort action against his parent for personal injuries, even though the parent's liability is covered by liability insurance. This rule implements a public policy protecting family unity, domestic serenity, and parental discipline. *Redding v. Redding,* 235 N.C. 638, 70 S.E. 2d 676; *Small v. Morrison,* 185 N.C. 577, 118 S.E. 12, 31 A.L.R. 1135; Annot., Right of parent or representatives to maintain tort action against minor child, 60 A.L.R. 2d 1285; 39 Am. Jur., *Parent and Child* § 90 (1942); 3 Lee, North Carolina Family Law § 248 (3d Ed. 1963). Upon the same theory, an overwhelming majority of jurisdictions likewise hold that neither a parent nor his personal representative can sue an unemancipated minor child for a personal tort. Annot., Right of parent or representatives to maintain tort action against minor child, *supra;* 39 Am. Jur., *Parent and Child* § 92 (1942). "The child's immunity is said to be the reciprocal of the parent's immunity." 3 Lee, *op. cit. supra* at 176. The *complete* emancipation of a child, however, removes the bar to actions between parent and child for personal torts. Annot., Right of parent or representatives to maintain tort action against minor child, *supra* at 1292. See also Comment, *Tort Actions Between Members of the Family,* 26 Mo. L. Rev. 152, 194.

The emancipation of a child may be complete or partial. A minor may be emancipated for some purposes and not for others, and sim-

ilarly a parent may be freed of some of his obligations and divested of some of his rights yet not freed and divested of others. *Hunycutt v. Thompson,* 159 N.C. 29, 74 S.E. 628. The power to emancipate resides in that parent having the duty to support, ordinarily the father. Partial emancipation usually means "nothing more than the relinquishment of the father's right to the child's earnings for a certain period or for certain purposes or under certain circumstances. The father does not thereby relieve himself of his parental duty to support the child or his parental right to control the child." 3 Lee, *op. cit. supra* § 233. Complete emancipation occurs *by act of the parent* when he surrenders all right to the services and earnings of the child, as well as the right to the custody and control of his person. By corollary, the parent is thereby relieved of his duty to support the child, but "a parent cannot by any process of emancipation relieve himself of the duty to support a child too young or weak to support itself." *Ibid.* Complete emancipation arises *by operation of law* irrespective of the parent's consent when a child marries, *Church v. Hancock,* 261 N.C. 764, 136 S.E. 2d 81, or when the child becomes twenty-one years old, unless the child is so weak in mind or body that he is unable to support himself and remains in the parent's home unmarried. In this latter event, the parent's duty to support the child continues. *Wells v. Wells,* 227 N.C. 614, 44 S.E. 2d 31. Complete emancipation occurs, as well, by operation of law when the parent abandons or fails to support the child; under this circumstance, however, the parent is merely divested of his rights in the person and the property of the child and is not freed of his obligations, for he may not, of course, benefit from his own wrong. A parent's mere waiver of his right to the earnings of the minor child will not alone constitute complete emancipation. *Small v. Morrison, supra; Little v. Holmes,* 181 N.C. 413, 107 S.E. 574; *Wilkinson v. Dellinger,* 126 N.C. 462, 35 S.E. 819; 39 Am. Jur., *Parent and Child* §§ 64-65 (1942). Whether emancipation is complete, so as to remove the bar to a tort action by the parent or his representative against a minor child, depends upon the particulars of each case, and is, therefore, generally a question for the jury. Emancipation will not be presumed; it must be proved, and the burden is on the parent or the one asserting it. *Holland v. Hartley,* 171 N.C. 376, 88 S.E. 507; *accord, Parker v. Parker,* 230 S.C. 28, 94 S.E. 2d 12, 60 A.L.R. 2d 1280; 39 Am. Jur., *Parent and Child* § 64 (1942).

The execution of a formal contract by a parent is not required to accomplish the emancipation of a minor, and the intent and purpose of the parent to emancipate his child may be expressed either in writing or orally. It may likewise be implied from the parent's conduct

and surrounding circumstances. *Daniel v. R. R.*, 171 N.C. 23, 86 S.E. 174; 3 Lee, *op. cit. supra* § 233. Emancipation may be implied by the assumption of the minor and the parent of a status inconsistent with parental control and care. *Jolley v. Telegraph Co.*, 204 N.C. 136, 167 S.E. 575; 67 C.J.S., *Parent and Child* §§ 88-89 (1950).

> "A minor child may live away from the home of its parents and receive his wages for the week, and pay his own expenses therefrom, and yet not be freed from the authority and control of his parents. On the other hand, a minor child while living at home with his parents may be completely emancipated from the control of his father and entitled to the earnings from his services. . . ." 3 Lee, *op. cit. supra* at 75.

As Sherwood, J., wrote in *Dierker v. Hess*, 54 Mo. 246, 250 (1873):

> "It is not necessary that the father . . . should proclaim that fact (emancipation) from the housetops, or accompany it by some token or ceremonial as open and as odious as that which formerly attended the manumission of a slave; nor is it necessary to accomplish that end, that the son should cease to be a member of his father's family; that the dearest domestic ties should be rudely sundered, and he driven like some alien and outcast from beneath the paternal roof."

Though defendant in this case was her own provider and her own chaperone, according to plaintiff's evidence, she would not knowingly have transgressed the wishes of her parents. She deferred to their advice as she had always done and, in addition, provided her mother with transportation whenever it was requested. Defendant contends that this shows non-emancipation entitling her to nonsuit. We do not so hold. Such a ruling would be tantamount to holding that complete emancipation requires the repudiation of all habits of filial piety which every good parent labors to inculcate and which, as a result, become instinctive in the child of such a parent. *Felix nati pietate.* Vergil, A. 3, 480. Even when he becomes twenty-one, a child is not suddenly metamorphosed into a chilled stranger to his parents; he remains by common experience in emotional privity with them. Complete emancipation is not *ipso facto* lacking simply because *pietas* endures, no more than it is established simply because *pietas* is lacking. Between the two there is no *necessary* connection. Emancipation has to do with a legal, *pietas* with an emotional, relationship. For complete emancipation, the law does not require the severing of all parental ties; the

parent may continue to receive by grace that which he could formerly command.

Plaintiff's evidence, taken as true, was sufficient to establish defendant's complete emancipation by consent of the father and to make her amenable to suit by her mother. It was also sufficient to establish her liability for actionable negligence. That defendant permitted her foot to slip from the clutch while her automobile was in gear with its engine running was, in the absence of any explanation of this mishap, evidence of a lack of proper care under the circumstances. The motions of nonsuit were therefore properly overruled.

The remaining assignments of error which now merit discussion relate to the issue of damages. Over defendant's objection, exception, and motion to strike, the physician, Dr. Webb, who first examined plaintiff on January 12, 1963, was permitted to testify that in his opinion she then had a ruptured disc in the interspace between the fourth and fifth lumbar vertebrae. It is defendant's contention that plaintiff has adduced no evidence establishing a causal relation between this condition and the accident upon which she bases her suit. These rulings constitute defendant's assignment of error No. 3.

The doctrine of proximate cause which determines the existence of liability for negligence is equally applicable to liability for particular items of damage. To hold a defendant responsible for a plaintiff's injuries, defendant's negligence must have been a substantial factor, that is, a proximate cause of the *particular* injuries for which plaintiff seeks recovery. *Lee v. Stevens*, 251 N.C. 429, 111 S.E. 2d 623; *Byrd v. Express Co.*, 139 N.C. 273, 51 S.E. 851; McCormick, *Damages* § 72 (1935 Ed.).

In this record there is not a scintilla of medical evidence that plaintiff's ruptured disc might, with reasonable probability, have resulted from the accident on June 12, 1962. "If it is not reasonably probable, as a scientific fact, that a particular effect is capable of production by a given cause, and the witness (expert) so indicates, the evidence is not sufficient to establish *prima facie* the causal relation, and if the testimony is offered by the party having the burden of showing the causal relation, the testimony, upon objection, should not be admitted and, if admitted, should be stricken." *Lockwood v. McCaskill,* 262 N.C. 663, 138 S.E. 2d 541, 545. It is true that plaintiff in this case said that when the door hit her, the blow "kind of twisted (her) body and knocked (her) against the side of the car," and that Dr. Webb said, "A ruptured disc usually occurs with some acute movement which produces a marked flexion, that is, bending forward or extension of the spinal column." This combined testimony, however, fails to supply the missing infer-

ence of cause and effect. It only creates conjecture and suggests the possibility. Did the rupture occur when the door hit plaintiff? Did it occur later as a result of that blow, some other type of trauma, or the constant wear and tear in everyday activities of bending, lifting, and moving the spine? Whether either Dr. Webb or Dr. DeWalt could have expressed an expert, medical opinion on the matter of causation, in answer to a properly framed hypothetical question, we cannot say. No such question was asked either. The jurors were left to speculate about a matter which frequently troubles even orthopedic specialists. "One of the most difficult problems in legal medicine is the determination of the relationship between an injury or a specific episode and rupture of the intervertebral disc." 1 Lawyers' Medical Cyclopedia § 7.16 (1958 Ed.).

There are many instances in which the facts in evidence are such that any layman of average intelligence and experience would know what caused the injuries complained of. *Jordan v. Glickman*, 219 N.C. 388, 14 S.E. 2d 40; Annot., Admissibility of opinion evidence as to cause of death, disease, or injury, 66 A.L.R. 2d 1086, 1126, supplementing 136 A.L.R. 965, 1004. For instance, no medical evidence was required to link plaintiff's soreness the next day and the six-inch bruise on her right hip with the incident on June 12th. Where, however, the subject matter — for example, a ruptured disc — is "so far removed from the usual and ordinary experience of the average man that expert knowledge is essential to the formation of an intelligent opinion, only an expert can competently give opinion evidence as to the cause of death, disease, or a physical condition." *Ibid.*

Where "a layman can have no well-founded knowledge and can do no more than indulge in mere speculation (as to the cause of a physical condition), there is no proper foundation for a finding by the trier without expert medical testimony." *Huskins v. Feldspar Corp.*, 241 N.C. 128, 84 S.E. 2d 645; *accord, Burton v. Holding & M. Lumber Co.*, 112 Vt. 17, 20 A. 2d 99, 135 A.L.R. 512; see *Hawkins v. McCain*, 239 N.C. 160, 79 S.E. 2d 493. The physical processes which produce a ruptured disc belong to the mysteries of medicine. Defendant's assignment of error No. 3 is sustained.

Defendant's assignment of error No. 5 raises the question whether the court erred in admitting the mortuary table and giving the following instructions, which permitted the jury to assess damages for permanent injuries.

> "The mortuary tables indicate that at the age 58, that being the evidence tending to show was the age of the plaintiff at the date

> of the accident, and the plaintiff had a life expectation of 17.3 years; and the plaintiff, of course, has offered these tables into evidence which tend to show what her life expectancy is. . . .
>
> For any future suffering or damages or of decreased earning power you are to decrease any award you make along that line down to the present cash value upon the theory a dollar to be paid now for something to occur in the future is worth more now than in the future; so you will award on that basis if you award anything on this, what is the present cash value of any future loss you find she may sustain."

This assignment of error raises the question whether plaintiff offered any evidence that she has a permanent injury as a result of the occurrence on June 12, 1962. *O'Brien v. Parks Cramer Co.*, 196 N.C. 359, 145 S.E. 684. The answer is No, and assignment of error No. 5 must also be sustained.

There can be no recovery for a permanent injury unless there is some evidence tending to establish one with reasonable certainty. *Kircher v. Larchwood*, 120 Iowa 578, 95 N.W. 184. Upon proof of an *objective* injury from which it is apparent that the injured person must of necessity continue to undergo pain and suffering in the future, the jury may award damages for it without the necessity of expert testimony. Where, however, the injury is *subjective* and of such a nature that laymen cannot, with reasonable certainty, know whether there will be future pain and suffering, it is necessary, in order to warrant an instruction which will authorize the jury to award damages for permanent injury, that there "be offered evidence by expert witnesses, learned in human anatomy, who can testify, either from a personal examination or knowledge of the history of the case, or from a hypothetical question based on the facts, that the plaintiff, with reasonable certainty, may be expected to experience future pain and suffering as a result of the injury proven." *Shawnee-Tecumseh Traction Co. v. Griggs*, 50 Okla. 566, 568, 151 Pac. 230, 231; Annot., Necessity of expert evidence to warrant submission to jury of issue as to permanency of injury or as to future pain and suffering, or to sustain award of damages on that basis, 115 A.L.R. 1149.

Even if we were to assume a causal connection between plaintiff's ruptured disc and the accident on June 12th (an assumption which we cannot make on this record), Dr. Webb's testimony was that such a condition usually improves but *could* reoccur. This falls short of establishing a permanent injury, and plaintiff's counsel made no further effort to show one. Upon this equivocal testimony the jury should

be left to speculate no more whether the condition created by plaintiff's ruptured disc was permanent than what was the cause of it.

In actions for personal injuries resulting in permanent disability, the mortuary table (G.S. 8-46) is competent evidence bearing upon the life expectancy and the future earning capacity of the injured person. Stansbury, North Carolina Evidence § 101 (2d Ed. 1963). It is not admissible unless there is evidence of permanent injury. McCormick, *op. cit. supra* § 86. Without such evidence, the admission of the mortuary table to show the probable expectancy of life would be misleading and prejudicial. "The expectancy of life is only material when the injury is shown to be one which will continue through life," *Vincennes Bridge Co. v. Quinn's Guardian,* 231 Ky. 772, 778, 22 S.W. 2d 300, 303; *accord, Louisville N. A. & C. Ry. Co. v. Miller,* 141 Ind. 533, 37 N.E. 343. When permanence is not shown to be probable, "the admission of evidence as to the probable duration of the plaintiff's life is improper, and can only mislead the jury as to the real import of the testimony upon the question of damages." *MacGregor v. Rhode Island Co.,* 27 R.I. 85, 89, 60 Atl. 761, 763.

For the errors (1) in admitting testimony that plaintiff had a ruptured disc without sufficient evidence of causation and (2) in permitting the jury to consider the mortuary table and award damages for permanent injury without sufficient evidence of permanency, defendant is entitled to a

New trial.

STATE v. LIVINGSTON BROWN.

(Filed 15 January, 1965.)

1. Homicide § 15—

In order for a declaration to be competent as a dying declaration the declarant must have been in actual danger of death at the time of making the declaration, the declarant must have been in full apprehension of impending death, and death must have ensued.

2. Same—

That declarant at the time of making the declaration was then presently conscious of impending death need not be established by a statement of declarant to that effect but may be inferred from the surrounding circumstances.

3. Same—

Consciousness of impending death as an essential element of admissibility of a declaration is satisfied if declarant believes he is going to die, but it is not required that he should have given up all hope of survival or should consider himself to be in the very act of dying.

4. Same—

The admissibility of a declaration as a dying declaration is a question to be determined by the trial judge, and when the judge admits the declaration his ruling is reviewable only to determine whether there is evidence tending to show the facts essential to support it.

5. Same— Evidence held sufficient to support finding that declarant believed she was facing impending death.

Declarant was admitted to the hospital with severe burns over about 70 per cent of her body from which she died some 25 hours thereafter. The evidence disclosed that her physician told her he thought she would be all right (which was not an honest statement), that declarant stated she did not know whether she was going to make it or not, but also that declarant requested that the sheriff's department be called in a hurry because she did not know how long she would be able to talk, that she told the nurse that she felt she had been spared in order to tell someone about the incident, and that, upon spitting up blood, she said that her mother had told her if anyone ever swallowed fire it would kill them. *Held:* The facts and circumstances in evidence are sufficient to support the court's finding that declarant at the time of making the declarations believed she was facing impending death.

6. Homicide § 14; Criminal Law § 61—

It is competent to show in evidence that a track of a mud grip tire on the right and the track of a tire of a regular tread on opposite side were found at the scene of the crime and that defendant's car had a mud grip tire on the right rear and a regular tire on the opposite side.

7. Homicide § 20—

The dying declaration of the victim that defendant had poured gasoline on her and set her afire, together with evidence that defendant had purchased a half gallon of gasoline in containers, that a broken half gallon fruit jar with the odor of gasoline in it, a match book cover, matches, and items that had been burned were found at the scene, together with evidence tending to identify the tire tracks at the scene as those of defendant's car, *held* sufficient to overrule defendant's motion for nonsuit.

8. Criminal Law § 159—

Assignments of error not brought forward and discussed in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

APPEAL by defendant from *Crissman, J.*, June 1964 Session of RANDOLPH.

Criminal prosecution on an indictment charging murder in the first degree. Before defendant entered a plea, the solicitor for the State

announced in open court that he would seek only a verdict of guilty of murder in the second degree or manslaughter, as the facts might appear.

Plea: Not guilty. Verdict: Guilty of murder in the second degree.

From a judgment of imprisonment, defendant appeals.

Attorney General T. W. Bruton and Deputy Attorney General Harry W. McGalliard for the State.

Archie L. Smith for defendant appellant.

PARKER, J. The State's evidence shows these facts: Sometime after 1:00 a.m. on 16 March 1964, Lucille Currie alone came to the home of Robert H. Seawell, which is situate about six and one-half miles east of the town of Asheboro on what is called the Wagon Wheel Road. She awakened Seawell and his family. According to Seawell's testimony, her body and face were burned, and she had no clothes on "from here up (indicating)." She was given a sheet and wrapped herself up. Seawell called an ambulance, which arrived in about twelve minutes, and she was carried to Randolph Hospital in Asheboro.

The State and defendant stipulated that Lucille Currie was admitted in Randolph Hospital at 2:15 a.m. on 16 March 1964, and died in that hospital at 3:00 a.m. on 17 March 1964.

Defendant assigns as errors the admission over his objections of testimony of Dr. Luke Query, of Mrs. Nora Pratt, of Paul W. Scott, of Blease Garner, and of J. C. Dawkins, as to declarations made by Lucille Currie in Randolph Hospital, which were admitted by the court as dying declarations. These assignments of error are supported by appropriate exceptions. The facts necessary for an understanding of these assignments of error are set out below.

When Lucille Currie was admitted in Randolph Hospital, she was suffering from second and third degree burns on about 70% of her head and body. These burns caused her death in less than twenty-five hours after her admission in the hospital.

J. C. Dawkins, sergeant with the Asheboro Police Department, received a call from Randolph Hospital, according to his testimony, around 1:45 a.m. on 16 March 1964, and went to the hospital. He saw Lucille Currie in the emergency room of the hospital. A nurse and two ambulance attendants were there with her. She was lying on a table with a sheet over the top part of her body. He could see her hip and the backbone of her shoulder and back of her head. She was burned very badly. The skin was coming off, and her ears were practically burned off. He arrived at the hospital before Dr. Luke Query did. He told

Lucille he would have to call the Sheriff's Department since it happened out of town. She told him to please hurry that she did not know how long she would be able to talk. She told him her boy friend, Livingston Brown, had poured gasoline on her and set her on fire, that it happened off the Wagon Wheel Road. He had her repeat the statement when he saw how serious her condition was. Deputy Sheriff Blease Garner came to the hospital and was in the emergency room part of the time he was talking to Lucille. After two o'clock he left the hospital with Deputy Sheriff Garner, went to Livingston Brown's home, and arrested him.

Dr. Luke Query is a practicing medical doctor in Asheboro. He saw and treated Lucille Currie in Randolph Hospital for second and third degree burns on about 70% of her head and body. In his opinion she died as a result of these burns. She was aware of the fact that she was seriously burned, but he does not know that she was aware of the fact that she was going to die. She asked him if she was going to live. He did not give her an honest answer. He told her he thought she would be all right. He asked her how it was done. She replied, "My boy friend did it." She did not state his name.

Mrs. Nora Pratt is a licensed practical nurse, and from 3:00 p.m. until 11:00 p.m. on 16 March 1964 she was in charge of the floor in Randolph Hospital on which Lucille's room was situate. When she came on duty, she went straight to her room. There were other patients in the room and she treated these patients in addition to Lucille. There was an aide on duty with her. Lucille was in a critical condition. Over 70% of her body was burned. She talked to Lucille about 3:10 p.m. Lucille said: "I feel the Lord has spared me for a reason — to tell someone — about the incident." Mrs. Pratt testified as follows:

> "She asked me if I knew Livingston Brown, and I didn't answer her. She said, 'He did it.' She said, 'We had been out together, and on the way back,' she said, 'he poured gasoline on me and set me afire' she said, 'I ran and fell in a hole.' She said, 'I laid there' and that is all."

Lucille died at 3:00 a.m., about twelve hours thereafter.

Paul W. Scott, a deputy sheriff of Randolph County, talked with Lucille about 11:00 a.m. on 16 March 1964, and also about 2:00 p.m. on the same day. All he could see of her were her arms and neck and head. They were badly burned. Her left ear was burned about off, and her hair was burned off. On his second visit to her, he asked her how she was feeling, and she replied that she did not know if she was going to make it or not. Scott testified:

"She told me Livingston Brown came to her house somewhere around 11 o'clock. She stated she knew exactly the time. On Sunday night, the 15th. She said he came in and told her he was going to kill her; that he hit her in the mouth; that he hit her in the stomach and took her by the arm and took her out to the car. This was at her residence over at Mr. Shaw's house here in Asheboro. She said he got her by the arm and forced her to get into the car; and that while going toward Franklinville he said he was going to kill her and nobody was going to know anything about it.

"She told me that when they got down to the Wagon Wheel Road he told her this was far enough and to get out of the car. They walked a short ways. She said he unscrewed a cap of a jar of gasoline and poured it on her and struck a match to it. She said she pulled off her coat and started running down across the field. That while she was running she heard him laughing; and she said she laid down in the hollow in some water and mud until she heard his car start up and leave, then she went back to the residence for help. She stated she was on fire."

Scott also testified that she told him the same story when he saw her at 11:00 a.m.

Blease Garner is a deputy sheriff of Randolph County. He saw Lucille in the emergency room in Randolph Hospital shortly after 2:00 a.m. on 16 March 1964. Dr. Luke Query came in the emergency room about the same time he did. He talked with Lucille in the hospital on four or five different occasions. He first talked with her upon his arrival in the emergency room. He asked her what had happened, and, according to his testimony, she replied as follows:

"She stated that Livingston Brown came to her house around 11 o'clock p.m. March 16, 1964. [It is apparent from the record that it was about 11:00 p.m. 15 March 1964.] She stated she was not sure that this was the correct time, that it might have been a little later than this, that she was just making a guess about the time; and told her he was going to kill her. She said he came into the house, hit her in the mouth and in the stomach, that he was talking all the time, 'I am going to kill you. No one is going to see me. No one will know that I did it.' And he got her by the arm and forced her into the car, and stated that he believed she had been two-timing him, that was why he was going to kill her. She said that they went down the Wagon Wheel Road near Franklinville and pulled into a side road, they got out and walked approxi-

mately 75 yards and he said, 'I guess this is far enough.' That during the time he was holding her by the arm and carrying a half gallon jar in the other. He poured gasoline on her head and stuck a match to her, pulled off her coat and she ran across the field and laid down in mud and water and pulled her clothes off. She waited until his car left in about ten minutes, she said she then went to some white people's house and asked for help; that they called an ambulance."

About 1:15 a.m. on 17 March 1964 he went to Randolph Hospital and talked again to Lucille. She died within less than two hours after this conversation. He testified:

"While I was talking to her she got sick on her stomach and she started to throw up some, and there was some blood in it. At that time she said, 'See that blood, I must have swallowed some of the fire. — My mother told me that if — My mother told me if anyone ever swallowed fire it would kill them. Why did he do that? He couldn't prove I was running around on him.' I then asked her if she could remember anyone that could have seen them together that night, she replied, 'I told you he was making sure no one would see us together.' At this time she got real sick on her stomach and I called a nurse and I left at that time."

The conditions essential to admissibility of dying declarations relating to the act of killing and the circumstances attending and leading up to the homicide of the declarant are: (1) At the time the declarations were made the declarant must have been in actual danger of death. (2) The declarant must have had full apprehension of a speedy and inevitable death, because all men are mortal, and know it. (3) Death must have ensued. *S. v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322; *S. v. Jordan,* 216 N.C. 356, 5 S.E. 2d 156; *S. v. Collins,* 189 N.C. 15, 126 S.E. 98; *S. v. Laughter,* 159 N.C. 488, 74 S.E. 913; Wigmore on Evidence, 3rd Ed., Vol. V, § 1441. "For the sake of completeness, although not important in the case at bar, we might add to this a fourth condition that the declarant, if living, would have been a competent witness to testify as to the matter." *S. v. Gordon, supra; S. v. Layton,* 204 N.C. 704, 169 S.E. 650. "It follows, also, that the expectation must be of a *speedy* death. * * * Nevertheless, no definition of time can be fixed; the determination must vary with each case, after all the circumstances are considered." Wigmore on Evidence, 3rd Ed., Vol. V, § 1441.

It is the condition of mind of the declarant which determines the admissibility of this class of proof, and if the declarant believes his death

from his injuries is inevitable, his declaration will not be excluded because his physician told him he would be all right. *S. v. Layton, supra; S. v. Caldwell,* 115 N.C. 794, 20 S.E. 523; *S. v. Mills,* 91 N.C. 581; 40 C.J.S., Homicide, § 290, p. 1255.

The admissibility of a declaration as a dying declaration is a question to be determined by the trial judge. When the trial judge admits the declaration, on appeal, the ruling of the trial judge is reviewable only to determine whether there is evidence tending to show facts essential to support the trial judge's ruling. *S. v. Rich,* 231 N.C. 696, 58 S.E. 2d 717; *S. v. Thompson,* 226 N.C. 651, 39 S.E. 2d 823; *S. v. Jordan, supra.* In *S. v. Jordan, supra,* it is said: "That some latitude must be given to the trial court in this matter is a necessity of administration * * *."

S. v. Bagley, 158 N.C. 608, 73 S.E. 995, is a case in which the defendant appealed from a judgment of death based on a verdict of guilty of murder in the first degree. Many of defendant's assignments of error related to the competency of dying declarations. The evidence in the case showed that the doctor, who was present with deceased when he died, told him he was in a critical condition and was likely to die, and that if there was any message he wanted to leave, he had better do so. The deceased then said the defendant shot him. The Court said in its opinion:

> "Dying declarations are admissible in cases of homicide when they appear to have been made by the deceased in present anticipation of death. It is not always necessary that the deceased should declare himself, that he believes he is about to pass away, but all the circumstances and surroundings in which he is placed should indicate that he is fully under the influence of the solemnity of such a belief.
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> * * *
>
> "We think the evidence indicates clearly that the deceased fully realized not only that his death was sure, but that it was also near, and that the court properly admitted his declaration."

In *S. v. Rich, supra,* there was testimony tending to show that a doctor, after examining the declarant, informed her she was approaching impending death, and that thereupon the declarant told him that she had been beaten by her husband and kicked in the abdomen, and that death resulted from such injury. The Court held that the evidence was sufficient to sustain the trial court's ruling admitting the declaration in evidence as a dying declaration, although the declarant herself made no statement that she believed she was about to die.

S. v. Watkins, 159 N.C. 480, 75 S.E. 22, is a case in which the declarant made a statement, just before an operation for gunshot wounds, after physician's advice that he did not have more than one chance in a hundred of living, that the officer at Black Mountain shot him. This declaration was held competent as a dying declaration. The Court said: "Surrounding circumstances are sufficient to show consciousness of approaching death and to lay the foundation for a dying declaration."

In Wigmore on Evidence, 3rd Ed., Vol. V, § 1442, it is said:

> "In ascertaining this consciousness of approaching death, recourse should naturally be had to all the attending circumstances.
>
> "It has been contended that only the *statements of the declarant himself* could be considered for this purpose; or, less broadly, that the *nature of the injury alone* could not be sufficient, *i. e.,* in effect, that the declarant must have shown in some way by conduct or language that he knew he was going to die. This, however, is without good reason. We may avail ourselves of any means of inferring the existence of such knowledge; and, if in a given case the nature of the wound is such that the declarant must have realized his situation, our object is sufficiently attained.
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> "Such is the settled judicial attitude.
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> * * *
>
> "No rule can here be laid down. The circumstances of each case will show whether the requisite consciousness existed; and it is poor policy to disturb the ruling of the trial judge upon the meaning of these circumstances."

In Stansbury's North Carolina Evidence, 2d Ed., § 146, p. 361, note five states:

> *"State v. Stewart,* 210 N.C. 362, 186 S.E. 488 (1936). This is the only North Carolina case found since 1798 in which the admission of a dying declaration was held erroneous on the ground of an insufficient apprehension of death."

Considering all the circumstances surrounding the making of all the declarations by Lucille Currie in respect to the facts attending and leading up to her burns, which resulted in her death, we think that the evidence clearly shows that the nature of the severe burns on about 70% of her head and body, which resulted in her death in about twenty-five hours after she was admitted in Randolph Hospital, was such that at the time of making all the declarations she must have fully

realized that her death was certain, and also near, and that she was speaking in the hush of its impending presence, that her consciousness of her speedy and approaching death from her burns is plainly shown when she said to Sergeant Dawkins shortly after her arrival in the emergency room in Randolph Hospital, after he said he would have to call the Sheriff's Department since it happened out of town, to please hurry that she did not know how long she would be able to talk, is further shown by her telling Mrs. Nora Pratt, a licensed practical nurse, at 3:10 p.m. in the hospital: "I feel the Lord has spared me for a reason — to tell someone — about the incident," and is also shown by her saying to Blease Garner about 1:15 a.m. on 17 March 1961, after she had gotten sick on her stomach and thrown up some blood, "See that blood, I must have swallowed some of the fire. — My mother told me that if — My mother told me if anyone ever swallowed fire it would kill them," and that all these attendant circumstances support the trial judge's rulings of competency of these declarations as dying declarations, and his admission of them in evidence. We think the requisite consciousness on her part of speedy and imminent death from her burns existed during the time that she made all of these declarations, although she did ask Dr. Query if she was going to live, a question that perhaps most any person in her condition would have asked in the hope of a comforting answer, and his reply that he thought she would be all right, which he testified was not an honest answer, and although about 2:00 p.m. on 16 March 1964 she told Paul W. Scott, a deputy sheriff, that she did not know if she was going to make it or not; and that the question she asked Dr. Query and the statement she made to Paul W. Scott do not amount to a subsequent change of her consciousness of the certainty of imminent death by the recurrence of a hope of life. "It is not necessary that the declarant should have given up *all* hope of survival, or that he should consider himself to be in the very act of dying. It is enough if he *believes* that he is going to die," Stansbury, N. C. Evidence, § 146, p. 359.

In addition to the facts above stated, the court offered additional evidence as follows: Between 10:00 and 12:00 p.m. on 15 March 1964 defendant drove up in an automobile to a filling station where James Wright was working, handed him a half gallon glass fruit jar and said he wanted it filled with gasoline. Wright told him he could not put gasoline in a glass container but he did have quart oil cans. Defendant told him to fill up two of these cans. He did and defendant put them on the floor board of his automobile. Wright asked him if he wanted him to help plug up the holes and defendant said, "I'm in a hurry, I'm going to use this gas in a little bit." Defendant paid him and drove

away. After Lucille Currie was admitted in the hospital, officers found about a hundred yards from the home of Robert H. Seawell on a dirt road leading off the Wagon Wheel Road a broken half gallon glass fruit jar with the odor of gasoline in it, a match book cover, matches, and items that had been burned. At the scene officers found tire tracks which were unusual. There was one track of a mud grip tire on the right and another tire track of a regular tread on the opposite side. Officers found sitting behind defendant's house an automobile which had a mud grip tire on its right rear and a regular tread tire on the opposite side. We think the evidence in respect to the tire tracks was properly admitted in evidence. *S. v. Young,* 187 N.C. 698, 122 S.E. 667. Defendant's assignments of error to the denial of his motion for nonsuit at the close of all the evidence is overruled.

We have examined all of defendant's remaining assignments of error which have been brought forward and discussed in his brief, and they are overruled. The assignments of error which have not been brought forward and discussed in his brief are deemed to be abandoned. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783, 810. No error has been shown that would warrant disturbing the verdict and judgment below.

No error.

GROVER CECIL CLARK v. CLAY ROBERTS AND ELMER C. CLARK.

(Filed 15 January, 1965.)

1. Negligence § 11—

Every person having the capacity to exercise ordinary care for his own safety is required to do so, and if his failure to do so concurs and cooperates as a proximate cause of the injury complained of he is guilty of contributory negligence.

2. Negligence § 1—

Ordinary care is such care as an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury.

3. Negligence § 11—

A person can not be held contributorily negligent in failing to avoid injury from dangerous machinery unless he acts or fails to act with knowledge and appreciation, either actual or constructive, of the danger.

4. Master and Servant § 24—

It is the duty of the employer to warn the employee of dangers known to the employer and not known to the employee or not discoverable in the exercise of due care, or dangers which the employee, by reason of youth, inexperience or incompetency, could not appreciate.

5. Master and Servant § 22—

The employer is not an insurer of the safety of his employee.

6. Master and Servant § 29— Plaintiff's evidence held to disclose contributory negligence barring recovery as a matter of law.

Plaintiff, 21 years old with a degree in civil engineering, employed to work on a farm, was injured when his arm was cut by knives of a silage cutter. Plaintiff's evidence tended to show that he was ordered to unstop the blower of the silage cutter used in the field, that he removed the inspection plate and stuck his arm some foot or more down the shaft into the box containing the knives, that the shaft on which the knives were mounted was attached to a fly-wheel which continued turning for some time after the power was cut off, and that plaintiff knew it was dangerous to put his hand into the box when the knives were moving, and that plaintiff could have ascertained whether the flywheel was still turning before he inserted his arm into the box but failed to do so. *Held:* The evidence discloses contributory negligence as a matter of law barring recovery.

7. Negligence § 26—

The evidence will be considered in the light most favorable to plaintiff in passing upon the question of whether plaintiff's own evidence discloses contributory negligence as a matter of law.

APPEAL by plaintiff from a judgment of compulsory nonsuit entered at the close of his evidence by *Patton, J.,* March-April 1964 Regular Session of MADISON.

A. E. Leake for plaintiff appellant.

Williams, Williams & Morris by William C. Morris, Jr., for defendant appellees.

PARKER, J. In 1963 defendant Elmer C. Clark owned and operated a farm in Madison County. Defendant Clay Roberts was the manager of his farm. On 26 August 1963 plaintiff, son of defendant Clark, was twenty-one years old and had a bachelor of science degree in civil engineering from North Carolina State College. On that date he was employed by the North Carolina State Highway Commission as a civil engineer in a two-year training program at a salary in excess of $500 a month, and was also employed by his father to do part-time work as a laborer on his farm under the supervision of defendant Roberts. Plaintiff brought this suit alleging that he was injured by the negli-

gence of the defendants on 26 August 1963, when, acting under the instructions of defendant Roberts, he inserted his left hand and forearm into a 1963 New Holland Field Chopper, Model 616, to see if it was clogged by silage, and if so, to remove it, and in consequence his left hand was severely cut by the knives therein. Plaintiff alleges that his injuries were proximately caused by the negligence of defendant Roberts, for which negligence defendant Clark is legally responsible, in the following respects: (1) He negligently failed to give plaintiff proper supervision; (2) he negligently failed to instruct and inform plaintiff properly as to the hazards and dangers of his employment and as to the proper safety procedures to follow in avoiding the said hazards and dangers, when he knew, or should have known, that this plaintiff was young and unfamiliar with the operation of dangerous farm machinery; (3) he negligently instructed plaintiff to place his hand in a position where it would encounter the rapidly moving knives of the Field Chopper; (4) he negligently instructed plaintiff to assist in the operation of dangerous farm machinery that was not equipped with proper safety devices; (5) he negligently instructed plaintiff to assist in the operation of defective farm equipment, and (6) he negligently instructed plaintiff to assist in the operation of the Field Chopper that provided no method of seeing inside the blower, or of observing the knives, and provided no way of checking the blower and knives to see if they were clogged, and if so, no way of unclogging them, other than plaintiff's inserting his hand into the blower.

The defendants filed a joint answer in which they deny any negligence on their part. As a further answer and as a first defense to plaintiff's action, they plead contributory negligence of plaintiff; as a second defense, they plead that defendant Clark exercised due care in selecting his manager Roberts, and if Roberts was guilty of any negligence, which is denied, then such negligence was that of a fellow servant for which he, Clark, was not liable; and as a third defense, they plead assumption of risk by plaintiff.

In addition to the facts stated in the first four sentences in the first paragraph of this opinion, which are taken from plaintiff's evidence, this is a summary of plaintiff's evidence, except when quoted: On the afternoon of 26 August 1963 he and Clay Roberts were cutting down corn on his father's farm to be placed in a silo. In doing this work, they were using a Ford Diesel Tractor, a New Holland Field Chopper, Model 616, and a Chevrolet truck. Defendant Clark had purchased this Field Chopper about thirty days before 26 August 1963 from the Blue Ridge Tractor and Implement Company in West Asheville. It is a Field Chopper in wide use in the area and had not been altered in any

way. The Field Chopper was pulled through the field by the Ford Diesel Tractor driven by Roberts, which furnished all the power for its operation. At the rear end of the Ford Diesel Tractor is a drive shaft connected directly with its motor, and connected to this drive shaft is a unit referred to as a power take-off unit, and this is connected with a drive shaft on the Field Chopper by a spline, through which power from the tractor is transmitted to operate the chopping knives of the Field Chopper. Inside the Field Chopper is a box containing a shaft to which are attached its cutting or chopping knives. This shaft has ball bearings, is well lubricated, and makes no noise when running. A hub or flywheel outside the Field Chopper is attached to the shaft with the knives, is about ten inches in diameter, and is visible and turns when the shaft with the knives is turning inside the Field Chopper. When the tractor motor is running, and the power take-off is put into effect, and the clutch is released, the power flows from the tractor into the Field Chopper and its knives begin operation. When the power is cut off from the tractor, the drive shaft on the Field Chopper and the hub or flywheel stop, its noise in operation begins to decrease, but the knife shaft being mounted on ball bearings will run approximately a few minutes.

The Field Chopper cuts down corn in the field close to the ground, and then cuts the corn into small particles. The chopping knives cause air pressure to build up in the knife box, which forces the particles of cut corn into a "smokestack or stovepipe affair" at the end of the Field Chopper that runs up and over to the side so that the particles of cut corn are blown into a truck or wagon that is driven or pulled along the side of the Field Chopper, as the tractor pulls it through the cornfield. At the back of this Field Chopper is a round hole about three or four inches in diameter which is covered by an inspection plate which can be moved by a catch with a handle. This inspection plate is about a foot or foot and a half above the top of the knives. When the Field Chopper is in use, this plate covers the hole to prevent the particles of cut corn from blowing out through the rear end instead of through the stack or pipe affair. The inspection plate over the knives is about three feet long and about nine inches wide. The knives are not exposed upon taking this plate off. There is another shield immediately over the knives. When this shield is taken off, there is a small opening which permits one to see the edge of the knives and to see whether the knives are turning or not.

About six o'clock on this afternoon the corn going into the intake on the Field Chopper started piling up and was not going in it. Roberts cut off the tractor, stopping all power from the tractor to the Field

Chopper, got out and started pulling corn out of the intake of the Field Chopper to see what was causing it to clog up. At that time plaintiff was on the Chevrolet truck. Roberts told him to go and unstop the blower. Plaintiff testified on direct examination:

> "On the afternoons of the previous week, he had shown me how to unstop this cutter, to hold it back of the silage cutter for pulling out the loose silage when the blower stopped up, and when the silage had stopped coming out of the chute at the top. (Admitted only as to defendant Roberts.) The blower was stopped up and there wasn't anything that could hurt you then. You could open the lid, take the silage out, and could start the cutter again and everything would start working again in a satisfactory manner.
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> "I had unstopped it in that manner previously a few times. I don't remember the exact number, a few times I'd say.
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> "Prior to this occasion on August 26th of last year, I had never run a field chopper of any form.
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> "After I had received this instruction to unstop the blower, I went to the rear of the field chopper, opened the lid, and put my hand in to pull out the loose silage. At that time, my hand hit the knives. The tractor was not in motion at the time. It had been cut off. The tractor's engine was not running at that time. It had been stopped between five and ten minutes. The chopper was not in motion at that time. It had not been moving for between five and ten minutes. Immediately before I put my hand in this opening, I looked at the chopper to see if I saw anything in motion. I did not see anything.
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> "It would not have been possible for me to see through the hole and see the knives.
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> "After I stuck my hand down in that hole, it was severely cut. * * * On the other occasions before this occasion, Clay Roberts had told me that when the blower was stopped up, nothing could happen; that there would be nothing moving and nothing could happen to me until he started the tractor and started the cutter going again. (Admitted only as to defendant Roberts.) My father, Elmer Clark, had not given me any instructions as to how to operate this piece of machinery. My father said Clay knew how to operate it."

Plaintiff testified on cross-examination:

> "As I went back around the rear of the truck and back alongside the silage cutter, I did look at that shaft and that fly wheel

device. I didn't see it turning, but it evidently was. There was corn on it. A portion of that corn obstructed my view. I could have moved that corn off and could have then seen the whole thing. That is, by taking a corn stick or corn stalk, and pushing the stuff off of it, I could have seen the shaft and the fly wheel device. I didn't do that, I was to check the blower. No, sir, I did not push the corn off to see whether it was turning. * * *

"Prior to this time I had put my hand in there and cleaned out the back of this silage cutter a few times. * * * On this particular occasion, when I opened the inspection plate, there over the hole and put my arm in, I saw nothing. I couldn't see anything. I couldn't see what was down in the hole, and I couldn't see where I was placing my hand. * * * I did not take a corn stalk and push in there and push down against the knives to see if they were turning. I could have done so, and thus determined whether those knives were moving. * * * I put my hand in there approximately a foot or a foot and a half before I encountered the knives. * * * The knives on this shaft or axle would run freely for some time after the power was cut off. * * * They would run approximately a few minutes. * * * The power take off from the tractor had been cut off approximately five or ten minutes, somewhere in that range, because I sat in my truck some time before I ever got out. * * * When I put my hand in there I didn't know whether the knives were moving or not.

"* * * I did not have to be told not to put my hand in there on those knives when they were turning."

Plaintiff had grown up and worked on his father's farm. He had seen all kinds of farm machinery. He had operated a tractor pulling a mowing machine, a hay rake, disk harrows, and plows. He had worked around silage cutters two or three years before. During the summer of 1962 a New Holland Field Chopper, Model 616, had done contract work for his father, and he hauled silage from it. He knew where the knives were located in the Field Chopper in which he placed his hand and was cut. He testified on cross-examination: "I knew you could get hurt with farm machinery, if you didn't use it correctly. I knew that these knives in this silage cutter would cut you if they were turning and you stuck your hand in there. Anybody would know that if you stuck your hand in there on those knives and them turning they would get hurt." He had finished high school at Marshall, and had had two years pre-engineering courses at Mars Hill College before entering North Carolina State College.

Plaintiff's father, a witness for him, testified in part to this effect: He told plaintiff Roberts was familiar with and acquainted with the machinery, and to go to him for instructions. The hole in which his son stuck his arm, when he was cut, is located about twelve or eighteen inches above the knives, which are located in the knife box part of the Field Chopper. When the power is cut off from the tractor, the shaft with the knives "has free wheeling" and coasts. If the shaft with the knives was running, and he stuck his hand in there, he knows it would be cut.

Defendant Roberts, a witness for plaintiff, testified in part to this effect: He had full authority from defendant Clark to supervise the laborers and to instruct them what to do and how to do it. When he discovered the Field Chopper was clogged up, he turned off the motor on the tractor, went to the head of the Field Chopper, and was removing corn. He told plaintiff to go to the back of the Field Chopper and see if it was choked up. He had not given him any instructions about how to unclog it. He heard the inspection plate being thrown back and heard plaintiff holler.

Defendant Clark hired defendant Roberts as his farm manager upon the recommendation of his brother-in-law, Zeno Ponder. Roberts had worked two years for Ponder. Clark, after employing Roberts, then bought the Field Chopper in the instant case, so he could put up his own silage and not have to employ Ponder, as he had done before, to put up his silage. Defendant Clark had worked for the American Enka Company for twenty-two years, and also farmed. This was the first Field Chopper he had owned.

We find no evidence in the record to support the allegations in the complaint that the New Holland Field Chopper, Model 616, here was defective or that it was not equipped with proper safety devices. Plaintiff's evidence affirmatively shows that defendant Clark had purchased it about thirty days before plaintiff was injured from Blue Ridge Tractor and Implement Company in West Asheville, that it is in general use in the area, and had not been altered. His evidence also affirmatively shows that its cutting knives attached to a shaft were in a knife box inside it, and that over these knives was a shield and over this an inspection plate. There is no evidence in the record of defective materials or workmanship or that it was in disrepair. On the record before us there is no evidence it was an inherently dangerous instrumentality. See *Kientz v. Carlton,* 245 N.C. 236, 96 S.E. 2d 14, a lawn mower case.

There is no evidence in the record before us to support the allegation in the complaint that Roberts instructed plaintiff to place his hand

in a position where it would encounter the rapidly moving blades of the Field Chopper, when they were moving.

In the circumstances disclosed by the record before us, we are constrained to hold that the judgment of compulsory nonsuit below should be sustained, if not upon the principal question of liability, then upon the ground of plaintiff's contributory negligence.

Every person having the capacity to exercise ordinary care for his own safety against injury is required by law to do so, and if he fails to exercise such care, and such failure, concurring and cooperating with the actionable negligence of defendant contributes to the injury complained of, he is guilty of contributory negligence. Ordinary care is such care as an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury. *Chaffin v. Brame,* 233 N.C. 377, 64 S.E. 2d 276; *Manheim v. Blue Bird Taxi Corporation,* 214 N.C. 689, 200 S.E. 382; 65 C.J.S., Negligence, § 118, a, b.

Plaintiff is subject to this universal rule, but his conduct on this occasion "must be judged in the light of the general principle that the law does not require a person to shape his behavior by circumstances of which he is justifiably ignorant, and the resultant particular rule that a plaintiff cannot be guilty of contributory negligence unless he acts or fails to act with knowledge and appreciation, either actual or constructive, of the danger of injury which his conduct involves." *Chaffin v. Brame, supra.*

This Court said in *Watson v. Construction Company,* 197 N.C. 586, 150 S.E. 20:

> "[I]t is conceded to be the duty of an employer to warn his employees concerning dangers which are known to him, or which in the exercise of reasonable care should be known to him, and are unknown to his employees or are undiscoverable by them in the exercise of due care, and concerning dangers which, by reason of youth, inexperience or incompetency the employees do not appreciate. Under these conditions unless the servant is warned or instructed he does not assume the risk of such dangers, and if without fault or negligence on his part he receives an injury in consequence of not having been warned or instructed the master will be liable to him in damages."

See in accord *Steeley v. Lumber Co.,* 165 N.C. 27, 80 S.E. 963, where numerous authorities are cited.

A master or employer is not an insurer of the safety of his servant or employee. *Baker v. R. R.,* 232 N.C. 523, 61 S.E. 2d 621.

Plaintiff's evidence plainly shows these facts: At the time of his injury he was twenty-one years old, and held a bachelor of science degree in civil engineering from North Carolina State College. On that date he was employed by the North Carolina State Highway Commission as a civil engineer in a two-year training program at a salary in excess of $500 a month, and was also employed by his father to do part-time work as a laborer on his farm under the supervision of the manager Roberts. He had finished high school at Marshall, and had had two years pre-engineering courses at Mars Hill College before entering North Carolina State College. He had grown up and worked on his father's farm. He had seen all kinds of farm machinery. He had operated a tractor pulling various farm implements. He had worked around silage cutters two or three years before. The preceding summer he had worked around a Field Chopper similar to the one that injured him, though he did not operate it but merely hauled the particles of cut corn to the silo. He knew where the cutting knives were in the Field Chopper in the instant case. He knew a person could get hurt with farm machinery, if it is not used correctly, He testified: "I knew that these knives in this silage cutter would cut you if they were turning and you stuck your hand in there. Anybody would know that if you stuck your hand in there on those knives and them turning they would get hurt." He knew that when the power was cut off on the tractor to the Field Chopper that the shaft to which the cutting knives were attached was mounted on ball bearings, made no noise when running, and would turn for several minutes after the power was cut off. There was no need for Roberts or his father to instruct him as to the danger of sticking his hand in the Field Chopper in proximity to the chopping knives when they were moving, because he knew that as well as either or both of them did. Roberts told him to go to the Field Chopper and see what was causing it to clog up. When he arrived, a portion of the corn obstructed his view. By taking a cornstalk and pushing the corn off, he could have seen the shaft and the flywheel and whether it was running. That he did not do. He did not push the corn off to see whether the knives were turning. He could have taken a cornstalk and pushed it in the Field Chopper to determine whether the knives were moving. This he did not do. When he opened the lid over the knives, he could not see whether the knives were moving or not. Under such circumstances, and acting with actual knowledge and appreciation of the danger of sticking his hand into the Field Chopper in close proximity to its chopping knives if they were moving, he stuck his left hand and forearm into the Field Chopper about a foot or foot and a half deep to see if it was clogged, and was severely cut by the moving knives. Considering plain-

tiff's own evidence in the light most favorable to him, as we are required to do in considering a motion for judgment of compulsory nonsuit on the ground of contributory negligence, *Ramey v. R. R.*, 262 N.C. 230, 136 S.E. 2d 638, it leads to the unescapable conclusion that plaintiff failed to use the ordinary care that an ordinarily prudent person would have exercised under the same or similar circumstances to avoid injury to himself, and that such failure contributed proximately to his injuries. Plaintiff proved himself out of court. *Lincoln v. R. R.*, 207 N.C. 787, 178 S.E. 601. The judgment of compulsory nonsuit below is

Affirmed.

IN THE MATTER OF APPEAL OF PILOT FREIGHT CARRIERS, INC. TO THE STATE BOARD OF ASSESSMENT FROM THE 1962 AD VALOREM VALUATION PLACED BY MECKLENBURG COUNTY ON PERSONAL PROPERTY OF THE SAID PILOT FREIGHT CARRIERS, INC.

(Filed 15 January, 1965.)

1. Taxation § 23—

A county board of equalization and review and the State Board of As-

as the Legislature confers.

2. Same—

A county board of equalization and review has authority to pass upon the tax situs of personal property as well as jurisdiction to list values and assess property. G.S. 105-327(g).

3. Same—

The State Board of Assessment has jurisdiction to determine the tax situs of personal property upon appeal from the determination of that question by a county board of equalization and review, G.S. 105-275, or the taxpayer may follow the procedure prescribed by G.S. 105-406 if he prefers.

4. Taxation § 24—

The residence of a corporation is the place of its principal office in the State, and the situs of its personal property for taxation is the county of its residence, G.S. 105-302(a), except for personal property owned by it which is situated in another county within the meaning of G.S. 105-302(d).

5. Same—

An interstate carrier having its principal office in a county of this State maintained "break-bulk" terminals in other counties and listed for taxation

in such other counties only such equipment as was permanently stationed at such terminals, but listed its "line-haul" equipment only in the county of its residence. *Held:* The county of its residence is the situs of its "line-haul" equipment for the purpose of taxation, since the "line-haul" equipment has no situs in the counties of the "break-bulk" terminals. The fact that, for the purpose of internal control, the carrier assigned certain of its tractors to the "break-bulk" terminals does not alter this result.

6. Same—

Situs of property for taxation within the meaning of G.S. 105-302(d) means more than mere temporary presence and connotes a more or less permanent location.

APPEAL by Mecklenburg County from *Copeland, S. J.*, April 13, 1964 Schedule "D" Non-Jury Session of MECKLENBURG.

Appeal by Mecklenburg County from a judgment of the Superior Court affirming a ruling of the State Board of Assessment with reference to the tax situs of certain rolling stock belonging to Pilot Freight Carriers, Inc. The evidence of the parties before the State Board of Assessment was uncontradicted and shows these pertinent facts:

Pilot Freight Carriers, Inc. (Pilot), a North Carolina corporation with its principal office in Winston-Salem, Forsyth County, is a common carrier of property in interstate commerce. On January 1, 1961, and January 1, 1962, Pilot had a freight terminal in or near the following North Carolina cities: Winston-Salem, Charlotte, Durham, Asheville, Laurinburg and Hickory. It also had twenty-two terminals located outside of North Carolina along the Eastern Seaboard. The terminals at Winston-Salem, Charlotte, and Durham, are break-bulk terminals, in which freight is unloaded from one trailer and reloaded into another for shipment to the ultimate destination. At each terminal Pilot requires a certain number of trucks, tractors, and single-axle trailers for pickup and delivery work, the break-bulk terminals requiring the greatest number. These units are permanently based at the particular terminal. For the year 1962 Pilot listed 49 such units for *ad valorem* taxes in Mecklenburg County. These units (listed at $187,755.00) and the office equipment and furnishings at the terminal (listed at $15,725.00) are not involved in this proceeding.

During the year 1962 Pilot had, in all, 1,118 pieces of equipment. The vast majority were not used in connection with a single terminal but were line-haul tractors and trailers which might remain in one terminal from fifty minutes to twenty-four hours. From year to year or from day to day this situation does not change. For each tractor Pilot owns approximately two trailers. It exchanges trailers with about

fifty other companies on the Eastern Seaboard. When tractors and trailers are not on the road, they are parked anywhere from Maine to Florida.

Each terminal requires a varying number of line-haul tractors to move the freight which originates there or which it forwards, the break-bulk terminals requiring, again, the largest number. These requirements change from day to day. For internal-control purposes only, from time to time Pilot arbitrarily assigns a definite number of designated tractors to a particular terminal. "The lists are just a guide to go by to move the equipment." The particular unit assigned to a designated terminal, may, in fact, never visit it during the year. Long-haul trailers are never assigned to a particular terminal even for internal-control purposes.

For 1961 and prior years, for the apparent purpose of distributing its tax payments, Pilot arbitrarily listed for *ad valorem* taxes in Mecklenburg County many of its line-haul tractors and trailers without regard to the statutory tax situs of the property. For 1961 it listed a total of 300 units. For the year 1962, however, it listed 49 units, only those items of equipment actually based at, and continually used in connection with, the Charlotte terminal. Insisting that it should be more in line with that of prior years, the Tax Supervisor for Mecklenburg County refused to accept this listing. Thereafter he devised for Mecklenburg County a tax formula factored into Pilot's total mileage, the portion thereof traveled in North Carolina, tonnage of freight handled, and the total number of its motor vehicles. The record does not disclose the formula, and, because Pilot refused to supply the necessary information, it was not put into effect. In June 1962 the Mecklenburg County Board of Equalization and Review (County Board) arbitrarily listed for taxation the 300 units which Pilot had listed in 1961. Using the average value of the number of the vehicles listed there during the previous five years, it assessed all of Pilot's property in Mecklenburg County at the figure of $905,825.00. This figure included the 49 units which Pilot had voluntarily listed at $187,755.00, as well as the office equipment. Pursuant to G.S. 105-329, Pilot appealed the listing and assessment to the State Board of Assessment (State Board), where it contended that the tax situs of the rolling stock in question is Forsyth County, the location of its principal office. The State Board, holding that this equipment was not situated in Mecklenburg County for the purpose of *ad valorem* taxes, reversed the County Board. The County then petitioned the Superior Court of Mecklenburg County, pursuant to G.S. 143-306 *et seq.*, to review and reverse the decision of the State Board for that (1) jurisdiction to determine the tax situs of

property is vested exclusively in the Superior Court but, (2) if the State Board did have such jurisdiction, it erred in not requiring respondent to list the line-haul equipment in question in Mecklenburg County under the provisions of G.S. 105-302. The Superior Court heard the matter and entered a judgment affirming the ruling of the State Board that the situs of the controversial equipment was not Mecklenburg County. The County appeals to this Court.

Dockery, Ruff, Perry, Bond & Cobb by Hamlin L. Wade; Hasty, Hasty and Kratt by Fred H. Hasty for Mecklenburg County, appellant.

Womble, Carlyle, Sandridge & Rice by Leon L. Rice, Jr. and Wade M. Gallant, Jr., for Pilot Freight Carriers, Inc., appellee.

SHARP, J. This appeal presents two questions: (1) Did the State Board of Assessment have jurisdiction to determine the tax situs of the line-haul tractors and trailers owned by Pilot Freight Carriers, a North Carolina corporation, whose principal place of business is in Forsyth County? (2) If so, did it correctly rule that the tractors and trailers in question were not *situated* in Mecklenburg County within the meaning of G.S. 105-302(d), and, therefore, did not have a tax situs there?

The County Board and the State Board are both creatures of the legislature, and each has only such powers as the legislature confers. *State v. Curtis,* 230 N.C. 169, 52 S.E. 2d 364. G.S. 105-327(g) prescribes the powers of the County Board:

"(1) It shall be the duty of the board of equalization and review to equalize the valuation of all property in the county, to the end that such property shall be listed on the tax records at the valuation required by law; and said board shall correct the tax records for each township so that they will conform to the provisions of this subchapter.

"(2) The board shall, on request, hear any and all taxpayers who own or control taxable property assessed for taxation in the county in respect to the valuation of such property or the property of others.

"(3) The board shall examine and review the tax lists of each township for the current year; shall, of its own motion or on sufficient cause shown by any person, list and assess any real or personal property or polls subject to taxation in the county omitted from said lists; shall correct all errors in the names of persons, in the description of property, and in the

assessment and valuation of any taxable property appearing on said lists; shall increase or reduce the assessed value of any property which in their opinion shall have been returned below or above the valuation required by law; and shall cause to be done whatever else shall be necessary to make said lists comply with the provisions of this subchapter . . ."

This statute obviously gives a county board jurisdiction to list, value, and assess only property situated in its county, but it is equally apparent that it imposes upon it the duty to see that all property in that county is listed for taxation at the valuation required by law. This duty necessarily implies the power to consider and decide whether property is located in the county for tax purposes, *i. e.*, to pass upon its tax situs. A determination of that fact is a requirement precedent to any legal listing, assessment, and valuation for tax purposes. In most instances the taxpayer who appeals the valuation placed upon his property by the County Board raises no question of situs; he is usually concerned only with having the valuation reduced, not eliminated there. Where, however, the question of tax situs is raised before the County Board, it is an integral part of its duties to pass upon the question. In doing so, it is not passing upon the taxpayer's liability for the tax. Pilot concedes the liability; the only question is whether it is liable to Mecklenburg County.

G.S. 105-329 authorizes the property owner or any member of the County Board of Commissioners to appeal from a decision of the County Board to the State Board. The jurisdiction of the latter is fixed by G.S. 105-275, which provides:

"Duties of the Board.—The State Board of Assessment shall exercise general and specific supervision of the systems of valuation and taxation throughout the State, including counties and municipalities, and in addition it shall be and constitute a State Board of Equalization and Review of valuation and taxation in this State. It shall be the duty of said Board: . . .

"(3) To hear and to adjudicate appeals from boards of county commissioners and county boards of equalization and review *as to property liable for taxation that has not been assessed or of property that has been fraudulently or improperly assessed through error or otherwise, to investigate the same, and if error, inequality, or fraud is found to exist, to take such proceedings and to make such orders as to correct the same.* In case it shall be made to appear to the State Board of Assessment that any tax list or assess-

ment roll in any county in this State is grossly irregular, or any property is unlawfully or unequally assessed as between individuals, between sections of a county, or between counties, the said Board shall correct such irregularities, inequalities and lack of uniformity, and shall equalize and make uniform the valuation thereof upon complaint by the board of county commissioners under rules and regulations prescribed by it, not inconsistent with this subchapter . . .

"(5) To discharge such other duties as may be prescribed by law, and take such action, do such things, and prescribe such rules and regulations as may be needful and proper to enforce the provisions of this subchapter and the Revenue Act. . . ." (Italics ours.)

Valuation is merely one aspect of taxation, as the preamble to G.S. 105-275, quoted above, recognizes. The statute makes the State Board a board of equalization and review *of valuation and taxation in this State*. Subsection (3), italicized above, specifically authorizes the State Board to hear and adjudicate appeals from the County Board "as to property liable for taxation" which either has not been assessed or has been improperly assessed and then to make such orders as are necessary under the law. Subsection (3) is specific statutory recognition that jurisdiction over *ad valorem* taxation includes the power to determine the tax situs of the property which a county has assessed. One of the primary functions of the State Board is to maintain reasonable uniformity throughout the 100 counties in carrying out the provisions of the revenue laws and the Machinery Act with reference to both tax valuations and procedures. If, as the County contends, the only issue which the State Board can determine upon an appeal from a county board is the narrow one of valuation, that function of the State Board is thwarted. Should this Court adopt that view, a taxpayer could be assessed for the same items of rolling stock in all or several of the 100 counties in North Carolina. The argument of the county that a taxpayer, faced with such multiple assessments, has an adequate remedy under G.S. 105-406 is not realistic. In such an instance, to institute an action for injunctive relief or to pay the taxes under protest and sue for a refund conceivably could require so much litigation and such extensive use of funds as to strain the resources of the most solvent common carrier. We are certain the legislature never intended to place any taxpayer of the State in such a position. Indeed, we apprehend that one of the legislative purposes in creating the State Board was to prevent duplicate or multiple listings.

We hold that the State Board had jurisdiction to decide the question of the tax situs of the rolling stock here involved. The jurisdiction which G.S. 105-275(3) confers upon the State Board is not exclusive. The provisions of G.S. 105-406 are still open to a taxpayer if he prefers those provisions. Furthermore, the administrative decisions of the State Board are always subject to review by the Superior Court. Under both G.S. 105-275(3) and G.S. 105-406, if either the taxpayer or the taxing authority wants judicial review, it is available. As Rodman, J. pointed out in *Duke v. Shaw, Commissioner of Revenue,* 247 N.C. 236, 100 S.E. 2d 506, it is immaterial whether the Superior Court determines the taxpayer's question in an action originally instituted in that court or upon an appeal from the State Board. The answer to the first question presented by this appeal is, therefore, Yes. The second question, whether upon the undisputed facts in this case the State Board correctly held that the tax situs of the property was not Mecklenburg County, must likewise be answered, Yes.

The general rule is that personal property must be listed in the township in which its owner has his residence, and the residence of a corporation is at the place of its principal office in the State, G.S. 105-302(a). As an exception to the rule, G.S. 105-302(d) requires all tangible property — except farm products — to "be listed in the township in which such property is *situated,* rather than in the township in which the owner resides, if the owner . . . hires or occupies a store, mill, dockyard, piling ground, place for the sale of property, shop, office, mine, farm, place for storage, manufactory or warehouse therein for use in connection with such property. . . ." (Italics ours.) Property stored in public warehouses, merchandise in the possession of a consignee or a broker, property used by the public generally, and vending machines placed on a location outside the township in which the owner or the lessor had his residence come within the provisions of subsection (d).

Since the "residence" of Pilot is Forsyth County, Pilot may not be required to list these line-haul tractors and trailers in Mecklenburg County unless they are *situated* there within the meaning of G.S. 105-302(d). Webster defines *situated* as "having a site, situation or location; located; *as a town situated on a hill.*" Webster, New International Dictionary (2d ed. 1934). (Italics ours.) Clearly, *situated* connotes a more or less permanent location. *Credit Corp. v. Walters,* 230 N.C. 443, 446, 53 S.E. 2d 520, 522. It does not mean a mere temporary presence. *Montague Brothers v. Shepherd Co.,* 231 N.C. 551, 554, 58 S.E. 2d 118, 121. See *Finance Co. v. O'Daniel,* 237 N.C. 286, 290, 74 S.E. 2d 717, 720.

Pilot's line-haul tractors and trailers are not more or less permanently situated or located in Mecklenburg County or at any other one of its twenty-eight terminals on the Eastern Seaboard. The County's contention that Pilot's equipment lists locate and situate a certain number of its rolling stock in Mecklenburg County is untenable. These lists, which purport to assign designated tractors to specific terminals, are changed from day to day and are merely a bookkeeping device for Pilot's internal control. They bear no relation either to the actual identity of the equipment assigned to a particular terminal or to its geographical location on any designated date. Under existing statutes, these lists are irrelevant on the question of tax situs.

By G.S. 105-364 through G.S. 105-369 the General Assembly has provided a method by which the State Board values and assesses all rolling stock and other tangible and intangible property of railroads operating in this State, as well as a formula for apportioning the valuations between the several counties involved. "As to the *situs* of realty there can be no doubt, but the *situs* of personalty for purposes of taxation from time immemorial has been a matter for the law-making power, which has provided different rules for different kinds of personalty, and has changed them from time to time." *Winston v. Salem,* 131 N.C. 404, 42 S.E. 889. Except for its property which has acquired a business situs elsewhere (G.S. 105-302(d)), the legislature has fixed the tax situs of the personalty of a corporation at the place of its principal office in the State. The County Board first attempted to tax Pilot's rolling stock in a manner somewhat analogous to the method the General Assembly had provided for taxing the rolling stock of railroads. Pilot thwarted this attempt by refusing to supply the necessary information to implement the formula. However, without legislative sanction — which it does not have —, Mecklenburg County has no authority to use such a device. No more is it authorized arbitrarily to list 300 of Pilot's 1,118 pieces of equipment for taxation and to give each unit a value based on the average of Pilot's listings for the previous five years. The County suggests that if Pilot is permitted to list all its line-haul equipment in Forsyth County, that permission will constitute an incentive for large trucking firms to establish their principal offices in counties with low tax rates and little business. If we should concede this highly improbable possibility, the answer is that the problem is the legislature's alone.

The judgment of Copeland, S. J. was, in all respects, correct and it is Affirmed.

STATE v. FRANK ROWLAND.

(Filed 15 January, 1965.)

1. Criminal Law § 101—

A general motion to nonsuit is properly overruled if there is evidence sufficient to support a conviction of the crime charged or of an included crime.

2. Robbery § 4—

Evidence tending to show that the victim of a robbery was left unconscious from a blow inflicting a wound in the back of her head requiring eight stitches to close and causing her to be hospitalized for two weeks, is sufficient to show that the robbery was committed by the use of a dangerous weapon, since the dangerous character of the weapon may be inferred from the wound. G.S. 14-87.

3. Criminal Law § 101—

Where the State relies upon circumstantial evidence, defendant's motion to nonsuit presents only the question whether a reasonable inference of defendant's guilt may be drawn from the circumstances adduced by the evidence, it being for the jury to determine whether the facts, taken singly or in combination, satisfy the jury beyond reasonable doubt that defendant is actually guilty.

4. Criminal Law § 44—

Where a dog is identified as a "bloodhound" and a "thoroughbred," and it is shown that the dog actually followed a single human scent, differentiating it from others, objection that it had not been shown that the dog was of pure blood is untenable.

5. Same—

Where the evidence discloses that a bloodhound followed tracks from the scene of the crime to a room of a house some distance away in which the defendant and another were sitting, with evidence tending to show that defendant had on his person bills of the same denomination as those taken from the unconscious body of the victim of a robbery, objection to the evidence of the actions of the dog because the dog did not sufficiently identify defendant at the end of the trail is untenable.

6. Robbery § 4—Circumstantial evidence of defendant's guilt of robbery with a dangerous weapon held sufficient to be submitted to the jury.

Evidence tending to show that the occupant of a house went to investigate a noise in the house, that while doing so she was rendered unconscious by a blow to the head, that defendant had been on the premises a short while previously, that defendant had been penniless the day before, that later on the same afternoon defendant purchased shoes and whiskey and that night, when approached by a deputy, attempted to conceal in the cushions of the sofa on which he was sitting bills of the same denomination as those taken from the victim, *held* sufficient to be submitted to the jury on the question of defendant's guilt, irrespective of evidence that defendant was trailed by a bloodhound from the scene of the crime to the place where

apprehended by the deputy, and, under the circumstances, the evidence in regard to the actions of the bloodhound being merely explanatory of the deputy's timely arrival, its admission was not prejudicial.

7. Criminal Law § 162—

Where there is sufficient competent evidence to overrule defendant's motion to nonsuit, the introduction of other evidence, even if incompetent, is not prejudicial when such evidence does not in itself tend to link defendant with the *corpus delicti* and it is apparent from the whole record that its admission did not affect the result adversely to defendant.

APPEAL by defendant from *Carr, J.*, April 1964 Criminal Term of ROBESON.

At the November Term 1959, defendant was convicted upon a bill of indictment charging that on September 23, 1959, with the use of a dangerous weapon, *a large club or blunt instrument*, he feloniously took from the person of Maggie Hunt three hundred dollars. Thereafter the sentence imposed was vacated because defendant had not been represented by counsel, and defendant was tried *de novo* at the April Term 1964.

The State's evidence tends to establish these facts: Between 3:00 and 4:00 p.m. on September 23, 1959, Maggie Hunt, a seventy-six-year-old woman, was alone at her home. In a moneybag tied round her waist under her clothes, she had two one-hundred dollar bills and some fives and tens, "a little over three hundred dollars in all." That afternoon, as he had done regularly since January, when he was shot in the right hand and lost a finger, defendant came to the door of her home with a jar and a paper bag to beg for food. Into the jar Mrs. Hunt put milk she had just churned and into the bag, food. She handed both to him from the door. She then went to her front porch and sat down for ten or fifteen minutes. Hearing a racket in a back room, she went inside to investigate. Until she came to in the hospital, where she remained for two weeks, the last thing Mrs. Hunt remembers is standing with her back to the kitchen door. About sundown her daughter-in-law found her sitting, with her head down, in a chair on the front porch. She was unconscious and bleeding from her nose and from a wound in the back of her head. It required eight stitches to close the wound. Her money was gone. There was blood on the floor in the room next to the kitchen.

Deputy Sheriff Thompson came to the house shortly after dark. In the backyard, in soft dirt, he found distinctive tracks. "One side of the foot had a few little ridges on it, the rest of the shoe was worn slick and there were two round holes in the track in the bottom of each shoe. The side of one of the shoes had some tread on it and the other

side slick. The other shoe was worn slick. The tracks led from the back of Maggie's home into the corn field." Deputy Sheriff Thompson went home and got the bloodhound which he had acquired from prison authorities four years previously and which he described as follows:

> "At that time the bloodhound was a pretty old dog. He was a thoroughbred. He had been trained to tracking the human scents and human bodies. I had been using him four years myself for the purpose of tracking human scents. I have used him to track a lot of people. I would say seventy-five or a hundred. The dog was reliable in tracking human scent. . . . (T)hat is all he would ever run, that was human scent . . . (he) had been trained by the State and prison camp."

According to Deputy Thompson, the dog had the ability to discriminate between different human scents. He put the dog on the tracks at the edge of the yard. With reference to succeeding events he testified:

> "I trailed him on down through the cornfield, hit a sandy spot in the cornfield and this same set of tracks, with holes in the bottom of the shoes, and walked this sandy strip, crossed a streak of woods into a pasture, went through the pasture, and went under a barbed wire fence into a highway, crossed the highway to the left-hand shoulder, went to the right down the highway about two hundred yards, crossed the highway back in front of Wesley Carter's wife's home, where she lives, went up in the yard, and the dog went up the front steps. I knocked on the door and Wesley's wife said, "come in." I pushed the door open. She was sitting across the room to the left of the door. Frank Rowland was sitting on a long sofa. The dog went into the house with me. . . .
>
> "When I walked in I noticed Rowland, he pulled his hand out of his left pocket and slipped it down under him like, to the side. I went to him, got him up and searched him, and where he was sitting, where he put his hand, I found two one-hundred dollar bills and eighteen or nineteen other dollars, there was five, ten and ones. In the right-hand pocket he had one fifty cents and three quarters and I believe a nickel or dime in the right-hand pocket."

Wesley Carter's wife, Earline, disclaimed any knowledge of the money. Defendant said it was not his, and he could not explain where he got it. Defendant was wearing a new pair of shoes — not the ones which made the tracks the dog had followed. The day before, defendant, wearing old tennis shoes, had told Deputy Thompson that he needed some shoes and clothes and asked him for work. When ques-

tioned about the new shoes, defendant told the deputy that he had bought them late that afternoon in Rowland and had put his old ones in a trash can at Annie Washington's place. There the officer found a pair of rubber boots, cut off at the ankles, which he had seen defendant wearing. About 9:00 p.m. defendant was arrested and charged with robbing Maggie Hunt with the use of a dangerous weapon. The next morning the deputy went to Wesley Carter's home, where defendant lived and which is about five hundred yards from Mrs. Hunt's place. He testified:

> "I went in a room in Wesley Carter's home and this pair of shoes that I was trailing, tennis shoes I call them, was sitting under Rowland's bed, had two round holes in the soles, and some ridges on the right shoe. I compared them with tracks I had followed the day before. They compared exactly the same. I talked with Rowland and he said that was his shoes."

Wesley Carter and his wife lived in homes about one mile apart. Wesley permitted defendant to live in his home because he "did not have any place to stay . . . and he didn't have anything to pay with." When the deputy put his dog on the tracks at the edge of the field, the dog went straight from the Hunt home to the home of Earline Carter without ever going near Wesley Carter's home. The record does not disclose the distance from the Hunt home to Earline Carter's house, but it took the dog between thirty-five and forty minutes to lead the deputy there.

Defendant did not testify. He put on four witnesses, the testimony of two of whom tended to establish an alibi, placing him at the time in question at Annie Washington's place, where, defendant told the officer, he had purchased a pint of liquor. Earline Carter, testifying as a witness for defendant, said that he came to her house fifteen or twenty minutes ahead of Deputy Thompson; that she had been away from home between 1:00 and 4:30 p.m. and her house was locked during that time; that the deputy found defendant "sitting on the money" at her house; that the money was not hers; that nobody but defendant had come to her house after she got home that evening; and that she knew defendant had no money of his own. (Of this money, $223.00 was returned to Maggie Hunt.)

The jury returned a verdict of guilty as charged. From the sentence imposed defendant appeals.

Attorney General Bruton, Deputy Attorney General Harry W. McGalliard, Assistant Attorney General Richard T. Sanders and Staff Attorney L. P. Hornthal, Jr., for the State.

Watts & Gardner for defendant.

SHARP, J. Defendant's appeal presents two questions: (1) Was defendant's motion for nonsuit properly overruled? (2) Did the court err in admitting evidence of the action of the dog, with which, according to the State's evidence, the deputy sheriff tracked defendant?

Even if the bloodhound evidence were eliminated, the remaining evidence was, taken in the light most favorable to the State, sufficient to establish these facts: Three hundred dollars (two one-hundred dollar bills and others of smaller denomination) was taken from the person of Maggie Hunt while she was unconscious from a blow. An unseen assailant had inflicted the blow within minutes after Mrs. Hunt had heard a noise inside of the house and while she was investigating it. Defendant had been on the premises fifteen minutes previously, begging food. He had been penniless the day before and had been wearing the tennis shoes with holes in them. The afternoon Mrs. Hunt's money was taken, defendant purchased, among other things, shoes and whiskey. That night, when the deputy entered the room where defendant was, defendant attempted to conceal between the cushions and the coverlet of the sofa on which he was seated two one-hundred dollar bills and eighteen or nineteen dollars in smaller bills. The only statement he made was that the money was not his.

The crime of which defendant was charged and convicted was robbery with the use of a dangerous weapon, to wit: a large club or blunt instrument. It is defendant's contention that his motion for nonsuit should have been allowed because, *inter alia*, there is no direct or positive evidence that Mrs. Hunt was struck with any dangerous weapon, namely a club or blunt instrument. Defendant's motion for nonsuit was general. He did not specifically move to dismiss the charge of armed robbery. "A motion for judgment as of nonsuit addressed to the entire bill is properly overruled if there is evidence sufficient to support a conviction of the crime charged or of an included . . . crime." *State v. Virgil*, 263 N.C. 73, 75, 138 S.E. 2d 777, 778; *accord, State v. Johnson*, 227 N.C. 587, 42 S.E. 2d 685. An indictment under G.S. 14-87 includes common-law robbery. *State v. Wenrich*, 251 N.C. 460, 111 S.E. 2d 582. Palpably, the State's evidence in this case would support a conviction of common-law robbery. *State v. Lawrence*, 262 N.C. 162, 136 S.E. 2d 595. We think the State's evidence equally potent to establish robbery with the use of a club or other blunt instrument. "The dangerous or deadly character of a weapon with which accused was armed in committing a robbery may be established by circumstantial evidence." 77 C.J.S., *Robbery* § 47c (1952). In *People v. Sampson*, 99 Cal. App. 306,

278 P. 492 (3d Dist. Ct. of Appeals), a case in which the defendant was convicted of robbery, the victim was struck from behind. In sustaining a conviction the court said:

> "Having been rendered immediately unconscious by the blow, and not having seen in advance the instrument with which he was struck, the witness could not know what weapon was used. The character of weapon used by the defendant may be shown, of course, by circumstantial evidence, and proof that the victim was rendered unconscious by the blow and remained in that condition for a considerable time, together with the nature of the injury inflicted, warrants the inference, in the absence of other evidence, that a dangerous weapon was used." *Id.* at 309, 278 P. at 493.

In *People v. Liner,* 168 Cal. App. 2d 411, 335 P. 2d 964 (4th Dist. Ct. of Appeals), the court held that the jury could infer, from the appearance of the wound in the back of the victim's scalp, that a blunt object, which was a dangerous or deadly weapon, was used. Here, Mrs. Hunt, the victim, was rendered unconscious by a blow which, leaving a wound requiring eight stitches to close, caused her to be hospitalized for two weeks. The only reasonable inference is that a dangerous weapon was used.

When the motion for nonsuit calls into question the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty. *State v. Thompson,* 256 N.C. 593, 124 S.E. 2d 728; *State v. Bright,* 237 N.C. 475, 75 S.E. 2d 407. The chain of circumstantial evidence in this case was clearly sufficient to establish both the *corpus delicti* and that defendant was the perpetrator of the crime. Thus, it was sufficient to overrule defendant's motion for nonsuit.

Defendant next contends that he is entitled to a new trial because the bloodhound evidence was both incompetent and prejudicial.

In *State v. McLeod,* 196 N.C. 542, 146 S.E. 409, a case in which bloodhound evidence was held incompetent and prejudicial because the action of the dogs afforded no reasonable inference of identity of the prisoner as the guilty party, Stacy, C. J., said:

> "It is fully recognized in this jurisdiction that the action of bloodhounds may be received in evidence when it is properly shown: (1) that they are of pure blood, and of a stock character-

> ized by acuteness of scent and power of discrimination; (2) that they possess these qualities, and have been accustomed and trained to pursue the human track; (3) that they have been found by experience reliable in such pursuit; (4) and that in the particular case they were put on the trail of the guilty party (who) . . . was pursued and followed under such circumstances and in such way as to afford substantial assurance, or permit a reasonable inference, of identification." *Id.* at 545, 146 S.E. at 411.

Defendant argues that the State did not lay a proper foundation for the bloodhound evidence in that it failed to establish either that Deputy Thompson's dog was of pure blood or that, at the end of the trail, the dog identified defendant with reasonable certainty — requisites (1) and (4) as set out above in *McLeod*.

With reference to the first requisite, the deputy described his dog as "a bloodhound" and "a thoroughbred." "The terms *thoroughbred, full-blood,* and *pure-bred* are generally used in this country as practically synonymous." 3 Dictionary of American English 1861 (1942 Ed.). In *State v. Wiggins,* 171 N.C. 813, 89 S.E. 58, identification of the defendant by "bloodhounds brought from Tennessee" was admitted. In *State v. Yearwood,* 178 N.C. 813, 101 S.E. 513, the admission of evidence of identification by a dog described only as "an English bloodhound" was approved. In practice, if the dog has been identified as a bloodhound, it has been the conduct of the hound and other attendant circumstances, rather than the dog's family tree, which have determined the admissibility of his evidence.

We find no North Carolina cases, and defendant has cited us to none, in which bloodhound evidence has been excluded for a deficiency in the proof of the bloodhound's pedigree *if* he is shown to be naturally capable of following the human scent, *i. e.,* that he is a bloodhound, *and if* the evidence is corroborative of other evidence tending to show defendant's guilt. See Annot., Evidence of trailing by dogs, 94 A.L.R. 413, 419. In *State v. Yearwood, supra* at 818, 101 S.E. at 516, Walker, J., said: "The dog which trailed this defendant proved his own reliability." So, also, it seems to us, did the deputy's dog. The performance of this "pretty old" dog without any papers puts him in a class with the young horse which was the subject of many a chapel talk to his boys by famed old schoolmaster William Robert ("Old Sawney") Webb at the Webb School in Bellbuckle, Tennessee. His story was that when a young horse of obscure lineage (no registration papers) won the derby in a record-breaking burst of speed, horse fanciers began scouring the country for his sire, dam, and siblings. This young stallion, ac-

cording to "Old Sawney," had "pedigreed his ancestors," and that was all that the schoolmaster demanded of his boys. By his performance, the old dog in this case pedigreed himself, at least. This record leaves little doubt that the shoe prints which he had followed from Maggie's to Earline's belonged to defendant.

It is true that the evidence is silent as to what the dog did when he and the deputy arrived at Earline Carter's. She said that the officer tied the dog outside and never brought him into the house. The deputy said that the dog went in with him, but counsel for neither the State nor defendant inquired into the dog's actions inside the house. They, as we, probably considered the dog's conduct at the end of the trial immaterial when, there, the deputy found defendant sitting on a cache of money, which included two one-hundred dollar bills. Such a circumstance ordinarily would satisfy the fourth requisite given above in *McLeod.* See *State v. Norman,* 153 N.C. 591, 595, 68 S.E. 917, 918. We conclude that the bloodhound evidence is not incompetent for failure to comply with *McLeod.* If, however, defendant had been found at the end of the trail without the hundred-dollar bills, the evidence would undoubtedly be incompetent. The law of probability makes it as certain as anything in life can be that the bills belonged to Maggie Hunt; under these facts it made no difference whether the dog bayed defendant.

The feat of the dog in following defendant's tracks from Maggie Hunt's to Earline's furnished, in itself, no relevant evidence. under the facts of this case, that defendant was the robber, *i. e.,* no relevant evidence linking defendant with the *corpus delicti.* It is irrelevant that defendant's tracks led from Maggie's house, for he had been there earlier to beg, a lawful mission. That defendant was present at Earline's house *at the time the dog arrived there* was clearly a coincidence. Since, *coincidentally,* defendant happened to be at Maggie's with the money, we think the admission of the evidence, if error, was not prejudicial error. It explained the deputy's timely arrival and is equivalent to the testimony we frequently hear from officers that "in consequence of a telephone call from *X*" they went to a designated spot, where they found a certain item or person. Such evidence does not itself tend to link a defendant with the *corpus delicti,* but it does relate to other evidence so tending.

As previously pointed out, the State's evidence was sufficient, without the bloodhound evidence, to take the case against defendant to the jury. Upon a third trial, "with the dog left out," we apprehend that the verdict would be the same, because of defendant's possession of the bills. See *State v. McLeod,* 198 N.C. 649, 152 S.E. 895 (second trial) (dissent

of Brogden, J.). The bloodhound evidence could not have brought about the result. *State v. Norris,* 242 N.C. 47, 86 S.E. 2d 916. The burden is on defendant to show not only that there was error but also that the error affected the result adversely to him.

In the trial we find

No error.

RAY COX, ADMINISTRATOR OF THE ESTATE OF LILLIE COX BURGESS, DECEASED v. FRANCES LACKEY SHAW, PAUL R. BURGESS, AND BARBARA BURGESS, ADMINISTRATRIX OF THE ESTATE OF PAUL D. BURGESS, DECEASED.

(Filed 15 January, 1965.)

1. Parent and Child § 2—

The administrator of the mother may not maintain an action against the administrator of the son's estate to recover for wrongful death based upon the tortious act of the unemancipated son.

2. Husband and Wife § 9—

One spouse may maintain an action against the other in tort, G.S. 52-10.1, and if a husband's negligence results in the death of his wife her personal representative may maintain an action against him for her wrongful death.

3. Automobiles § 50—

The negligence of the driver will be imputed to the owner-passenger having the right to control and direct the operation of the vehicle by the driver.

4. Automobiles § 55—

Under the family purpose doctrine the negligent operation of a car by a minor member of the family is imputed to the father furnishing the vehicle, regardless of whether the father is present in the car at the time of the accident.

5. Same; Husband and Wife § 9— Child's immunity to suit by mother will not be extended to prevent mother from recovering from child's father under family purpose doctrine.

Father, mother and son were riding in a family purpose car driven by the unemancipated minor son. The mother and son were killed in a collision, and suit for wrongful death was instituted by the mother's administrator against the administrator of the son and against the father on the basis of agency and under the family purpose doctrine. *Held:* The immunity of the son's estate from suit in tort by the personal representative of the mother does not extend to the father even though his liability is deriva-

tive. In the event of recovery by the mother's estate against the father, the father would not be entitled to recover against the son's estate on the theory of breach of duty by the son as agent.

6. Actions § 5; Death § 9—

In an action for wrongful death in a suit by the administrator of the mother to recover against the estate of her son and against her husband for wrongful death resulting from the negligent operation of a family car by the son, any recovery will be diminished by the share in such recovery which would go to the son's estate or to the husband under the doctrine that those culpably responsible for a person's death may not share in any recovery for the wrongful death.

APPEAL by plaintiff from *Walker, S. J.*, June 1, 1964 Conflict Session of RANDOLPH.

Action for wrongful death. On this appeal we review a judgment on the pleadings whereby the judge dismissed the action against two of the three defendants. The allegations of the complaint, the answer of the two defendant-appellees, and the reply establish these pertinent facts: The Burgess family, on September 8, 1963, consisted of P. R. Burgess (husband-father), Lillie Cox Burgess (wife-mother), Paul Burgess (son) and a daughter. For the sake of clarity these individuals will hereinafter be designated by their family relationship. On the afternoon of September 8, 1963, son, wife-mother, and husband-father were riding in the front seat of the father's family-purpose automobile on a trip which was for the pleasure and benefit of the three. Son, an unemancipated minor living in the home of his parents, was driving. The Burgess car was proceeding south on N. C. Highway No. 49 and was approaching the intersection of that highway with U. S. Highway No. 64, the dominant highway, in the Town of Ramseur. In the intersection, the Burgess car collided with the automobile being driven westerly on Highway No. 64 by Frances Lackey Shaw, the third defendant, who is not involved in this appeal. In the collision, mother and son were killed.

Plaintiff, the administrator of wife-mother, instituted this action against (1) Frances Lackey Shaw, (2) the administratrix of son, and (3) husband-father. Plaintiff alleges that his intestate's death was proximately caused by the joint and concurring negligence of Shaw and son and that husband-father is derivatively liable for the negligence of son both because he was the provider of the family-purpose automobile and because he was present in his vehicle with the right to control the manner of its operation by son, who was driving it for husband-father's benefit and pleasure. Husband-father and the administratrix of son moved the court for judgment upon the pleadings

dismissing this action as to them. The motion was allowed, and plaintiff appeals.

Coltrane and Gavin for plaintiff.
Miller and Beck for defendant.

SHARP, J. This appeal presents two questions: (1) May the administrator of a mother sue the estate of her unemancipated minor son for damages for her wrongful death caused by the son's negligence? (2) If not, may the wife-mother's administrator maintain the action against the surviving husband-father, under the principle of *respondeat superior*, for son's negligence?

At common law an unemancipated minor child may not maintain an action against his parent to recover damages for negligence. *Redding v. Redding*, 235 N.C. 638, 70 S.E. 2d 676; *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12, 31 A.L.R. 1135. Likewise, the administrator of an unemancipated minor child killed by his parent's negligence has no cause of action against the parent for the wrongful death. *Capps v. Smith*, 263 N.C. 120, 139 S.E. 2d 19; *Lewis v. Insurance Co.*, 243 N.C. 55, 89 S.E. 2d 788; *Goldsmith v. Samet*, 201 N.C. 574, 160 S.E. 835; Annot., Liability of parent or person *in loco parentis* for personal tort against minor child, 19 A.L.R. 2d 423, 439. This immunity from suit is founded on the same public policy which prevents a parent or his personal representative from maintaining an action against an unemancipated minor child or his representative for negligence. *Gillikin v. Burbage, ante* at 317, ... S.E. 2d at .....; Annot., Right of parent or representatives to maintain tort action against minor child, 60 A.L.R. 2d 1285; 3 Lee, North Carolina Family Law § 248 (3d Ed. 1963).

The answer to the first question, therefore, is No, and the judgment dismissing the action against the administratrix of the son of plaintiff's intestate is affirmed.

We now consider the second question. G.S. 52-10.1 permits one spouse to maintain an action against the other for injuries caused by his or her tort. If a husband's negligence results in the death of his wife, her personal representative may maintain an action against him for her wrongful death. *King v. Gates*, 231 N.C. 537, 57 S.E. 2d 765. As a passenger in his own automobile the husband-father had the right to control and direct its operation by the driver, his son. If the son were negligent, his negligence is to be imputed to the father. *Shoe v. Hood*, 251 N.C. 719, 112 S.E. 2d 543; *Tew v. Runnels*, 249 N.C. 1, 105 S.E. 2d 108. The law is the same under the family-purpose doctrine, since negligence would have been equally imputable to the father had he not

been present. *Ewing v. Thompson,* 233 N.C. 564, 65 S.E. 2d 17; *Watts v. Lefler,* 190 N.C. 722, 130 S.E. 630. If the son was negligent on the occasion in question and if the son's immunity from the wife-mother's suit is extended to the husband-father, the husband-father would then be liable to all persons whomsoever injured by his son's negligence save only the wife-mother, plaintiff's intestate.

The husband-father contends that the family-purpose doctrine was originated for the protection of third parties, not the family of the owner of the automobile, and that the doctrine should not be extended to permit a wife to recover from her husband under the principle of *respondeat superior* for the negligence of the couple's son where the son, the active tort-feasor, is immune to her suit. In short, the husband-father contends that he is entitled to avail himself of his son's immunity.

Plaintiff relies upon the case of *Wright v. Wright,* 229 N.C. 503, 50 S.E. 2d 540, followed in *Foy v. Electric Co.,* 231 N.C. 161, 56 S.E. 2d 418. In *Wright,* a six-year-old boy was permitted to sue his father's employer, a taxicab operator, for injuries caused by the father's negligence while operating a taxi. The father, with his employer's implied consent, was "baby sitting" while driving the cab. The father himself was not a party to the suit. In affirming the judgment for the plaintiff, this Court, speaking through Seawell, J., said: "The personal immunity from suit because of the domestic relation does not extend to the employer *so as to cancel his liability* or defeat recovery on the principle of *respondeat superior* when the injury was inflicted by the servant acting as such." *Id.* at 507, 50 S.E. 2d at 544. (Italics ours.) The opinion pointed out that the decision did not turn on the fact that the defendant owed a higher duty because he was a carrier of passengers for hire.

Defendants stress that the defendant in *Wright* was a business employer, a stranger to the family circle. So, also, was the defendant in *Schubert v. Schubert Wagon Co.,* 249 N.Y. 253, 164 N.E. 42, 64 A.L.R. 293, a case which obviously commanded the decision in *Wright.* In *Schubert* the plaintiff, as the wife of the negligent employee, was precluded by the law of the jurisdiction from suing her husband. The New York court, speaking through Cardozo, C. J., said: "The disability of wife or husband to maintain an action against the other for injuries to the person is not a disability to maintain a like action against the other's principal or master." *Id.* at 255, 164 N.E. at 42, 64 A.L.R. at 294. Cardozo, C.J., argued as follows: A master, otherwise liable for his servant's tort, is not exonerated when the servant has had the benefit of a covenant not to sue, has been discharged in bankruptcy,

"or has escaped liability upon grounds not inconsistent with the commission of a wrong, unreleased and unrequited." *Id.* at 256, 164 N.E. at 42, 64 A.L.R. at 294. The husband's negligent act which has injured his wife is still unlawful even though the law exempts him from liability for damages. When a servant commits a tort for which the master is derivatively liable, the master is brought under a distinct liability of his own. He may not hide behind his servant's immunity — "unlawful the act remains, however shorn of a remedy." *Id.* at 257, 164 N.E. at 43, 64 A.L.R. at 295.

The only case in point which our research has discovered is *Silverman v. Silverman,* 145 Conn. 663, 145 A. 2d 826. There, plaintiff-wife sustained injuries as a result of the negligent operation of defendant-husband's family-purpose automobile by the couple's unemancipated minor son. From a judgment in her favor the husband appealed. The Connecticut court considered and rejected the same contention which defendant husband-father makes in this case, *i. e.,* that the mother had as much right and duty to direct her son's operation of the vehicle as did her husband and that the son's negligence, if imputable to the father, was imputable to the mother, also.

> "It does not appear that the mother was other than a passenger in the car. The negligence of the operator of an automobile cannot ordinarily be imputed to one who is a passenger in it . . . The record is barren of any evidence that the mother had anything to do with the operation of the car. The negligence of a child is not imputed to a parent who does not control, or have the right and duty to exercise control of, the child's conduct in the operation of a vehicle; . . . unless the parent owns the vehicle and has the child drive it for him; . . . or the child was the agent of the parent in the operation of the vehicle at the time." *Id.* at 668, 145 A. 2d at 828.

As the owner-provider of the automobile, the husband-father, not the wife-mother, was the one having the right to control its operation; our case is the same as *Silverman.* The court said:

> "The principal question involved is whether the wife and mother has a cause of action against the husband and father under the family car doctrine for the tort of the unemancipated child even though she is precluded from recovering from the child. No reported cases upon this point have been cited by counsel, nor have we found any. We must decide whether it is likewise against public policy to allow recovery from the husband because of the delict of

his son, who was his agent but is himself immune to suit." *Id.* at 664, 145 A. 2d at 827.

In reaching the conclusion that the husband-father should be held liable to the wife-mother, the Connecticut court was largely influenced by its previous decision in *Chase v. New Haven Waste Material Corp.*, 111 Conn. 377, 150 A. 107, 68 A.L.R. 1497, in which an unemancipated minor child, injured by the negligence of his father acting in the scope of his employment, was permitted to recover from the father's business employer. Like our case of *Wright, Chase* was decided on the authority of *Schubert v. Schubert Wagon Co., supra.*

The principle of *Wright* and *Schubert* is set out in Restatement (Second), Agency § 217 (1958) as follows:

> "In an action against a principal based on the conduct of a servant in the course of employment: . . . the principal has no defense because of the fact that: . . . the agent has an immunity from civil liability as to the act . . .
>
> Immunity is a word which denotes the absence of civil liability for what would be a tortious act but for the relation between the parties or the status or position of the actor. Illustrative of the immunities created by relation between the parties are those resulting from the relation of parent and child and of husband and wife."

The older cases denied recovery from the principal for the agent's conduct where the agent was himself immune from suit because of the family relationship. It was reasoned (1) that, the master's liability being vicarious, he should not be liable where the servant is not or (2) that the master's right of indemnity against the servant would defeat the domestic immunity by throwing the ultimate loss upon the servant because of his liability to the master. In commenting upon these arguments, Prosser says:

> "The first argument confuses immunity from suit with lack of responsibility — the servant has committed a tort which by ordinary rules of law should make the master liable, and there is no reason to include the latter within the purely personal immunity of the family. The second misses the point that the master's recovery over against the servant is not based upon any continuation of the original domestic claim, but upon the servant's independent duty of care for the protection of the master's interests; and that if protection of the servant is still the *sine qua non*, it may be accomplished merely by denying the indemnity. Accordingly the

> overwhelming majority of the courts now hold that the employer is liable even though the servant is not." Prosser, Torts § 101 (2d Ed. 1955).

Accord, Restatement (Second), Agency, Appendix § 217 (1958).

In answer to the second question, we hold that plaintiff is entitled to maintain this suit against defendant P. R. Burgess, under the family-purpose doctrine, notwithstanding that he is not a business employer, and the judgment dismissing the action against him is reversed.

In disposing of the argument that ultimately the consequence of permitting an action against the master might be to cast the burden on the servant, since the master, if not personally at fault, has a remedy over, Cardozo, C. J., says, "The consequences may be admitted, without admitting its significance as a determining factor in the solution of the problem." *Schubert v. Schubert Wagon Co., supra* at 257, 164 N.E. at 43, 64 A.L.R. at 295. He reasoned that, in such a case, the master recovers from his servant not because he is subrogated to the claim of the injured third party against the servant, but because the servant has breached the independent duty he owed to the master to use due care in the performance of the duties assigned him by the master.

All this is true in the ordinary case of *respondeat superior,* but in the ordinary case the servant is not, as here, immune from suit *ex delicto* by the master. Where the servant's employment contract with the master is breached by the servant's negligence as to a third person, the master's action against the servant for indemnity is, as Cardozo, C. J. rightly implies when he speaks of the servant's "duty," essentially delictual. *Cf. Peele v. Hartsell,* 258 N.C. 680, 129 S.E. 2d 97. This is not inharmonious with *Steele v. Hauling Co.,* 260 N.C. 486, 133 S.E. 2d 197, wherein it is stated, "The doctrine of primary-secondary liability is based upon a contract implied in law." *Id.* at 490, 133 S.E. 2d at 200. Enforceable in assumpsit, a contract implied in law is a *quasi* contract, which may result either from a tortious wrong, as in our case, or from one that is contractual. "A quasi-contractual obligation is one that is created by the law for reasons of justice, without any expression of assent and sometimes even against a clear expression of dissent . . . (I)t would be better not to use the word 'contract' at all." 1 Corbin, Contracts § 19 (1963 Ed.); *accord,* 46 Am. Jur., *Restitution* &c. 99, 100 (1943). When we understand that the flat statement that indemnity "springs from a contract express or implied," 27 Am. Jur., *Indemnity* § 6 (1940), is thus to be qualified (1) by the fact that a quasi-contract is meant and (2) by the fact that this particular quasi-contract is of

tortious origin, we cannot be led to say that the unemancipated son would not be immune to suit by his father on the *contract* of indemnity. Accordingly, this decision does not lift the immunity of the son's estate from suit by the father so as to authorize an action by him for indemnity should plaintiff recover in this action. Had we not based our family-purpose doctrine upon the concept of master and servant, this exegesis would have been unnecessary. "Here, as alsewhere, we are to be on our guard against the perils that are latent in a 'jurisprudence of conceptions,'" Cardozo, C. J., in *Schubert v. Schubert Wagon Co.*, *supra* at 256, 164 N.E. at 42, 64 A.L.R. at 294.

Neither will this decision permit defendant husband-father, as a distributee of the estate of his wife, to profit from his own wrong. Where the beneficiary of an estate is culpably responsible for the decedent's death, he may not share in the administrator's recovery for wrongful death. The identity of beneficiaries entitled to share in the recovery is determined as of the time of decedent's death. *Davenport v. Patrick,* 227 N.C. 686, 44 S.E. 2d 203. Here, had plaintiff's intestate died a natural death, her beneficiaries would have been her husband, her son, and her daughter. G.S. 29-14(2). Under the circumstances, however, only the daughter will be entitled to benefit from any recovery which the administrator may obtain in this action. Therefore, should the jury return a verdict in plaintiff's favor, the court will enter judgment for only one-third of the amount. *Dixon v. Briley,* 253 N.C. 807, 117 S.E. 2d 747; *Davenport v. Patrick, supra; Pearson v. Stores Corp.,* 219 N.C. 717, 14 S.E. 2d 811; see Annot., Right of action for death against tortfeasor who is one of the class to whom, or for benefit of whom, the right of action for death is given by statute, 117 A.L.R. 496. It is further noted that defendant husband-father is himself primarily liable for intestate's burial expenses. *Davenport v. Patrick, supra.*

As to the action against Burgess, Administratrix of Paul D. Burgess—
Affirmed.

As to the action against Paul R. Burgess —
Reversed.

WILLIS E. BYRD v. NORTH STATE MOTOR LINES, INC.; ROWE'S TRUCKING COMPANY, INC.; AND GEORGE THOMAS WOOLARD.

(Filed 15 January, 1965.)

1. Automobiles § 41c—

Evidence that defendant's tractor-trailer, traveling east on a street between warehouses at a port, struck the "counter weight" of a fork lift which was unloading a tractor-trailer on the north side of the street, resulting in the injury in suit, *held* sufficient to be submitted to the jury on the issue of negligence.

2. Appeal and Error § 1—

Where judgment of nonsuit is reversed, the Supreme Court will refrain from discussing the evidence except to the extent necessary to explain the conclusion reached.

3. Automobiles § 54a—

A carrier will be held liable in damages for injuries to third persons caused by the negligent operation of a vehicle transporting goods under authority of its intrastate franchise by application of the same public policy which imposes liability on an interstate carrier for injuries resulting from the operation of a vehicle under its interstate franchise, notwithstanding the vehicle may be driven by the owner-lessor at the time of the accident.

4. Same— If a carrier of agricultural products is exempt from Federal franchise, he is subject to State regulation.

The evidence tended to show that the owner of a tractor was operating the tractor and a trailer in transporting tobacco from a municipality in this State to a port in the State for shipment in foreign commerce, that defendant carrier had leased the equipment, and that the trailer had painted on its side the name of defendant carrier and the identifying number assigned to the trailer by the Utilities Commission. *Held:* If no interstate franchise was required because the freight consisted of agricultural products, then the shipment was not exempt from State regulation, and the transportation was under authority of the intrastate franchise rights, and defendant carrier is liable for injuries to third persons resulting from the negligent operation of the vehicle. G.S. 62-121.7(8).

5. Same—

The accident in suit occurred after the cargo had been unloaded at a warehouse and after the tractor-trailer had been turned around and was in the process of leaving the port terminal. *Held:* The liability of the carrier under his franchise continued at least during the time the vehicle was on the port terminal premises.

6. Automobiles § 54f—

Evidence in this case *held* sufficient to be submitted to the jury on the issue of whether the owner-operator of the tractor-trailer in the shipment in intrastate commerce was the agent of the carrier under whose franchise authority the shipment was transported.

APPEAL by plaintiff from *Peel, J.*, March 16, 1964, Civil Session of CARTERET.

Personal injury action.

Plaintiff was employed by the North Carolina State Ports Authority as operator of a tow-motor fork lift. On November 21, 1961, about 11:00 a.m., in Morehead City, N. C., on the Port Terminal premises of the Ports Authority, in the area between Warehouse #2 and Warehouse #4, there was a collision between a tractor-trailer combination (T/T), operated by defendant Woolard, and the fork lift operated by plaintiff.

The stipulations and evidence establish or tend to establish the background facts narrated below.

The area between Warehouse #2 and Warehouse #4 is a paved east-west street. Warehouse #4 is north of and parallel with Warehouse #2. The distance from the outer edge of the loading platform (ramp) along the north side of Warehouse #2 to the outer edge of a similar ramp along the south side of Warehouse #4 is 52 feet and 2 inches. There is "a drainage dip" in the center of this street. Immediately west of said warehouses, said east-west street intersects with a north-south street. The width of the north-south street is 49 feet and 9 inches. West of said intersection, and in line with Warehouse #2 and Warehouse #4, respectively, are Warehouse #3 and Warehouse #5.

The T/T operated by Woolard was in a line of similar trucks headed west for unloading on the portion of the ramp along the north side of Warehouse #2 opposite Door #16. In its turn, it pulled up "within about two inches of" the ramp. This T/T combination is 49 feet long and about 8 feet wide. It includes "a 37-foot platform trailer." "The West edge of Door #16 is 84 feet 7 inches from the West edge of Warehouse #2." The load on the trailer consisted of 27 hogsheads of tobacco. Each of nine rows consisted of two hogsheads on the bed of the trailer and a third hogshead above and between them. When the T/T first stopped, the three hogsheads constituting the row at the rear of the trailer were opposite Door #16. The top hogshead was pushed onto the ramp by the projecting prongs or "shoe" of the fork lift and thereafter the lower two hogsheads were pushed onto the ramp by manual labor. After the removal of each row, the T/T backed the short distance necessary to bring the next row of hogsheads into position opposite Door #16. Each time the T/T backed, "(t)he fork lift would back up from one foot to two feet to clear the truck it was unloading."

The overall length of the fork lift is 14 feet, 9 inches. It is four feet wide. It weighs between seven and eight thousand pounds. The prongs or "shoe" used in pushing hogsheads from a trailer onto the ramp are at

the front of the fork lift. There is a "counter-balance" on the back of the fork lift, "a heavy piece of steel . . . to keep the front end from tipping up when unloading is being done." "The operator sits close to the rear over the motor . . ."

After unloading, the T/T operated by Woolard pulled away from said ramp and proceeded west to said intersection. There, after first turning right (north) into the intersecting north-south street and then backing therein to a point south of the east-west street, Woolard proceeded forward and made a right turn into the east-west street. While Woolard was proceeding as indicated, another truck had pulled into position for unloading at Door #16 in like manner and plaintiff, operating the fork lift, had pushed off "two tiers of hogsheads."

The T/T operated by Woolard was proceeding east in said east-west street (between Warehouse #2 and Warehouse #4) when the tool box under the right side of the bed of the trailer and approximately midway the length thereof, and thereafter the right tandem wheels of the trailer, collided with the right portion of the "counter-balance" of the fork lift. On account of said collision, plaintiff was thrown from said fork lift and seriously injured.

Evidential facts pertinent to the agency issue will be set forth in the opinion.

Plaintiff alleged the collision and his injuries were caused by the negligence of Woolard while acting as agent for the corporate defendants. Defendants, by joint answer, denied Woolard was negligent; denied Woolard was acting as agent for the corporate defendants; and alleged, as a conditional further defense, the contributory negligence of plaintiff. Other further defenses alleged by defendants are not pertinent to decision on this appeal.

When the case was called for trial, plaintiff announced he would take a voluntary nonsuit as to Rowe's Trucking Company, Inc. At the conclusion of plaintiff's evidence, Woolard and North State Motor Lines, Inc., moved for judgment(s) of involuntary nonsuit. Woolard's motion was overruled. The motion of North State Motor Lines, Inc., was allowed. Thereupon, plaintiff announced he would take a voluntary nonsuit as to Woolard. Judgment(s) of voluntary nonsuit as to Woolard and as to Rowe's Trucking Company, Inc., was entered.

Judgment of involuntary nonsuit was entered as to North State Motor Lines, Inc. Plaintiff excepted and appealed.

Wheatly & Bennett for plaintiff appellant.

Fields & Cooper and Dupree, Weaver, Horton & Cockman for North State Motor Lines, Inc., defendant appellee.

BOBBITT, J. Careful consideration impels the conclusion that the evidence, when considered in the light most favorable to plaintiff, is sufficient to require submission for jury determination of an issue as to the alleged actionable negligence of Woolard and that such evidence does not establish contributory negligence as a matter of law. The overruling of Woolard's motion for judgment of nonsuit indicates Judge Peel's view, as to this feature of the case, was in accord with ours. Having reached this conclusion, we deem it appropriate to refrain from further discussion of the evidence (relevant to said issues) presently before us. *Weaver v. Bennett,* 259 N.C. 16, 19, 129 S.E. 2d 610; *Tucker v. Moorefield,* 250 N.C. 340, 342, 108 S.E. 2d 637, and cases cited.

Since a judgment of voluntary nonsuit was entered as to Woolard, the sufficiency of the evidence as to Woolard's actionable negligence is relevant on this appeal only if the evidence is also sufficient to require submission of an issue as to Woolard's alleged agency for North State Motor Lines, Inc., (North State) on the occasion of the collision.

It is established by the pleadings (1) that Woolard is a resident of Rocky Mount, N. C., and (2) that North State is a North Carolina corporation with principal office and place of business in Rocky Mount, N. C.

It was stipulated that "North State Motor Lines, Inc. was a common carrier on the day in question and that on that date it was operating under a certificate issued by the Utilities Commission of the State of North Carolina and that it was also operating under a certificate issued by the Interstate Commerce Commission and further that it was hauling exempt commodities."

The principal evidence relevant to the agency issue consists of the testimony of Donald Bryan, Assistant General Manager of North State, examined by plaintiff at trial as an adverse witness. His testimony, summarized except when quoted, is set forth below.

Woolard was the owner as well as the operator of the (1958 Chevrolet) tractor. North State "obtained possession of that tractor under routine lease agreement from George Woolard." North State had leased the (1950 Trailmobile) trailer from Rowe Trucking Co., Inc., the owner.

In compliance with the requirement of the North Carolina Utilities Commission, the sign, "North State Motor Lines, Inc., Rocky Mount, N. C.," and also the identifying sign, "Truck No. 122," a vehicle number assigned for use by North State, were *painted* on the Woolard tractor.

Under the *oral* lease between North State and Woolard, the compensation Woolard received was paid to him as owner. Woolard was to re-

ceive as compensation "65% of the gross revenue earned by his truck." However, North State was to deduct therefrom: (1) for gasoline and oil purchased on its credit; (2) for repairs made on its credit; (3) for tire repairs or purchases made on its credit; (4) for "moneys loaned to him for operating expenses at various times"; and (5) for the amount of premiums paid "to cover him under (its) Workmen's compensation policy."

Rowe Trucking Co., Inc., was paid a commission "from the 35% portion that was retained by North State Motor Lines." "A record was kept of what the trailer was used for and . . . it was kept with Woolard's tractor that particular time as a unit, for bookkeeping purposes. Woolard pulled any trailer that North State Motor Lines provided."

On November 21, 1961, North State dispatched Woolard's tractor, pulling the 1950 Trailmobile trailer with a cargo of 27 hogsheads of tobacco, from Rocky Mount to said Port Terminal in Morehead City for export "through the Port." The rate covering the shipment "didn't come through the Utilities Commission," but was in accordance with the rate that came to North State from the Tariff Bureau of the Motor Carriers Traffic Association, Inc. Woolard had nothing to do with determining the rate. The contract covering the shipment was between the shipper and North State. The rate was based on the trip from Rocky Mount to Morehead City without reference to a return trip from Morehead City to Rocky Mount.

While North State did not designate the route Woolard would travel from Rocky Mount to Morehead City, Woolard "was to deliver (the shipment) . . . to Morehead City as soon as possible barring any difficulties or taking time out to eat or stopping to fuel his truck . . ." The only instruction given Woolard was to call North State after he had unloaded in Morehead City "to determine if they had another truck load of freight to offer for him to transport, and if Mr. Woolard wanted another load he would get in touch with the company." Woolard was free to take or not take another load. North State, on this occasion, made unsuccessful efforts to find another load involving a trip from Morehead City to Rocky Mount, Wilmington, Norfolk or elsewhere.

Bryan testified: "He (Woolard) could have obtained a load of freight that was justifiable in his own mind to transport provided that particular load of freight was moved under North State Motor Lines bill of lading," and if he did so obtain a load of freight and did so move it under North State's bill of lading, the money would have been paid in gross to the office of North State.

Bryan testified Woolard was obligated to look out for and protect the trailer while it was in his possession. Under examination by plaintiff's counsel, Bryan testified he did not know whether Woolard was obligated to bring the trailer back to Rocky Mount. This was at variance with his further testimony when, under examination by North State's counsel, he said: "Mr. Woolard was under no obligation to bring the trailer back to Rocky Mount."

It is noted: Absent evidence of specific agreement with reference thereto, this Court cannot accept as authoritative Bryan's legal opinions as to whether Woolard was obligated to bring the trailer back to Rocky Mount or as to the extent Woolard was obligated to comply with North State's directives.

North State contends plaintiff's evidence is insufficient to require submission of an issue as to agency. It contends Bryan's testimony establishes that Woolard was an independent contractor rather than an agent.

"It is now established in this jurisdiction that an interstate carrier, which exercises its franchise rights by transporting its freight in leased equipment under leases such as that here involved, is liable in damages for injuries to third parties caused by the negligent operation of such equipment in the prosecution of such carrier's business." *McGill v. Freight*, 245 N.C. 469, 473, 96 S.E. 2d 438, and cases cited.

Nothing in the record indicates either intrastate or interstate franchise rights had been granted to Woolard. Whether Woolard was free to do so or not, there was no evidence he used his tractor to transport commodities for any person, firm or corporation other than North State. North State's name and its identifying truck number were painted on Woolard's tractor. It may be inferred from the facts in evidence that the relationship between North State and Woolard was a continuing relationship, albeit terminable at will, and that Woolard's owner-operated tractor was regularly used in pulling North State (owned or leased) trailers as an integral part of the prosecution of North State's business as a common carrier.

North State contends Woolard, on November 21, 1961, was not exercising North State's interstate or intrastate franchise rights as a common carrier.

North State contends no interstate franchise was required because the cargo consisted wholly of tobacco, an exempt (agricultural) product. Neither brief cites statute or decision bearing upon this subject. As pertinent to this subject, reference is made to the following: 49 U.S.C.A. § 303(b)(6); *Frozen Food Express v. United States*, 148 F. Supp. 399 (S.D. Tex.) *aff'd sub nom. Akron, Canton & Youngstown R.*

R. v. Frozen Food Express, 355 U.S. 6, 78 S. Ct. 38, 40, 42, 2 L. Ed. 2d 22; *Interstate Commerce Commission v. Yeary Transfer Co.,* 104 F. Supp. 245 (E.D. Ky.), *aff'd* 202 F. 2d 151 (6 Cir.); *Interstate Commerce Com'n v. Allen E. Kroblin, Inc.,* 113 F. Supp. 599, 603 (N.D. Ia.), and cases cited; *Strickland Transportation Co. v. Brown Express,* 321 S.W. 2d 357, 360 (Tex. Civ. App.). For present purposes, we accept North State's contention that the shipment of November 21, 1961, was exempt from the provisions of the Interstate Commerce Act.

North State contends no intrastate franchise was required because the cargo was transported from Rocky Mount to the Port Terminal in Morehead City for shipment to an overseas destination. Assuming, for present purposes, the sufficiency of the evidence to show the shipment was subject to the power of Congress "(t)o regulate commerce with foreign nations," U. S. Constitution, Article I, § 8, if, as North State contends, the cargo consisted wholly of an exempt commodity, Congress has disavowed any intent to regulate such shipment.

"Intrastate commerce," as defined in G.S. 62-121.7(8), "includes all transportation of property by motor vehicles within the State for compensation in interstate or foreign commerce which has been exempted from regulation under the Interstate Commerce Act." We find nothing in G.S. 62-121.8, captioned, "Exemption from regulations," that would exempt the shipment of November 21, 1961, from the provision of the North Carolina Truck Act (G.S. Chapter 62, Article 6B). G.S. 62-121.15(a) provides, with exceptions not applicable here, that no person shall engage in the transportation of property in "intrastate commerce" until and unless such person shall have applied to and obtained from the North Carolina Utilities Commission a certificate or permit authorizing such operations.

If Woolard, when transporting the cargo of tobacco on November 21, 1961, was not acting under authority of North State's interstate franchise rights, it seems clear he was acting under authority of North State's intrastate franchise rights. If so, the same considerations of public policy on which the legal principles stated in *McGill v. Freight, supra,* and cases cited therein, are based would apply; and it is our opinion, and we so decide, that an intrastate carrier, which exercises its franchise rights by transporting its freight in leased equipment under a lease such as that here involved, is liable in damages for injuries to third parties caused by the negligent operation of such equipment in the prosecution of such carrier's business.

True, the collision occurred after the cargo of tobacco had been unloaded. However, we are of opinion, and so decide, that the liability of North State for Woolard's operation of the leased equipment con-

tinued (at least) during the time it was on the Port Terminal premises.

Apart from the foregoing, the evidence was sufficient for submission to the jury as to the alleged agency of Woolard on legal principles stated in *Cooper v. Publishing Co.*, 258 N.C. 578, 129 S.E. 2d 107, and cases cited therein. The evidential matters set forth above, without repetition, indicate the factors (*indicia*) tending to support the view that Woolard was acting as agent of North State.

For the reasons stated, the judgment of involuntary nonsuit as to North State is reversed. Since decision is based on the admitted evidence, it is unnecessary to consider whether the court erred in the exclusion of proffered testimony.

Reversed.

W. L. KINSEY, ADMINISTRATOR OF THE ESTATE OF DAVID BETHEA, DECEASED v. TOWN OF KENLY, CARL DURHAM, RALPH DAVIS, AND EULA MAE STANCIL AND KENNETH H. STANCIL.

(Filed 15 January, 1965.)

1. Automobiles § 41e— Evidence that police car was stopped so as to block two lanes of three-lane traffic, and left standing without lights held to take issue of negligence to jury.

The evidence favorable to plaintiff tended to show that there were three northbound traffic lanes on the highway in question and that the driver of the car in which plaintiff was a passenger stopped in the east lane for northbound traffic in response to signal of police officers, that the police car was stopped back of it at an angle so that the front of the police car was in the eastern lane and the rear thereof extended into the center lane, that all occupants of both cars got out and were standing in the median, that the police car was standing without lights, and that a northbound car hit the rear of the police car which struck the car in which plaintiff had been riding and knocked it against plaintiff, causing the injury in suit. *Held:* The evidence was sufficient to be submitted to the jury on the issue of negligence in stopping the police car in such manner and leaving it standing without lights.

2. Automobiles § 9—

The stopping of a police car on a highway solely to enable police officers to determine whether the driver of another car had a driver's license does not constitute a parking of the police car in violation of G.S. 20-161(a).

3. Automobiles § 46—

Where, under the circumstances, negligence must be predicated on the concurrent acts of defendant driver in stopping the car he was driving on

the highway at an angle so as to block two traffic lanes and in leaving the car standing in this position without lights sufficient to disclose its presence, an instruction which permits the jury to answer the issue of negligence in the affirmative solely upon the jury's finding that the car was stopped at an angle in the manner indicated by plaintiff must be held for prejudicial error as being incomplete.

4. Damages § 15—

An instruction that counsel had introduced the mortuary tables and that the jury had the right to consider the tables but that they were not conclusive, without reading to the jury provisions of the statute, or stating its provisions in substance, must be held incomplete and erroneous. G.S. 8-46.

MOORE, J., took no part in the consideration or decision of this case.

APPEAL by defendants Town of Kenly and Carl Durham from judgment entered by *Bickett, J.*, at June 1964 Session, on verdict returned after trial before *Burgwyn, E. J.*, and a jury, at November 1963 Session of JOHNSTON.

David Bethea instituted this action June 2, 1961, to recover damages for personal injuries he sustained October 30, 1960, allegedly caused by the negligence of defendants.

Upon trial at November 1963 Session, before Burgwyn, E. J., the jury answered issues as follows: "1. Was the plaintiff injured as a result of the negligence of the defendants Carl Durham and Town of Kenly, as alleged in the Complaint? Answer: YES. 2. Was the plaintiff injured by the negligence of the defendants Kenneth H. Stancil and Eula Mae Stancil, as alleged in the Complaint? Answer: YES. 3. What damage, if any, is plaintiff entitled to recover of the defendants? Answer: $55,000.00." (Note: The action as to defendant Davis was nonsuited at the conclusion of plaintiff's evidence.) The court entered orders (1) reducing the amount of damages to $40,000.00 and (2) setting aside the verdict as to the first issue "as a matter of law." On plaintiff's appeal therefrom, this Court held said orders erroneous and remanded the case for judgment on the verdict. *Bethea v. Kenly*, 261 N.C. 730, 136 S.E. 2d 38.

On May 25, 1964, David Bethea, original plaintiff, died; and W. L. Kinsey was appointed and qualified as administrator of David Bethea's estate.

At June 1964 Session, the said administrator was substituted for his intestate as party plaintiff, and plaintiff moved that the amount of damages awarded by the jury "be reduced to $50,000.00, in order to come within Article 15A of Chapter 160 of the General Statutes." Thereupon, based on the verdict rendered at November 1963 Session,

judgment was entered by Bickett, J. "that the plaintiff have and recover of the defendants, Town of Kenly, Carl Durham, Eula Mae Stancil and Kenneth H. Stancil, the sum of Fifty Thousand ($50,000.00) Dollars," with interest and costs.

Defendants Town of Kenly and Carl Durham excepted and appealed. Their assignments of error, apart from that based on their exception to the judgment, are based on exceptions taken during and with reference to the trial at November 1963 Session.

Spence & Mast for plaintiff appellee.

Smith, Leach, Anderson & Dorsett and William R. Britt for Town of Kenly and Carl Durham, defendant appellants.

BOBBITT, J. While the administrator is now the party plaintiff, this is a *personal injury* action. Hereafter, David Bethea, the injured person — original plaintiff, will be referred to by name (Bethea) rather than as plaintiff or original plaintiff.

Bethea was injured about 12:05 a.m., on Sunday, October 30, 1960, as a result of a collision of three automobiles. The collision occurred on U.S. Highway #301, a main north-south route, which passes through the Town of Kenly, a municipal corporation. Within the corporate limits of Kenly, in the area where the collision occurred, three lanes for northbound traffic (toward Wilson) are separated from three lanes for southbound traffic (toward Smithfield) by a (raised) concrete traffic island or median.

With further reference to the three lanes for northbound traffic: A curbing runs along the east side of said street or highway. The east lane, next to the curbing, is 13 feet wide. The center lane is 10½ feet wide. The west lane is 10½ feet wide.

East of said curbing, between the curbing and the sidewalk, there is a grass strip 4 feet wide; and the (paved) sidewalk is 4 feet wide. East of the sidewalk there is an embankment, "a decline down into a field."

North of where plaintiff was injured, Sixth Street, which is forty feet wide from curb to curb, intersects Highway #301.

A car operated by one Everett Joyner, in which Bethea was a passenger, had stopped in the east lane (for northbound traffic) in response to a signal (siren) from a police car operated by defendant Durham. Defendant Davis was a passenger in the police car. Both Durham and Davis were police officers of Kenly. Durham stopped the police car to the rear of the Joyner car. Before stopping, the Joyner car and the police car had been proceeding north on Highway #301.

Joyner and Durham, the drivers, got out on the left side of the cars. They were standing near the left rear of the Joyner car, within the east traffic lane. Durham was checking to determine whether Joyner had a driver's license.

Bethea and Davis, the passengers, got out on the right side of the cars. They were standing on the grass strip between the curbing and the sidewalk. A car operated by defendant Kenneth H. Stancil, traveling north, crashed into the rear of the police car, causing the police car to strike the Joyner car and Bethea. Davis, immediately before the crash, had "jumped right over the embankment down the hill" and was not injured.

It is admitted: (1) Kenneth Stancil, then 20 years of age, was operating the Stancil car as agent, within the family purpose doctrine, of his mother, defendant Eula Mae Stancil, the owner; (2) Durham and Davis were acting in the course of their employment as police officers of Kenly; (3) the Town of Kenly, after due notice thereof, had failed and refused to pay Bethea's claim; and (4) the Town of Kenly had secured liability insurance and to the extent thereof ($50,000.00) had waived its governmental immunity as provided in G.S. 160-191.1 *et seq.*

The record contains original pleadings consisting of (1) complaint, (2) answer of Town of Kenly, (3) joint answer of Durham and Davis and (4) answer of Eula Mae Stancil.

The record also contains the pleadings on which the case was tried, to wit: (1) amended complaint; (2) joint answer of Town of Kenly, Durham and Davis to amended complaint; (3) answer of Eula Mae Stancil to amended complaint; and (4) answer of Kenneth H. Stancil to amended complaint.

Included in paragraph 7 of the *original* complaint, which consists largely of a description of the traffic lanes of Highway #301, is an allegation, "and . . . the parking of any motor vehicle on said highway within the corporate limits of the Town of Kenly is unlawful and is prohibited." Appellants, in their answers to the *original* complaint, admitted the allegations of paragraph 7 thereof. Bethea offered in evidence appellants' said admission of the allegations of paragraph 7 of the *original* complaint.

Paragraph 7 of the *amended* complaint contains an allegation that "no parking" signs had been erected on both sides of Highway #301 in the Town of Kenly "*pursuant to ordinances* duly adopted by the Town Board of the Town of Kenly on the 2nd day of May, 1960," and that Durham and Davis "acted in express violation of *the provisions of said Ordinance* and the requirements of said 'no parking' signs when they parked the police vehicle . . . on U. S. Highway 301 and when they

required . . . Joyner to park his vehicle on U. S. Highway 301." (Our italics).

It is alleged in paragraph 8 of the *amended* complaint "(t)hat within the Town of Kenly the parking of any motor vehicle on said Highway 301 within the corporate limits of the Town of Kenly is unlawful and is prohibited."

In their joint answer to the *amended* complaint, appellants denied the allegations of paragraphs 7 and 8 thereof.

While there was evidence as to the presence and location of "no parking" signs along Highway #301 within the corporate limits of Kenly, no ordinance relating thereto or otherwise purporting to regulate parking on Highway #301 was offered in evidence.

The amended (as well as original) complaint contains full allegations to the effect the officers were negligent in causing Joyner to stop and "to park" on Highway #301 and in stopping and "parking" the police car thereon and in "parking" the police car at an angle and in such manner that a portion thereof was in and "fouling the center lane" for northbound traffic.

Allegations of the amended complaint with reference to lights or lack of lights on the police car are as follows: Durham and Davis, "in parking the police vehicle . . . at an angle on said highway, were negligent and careless in that any lights on the police vehicle did not reflect up and down the highway as required by law, but did reflect and shine across said highway. . . . some of the lights, if not all the lights, on the police vehicle had been turned off." Again: Durham and Davis "parked said police vehicle at an angle on the highway . . . and at the time the police vehicle was not properly and adequately equipped with lights." The only other allegation with reference to lights is that contained in paragraph 6 of the amended complaint, to wit, that the officers "caused the plaintiff (Bethea) and the operator of the vehicle in which plaintiff (Bethea) was riding to get out of said car and come to the rear of the car in which they were riding, *in order that the officers might examine their driver's license in front of the headlights of said police automobile.*" (Our italics.)

All the evidence tends to show Joyner parked the car he was driving (a 1951 Ford owned by one Simms) wholly within the east lane, parallel and close to the curbing; and that, as testified by Joyner, "(t)he headlights and taillights were burning" on the Joyner car. Bethea testified: "Our lights were on."

Evidence favorable to Bethea tends to show that the police car, where stopped by Durham, was "catercornered," that is, headed diagonally across the east lane with the front close to the curbing and the

rear extending into the center lane. A witness for Bethea testified: "It was three or four feet into the center lane." Bethea's other evidence does not purport to fix how far it extended into the center lane. Evidence favorable to appellants tends to show the police car stopped wholly in the east lane, parallel and close to the curb, close to and directly behind the Joyner car; and that, as a result of the collision(s), the Joyner car was knocked straight forward a distance of 285 feet onto a shoulder (beyond Sixth Street) and down an embankment. (Note: North of Sixth Street Highway #301 "goes back into a dual road.")

Evidence favorable to Bethea tends to show the Stancil car approached the scene of collision in the center lane and struck the left rear of the police car. Evidence favorable to appellants tends to show the Stancil car approached the scene of collision in the east lane and struck the police car directly in the rear thereof.

Evidence favorable to Bethea tends to show there were no lights of any kind on the police car and that Durham was undertaking to check Joyner's driver's license by means of a flashlight. Evidence favorable to appellants tends to show the front and rear lights on the police car were burning; that a rotating or revolving red light, mounted on the dash of the police car, was burning; that this red light was observable and was observed by persons at an intersection some two and one-half or three and one-half blocks south of the collision; that Durham, by waving his flashlight, undertook to attract Stancil's attention and cause him to bear to his left and use the ample space available for his use; and that the area was illuminated by street lights.

It is unnecessary to review evidence tending to support Bethea's allegations to the effect Kenneth H. Stancil operated his mother's car "at a high and dangerous rate of speed," and "carelessly and recklessly and in wanton disregard of the rights and safety of others," and without keeping "a careful and proper lookout," and "violently collided with" the police car, and "knocked the police vehicle with great force into and upon" the Joyner car. Suffice to say, there was ample evidence to sustain the finding that Kenneth H. Stancil was guilty of actionable negligence. Incidentally, it is noted that Kenneth H. Stancil did not testify.

Appellants contend their motion(s) for judgment of nonsuit should have been granted. However, the evidence most favorable to Bethea tends to show the Stancil car was traveling in the center lane for northbound traffic; that the police car was stopped and standing in such manner that a substantial portion of the rear thereof was in said center lane; that there were no burning lights on the police car; and that the presence and position of said cars were not disclosed by street

lights. This evidence, independent of whether the Joyner and police cars were "parked" in violation of an ordinance of the Town of Kenly or in violation of G.S. 20-161(a), was sufficient to require submission of the issue as to appellants' actionable negligence. Hence, appellants' motion(s) for judgment of nonsuit were properly overruled.

In an early portion of the charge, the court instructed the jury as follows: "However, I charge you if you find from the testimony and by its greater weight, the burden being on the plaintiff to so satisfy you, that the defendant Durham did park his automobile or police automobile upon the public highway at night with its rear end extending into the middle or partly into the middle lane of Highway 301 *without its lights burning;* and that such act on his part was negligence and that such negligence was the proximate cause or one of the proximate causes combining and cooperating with the negligence of the defendant Kenneth H. Stancil, if you find that Kenneth H. Stancil was negligent then I charge you it would be your duty to answer that first issue YES." (Out italics.) It is noted that the court did not instruct the jury to answer the first issue, "No," if Bethea failed to satisfy the jury from the evidence and by its greater weight of all matters set forth in the quoted instruction.

Much later in the charge the court, with reference to the first issue, gave the following final instruction: "If you are satisfied from the testimony and by its greater weight, the burden being upon the plaintiff to so satisfy you that there was negligence on the part of Mr. Durham in the way and manner that he parked the Town's car on the night in question and that such negligence was one of the proximate causes of the injury complained of and was not insulated by the negligence of the other defendant, you would answer the first issue YES. If you fail to be so satisfied, it would be your duty to answer it NO."

Under said final instruction, it seems clear the jury was permitted to find appellants guilty of actionable negligence solely on the basis of "the way and manner" in which Durham "parked the Town's car on the night in question."

The action of the officers in causing Joyner to stop and the stopping of the police car, solely to enable the officers to determine whether Joyner had a driver's license, did not constitute *a parking* of an automobile or automobiles in violation of G.S. 20-161(a). *Skinner v. Evans,* 243 N.C. 760, 765, 92 S.E. 2d 209, and cases cited; *Meece v. Dickson,* 252 N.C. 300, 304, 113 S.E. 2d 578, and cases cited. A failure to display lights on a vehicle "parked or stopped upon a highway" in violation of G.S. 20-134 is a different matter. *Melton v. Crotts,* 257 N.C. 121, 125, 125 S.E. 2d 396. Nor did such action constitute *a parking* of an

automobile or automobiles in violation of an ordinance, if any, of Kenly relating to parking on Highway #301. As Stancil approached the scene of collision, there was available for his use the entire west lane for northbound traffic and (according to Bethea's evidence) all except three or four feet of the center lane. there was no other traffic that might have affected Stancil's operation.

Under the circumstances, we are of opinion, and so decide, that to establish the actionable negligence of appellants it was incumbent upon Bethea to satisfy the jury by the greater weight of the evidence not only that the police car was stopped in the way and manner Bethea contended but that it was standing without lights sufficient to disclose its presence and position. Hence, the said final instruction was incomplete, erroneous and prejudicial.

Bethea sustained serious injuries. His right leg was amputated. Since he suffered permanent disability, his life expectancy became a matter of major significance. Bearing thereon, the court instructed the jury as follows: "He (Bethea) contends . . . that at the time of the accident he was a man . . . 46 years old, and his counsel have introduced the mortuary tables of the State which (indicates he had a life expectancy of some 26 years). You have a right to consider that; that is not conclusive; you are not bound by that." Appellants excepted to the portion within parentheses.

The court did not read to the jury the provisions of G.S. 8-46 or state in substance the provisions thereof. No instruction was given as to factors to be considered in determining life expectancy nor was the jury advised of their duty to make such determination. For reasons stated in *Harris v. Greyhound Corporation,* 243 N.C. 346, 354, 90 S.E. 2d 710, the instruction relating to life expectancy is incomplete and erroneous. See *Starnes v. Tyson,* 226 N.C. 395, 397, 38 S.E. 2d 211, and cases cited.

For the reasons stated, appellants are awarded a new trial.

New trial.

MOORE, J., took no part in the consideration or decision of this case.

NORTH CAROLINA NATIONAL BANK v. CLARA McKAY STONE, INDIVIDUALLY; ELWOOD K. GOODSON, JOHN PAUL LUCAS, JR., EDWARD L. VINSON, DENNIS E. MEYERS, MARSHALL I. PICKENS, GEORGE C. SNYDER, JULIAN JACOBS, ROSS PUETTE, AND RICHARD E. THIGPEN, AS TRUSTEES OF MYERS PARK METHODIST CHURCH; MINT MUSEUM OF ART, INCORPORATED; UNITED COMMUNITY SERVICES IN CHARLOTTE AND MECKLENBURG COUNTY; ROTARY CLUB OF CHARLOTTE, NORTH CAROLINA, INCORPORATED; ROTARY INTERNATIONAL; CAROLINAS PIEDMONT SECTION OF THE AMERICAN CHEMICAL SOCIETY; QUEENS COLLEGE; THE TRUSTEES OF RANDOLPH-MACON WOMAN'S COLLEGE; CROSSNORE SCHOOL, INCORPORATED; THE CLEMSON AGRICULTURAL COLLEGE OF SOUTH CAROLINA; THE UNIVERSITY OF NORTH CAROLINA; TOWN OF PILOT MOUNTAIN; BOONVILLE BAPTIST CHURCH, INCORPORATED; MERCY HOSPITAL, INC.; THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY; JOHNSON C. SMITH UNIVERSITY, INC.; CHARLES J. WOLHAR, ARTHUR R. THOMPSON, AND THOMAS F. WHALEN, JR., TRUSTEES OF THE CHARLES H. STONE SCHOLARSHIP FUND OF THE PIEDMONT SECTION OF THE AMERICAN ASSOCIATION OF TEXTILE CHEMISTS AND COLORISTS; THOMAS W. EDWARDS AND WIFE, MARIE B. EDWARDS; LEONA STONE CUMMINGS AND HUSBAND, TAFT CUMMINGS; CONRAD HAROLD CUMMINGS; CHARLES GRAY CUMMINGS; CLARA B. CUMMINGS GREEN; PHYLLIS CUMMINGS MANNING; DONALD RAY CUMMINGS, A MINOR; ELMER STONE; ETHEL STONE CARTER; CHARLES E. STONE; CLARA JEAN STONE; ILA SUE WHITE, A MINOR; ILA STONE SPARKS AND HUSBAND, EVAN ABEDNEGO SPARKS; PAGE ALBERT SPARKS; PEGGY JEAN SPARKS STUDZINSKI; NANCE LEE SPARKS ZOUTES; THOMAS J. W. STONE AND WIFE, KATHRYN ROBERTS STONE; THOMAS JAMES STONE, A MINOR; CHARLES D. W. STONE AND WIFE, LUCILLE WAGONER STONE; ANNETTE STONE VESTAL; CHARLES A. STONE, A MINOR; BRENDA SUE STONE, A MINOR; JULIA DARLENE STONE, A MINOR; FRED POINDEXTER AND WIFE, VIOLA CHATMAN POINDEXTER; ELLA STONE POINDEXTER; GERALDINE SPARKS HANKS AND HUSBAND, ARVIL McARTHUR HANKS; NANCY ANN HANKS; ARVILENE IRENE HANKS, A MINOR; MELVIN HAYWOOD HANKS, A MINOR, AND MARY MOORE DAVENPORT.

(Filed 15 January, 1965.)

1. Wills § 60—

Under the present statute the failure of the surviving spouse to resign as personal representative during the time the right to dissent is determinable under the provisions of G.S. 30-1 cannot constitute a waiver of the right to dissent.

2. Same—

Where at the time of qualifying as executrix the widow did not know the value of the estate or the value of the provisions made for her in the will, her act in qualifying does not preclude her from dissenting from the will upon learning of the value of the estate and the value of its provisions for her.

BANK *v.* STONE.

APPEAL by defendants other than Mrs. Stone from *Campbell, J.*, June 15, 1964 Reguler Civil B. Session, MECKLENBURG Superior Court.

The North Carolina National Bank, as executor of the last will and testament of Charles H. Stone, instituted this civil action to have the Court determine the rights of the parties in the testator's estate and to give the plaintiff advice and direction with respect to its duties as executor and trustee. The parties waived a jury trial and agreed for the presiding judge to find the facts and to render judgment thereon.

After a full hearing at which all interested parties were represented by counsel, Judge Campbell made extensive findings of fact and concluded that Clara McKay Stone had filed a valid dissent to her husband's will and was entitled to share in his estate as in case of intestacy. All defendants except the surviving spouse excepted and appealed. The facts pertinent to decision will be discussed in the opinion.

Richard M. Welling for defendant appellants.

Cansler & Lockhart for defendant Clara McKay Stone, appellee.

Ray Rankin; Henderson, Henderson & Shuford by David H. Henderson for defendant appellees named in Item VIII of the Will.

HIGGINS, J. The appellants have abandoned all assignments of error except those relating to the validity of the dissent filed by Mrs. Stone, the surviving spouse. At the time of his death on October 20, 1963, the testator was 86 years of age. He was not survived either by lineal descendants or by parent. The surviving spouse was 77. The couple had been married for 56 years. Mr. Stone executed his will before witnesses on May 28, 1955. Thereafter, in his own handwriting, he executed 10 codicils, the last of which was dated June 24, 1963. The will and eight of the codicils were found in the testator's lock box in the plaintiff bank.

In Item V of the will, the testator provided: "(T)hat all the rest and residue of all property of which I may die possessed, . . . be divided into two equal parts, hereinafter referred to respectively as . . . Trust A, this Trust being for charitable, educational and religious purposes, and . . . Trust B, which I give, devise and bequeath as hereinafter set forth." All debts, costs of administration, and taxes are to be paid out of Trust B. Nephews and nieces are the main beneficiaries of that trust.

Item VII(a) of the will required the trustee to "distribute the net income (from Trust A) to my said wife, Clara McKay Stone, in monthly installments, unless . . . she notifies the Trustee in writing that the sums being paid her are in excess of her needs and specifies a smaller sum . . . in which event the Trustee shall pay . . . such lesser

sum." The will further provided that "in case of necessity" the trustee may, in its discretion, use the income from Trust B for the wife's benefit.

After the testator's death, a deputy clerk and Mrs. Stone met in the bank with its trust officers who opened Mr. Stone's safety deposit box which contained the will and eight of the ten codicils and "for the next two and one-half hours they arranged the securities and made a list of the contents of the locked box." In so far as the evidence discloses, no attempt was made to estimate the value of the stocks and bonds. The Trust Department of the Bank retained the will, the codicils, and all securities.

On November 1, 1963, the trust officers of the plaintiff presented the will and the codicils to the proper authorities, had the same probated in common form as the last will and testament of Charles H. Stone. The Bank qualified as executor of the estate and received letters testamentary in witness thereof. The surviving spouse was not present and did not participate in the probate proceedings. However, later on the same day (at whose call does not appear) she did go to the clerk's office, took the oath and received letters as co-executrix. At the time she appeared before the clerk to take the oath, it was her information and belief that her husband had left an estate of $500,000.00 to $600,000.00. She did not then know either the value of the estate or the value of the provisions made for her in the will. She had never had possession of the will or any of the securities. The will was already probated before she appeared to take the oath. She did not know and was not advised as to what provision was made for her in the will until 26 days after she had qualified. It was then that she found out for the first time that instead of an estate worth $500,000.00 to $600,000.00 as she had thought, Mr. Stone's estate was worth more than two million dollars. A later appraisal showed the value of the estate as of October 20, 1963, the date of Mr. Stone's death, to be $2,131,735.42, and the value of the provisions made for her in his will, added to the other property which passed to her outside the will but as a result of Mr. Stone's death, to be $331,424.45. On February 13, 1964, Mrs. Stone, having ascertained these values, resigned as executrix, surrendered her letters for cancellation, and filed her dissent.

The sole question involved and debated here is this: Did Mrs. Stone waive her right to dissent from her husband's will? The right to dissent now arises under G.S. 30-1. This right is limited to those cases in which provisions under the will when added to the value of property passing outside the will as a result of the testator's death (1) is less than the intestate share, or (2) is less than one-half the net estate if

neither lineal descendant nor parent survives. In this connection we take note that G.S. 30-1(c) provides a method by which to determine the value of benefits under the will and the benefits in case of intestacy, then provides, "If such personal representative and the surviving spouse do not so agree upon the determination and value, *or if the surviving spouse is the personal representative* . . . the clerk shall appoint one or more disinterested persons to make such determination and establish such value." (emphasis added.) From the foregoing, we conclude the personal representative need not resign from that position during the time the right to dissent is being determined. *Quaere:* If she does dissent, need she then resign?

The appellants do not consider in their brief the effect of G.S. 30-1 on the right of the surviving spouse (wife) to dissent from her husband's will. They rely as authority for denying her the right to dissent on the case of *Mendenhall v. Mendenhall,* 53 N.C. 287, and three subsequent cases which do not expressly overrule that case. We discuss them *in seriatim.* The cases are: *In Re Shuford's Will,* 164 N.C. 133, 80 S.E. 420; *In Re Meadows' Will,* 185 N.C. 99, 116 S.E. 297; and *Joyce v. Joyce,* 260 N.C. 757, 133 S.E. 2d 675.

The appellants insist the mere qualification as co-executrix is an irrevocable election to abide by the will and is a conclusive waiver of her right to dissent. The mudsill of this argument is found in *Mendenhall v. Mendenhall, supra:* "The act of qualifying as executrix and undertaking upon oath, to carry into effect the provisions of the will, is irrevocable. She cannot now renounce and discharge herself from the duties thereby assumed. This is settled law. It follows that she thereby waived any right, which she before had, which is inconsistent with the act done and the duties assumed." At the time of this decision the executor took as his own that which was not otherwise disposed of by the will. The law did not permit a resignation. Now the executor holds property as trustee. He may resign and upon so doing is required to account. We hold the rule thus stated is too harsh and inflexible to fit modern times or business conditions. The decision is more than 100 years old. At the time it was rendered the law permitted a husband to flog his wife, provided he did not use a switch bigger than his finger. The length was not considered of major importance.

In *Shuford,* the widow qualified but later found out that an agreement with the testator's children could not be carried out in a manner which would protect the executors. She was permitted to enter her dissent to the will. In *Meadows,* the question arose on the application of the widow to have the court recall the letters issued to her and to enable her to file a dissent to her husband's will. On appeal from the clerk al-

lowing the petition, the Superior Court Judge held that by qualifying as the personal representative the widow renounced her claim of dower and year's allowance. This Court reversed, sending the case back for a hearing on the petition.

In *Joyce,* the surviving spouse (wife) qualified as executrix and at the same time two of the testator's sons qualified as executors. Five months and seven days thereafter the widow filed a dissent to the will and resigned as executrix. The Superior Court found the surviving spouse was 75 years of age, in bad health, and at the time she qualified she did not know the extent of the estate "until she had been placed in the position of co-executrix . . . she did not seek or receive the advice of an attorney concerning the will, or her rights and obligations under it."

In *Joyce,* after stating the general rule that where a widow offers a will for probate and qualifies as executrix thereunder and enters upon the duties of her office or knowingly takes property thereunder, she may not afterwards be allowed to resign and dissent from the will, nevertheless, the Chief Justice, as was done in *Shuford* and *Meadows,* found escape from the rigors of the rule in *Mendenhall* by saying: "The statute G.S. 30-1 allows a widow six months from the probate of the will of her husband within which to dissent. 'Clearly that time is allowed by the law to enable the widow to make an examination in to the value of the estate, the debts and liabilities, and for her to come to an intelligent conclusion as to the course she should pursue under all the circumstances that surround her.' "

In *Bank v. Barbee,* 260 N.C. 106, 131 S.E. 2d 666, Sharp, J., has reviewed the many decisions of this Court on the question here involved: "In the vast majority of jurisdictions the rule is that merely qualifying as executor or administrator c.t.a. is not sufficient standing alone, to constitute an election to take under the will but is a factor tending to establish such an election which must be considered in conjunction with all the other circumstances. 57 Am. Jur., Wills, § 1539; Anno. — Wills — Election by Beneficairy, 166 A.L.R. 316, 320."

At the conclusion of the hearing in this case, Judge Campbell found facts, the substance of which is discussed herein. He concluded the surviving spouse had filed a valid dissent to the will. The conclusion was supported by the findings of fact and by the legal principles herein discussed. The judgment is

Affirmed.

GEORGE C. BELL v. SMITH CONCRETE PRODUCTS, INC.; PRESTRESSED CONCRETE, INC.; CATHARINE H. SMITH; RALPH L. WOOTEN; JOHN E. KELLY; MABEL E. HARGETT; AND MARGARET B. MARROW, EXECUTRIX OF THE ESTATE OF T. F. MARROW, JR., DECEASED.

(Filed 15 January, 1965.)

1. Specific Performance—

Breach of contract to sell personal property ordinarily gives rise to an action for damages, and an action for specific performance will not lie unless the injured party cannot be adequately compensated by a monetary payment.

2. Contracts §§ 1, 6—

A stipulation in a contract giving each party the election to continue to perform or to pay a specified sum for terminating the contract, is valid and enforceable.

3. Contracts § 12—

Evidence of prior negotiations of the parties to a written agreement may be competent for the purpose of throwing light on the intent of the parties.

4. Specific Performance—

A contract for the sale of unique personal property may not be specifically enforced when the language of the agreement, considered in the light of the prior negotiations between the parties, discloses the intent that each party should have the option of paying a designated sum as liquidated damages instead of completing performance.

5. Tender—

Where the purchaser in a contract for the sale of unique personal property, asserting his right to specific performance, refuses to accept a tender by the seller of the amount of liquidated damages specified in the contract, such refusal does not discharge the seller's obligation to pay the liquidated damages, and judgment for such damages, and not a judgment of nonsuit, should be entered upon the purchaser's failure to make out his case for specific performance.

APPEAL by plaintiff from *Fountain, J.*, February 1964 Session of LENOIR.

Plaintiff seeks, by this action, specific performance of defendants' obligation to sell him the "business and assets" of corporate defendants for the price and on the terms set out in his "proposal for purchase," dated November 14, 1962, accepted by corporate defendants and agreed to by individual defendants on November 19, 1962.

At the conclusion of the evidence, the court allowed defendants' motion to nonsuit. Plaintiff excepted and appealed.

Jones, Reed & Griffin for plaintiff.

LaRoque, Allen & Cheek, Charles Read Vincent and Wallace & Langley for defendant appellees.

RODMAN, J. As a general rule, the remedy for a breach of contract for the sale of personal property is an action at law, where damages are awarded. *Rodgers v. Brock,* 156 N.C. 401, 72 S.E. 820; 17A C.J.S. 1008-9. To invoke equitable jurisdiction, it must appear that the party injured by the breach can not be adequately compensated by monetary payment. If that be so, specific peformance may be decreed. 49 Am. Jur. 6; 81 C.J.S. 408. Specific performance is decreed only when necessary to require one to do that which in good conscience he ought to do without court compulsion.

Business survives because it is normal for contracting parties to comply with their respective obligations. The normal response to an asserted breach is: "My obligation does not go to the extent you assert." To assure performance, it is not unusual to require a performance bond or to stipulate what sum will compensate for a loss resulting from a breach. In some situations the negotiating parties may forsee conditions which may make it desirable for them to have an election whether they will continue to perform or pay compensation for the privilege of terminating the contract. Such a stipulation in no way impairs the freedom to contract. It is valid and will be enforced. *Bradshaw v. Millikin,* 173 N.C. 432, 92 S.E. 161; Annotations, 32 A.L.R. 584; 98 A.L.R. 887; Specific Performance, 49 Am. Jur. § 43; 81 C.J.S. 51.

The rights and obligations of the parties to this litigation are fixed by plaintiff's "proposal for purchase" accepted by defendant corporations. That document must be interpreted to ascertain the extent of the rights and obligations of the respective parties. A proper interpretation can not be made without understanding the situation of the parties. This factual background sheds light on what the parties intended to accomplish. That intent is the heart of the contract. *Realty Co. v. Batson,* 256 N.C. 298, 123 S.E. 2d 744; *Stanley v. Cox,* 253 N.C. 620, 117 S.E. 2d 826; *Power Co. v. Membership Corp.,* 253 N.C. 596, 117 S.E. 2d 812; *De Bruhl v. Highway Commission,* 245 N.C. 139, 95 S.E. 2d 553; 17A C.J.S., Contracts, § 321.

Plaintiff and defendants offered, without objection, evidence relating to the situation of the parties, explanations made prior to delivery, of different portions of the tentative draft, and the reasons given for refusing to negotiate further.

These facts appear from the evidence: Smith Concrete Products, Inc. (Smith) and Prestressed Concrete Products, Inc. (Prestressed) are domestic corporations. Their offices and plants are located in Le-

noir County. Smith manufactures prestressed concrete blocks and miscellaneous building materials. Prestressed "manufactures a miscellaneous molding line of concrete products." Smith and Prestressed engage in the same general type of business. The plants of the two corporations are on adjoining properties. Catherine H. Smith, Ralph L. Wooten, John E. Kelly, Mabel E. Hargett, T. F. Marrow, Jr., owned, in the fall of 1962, all of the capital stock of both Smith and Prestressed. They constituted the Board of Directors of the corporations. Mrs. Smith owned a majority of the stock in each corporation. (The record does not disclose what percentage she owned, but it may be inferred she owned substantially more than a majority.) She acquired at least a portion of her stock from her deceased husband. She was president of each corporation.

All the negotiations leading to plaintiff's offer to purchase were with Mrs. Smith. She and her accountant wished to fix the fair value of her stock in the corporations, so that proper estate tax returns might be made. A contract serving Mrs. Smith's interest might be prejudicial to the remaining stockholders.

The corporations had earned a good name in the trade by the quality of their products. The process used by Smith and Prestressed differs from that used by other concrete companies.

Plaintiff moved to Kinston in the summer of 1962. He then learned that Mrs. Smith was interested in selling her stock in the corporations, or causing the corporations to sell their assets. He then asked for and was given financial statements for a period of five years. After a study of these statements, he informed Mrs. Smith that he was interested in purchasing. She suggested that he confer with Mr. Mitchiner, her attorney and financial adviser in these matters. Plaintiff had several conferences with Mr. Mitchiner and, with Mrs. Smith's consent, employed Mr. Mitchiner to assist him in preparing a plan which he would submit to Mrs. Smith as a basis on which he would purchase the corporate properties. Plaintiff examined the proposal as drafted by Mitchiner. He indicated changes which he desired to make. Thereafter, plaintiff, Mitchiner and Mrs. Smith met in plaintiff's office to consider the proposal as drafted by Mitchiner, and the amendments or changes which plaintiff desired to incorporate. The proposal, as then drafted, called for a sale of "the business and assets" of defendant corporations to plaintiff "or one or more corporations organized by him." The sale was to be made as of November 30, 1962. The purchase price would be the net book value of the assets as of November 30, 1962. (There is nothing in the record to indicate the approximate value of the assets and liabilities.) Plaintiff proposed to pay $50,000 in cash, the

balance to be evidenced by a note, or notes, bearing interest at 5% per annum, to be amortized over fifteen years, the first five payments to be made annually, the first on December 1, 1964. The balance was to be paid in 120 monthly installments. Payments of the note, or notes, would be secured by mortgage or deed of trust "on all the assets conveyed, including a valid assignment of leasehold properties."

The offer expressly provided: As additional security, purchaser would be required to place all of his stock in escrow, but he would retain the exclusive right to vote the stock unless and until there was a default in the payment of some installment. "Adequate protective provisions shall be made in such instruments against bankruptcy, receivership, wasting of assets and/or otherwise which may prejudice such securities to the sellers."

"This offer to purchase shall exist and continue for a period of 10 days from the date hereof, and if not accepted within that period the same shall discontinue and be of no force and effect, whereupon the good faith deposit herewith attached shall be returned. However, if the same is accepted within that time, and for any reason other than death or physical disability to manage and operate the business, the purchaser shall fail to go through with or complete the purchase accordingly, such deposit herewith made shall be retained by the sellers as liquidated damages."

When plaintiff's first draft was discussed, Mrs. Smith inquired as to the meaning of the quoted paragraph relating to liquidated damages. She testified: "I asked him what it was and he explained to me what it was and Mr. Bell explained to me what it was, and Mr. Mitchiner, in my defense, felt that this gave Mr. Bell the privilege of withdrawing before December 1st if he so desired, but it did not give me any privilege. So that is written in here in long hand to be added to the next proposal * * * and that if I withdrew before November *(sic)* 1st, Mr. Bell had probably lost two weeks of work out there, had lost that amount of his time and they thought that [$2,000] was adequate compensation for that and he agreed to it, and Mr. Mitchiner had that put into the proposal. * * * [T]hey told me if for any reason I wanted to withdraw before December 1st they would act as they agreed, that I had the privilege of doing so by forfeiting my two thousand dollars."

The amendment to which Mrs. Smith refers, giving her the privilege "to withdraw before December 1st," incorporated in the draft submitted to and accepted by defendants, comes immediately after the provision giving plaintiff an option to pay liquidated damages. It reads: "Provided, however, that if sellers fail to go through with or

complete sale to purchaser, they will pay to purchaser as liquidated damages the sum of $2,000."

Defendant corporations were indebted to Small Business Administration. Incorporated in the final draft submitted to and accepted by defendants is this provision: "It is further understood that if the purchaser cannot remove the lien and agreements now existing with the Small Business Administration, the failure of the sellers to remove the same or secure SBA's consent to the purchase, such failure shall not give rise to the payment or forfeiture of the aforesaid $2,000. or $25,000. liquidated damages."

Mr. Mitchiner, who acted as scrivener, testified: "[W]e had discussed at those two meetings the liquidating damage clause, and it was thoroughly understood by both of them that this agreement here, not agreement but proposal by Mr. Bell, was not a sales agreement; that if either of them wanted, or for any reason, failed to go through with the proposal after it was accepted, that the twenty-five thousand and two thousand dollars was to be the damages, which was felt to be what each side would have for their damages for failure to go through with the final sale, which was to take place on November 30th. That's what I understood, and I attempted to put it in here to that effect, and I also, in my precarious position of representing the seller, or proposed seller, Mrs. Smith and the companies, I wanted it understood, and we did have it understood, that this proposal did not incorporate the sales agreement, because there were so many things that had to be done." The last sentence in the above quotation manifestly refers to the concluding paragraph of plaintiff's proposal, which reads: "This offer or proposal is not intended to be all-inclusive as the terms and provisions of the entire purchase and security agreements, but to provide a basic understanding and agreements of such terms, conditions and provisions. As a good faith deposit, the purchaser has hereto attached and delivered herewith his check in the amount of $25,000. to support the offer and proposals herein made."

Defendants accepted plaintiff's proposal on November 19th. It is noteworthy that plaintiff testified that on that very day Mrs. Smith expressed "a hesitancy about selling the business to me." That hesitancy was based on the reluctance of defendants Kelly and Wooten to go along with the proposal. The directors of the corporations, or some of them, were disturbed about their continued employment and the ability of the corporations to continue to operate successfully without qualified personnel, experienced in production and sales. They did not challenge plaintiff's integrity or general business capacity, but main-

tained he had no experience in businesses similar to that done by corporate defendants.

A conference was held on November 29th for the purpose of agreeing on final details. Mrs. Smith then reminded plaintiff of the fact that on the 19th she had referred to the continued employment of trusted personnel, that she felt such continued employment essential to the success of the business, thereby assuring payment of the purchase money notes. Failing to secure satisfactory assurance with respect to personnel, she terminated the negotiations. The check for $2,000, payable to plaintiff, was tendered and refused.

Plaintiff, in describing the final conference, said: "Mr. Mitchiner told me that Mrs. Smith had decided not to sell the business, and related her reason for this was her concern over the fact that people would leave the business if I purchased it. After the conversation with Mr. Mitchiner the two of us went into the room where Mr. Sitterson was sitting with Mrs. Smith, and Mr. Mitchiner then went over the conversation he had had with me. I asked Mrs. Smith if that was her decision and she said 'yes,' and she briefly stated what Mr. Mitchiner had said, and I asked Mrs. Smith if that was her final decision and she said 'Yes' and then I left."

Unless we are to totally disregard uncontradicted testimony, it is clear that the parties understood that either, upon the payment of a specified sum, could be relieved of any obligation to the other. Because defendants had the right to terminate, plaintiff is not entitled to specific performance. He is, however, entitled to the sum fixed in the contract. His refusal to accept defendants' check does not discharge corporate defendants' obligation to pay. The court, instead of allowing the motion to nonsuit, should have entered judgment in favor of plaintiff against corporate defendants for two thousand dollars, as stipulated in the contract. The judgment will be modified to conform to this opinion.

Modified and affirmed.

STATE HIGHWAY COMMISSION v. E. R. CONRAD AND SALLY D. CONRAD.

(Filed 15 January, 1965.)

1. Eminent Domain § 6—

Where the parties consent that use as a residential subdivision is the highest and best capability of the land condemned, the court may admit in evidence a proper map for the purpose of explaining the testimony of the

witnesses in this regard, but the exclusion of a drawing showing the division of the tract into a maximum number of lots without regard to topography or the exigencies of a practical subdivision, will not be held for error, certainly when the jury is permitted to view the property and observe for itself its nature and location.

2. Same—

The court properly refuses to permit a witness to testify that he arrived at the value of the tract condemned by multiplying the maximum number of lots into which the tract could be divided by a stipulated amount per lot, since such computation fails to take into account the cost of improvements, advertising, selling and holding the land prior to sale, which factors cannot be ignored and are too conjectural to be computed.

3. Same—

Where a real estate expert testifies that he had personal knowledge of the prices paid in the voluntary sales of comparable tracts, such testimony is competent as substantive evidence of the value of the tract in question.

4. Same—

A real estate expert may testify as to his opinion of the value of the land in question even though his opinion be based in part on hearsay knowledge of the prices paid in voluntary sales of similar tracts in the vicinity, and he may testify to this effect without testifying as to what such sale prices actually were, since such testimony is not for the purpose of showing what such other prices were but to show how the witness arrived at his opinion of value.

5. Same—

The prices paid at voluntary sales of land similar to the land condemned at about the time of the taking are admissible as independent evidence of value of the land taken, and it is within the sound discretion of the trial judge to determine whether the facts are sufficiently similar to render the testimony admissible as evidence of the value of the land taken.

APPEAL by defendants from *Johnston, J.*, November 18, 1963, Session of FORSYTH.

Proceedings for condemnation of an easement in perpetuity for right of way for highway purposes.

Defendants owned a tract of land containing 5.3 acres situate in Winston Township, Forsyth County. On 7 October 1960 plaintiff, State Highway Commission, filed its complaint, declaration of taking and notice of deposit. The easement taken covers 2.12 acres of defendants' tract, and is a part of highway project No. 8.28307. Commissioners of appraisal were appointed on 2 July 1962 and filed their report on 17 July 1962. Plaintiff excepted to the damages determined by the Commissioners and requested a trial by jury in superior court.

The jury awarded $8,647 damages and judgment was entered accordingly. Defendants appeal.

Attorney General Bruton, Assistant Attorney General Lewis and Trial Attorney Hudson for plaintiff.

Deal, Hutchins and Minor and Edwin T. Pullen for defendants.

MOORE, J. The principal assignments of error relate to the competency of certain evidence.

Defendants' 5.3 acre tract, before the taking of the 2.12 acre right of way, was triangular in shape and the topography was irregular with undeveloped woodland on the south side which dropped off sharply to a bottom area at a creek on the north side. At the eastern boundary a small area around an abandoned house site had previously been cleared. The right of way runs northeast and southwest over and across the tract, leaving only .15 of an acre north of the right of way, and 3.18 acres south of the right of way.

W. Douglas Conrad, son of defendants, testified that the highest and best use to which the land was adaptable immediately before the taking was for residential subdivision, and before the taking he had "worked up a development of this property for residential purposes by making . . . maps with respect to it, with the idea of going to the City for permission to redevelop it into residential lots." He produced at the trial a map he had made, showing a street down the center, running generally east and west, with lots on both sides — 14 lots in all. He stated that it was "made prior to the time of condemnation," and it illustrates his testimony "with respect to the possible division of the property for residential purposes."

The property had not been actually subdivided on the grounds, no streets or lots had been laid out, and no improvements had been made. It was raw land in its original undeveloped state. However, there were residential subdivisions adjoining and nearby.

The witness stated that the value of the property before the taking of the right of way was $83,250. When asked by defendants' counsel how he arrived at this value he stated: "Well, if we multiply, if we take 14 times, or rather 9 times a minimum figure of 7,500 . . ." The court sustained objection to this last quoted testimony, and also excluded the map. All further testimony with respect to the number of lots into which the subject land could be divided, offered as a basis for determining value, was likewise excluded.

Defendants insist that (1) "the evidence offered . . . with respect to the number of residential lots that could be placed in the tract . . . was competent in explaining . . . before and after valuation," and (2) the map should have been admitted to illustrate the testimony of

witnesses as to the highest and best available use of the land, and that it is capable of subdivision.

The judge did not strike the testimony of the witness that the value of the property before the taking was $83,250, nor did he strike the testimony of any of defendants' witnesses as to value. The ruling of the court was to the effect that a designated number of lots multiplied by a price per lot is not a proper basis for determining value of undeveloped land which is suitable for subdivision. The ruling is correct. It is apparent that defendants intended to get before the jury a number of lots in a theoretical subdivision and a price per lot, and by the process of multiplication fix a value upon the tract as a whole. There had been no subdivision; the property was raw undeveloped land. The jury's inquiry was the fair market value of the property as a whole in its condition at the time of the taking, for future residential subdivision and development. All parties agreed that its highest and best capability was for residential subdivision.

"The measure of conpensation is not . . . the aggregate of the prices of the lots in which the tract could be best divided, since the expense of cleaning off and improving the land, laying out streets, dividing it into lots, advertising and selling the same, and holding it and paying taxes and interest until all of the lots are disposed of cannot be ignored and is too uncertain and conjectural to be computed. . . . The measure of compensation is the market value of the land as a whole, taking into consideration its value for building purposes if that is its most available use." 4 Nichols on Eminent Domain, 3d Ed., § 12.3142(1), pp. 176-181. The fair market value of undeveloped land immediately before condemnation is not a speculative value based on an imaginary subdivision and sales in lots to many purchasers. It is the fair market value of the land as a whole in its then state according to the purpose or purposes to which it is best adapted and in accordance to its best and highest capabilities. It is not proper for a jury to consider an undeveloped tract of land as though a subdivision thereon is an accomplished fact. Such undeveloped property may not be valued on a per lot basis. *Barnes v. Highway Commission,* 250 N.C. 378, 109 S.E. 2d 219; *Light Co. v. Moss,* 220 N.C. 200, 17 S.E. 2d 10; *Land Co. v. Traction Co.,* 162 N.C. 503, 78 S.E. 299.

Under proper circumstances a map of a proposed subdivision of undeveloped land is admissible to illustrate and explain the testimony of witnesses as to the highest and best available use of the property and that it is capable of subdivision. *Barnes v. Highway Commission, supra; Ellis v. Ohio Turnpike Commission,* 124 N.E. 2d 441 (Ohio 1955); *Campbell v. City of New Haven,* 125 A. 650 (Conn. 1924); *Wichita*

Falls & N. W. Ry. Co. v. Holloman, 114 P. 700 (Okla. 1911). But where such map is admitted in evidence, the inclusion of a price per lot noted thereon or by testimony of witnesses is incompetent and should be excluded. *Arkansas State Highway Commission v. Witkowski,* 364 S.W. 2d 309 (Ark. 1963); *Thornton v. City of Birmingham,* 35 S. 2d 545 (Ala. 1948). Such map should not be admitted where it is calculated to mislead the jury into allowing damages for improvements not in existence. *Rothenberger v. City of Reading,* 146 A. 104 (Pa. 1929). The trial court is clothed with discretion to admit or exclude such evidence in accordance with the particular circumstances presented. *Roy v. State,* 191 A. 2d 522 (N.H. 1963).

Under the circumstances of the instant case, the exclusion of the map was not error, for the following reasons:

(1). There was no contest as to the best and highest capability of the property. There was no contention by the plaintiff that it was not suitable for residential development or that it was incapable of practical subdivision. These matters were repeatedly conceded.

(2). The map was prepared by defendants' son. There was no showing that he is a civil engineer or that it was made from an actual survey. It appears to be a purely theoretical drawing designed to show a maximum number of lots. From the description given by witnesses of the nature of the terrain, it is apparent that the map does not take into consideration the contour of the land and does not purport to be a practical subdivision according to good engineering practices. See *Arkansas State Highway Commission v. Witkowski, supra; United States v. .15 of an Acre of Land,* 78 F. Supp. 956 (S.D., Me. 1948); *Wichita Falls & N. W. Ry. Co. v. Holloman, supra.*

(3). The jury was permitted to view the property and the boundaries were pointed out and the nature and location of the property observed.

Ayden v. Lancaster, 197 N.C. 556, 150 S.E. 40, involves elements not present in the case at bar, and is not authority for defendants' position. See *Barnes v. Highway Commission, supra* (250 N.C. 378, 389).

Defendants also assign as error the admission of certain evidence offered by plaintiff. Several expert real estate appraisers testified that they based their opinions of the value of the subject property in part on voluntary sales of comparable undeveloped lands. They described and gave the locations of the lands involved in these sales — one of the tracts adjoined defendants' property. They were permitted to say that they knew the sales prices. The witnesses who did not have first-hand

knowledge of the sales were not permitted to state the prices paid. One witness, Lewis Hubbard, who testified that he knew of his own knowledge the sales prices of two of the tracts was permitted to state the amounts paid per acre.

Defendants contend that the testimony of the experts was incompetent and prejudicial (1) because it was based on hearsay and could not be considered as substantive evidence, and (2) because the lands involved in the sales were not comparable to the *locus in quo*.

"A witness who has knowledge of value gained from experience, information and observation may give his opinion of the value of specific real property. . . ." Stansbury: North Carolina Evidence, 2d. Ed., § 128, p. 300. "The fact that certain elements are not independently admissible in evidence . . . does not bar their consideration by an expert witness in reaching an opinion. Thus, it has been said: 'An integral part of an expert's work is to obtain all possible information, data, detail and material which will aid him in arriving at an opinion. Much of the source material will be in and of itself inadmissible evidence but this fact does not preclude him from using it in arriving at an opinion. All of the factors he has gained are weighed and given the sanction of his experience in his expressing an opinion. It is proper for the expert when called as a witness to detail the facts upon which his conclusion or opinion is based and this is true even though his opinion is based entirely on knowledge gained from inadmissible sources.' (*People v. Ganghi Corp.*, 194 C.A. (2d) 427, 15 Cal. Rep. 25)." 5 Nichols on Eminent Domain, 3d. Ed., § 18.42(1), p. 256. Accord: *State v. Arnold*, 341 P. 2d 1089 (Ore. 1959).

"Dealing with direct testimony, it has been held that in the determination of fair market value of property taken in a condemnation case, evidence of price for which similar property has been sold in the vicinity may be admissible upon two separate theories and for two distinct purposes. First, such evidence may be admissible as substantive proof of the value of the condemned property, or secondly, it may be admissible, not as direct evidence of the value of the property under consideration, but in support of, and as background for, the opinion testified to by an expert as to the value of the property taken." 5 Nichols on Eminent Domain, 3d Ed., § 21.3(2), p. 437. See also 32 C.J.S., Evidence, § 546(117), p. 445.

Witness Hubbard had personal knowledge of two sales of similar property and the prices paid. His testimony with respect to these sales and prices was competent and admissible as substantive proof of the value of the condemned property.

The challenged testimony of the other expert witnesses was not incompetent as hearsay. These witnesses, on direct examination, described the similar properties and stated they knew the sales prices, but not at first-hand, and that their opinions as to the value of the condemned property were based in part thereon. They did not state what the sales prices of the similar properties were. An expert witness may testify as to the basis of his opinion because it is not offered to show the truth or falsity of such matters, but how the witnesses arrived at a value. It is therefore not hearsay evidence. Stansbury: North Carolina Evidence, 2d Ed., § 138, pp. 335-337; *State v. Oakley,* 356 S.W. 2d 909 (Tex. 1962). The witness may be cross-examined fully with respect to the matters he took into consideration in arriving at a value of the condemned property.

It is settled law in North Carolina that the price paid at voluntary sales of land similar to condemnee's land at or about the time of the taking is admissible as independent evidence of the value of the land taken. *Barnes v. Highway Commission, supra; Morrison v. Watson,* 101 N.C. 332, 7 S.E. 795. It is within the sound discretion of the trial judge to determine whether there is sufficient similarity to render the evidence of such sales admissible. *Highway Commission v. Coggins,* 262 N.C. 25, 136 S.E. 2d 265; *Highway Commission v. Pearce,* 261 N.C. 760, 136 S.E. 2d 71; *Barnes v. Highway Commission, supra.* We are of the opinion, after careful consideration of the evidence in the record, that the court did not abuse its discretion in determining that the undeveloped lands hold in the vicinity in 1958 and 1960 were sufficiently similar to the condemned land to render the voluntary sales thereof admissible as evidence of the value of the condemned land.

The other assignments of error have been carefully considered. In them we find no error sufficiently prejudicial to require a new trial. They present no new or unsettled questions of law.

No error.

STATE v. CLIFFORD BAXTER MORGAN.

(Filed 15 January, 1965.)

1. Indictment and Warrant § 9—

A warrant sufficiently charging defendant with an offense will not be quashed because it fails to sufficiently charge defendant's prior conviction of a like offense for the purpose of increased punishment.

2. Criminal Law § 111—

Where it appears that one of defendant's witnesses was a personal friend, another had known him for years, and that defendant was a business customer of a third, and another had worked together with defendant, a charge in the correct form that the jury should scrutinize the testimony of interested witnesses will not be held for prejudicial error, the relationships which might cause bias being infinite in number.

3. Same—

In this prosecution for driving while under the influence of intoxicating liquor, the record disclosed that a police officer observed defendant driving for some distance and identified defendant as the man he had seen driving. An instruction to the jury that an officer of the witness' experience is trained to make observations which would enable him to identify people and that he had identified defendant, *is held* not prejudicial under the facts of this case, there being ample evidence in the record to sustain the verdict.

4. Criminal Law § 131—

A sentence within the limits allowed for a first offense will not be disturbed on the contention that the warrant failed to charge the requisites of a prior conviction and that the court might nevertheless have taken the previous conviction into consideration in fixing punishment.

APPEAL by defendant from *Mintz, J.*, May Session 1964 of WAKE.

The defendant, Clarence Baxter Morgan, was arrested on 20 May 1963, in White Oak Township, Wake County, North Carolina, and charged in a warrant issued by the Recorder's Court at Apex, North Carolina, for unlawfully and wilfully operating a motor vehicle upon the public highways of the State of North Carolina, while under the influence of intoxicating liquor or narcotic drugs, this being his second offense (prior conviction 18 March 1958), contrary to the form of the statute, *et cetera*.

The defendant was tried in said Recorder's Court and found guilty and given a sentence of twelve months on the roads, suspended upon payment of a fine of $300.00 and costs.

Defendant appealed to the Superior Court of Wake County where he was tried and convicted upon the original warrant.

Prior to the entry of a plea, the defendant moved to quash the warrant on the ground that it did not sufficiently charge the second offense of operating a motor vehicle while under the influence of intoxicating liquor. The motion was denied. The defendant entered a plea of not guilty and the jury was empaneled. At this point, the defendant entered into a stipulation to the effect that on 1 November 1957 he was convicted in the Superior Court of Wake County for operating a motor vehicle upon the public highways of North Carolina while under the

influence of intoxicating beverages, and that the present charge is his second offense.

The State's evidence tends to show that on 20 May 1963, G. L. Swanson, State Highway Patrolman, was off duty, driving a private car, and was traveling on U. S. Highway 64, just east of Apex, North Carolina, when he saw the defendant driving a 1962 Ford automobile. Defendant pulled into the highway in front of the Patrolman, drove with his wheels on the right shoulder, during which time the Patrolman passed the defendant and watched the movement of defendant's vehicle in the rear-view mirror as defendant's car traveled across the road onto the left-hand shoulder and continued to weave from one side to the other. The Patrolman pulled off and stopped on the right-hand side of the road, waited for the defendant to overtake and pass him, then proceeded to follow defendant's vehicle for several miles. There were two other persons in the defendant's automobile. During the time the Patrolman followed defendant's vehicle, it continued to weave across the road, going off on the left-hand shoulder and then onto the right shoulder, forcing oncoming vehicles to pull off and stop. The Patrolman pulled alongside defendant's vehicle, blew his horn and attempted to stop him, but defendant increased his speed to 65 miles per hour — and over at times — and, finally, after several miles, the defendant pulled into a store near the county line, known as the Allen Norwood Store. The Patrolman again observed that defendant was driving the car. The Patrolman then called the State Highway Patrol, by phone, and as a result of this telephone call, State Highway Patrolman J. F. Huffine proceeded to defendant's home where the Patrolman found defendant's automobile parked in his front yard. Defendant was lying on the front seat of the vehicle with his head towards the steering wheel, his body on the right-hand side. Evidence further shows that Officer Huffine talked with defendant. Defendant twice told the officer that he had been riding around looking at tobacco; that he had been drinking, and that he had been driving the automobile.

The defendant did not take the stand, but offered several witnesses who knew the defendant and who had seen him during the morning of 20 May 1963. Their testimony, in summary, was to the effect that the defendant was not drunk and that Reid Holland was driving the automobile for the defendant.

The jury returned a verdict of guilty as charged. The court imposed a sentence of six months and assigned defendant to work under the supervision of the State Prison Department. With the consent of defendant, the sentence was suspended upon condition that the defendant

pay a fine of $500.00 and costs and not drive a motor vehicle for two years.

The defendant appeals, assigning error.

Attorney General Bruton, Deputy Attorney General Harry W. McGalliard, Asst. Attorney General James F. Bullock for the State.

Bernard A. Harrell for defendant.

DENNY, C.J. The defendant assigns as error the refusal of the court below to quash the warrant in that it does not charge a prior offense as required by G.S. 15-147.

The statute only requires that for an offense which, "on the second conviction thereof is punished with other or greater punishment than on the first conviction, it is sufficient to state that the offender was, at a certain time and place, convicted thereof; without otherwise describing the previous offense * * *." The warrant herein purports to give the time but not the place where the former offense was committed.

The State concedes that the warrant fails to allege facts sufficient to charge a second offense in order to subject the accused to the higher penalty pursuant to G.S. 20-179 for a second offense. Even so, the failure to adequately charge a prior offense did not prevent a conviction upon the alleged violation of G.S. 20-138, charged in the warrant. *S. v. Stone,* 245 N.C. 42, 95 S.E. 2d 77.

This assignment of error is overruled.

The appellant assigns as error the following portion of the charge to the jury: "* * * A number of these witnesses who testified here or some of them have testified, at least one or two, that the defendant was a customer of theirs, in one case not a regular customer and another case the witness testified he and the defendant were in the practice of trading or substituting, accommodating each other with the exchange of farm machinery in the operation of their farms * * *. The interested witness rule that I would call to your attention is that the law does not reject the testimony of interested witnesses when they testify on behalf of the defendant but the law says that if they are interested you should carefully scrutinize their testimony in the light of such interest as they may have on the theory that an interested person, interested in the outcome of one for whom they are testifying, may be interested in the outcome of your verdict but after you examine and closely scrutinize their testimony in the light of their interest in the case, if you find the witness is still telling the truth, you will give that testimony the same weight and credibility you would that of any disinterested witness."

The appellant in his brief concedes that the interested witness rule was charged in the proper language; that the defendant's exception is not based on an improper or incomplete charge but upon the premise that the court should not have charged at all with respect to interested witnesses.

One of defendant's witnesses testified to the effect that he was a personal friend of the defendant. Another witness said he had known the defendant for three or four years, that he was in the oil business and the defendant was a customer of his; that defendant's sister lives next door to his station. Defendant's witness Anderson testified that he and the defendant worked "together some on farms"; that they did not "visit much socially, sometimes once a week."

In *S. v. Faust,* 254 N.C. 101, 118 S.E. 2d 769, Moore, J. discussed the relationships which might cause bias in a witness as follows: "It does not appear that the Court had any particular relationship exclusively in mind. Bias need not prevail over the obligation of a solemn oath in any relationship, however close, of a witness to an interested party or to a cause. But experience teaches that bias because of relationship often colors the testimony of witnesses.

"The relationships which might cause bias are legion. 'Any sort of connection which is perceived or imagined between two or more things, or any comparison which is made by the mind, is a relation.' Webster's New International Dictionary, 2d Ed. (1936), p. 2102. The law recognizes relationships far beyond blood and marriage. 'Although relationship to a party should not discredit the witness, still this is a circumstance which may be weighed by the jury. So also social and business relations, intimacy or hostility, and other circumstances which are creative of bias may properly be considered.' Jones on Evidence, 5th Ed. (1958), Vol. 4, § 991, p. 1867. 'The range of external circumstances from which probable bias may be inferred is infinite * * *.' Wigmore on Evidence, 3rd Ed. (1940), Vol. III, § 949, pp. 499-504. *State v. Nat,* 51 N.C. 114; *People v. Cowan* (Cal. 1905), 82 P. 339."

The appellant seeks to sustain this assignment of error on the ground that the court was not justified in charging the jury with respect to interested witnesses, and, therefore, such charge was tantamount to an expression of opinion in violation of G.S. 1-180.

We concede the question as to whether the defendant's evidence was of such character as to justify the charge on the interested witness rule is a close one; however, in light of the opinion in *S. v. Faust, supra,* we are inclined to the view that the defendant was not prejudiced by the charge in this respect. This assignment of error is overruled.

The defendant assigns as error the following portion of the charge appearing in capital letters: "The State says and contends you ought to convict this defendant, State says and contends he was on the road that day driving his car and that Officer Swanson had an opportunity to observe him for several miles driving ahead, driving alongside of him, stopping on one occasion and passing him slowly on the other and THAT AN OFFICER OF HIS EXPERIENCE IS EQUIPPED OR RATHER HE IS TRAINED TO MAKE OBSERVATIONS WHICH AID HIM IN IDENTIFYING PEOPLE AND THAT HE HAS IDENTIFIED HIM, STATED POSITIVELY TO YOU HE IS THE MAN." The defendant contends that the foregoing instruction tended to enhance the testimony of the State's witness and was prejudicial to the defendant, citing *S. v. Shinn,* 234 N.C. 397, 67 S.E. 2d 270; *S. v. Simpson,* 233 N.C. 438, 64 S.E. 2d 568; *S. v. Love,* 229 N.C. 99, 47 S.E. 2d 712; and *S. v. Benton,* 226 N.C. 745, 40 S.E. 2d 617.

In *S. v. Shinn, supra,* in connection with the testimony of an undercover investigator for the State ABC Board, the court instructed the jury: "The court charges you that it was commendable on the part of a detective and it is commendable of a law enforcement officer to use all reasonable and proper means in the apprehension of those who are violating the law of the land, and when they do so in that spirit that will enable the law to place its hands upon offenders and violators, and it is to the credit rather than to the discredit of the persons so acting." This Court held the foregoing to be an erroneous instruction and granted a new trial.

Likewise, in the case of *S. v. Simpson, supra,* among other things complained of, the court instructed the jury as follows: "(T)he State contends that Banner (prosecuting witness) holds a responsible position * * * that he is a man worthy of your belief; that he has proven a good character by a white man who had known him for a number of years, and that his character alone in contradiction of the defendant and his witnesses is worth more than a dozen of them." This instruction was held to be erroneous.

Also, in *S. v. Benton, supra,* where the defendant was charged with rape, among other things, the court charged the jury as follows: "The State further insisted and contends that you should believe the officers in the case (naming them); that they have no reason to testify falsely against this man; that they are officers of the law * * * worthy of your belief and you should believe them; that if you believe what they say about it and what the defendant told them and the other evidence in the case * * * you should be satisfied * * * beyond a reasonable doubt that the defendant is guilty of the capital crime of rape." This charge was likewise held to be erroneous.

However, in the instant case, there is no question about the fact that Patrolman Swanson did have ample opportunity to observe the driver of defendant's car; and, furthermore, this officer did identify the defendant as the man he saw driving an automobile on Highway 64 on the morning of 20 May 1963. We think that it was purely a question of credibility which was for the jury to decide and that the charge did not materially enhance the credibility of the State's witness. There is ample evidence in the record to sustain the verdict of the jury, and we are of the opinion that the instruction complained of was not sufficiently prejudicial to warrant a new trial.

The remaining assignments of error, in our opinion, are without sufficient merit to require discussion and they are overruled.

The defendant concedes that the judgment imposed below was not excessive for a first offense. S. *v. Parker*, 220 N.C. 416, 17 S.E. 2d 475. Even so, he does contend that the court may have taken into consideration the fact that he had been previously convicted. Be that as it may, the court did not charge the jury with respect to a former offense; neither was the attention of the jury called to the fact that the defendant had stipulated that he had been previously convicted of a similar offense.

In the trial below, we find no reversible error.

No error.

STATE OF NORTH CAROLINA v. KENNETH LEROY CHAMBERLAIN.

(Filed 15 January, 1965.)

1. Criminal Law § 71—

The competency of an extrajudicial confession is a preliminary question for the trial court, but its finding that the confession was voluntarily made cannot stand if there is no competent evidence to support it.

2. Same—

The Fourteenth Amendment to the United States Constitution prohibits the use of a confession which is coerced, either by physical or mental means.

3. Constitutional Law § 30—

A defendant in a state criminal trial has a right to be tried according to the substantive and procedural due process requirements of the Fourteenth Amendment to the United States Constitution.

4. Arrest and Bail § 7; Indictment and Warrant § 1—

A person arrested without a warrant has the right to be taken, as soon as may be, before a magistrate having jurisdiction to issue a warrant in the case in order to protect him from being held in violation of his rights.

5. Criminal Law § 71—

Uncontradicted evidence that defendant, a soldier far from home, was arrested without a warrant and held and interrogated for some five days until he signed a confession, and that then a warrant was issued, with further evidence on his part that he was induced to sign the confession under implied threat that if he did not do so he would also be charged with another and more serious crime, with only negative evidence in contradiction of his testimony, *held* to show the confession was incompetent, and a finding of the trial court that the confession was voluntary must be vacated as not supported by the evidence.

APPEAL by defendant from *Carr, J.*, June 1964 Session of SCOTLAND.

Criminal prosecution on an indictment charging defendant on 16 August 1960 at and in Scotland County with the robbery of Jerry Riggins of $360 in money, by the use and threatened use of firearms and other dangerous weapons, to wit, a shotgun, whereby the life of Jerry Riggins was endangered and threatened.

Plea: Not guilty. Verdict: Guilty as charged in the indictment.

From a judgment of imprisonment in the State's prison, defendant appeals.

Attorney General T. W. Bruton, Deputy Attorney General Harry W. McGalliard, Assistant Attorney General Richard T. Sanders, and Staff Attorney George A. Goodwyn for the State.

Joe M. Cox for defendant appellant.

PARKER, J. At the December Term 1960 of the superior court of Scotland County, defendant, and apparently Ray Carney, were brought to trial on three indictments charging armed robbery. Defendant was not represented by counsel, and it would seem that Carney was also without counsel. Defendant entered a plea of guilty as charged in the three indictments. It would appear that Carney did likewise. Defendant was sentenced to imprisonment in the State's prison for a term of not less than 14 years and not more than 25 years. It would appear that Carney was also sentenced to imprisonment. The defendant did not appeal; and it would seem that Carney also did not appeal. Commitments were issued and defendant and apparently Carney began the service of their terms of imprisonment. The record does show that Carney has been paroled. Defendant has not, because he escaped from prison and was captured.

On 23 December 1963 defendant, pursuant to the provisions of G.S. 15-217, filed in the superior court of Scotland County a petition for a review of the constitutionality of his criminal trial at the December Term 1960 of Scotland County superior court, alleging that at the time of his trial he was an indigent, and that in violation of his rights under the 14th Amendment to the United States Constitution he was tried without the assistance of counsel, no counsel having been appointed for him by the court. The solicitor for the State filed no answer but admitted that defendant had no counsel appointed for him at his trial. Whereupon, Judge Carr at the March 1964 Session of the superior court of Scotland County issued an order granting defendant a new trial, basing his ruling upon the decision in the case of *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799, 93 A.L.R. 2d 733, and ordering the case to be calendared for trial at the June Session 1964 of the superior court of Scotland County. At the same Session Judge Carr issued an order finding that defendant is an indigent and appointing as counsel to represent him in his trial Joe M. Cox, an attorney at law practicing at the Scotland County Bar. G.S. 15-4.1.

At the June Session 1964 of the superior court of Scotland County the defendant entered a plea of not guilty. The State offered evidence tending to show the following facts: On 16 August 1960 Jerry Riggins was operating a motel on South Main Street in Laurinburg, North Carolina. He lived across the street from the motel. About 11:45 p.m. he closed the office in the motel and left for home. As he entered his yard a person stepped out of the bushes with a shotgun, made him lie down in the bushes, and robbed him of $17 in money and of a $50 wrist watch. This person asked him where the money was. He told him it was at the motel across the street in the safe. He told him to get up, which he did. They went behind his house, and this person motioned for an automobile to pull up. Upon arrival of the car he was blindfolded with a towel and placed in the car, which drove around the block and stopped in front of the motel. He was forced to go into the motel with the defendant and this other person followed them. They took the towel off his eyes, made him open the safe in the motel, and took from it $360 in money. They told him to lie down on the floor. He did, and the automobile drove off. Riggins could not identify either of these two men.

The State offered in evidence a confession by defendant to the effect that he and Ray Carney were guilty as charged in the indictment, which was admitted in evidence against him over his objection and exception. The trial court found the confession was voluntary. Defendant assigns this as error.

These facts in respect to the circumstances surrounding the making of the confession are without contradiction in the record before us: On 16 August 1960 defendant was a soldier in the U. S. army stationed at Fort Bragg, North Carolina. (Apparently Ray Carney was also a soldier there.) Defendant's home is in Grand Rapids, Oregon. He is a young man: his exact age does not appear in the record. About 8 p.m. on 17 August 1960 he and Ray Carney were arrested without a warrant by police officers of the town of Laurinburg and carried to the police station. They were interrogated there by officers that night about the Riggins robbery, and both denied having anything to do with it. Then they were placed in jail. Every day from then until 22 August 1960 defendant was interrogated at length by town police officers and deputy sheriffs in respect to the Riggins robbery and another armed robbery in the county. He repeatedly denied knowing anything about the Riggins robbery. Defendant had no lawyer. Finally about 10 a.m. on 22 August 1960 he made and signed the confession the State offered in evidence against him. The officers swore out a warrant against him on 23 August 1960.

Defendant testified to this effect: He is not guilty of robbing Jerry Riggins. He and Carney were placed in separate cells in the jail. When interrogated by the officers in respect to the Riggins robbery, he denied knowing anything about it. Finally a deputy sheriff told him they had two armed robbery charges against him, and they could also bring a charge of kidnapping Riggins against him, that kidnapping carried a life sentence, and that if he would cooperate and sign a confession that he had participated in the two armed robberies, they would drop the kidnapping charge and do their best to prevent an indictment for kidnapping. Two or three days later he made the confession to two police officers of Laurinburg, that the State introduced in evidence against him. It was false, and he made it because he was afraid he would be indicted for kidnapping.

The law is well settled in this jurisdiction that the competency of an extra-judicial confession of guilt is a preliminary question for the trial court, to be determined in the manner pointed out in *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, and the trial court's finding that the confession was voluntarily made will not be disturbed on appeal, if supported by any competent evidence. *S. v. Davis,* 253 N.C. 86, 116 S.E. 2d 365, *cert. den.* 365 U.S. 855, 5 L. Ed. 2d 819; *S. v. Marsh,* 234 N.C. 101, 66 S.E. 2d 684; *S. v. Rogers, supra;* Strong's N.C. Index, Vol. 1, Criminal Law, § 71.

It is also well settled that the 14th Amendment to the United States Constitution prohibits the use of coerced confessions in state prosecu-

tions, whether the coercion is physical or mental. *Haynes v. Washington,* 373 U.S. 503, 10 L. Ed. 2d 513; *Thomas v. Arizona,* 356 U.S. 390, 2 L. Ed. 2d 863, *reh. den.* 357 U.S. 944, 2 L. Ed. 2d 1557; *Payne v. Arkansas,* 356 U.S. 560, 2 L. Ed. 2d 975.

A defendant in a state criminal trial has a right to be tried according to the substantive and procedural due process requirements of the 14th Amendment to the United States Constitution. *Rogers v. Richmond,* 365 U.S. 534, 5 L. Ed. 2d 760; Stansbury, N. C. Evidence, 2d Ed., § 183.

G.S. 15-46 provides: "Every person arrested without warrant shall be either immediately taken before some magistrate having jurisdiction to issue a warrant in the case, or else committed to the county prison, and, as soon as may be, taken before such magistrate, who, on proper proof, shall issue a warrant and thereon proceed to act as may be required by law." "The object of a preliminary hearing is to effect a release for one who is held in violation of his rights." *S. v. Davis, supra.*

That defendant was not physically tortured or coerced affords no answer to the question whether his confession was coerced, for "There is torture of mind as well as of body; the will is as much affected by fear as by force." *Watts v. Indiana,* 338 U.S. 49, 93 L. Ed. 1801, 1805.

Considering the facts surrounding the making of defendant's extra-judicial confession offered in evidence against him, we find these facts undisputed: (1) Defendant, a young man in the armed service of the United States and some three thousand miles from home, was arrested about 8 p.m. on 17 August 1960 on Main Street in the town of Laurinburg, North Carolina, by police officers of that town without a warrant. (2) From the time of his arrest until about 10 a.m. on 22 August 1960, he was interrogated by police officers of Laurinburg and deputy sheriffs of Scotland County in respect to the armed robbery of Riggins and in respect to another armed robbery in the county, and he repeatedly denied that he knew anything about these robberies. (3) During all of this time he was without the benefit of counsel. (4) About 10 a.m. on 22 August 1960 he made the extra-judicial confession offered in evidence against him in this case. The next day a warrant was taken out against him charging him with the armed robbery of Riggins in this case. During this time he was kept in a cell segregated from Ray Carney. The record is silent as to when he had the preliminary hearing in this case.

In addition to the undisputed facts, we have this evidence: Defendant testified on the preliminary hearing that a deputy sheriff told him they had two armed robbery charges against him, and they could also bring a charge of kidnapping Riggins against him, that kidnapping

carried a life sentence, and that if he would cooperate and sign a confession that he had participated in the two armed robberies, they would drop the kidnapping charge and do their best to prevent an indictment for kidnapping. That two or three days later he made the confession to two police officers of Laurinburg that the State introduced in evidence against him. That his confession was false and he made it because he was afraid he would be indicted for kidnapping. J. B. Odom, a police officer of Laurinburg testified for the State: "I won't say that the word kidnapping was not mentioned, but it was never mentioned by me." Two deputy sheriffs talked to defendant, one of whom was dead when the instant case was tried. The other testified kidnapping was not mentioned in his presence. The State's evidence in respect to whether or not kidnapping was mentioned to defendant is entirely of a negative character, and does not amount to a complete negation of defendant's testimony in respect to what a deputy sheriff said to him about kidnapping.

It seems obvious from the totality of circumstances surrounding the making of the confession, particularly the testimony of defendant that his confession was induced by what a deputy sheriff said to him about kidnapping, which carried a life sentence, and the negative and unsatisfactory evidence of the State in reply thereto, that defendant's confession was extorted by fear and was not voluntary on his part, and that its admission in evidence was in violation of principles of law clearly stated as early as 1827 in *S. v. Roberts*, 12 N.C. 259, and continuously repeated in decisions of this Court since, deprived him of that fundamental fairness essential to the very concept of justice, and denied him due process of law guaranteed by the 14th Amendment. There is no competent evidence to support the finding of the learned trial judge that the confession was voluntary. Its admission in evidence against him constituted prejudicial error which entitles him to a New trial.

IN THE MATTER OF THE WILL OF FAITH N. CHARLES.

(Filed 15 January, 1965.)

1. Wills § 8—

The clerk of the Superior Court as probate judge has the sole power in the first instance to determine whether defendant died testate or intestate and whether a script offered for probate is his will.

2. Same—

Upon proof of the execution of a paper writing as a will it should be admitted to probate in common form, the proceeding being *ex parte*, and when so probated the paper writing stands as a will and the only will of testator until challenged and reversed in a proper proceeding before a competent tribunal, and other writings executed by decedent may not thereafter be offered for probate in common form, since this would be a collateral attack on the first probate.

3. Wills § 12—

Challenge to the probate of a paper writing in common form is by direct attack by caveat, which transfers the proceeding to the civil issue docket for trial by a jury after notice to all interested persons, and if decedent has executed other writings which parties interested wish to probate, such writings must be presented in the caveat proceeding in order that the court in one proceeding may adjudicate if there is a valid will and, if so, which or what parts of the written instruments is the will.

4. Same—

Upon the filing of a caveat the Superior Court acquires jurisdiction of the whole matter in controversy.

5. Same— Until judgment is entered establishing paper writing as will, parties interested under another writing may offer it in caveat.

Caveators presented, solely for the purpose of attacking the writing caveated, another writing probated in common form, executed by the same person. The Superior Court refused to permit a third writing to be presented in the caveat proceeding. The jury found that the writing first probated was not the last will and testament, and on a separate issue found that the second writing was the will, but the judgment of the court adjudged only that the writing first probated be annulled and set aside. *Held:* The judgment is *res judicata* only that the first probated writing was not valid as a will and does not preclude, in view of the theory of trial in the lower court, the parties interested under the third writing from offering that instrument upon their caveat to the second paper writing within three years from the date the second writing was probated in common form.

APPEAL by First Union National Bank, Guardian of Terry Douglas Charles, from *McConnell, J.*, March 23, 1964 Session, FORSYTH Superior Court.

Two proceedings originated before the Clerk of Superior Court of Forsyth County as Probate Judge. Each involved a different paper writing purporting to be the last will of Faith N. Charles, a resident of Forsyth County who was killed in an automobile accident on November 20, 1962. On December 5, 1962, Ralph Underwood, Executor, presented to the Judge of Probate a script dated January 7, 1959, which purported to be the will of Faith N. Charles. On December 27, 1962, after examination of the subscribing witnesses and the taking of other testimony, the writing was adjudged to be the last will of the maker

and was admitted to probate in common form. The will was marked Exhibit No. 3662 and the probate proceeding was assigned No. E-4986. The foregoing is disclosed by the record in case No. 400.

On January 2, 1963, the public administrator filed with the Judge of Probate a paper writing dated 11-15-62, purporting to be the will of Faith N. Charles. The script was marked Exhibit No. 3966 and the probate proceeding was assigned No. E-5215. Further action in this proceeding was deferred until September 25, 1963, at which time the script was adjudged probated in common form. This proceeding will be discussed later. The foregoing is disclosed by the record in No. 401.

On May 24, 1963, attorneys for Elizabeth T. Long, beneficiary in Exhibit No. 3966, filed a *caveat* to Exhibit 3662 and attached to the *caveat* a copy of Exhibit 3966, and alleged the latter revoked the former. The *caveator* did not request that Exhibit No. 3966 be admitted to probate as the will but that it be used in the proceeding as evidence that Exhibit 3662 had been revoked. The *caveator* executed the required bond and gave the names and addresses of interested persons to whom citations should be issued. The proceeding was transferred to the civil issue docket for jury trial.

In response to the citation the First Union National Bank, as guardian of Terry Douglas Charles, filed a petition in the *caveat* proceeding requesting permission to intervene, alleging that on October 1, 1962, Faith N. Charles executed a valid will giving all her property to the appellant's ward. The petition alleged that Exhibit 3966 was not in the handwriting of Faith N. Charles and was not her will. The petitioner prayed that it be permitted to prove and probate the script dated October 1, 1962, as the will of the testatrix and that it be permitted to show the invalidity of Exhibit 3966.

Judge Johnston, in term, entered an order upon the *caveator's* motion, the material part of which is here quoted:

> "IT IS, THEREFORE, ORDERED AND ADJUDGED that the Petitioner's Petition to consolidate with the above titled *caveat*, the proceedings for the probate in solemn form of the purported holographic will of Faith N. Charles dated October 1, 1962, is DENIED."

The record fails to disclose the appellant made any objection or took any exception to the order denying its petition.

The *caveat* proceeding came on for trial in the Superior Court on September 23, 1963. The propounders of the attested script dated January 7, 1959, neither appeared nor participated in the trial. Only the

caveator appeared in the proceedings. The jury answered these material issues as indicated:

"4. Is the paper writing dated November 15, 1962, the Last Will and Testament of Faith Norene Charles?

Answer: YES.

"6. Is the paperwriting dated January 7, 1959, the Last Will and Testament or any part of the Last Will and Testament of Faith Norene Charles?

Answer: NO."

The court disposed of the jury verdict in the following part of the judgment:

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

"That the paperwriting dated January 7, 1959, is not the Last Will and Testament, nor is it any part of the Last Will and Testament of Faith N. Charles and that the probate of said paperwriting is hereby annulled and set aside."

The appellant did not except to the judgment. Two days after the conclusion of the jury trial the Forsyth County Judge of Probate conducted an examination of witnesses and on the basis of that examination ordered Exhibit No. 3966 probated in common form.

On March 23, 1964, the appellant filed a motion to set aside the verdict and judgment in the *caveat* proceeding. The reasons assigned are:

"2. The verdict of the jury and the judgment in the above-entitled *caveat* proceeding are void or erroneous in that the purported will of Faith N. Charles dated October 1, 1962, was excluded from consideration, the jury and court considering, over the objections of this movant, only two of three purported wills of Faith N. Charles, that is, one dated January 7, 1959, the one being *caveated,* and one dated November 15, 1962. The exclusion from consideration of the purported will of Faith N. Charles dated October 1, 1962, over the objection of this movant was contrary to law and rendered the jury's verdict and the court's judgment in the above-entitled *caveat* proceeding void or erroneous."

The *caveator* objected to the motion and moved for judgment on the pleadings upon the ground the matters involved in the trial are *res*

judicata. From the order granting the motion and dismissing the action, the guardian appealed.

Ralph E. Goodale, Hinton G. Hudson, Jr., for appellant, First Union National Bank, Guardian of Terry Douglas Charles.

Elledge and Mast by David P. Mast, Jr., for appellee Elizabeth T. Long.

HIGGINS, J. The attorneys and judges in two separate proceedings have attempted to determine which of three scripts, or what combination of them, is the last will of Faith N. Charles. The Clerk of Superior Court as *ex officio* Judge of Probate has jurisdiction to take proof of wills and issue letters testamentary or of administration thereon. As Judge of Probate he has the sole power in the first instance to determine whether a decedent died testate or intestate and whether a script offered for probate is his will. *Walters v. Children's Home,* 251 N.C. 369, 111 S.E. 2d 707; *Brissie v. Craig,* 232 N.C. 701, 62 S.E. 2d 330; *Hutson v. Sawyer,* 104 N.C. 1, 10 S.E. 85.

When a paper writing purporting to be a will is presented to the Judge of Probate he takes proof with respect to its execution. If found in order, the script is admitted to probate in common form as a will. Thus far the proceeding is *ex parte.* It stands as the testator's will, and his only will, until challenged and reversed in a proper proceeding before a competent tribunal. The challenge must be by *caveat* and be heard in the Superior Court. *In Re Will of Ellis,* 235 N.C. 27, 69 S.E. 2d 25; *Wells v. Odum,* 205 N.C. 110, 170 S.E. 145. The attack must be direct and by *caveat.* A collateral attack is not permitted. *In Re Will of Cooper,* 196 N.C. 418, 145 S.E. 782. Offering another will for probate in another proceeding is a collateral and not a direct attack. *In Re Will of Puett,* 229 N.C. 8, 47 S.E. 2d 488. Any interested person may challenge the will and contest its validity by filing a *caveat* setting forth the grounds of the challenge. Upon the filing of the *caveat* the proceeding is transferred to the civil issue docket for trial before a jury. Upon this transfer, notice is given to all interested persons of the challenge, giving them an opportunity to enter and participate in the proceedings to the end that the court may determine whether the decedent left a will and, if so, whether any of the scripts before the court is the will. The "proceeding is *in rem,* in which the court pronounces its judgment as to whether . . . the *res, i. e.,* the script itself, is the will of the deceased. *In Re Hinton,* 180 N.C. 206, 104 S.E. 341." *Brissie v. Craig, supra.* The will is the *res.* The last will may consist of one or more written instruments. In a *caveat* proceeding any interested per-

son may present to the court any script which is material to the issue whether there is a will, and if so, what is it? *In Re Will of Marks,* 259 N.C. 326, 130 S.E. 2d 673; *In Re Will of Covington,* 252 N.C. 546, 114 S.E. 2d 257; *In Re Will of Hine,* 228 N.C. 405, 45 S.E. 2d 526.

When a *caveat* is filed the Superior Court acquires jurisdiction of the whole matter in controversy. *Morris v. Morris,* 245 N.C. 30, 95 S.E. 2d 110; *In Re Will of Wood,* 240 N.C. 134, 81 S.E. 2d 127; *In Re Will of Morrow,* 234 N.C. 365, 67 S.E. 2d 279; *In Re Will of Brock,* 229 N.C. 482, 50 S.E. 2d 555; *Wright v. Ball,* 200 N.C. 620, 158 S.E. 192; *Faison v. Williams,* 121 N.C. 152, 28 S.E. 188. Any other script purporting to be the decedent's will should be offered and its validity determined in the *caveat* proceeding. *In Re Will of Belvin,* 261 N.C. 275, 134 S.E. 2d 225; *In Re Will of Puett,* 229 N.C. 8, 47 S.E. 2d 488.

In the light of the foregoing rules and authorities, the conclusion follows that the court committed error in refusing the appellant's petition to intervene in the *caveat* proceeding and to assert that Faith N. Charles on October 1, 1962, executed a valid will leaving all her property to Terry Douglas Charles; and further, that the script dated November 15, 1962, and made a part of the original *caveat,* was not a valid will for the reasons assigned in the petition. *In Re Will of Belvin, supra.* The court should have allowed the petition and permitted the appellant to present to the jury the script dated October 1, 1962, together with evidence relating to its validity as a will; and likewise should have permitted it to offer evidence relating to the invalidity of the script dated November 15, 1962. *In Re Will of Marks, supra.* However, the appellant did not except to the denial of its petition and did not appear further in the *caveat* proceedings. It did not attempt to offer evidence nor to except to the judgment.

Although the verdict and judgment were entered in term on September 23, 1963, without objection or exception, or notice of appeal, the present guardian of Terry Douglas Charles, appellant herein, filed a motion on March 23, 1964, to set aside the verdict and judgment "as void or erroneous because the court excluded from consideration *over the objection of the movant,* of the will dated October 1, 1962." We must say the record fails to show such objection or exception. If exception had been taken and preserved, an assignment of error based thereon would be good.

At the April Session, 1964, on *caveator's* motion, Judge McConnell entered judgment on the pleadings, sustaining propounder's plea of *res judicata* by reason of the judgment and verdict and held that they constituted a valid defense to the appellant's motion. The appellant took timely exception to that order.

Judge McConnell committed error in holding the judgment entered by Johnston, J., is *res judicata* with respect to establishing the validity of the script dated 11-15-62 as the last will of Faith N. Charles. It is true the jury so found, but the court did not so adjudge. The court only adjudged that the paper writing dated January 7, 1959, was not her will. Beneficiaries under that script did not appeal. The judgment is *res judicata* as to them and eliminates Exhibit No. 3662. Exhibit No. 3966 was adjudged to be the will in the probate court order of September 25, 1963. It then became subject to *caveat.*

The procedures followed in the probate court and in the Superior Court upon *caveator's* motions induced the appellant to believe that Exhibit 3966 was not offered for probate in the *caveat* proceeding but was offered solely for the purpose of showing the revocation of the script dated January 7, 1959. Appellant, at the time its petition to intervene was denied, had been led to believe that its remedy was to challenge Exhibit 3966 at the time of, or after its probate in common form then pending in the probate court in which the script had been filed since January 2, 1963.

The probate in common form order was entered on September 25, 1963. The appellant has three years in which to file a *caveat.* This long discussion is designed to disclose sound legal reason why the appellee may not now go back before the Superior Court and move for and obtain a judgment that the script dated November 15, 1962, was probated in solemn form by reason of the jury's finding on Issue No. 4.

The judgment sustaining the plea of *res judicata* or that the appellant has lost its right to proceed as indicated is

Reversed.

FRANCES SHOE BEAM, ADMINISTRATRIX OF THE ESTATE OF ALMA LOUISE SHUFFLER SHOE v. HORACE EARL PARHAM; PILOT FREIGHT CARRIERS, INC., AND WILLIAM HENDERSON ROBERTS.

(Filed 15 January, 1965.)

1. Automobiles § 49—

When a gratuitious passenger becomes aware that the automobile in which he is riding is being persistently driven in a reckless and dangerous manner, the duty devolves upon him in the exercise of due care for his own safety to caution the driver, and, if his warning is disregarded, to request that the automobile be stopped and he be permitted to leave the car, and he may not acquiesce in a continued course of negligent conduct on the

part of the driver and then collect damages from the driver for injury proximately resulting therefrom.

2. Same—

A guest who feels endangered by the manner in which a car is operated is not ordinarily expected to leap therefrom while it is in motion, nor is it his duty to ask to be allowed to leave the vehicle under all circumstances of negligent operation, but he is required to use that care for his own safety which a reasonably prudent person would employ under the same or similar circumstances, which is ordinarily a question for the jury.

3. Same—

The evidence tended to show that the driver, who had drunk a dozen or more beers during the afternoon and evening, was driving in a reckless manner, that plaintiff's intestate and the other occupants of the car repeatedly requested him to drive carefully and asked him to stop and let them get out. In an action for wrongful death arising from an accident resulting from the negligence of the driver, intestate cannot be held contributorily negligent as a matter of law.

4. Same— Whether intestate was contributorily negligent in riding with defendant under the circumstances held for jury.

Evidence tending to show that while the car was being driven on a rural road toward intestate's home some five miles away, the owner of the car, who had been riding in the back seat, insisted on driving, that all occupants got out and changed seats for this purpose, that each member of the party had drunk some beers in the afternoon before going to a dance but that neither intestate nor the other woman passenger drank anything after entering the dance hall, and that intestate did not know that the men had purchased and drunk additional beer after reaching the dance hall. The evidence further tended to show that intestate knew that the owner had been drinking but that he did not act like he was intoxicated. *Held:* Whether, under the circumstances, an ordinarily prudent person would have remained afoot alone on the rural road at nighttime rather than risk the owner's driving is a question for the jury and intestate cannot be held contributorily negligent as a matter of law.

5. Negligence § 26—

Nonsuit for contributory negligence may be allowed only when plaintiff's evidence, considered in the light most favorable to him, establishes his own negligence as a proximate contributing cause of the injury so clearly that no other conclusion reasonably can be drawn therefrom.

APPEAL by defendant William Henderson Roberts, from *Crissman, J.*, January 1964 Civil Session of CABARRUS.

Action by the administratrix of the estate of Alma Louise Shuffler Shoe (Mrs. Shoe) against defendants for the wrongful death of and personal injuries to her intestate.

About 10:50 P.M. on 14 October 1960 there was a collision between a station wagon owned by defendant Roberts and a tractor-trailer unit

owned by corporate defendant and driven by its agent, defendant Parham. The collision occurred at the intersection of U. S. Highway 29 and 13th Street in the Town of Kannapolis. Mrs. Shoe was a guest passenger in the station wagon which allegedly was being operated by defendant Roberts. Mrs. Shoe was seriously injured in the collision and on 6 January 1961 died as a result of the injuries suffered therein.

The jury found that Parham and corporate defendant were not negligent, and that Mrs. Shoe's injuries and resulting death were caused by the negligence of defendant Roberts. $5,000 damages were awarded plaintiff. Judgment was entered accordingly. Defendant Roberts appeals.

Williams, Willeford & Boger for plaintiff.

Hartsell, Hartsell & Mills and Harold H. Smith for defendant appellant.

MOORE, J. Appellant assigns as error the denial of his motion for nonsuit. His sole contention is that Mrs. Shoe was contributorily negligent as a matter of law.

The evidence, taken in the light most favorable to plaintiff, is summarized as follows: Mrs. Shoe, Eugene Peacock and Mrs. Eugene Peacock went to Betty's Tavern, near Landis, about 3:00 P.M. on the afternoon of 14 October 1960. There they met defendant Roberts. They bought and drank a "few beers." About 7:30 P.M. they left Betty's Tavern in Roberts' station wagon and went to Tommy's Hayloft near Rockwell. Eugene Peacock drove the station wagon. They took with them two 6-packs of beer. No beer is sold at Tommy's Hayloft; it is a dance hall and no drinking is allowed inside. All of them drank beer before going inside. In the dance hall they were joined by C. M. Shuffler. Mrs. Shoe and Mrs. Peacock did not go outside the dance hall until about 10:15 P.M. when they were ready to go home. The men went outside and drank beer. When the supply on hand was exhausted they went for more beer and purchased a case, 24 cans. They drank 3 or 4 cans of this last supply. The party left Tommy's Hayloft about 10:15. Because of their drinking the men had trouble gaining readmission to the dance hall but were permitted to enter for the purpose of getting Mrs. Shoe and Mrs. Peacock so they could leave. Prior to leaving Tommy's Hayloft Roberts had drunk a dozen or more beers. Mrs. Shoe had drunk a "few beers" before going into the dance hall. She did not know that the men had gone for additional beer; no one told her about it. She was not present when Roberts and the other men were drinking outside the dance hall. They left Tommy's Hayloft in

the station wagon; Peacock was driving; Mrs. Shoe was on the back seat with Roberts. It was their purpose to take Mrs. Shoe home. It is about 10 miles from the dance hall to the place where the accident occurred. They were travelling a rural paved road. After they had gone 5 or 6 miles from the dance hall, defendant Roberts "started cussing and going on . . . talking about his car . . . he asked to drive and said he wanted his car." He "was fussing about his car and wanted to fight." Peacock stopped the station wagon and all got out. Roberts had been drinking but was not drunk; he "didn't act like" he was intoxicated. Roberts got under the wheel. All got back in the station wagon; Mrs. Shoe and Shuffler got in the front seat with Roberts, Mrs. Shoe was in the middle. Roberts drove recklessly. He would drive off the road, once he drove into the road ditch. All of them, including Mrs. Shoe, urged him to drive safely and tried to get him to stop and let them out. He wouldn't stop. Mrs. Shoe and Shuffler repeatedly turned off the ignition switch, but Roberts would immediately turn it back on. They could not get possession of the key. When they came to U. S. Highway 29 Roberts did not stop for the stop sign, though the others begged him to do so. He drove into the intersection in front of the approaching tractor-trailer unit and the vehicles collided. The highway patrolman who investigated the accident testified that Mrs. Peacock had no odor of alcohol about her, that Peacock and Shuffler did, and that Roberts was drunk. Mrs. Shoe had been carried to the hospital.

Defendant Roberts pleaded contributory negligence on the part of Mrs. Shoe and alleged that she failed to insist that the driver slow down and otherwise operate the car in a careful and prudent manner, and failed to insist that the driver stop the car and permit her to alight, and that she was intoxicated and knew the driver was intoxicated, but notwithstanding such knowledge she voluntarily entered the car and continued to ride therein.

When a gratuitous passenger becomes aware that the automobile in which he is riding is being persistently driven in a reckless and dangerous manner, the duty devolves upon him in the exercise of due care for his own safety to caution the driver, and, if his warning is disregarded, to request that the automobile be stopped and he be permitted to leave the car. He may not acquiesce in a continued course of negligent conduct on the part of the driver and then collect damages from him for injury proximately resulting therefrom. *Allen v. Metcalf,* 261 N.C. 570, 135 S.E. 2d 540; *Howell v. Lawless,* 260 N.C. 670, 133 S.E. 2d 508; *Samuels v. Bowers,* 232 N.C. 149, 59 S.E. 2d 787; *Bogen v. Bogen,* 220 N.C. 648, 18 S.E. 2d 162. This duty is not absolute but is dependent upon circumstances. Where conflicting inferences may be drawn from

the circumstances, whether the failure of the passenger to avail himself of opportunity for affirmative action for his own safety should constitute contributory negligence is a matter for the jury. It is not the duty of a guest, under all circumstances of negligent or reckless driving, to ask to be allowed to leave the vehicle. A guest who feels endangered by the manner in which a car is operated cannot ordinarily be expected to leap therefrom while it is in motion. A passenger is required to use that care for his own safety that a reasonably prudent person would employ under the same or similar circumstances. Whether he has measured up to this standard is ordinarily a question for the jury. *Bell v. Maxwell,* 246 N.C. 257, 98 S.E. 2d 33; *Samuels v. Bowers, supra; King v. Pope,* 202 N.C. 554, 163 S.E. 447.

The evidence for plaintiff tends to show that Mrs. Shoe and the other occupants of the car repeatedly remonstrated with defendant Roberts concerning the manner in which he was operating the station wagon, repeatedly cautioned him and requested that he drive carefully and prudently, and asked him to stop and let them get out. Mrs. Shoe and Shuffler attempted to stop the car. Roberts persisted in driving recklessly, refused to stop the car, and would not permit it to be stopped.

The more serious question is whether Mrs. Shoe was contributorily negligent as a matter of law in not remaining out of the car when Roberts took over the driving from Peacock. The highway patrolman was of the opinion that Roberts was drunk at the scene of the accident. Mrs. Shoe knew that he drank some beer at Betty's Tavern before 7:30 and that he drank a beer before going into the dance hall. She did not know that he had drunk any beer thereafter, did not know that additional beer had been purchased. He was not driving when they left the dance hall. When Roberts got under the wheel they were 5 or 6 miles from the dance hall and five miles or more from Mrs. Shoe's home. It was about 10:30 at night; they were on a rural road. She knew Roberts had been drinking, but he did not act like he was intoxicated. The other passengers were continuing the ride. Mrs. Shoe was a woman forty years of age. She had the choice of unknown dangers, hardship and perhaps embarrassment, on the one hand, and a ride with a driver who had been drinking, on the other. Whether, under the circumstances, an ordinarily prudent person would have remained afoot on a rural road late at night, more than five miles from home, with the prospect of being alone, rather than risk a ride with defendant Roberts driving, is in our opinion a question for the jury.

Dinkins v. Carlton, 255 N.C. 137, 120 S.E. 2d 543, is a case in point. Defendant, a 29 year old man, had been drinking. About 3:30 a.m. he invited three teenage boys to accompany him to a neighboring town,

with the understanding that one of the boys was to drive. En route defendant objected to the slowness of the driving and the car was stopped in a church yard and defendant took control of the car. Defendant drove recklessly and at high speed; there was no evidence that the boys remonstrated with him. After he had driven about 3 miles the car ran off the road and turned over; two of the boys were injured, one was killed. The boys were in high school or had graduated. *Held:* The evidence requires submission of an issue of contributory negligence, but does not disclose contributory negligence as a matter of law. The Court stated: "Ordinarily, the question of the contributory negligence of a guest in an automobile involved in a collision, is for the jury to decide in the light of all the surrounding facts and circumstances (quoting 5 Am. Jur., Automobiles, § 712). Commenting more specifically, it said: "True, the Williams boys and Cranfill could have refused to accompany defendant from Mitchell Chapel Church to Jonesville. In such case, they would have been stranded in the churchyard about 4:00 a.m. All circumstances considered, we cannot say they were contributorily negligent as a matter of law in remaining in the car after defendant stated he was going to take over the driving." The Court suggests that the matter should be considered in the "light upon how matters reasonably appeared to Williams and Cranfill when they were in the churchyard."

". . . involuntary nonsuit on the ground of contributory negligence of the plaintiff may be allowed only when the plaintiff's evidence, considered in the light most favorable to him, establishes his own negligence as a proximate contributing cause of the injury so clearly that no other conclusion reasonably can be drawn therefrom." *Samuels v. Bowers, supra.* The court properly submitted to the jury an issue as to contributory negligence of Mrs. Shoe. The issue was answered favorably to plaintiff.

No error.

RUTH P. KEARNS AND CLEO P. GREEN v. RICHARD W. PRIMM, ADMINISTRATOR OF ARCHIE A. PRIMM, DECEASED, RICHARD W. PRIMM, INDIVIDUALLY, DOGWOOD HOSIERY COMPANY, AND MARIE WRIGHT.

(Filed 15 January, 1965.)

1. Pleadings § 2—

Separate causes of action set up in the complaint should be separately stated, and when the complaint does not do so it is subject to demurrer. G.S. 1-123. Rule of Practice in the Supreme Court No. 20(2).

2. Pleadings § 18—

Where there is a misjoinder of parties and causes of action, demurrer to the complaint on this ground requires dismissal.

3. Pleadings § 2—

A complaint should contain, *inter alia*, a demand for the relief to which plaintiff supposes himself to be entitled. G.S. 1-122(3).

4. Dissent and Distribution § 1—

Title to the personal estate of an intestate, except for such portion as may be allotted as allowance for a year's support, vests in the administrator.

5. Executors and Administrators § 36—

An action to surcharge and falsify the account of the administrator for his alleged failure to account for designated personal assets of the estate is a proper subject of action under G.S. 28-147.

6. Dissent and Distribution § 1—

Title to the realty of an estate of an intestate vests in his heirs and not his personal representative.

7. Executors and Administrators § 36; Pleadings § 3—

Actions against the administrator to surcharge and falsify his account for maladministration and failure to account for personal assets of the estate are properly brought against the administrator individually and in his representative capacity with joinder of the beneficiaries of the estate, but such actions are improperly joined with an action required to be asserted against the administrator individually for obtaining title to realty of the estate for an inadequate price pursuant to alleged conspiracy in connection with the sale of the realty by the commissioner, and the action should be dismissed upon demurrer for misjoinder of parties and causes.

APPEALS by defendants from *Olive, Emergency Judge,* March 9, 1964, Civil Session of DAVIDSON.

Each of the four defendants demurred separately to the complaint and moved to dismiss on the ground of misjoinder of parties and causes of action. The hearing below was on said demurrers.

Plaintiffs, as background, alleged the following facts:

Plaintiffs and all individual defendants are citizens and residents of Davidson County. Defendant Dogwood Hosiery Company (Dogwood) is a North Carolina corporation with principal office and manufacturing plant in Thomasville.

Archie A. Primm, a citizen and resident of Davidson County, died intestate July 19, 1959; and on July 29, 1959, defendant Richard W. Primm was appointed and qualified as administrator of the estate of Archie A. Primm.

The persons who are heirs of the real property of Archie A. Primm and are entitled to his personal estate are: (1) plaintiff Ruth P. Kearns, a daughter, one-fifth; (2) plaintiff Cleo P. Green, a daughter, one-fifth; (3) A. M. Primm, a son, one-fifth; (4) Gilbert P. Welch a daughter, one-fifth; and (5) defendant Richard W. Primm, a son, one-fifth.

Archie A. Primm, at the time of his death, owned 37½ shares of Dogwood stock and 1500 shares of Dyers, Inc. (Dyers) stock, which, with other personal property, came into the hands of defendant administrator.

Archie A. Primm died seized and possessed of a tract of land in Thomasville Township, Davidson County, consisting of 17.38 acres.

When Archie A. Primm died, a building he owned, located on the portion of said tract shown on the map referred to below as Lots Nos. 19 and 20, was leased to and occupied by Dogwood and by Dyers; and Dogwood and Dyers were paying a monthly rental of $800.00 therefor.

For many years prior to the death of Archie A. Primm, said Archie A. Primm, and defendant Richard W. Primm, and defendant Marie Wright, were the principal stockholders and officers of defendant Dogwood and of Dyers. Defendant Richard W. Primm, as general manager, was in charge of the operation of these corporations.

Although not stated separately, the causes of action plaintiffs purport to allege are, in brief summary, the following:

1. Defendant Primm, prior to his appointment, persuaded plaintiffs, by means of false representations, to sign a statement authorizing the administrator to transfer to Dogwood, without consideration, the 37½ shares of Dogwood stock. The fair value thereof was "at least $50,000."

2. Defendant Primm, while acting as administrator, persuaded plaintiffs, by means of false representations, to sign an agreement authorizing the sale and transfer of the 1500 shares of Dyers stock to himself for $5,250.00. The fair market value thereof was "at least $11,000."

3. Defendant Primm, as administrator, paid $3,250.00 of the estate's funds to Marie Wright notwithstanding she had no valid claim therefor.

4. In a special proceeding entitled "*Gilbert P. Welch and husband, J. Arthur Welch, Petitioners v. Ruth P. Kearns and husband, Austin F. Kearns, A. M. Primm and wife, Sarah M. Primm, Cleo P. Green and husband, Walter Green, and Richard W. Primm and wife, Gertrude B. Primm, Defendants,*" the clerk, on October 27, 1961, appointed M. E. Gilliam as commissioner to subdivide and sell the 17.38-acre tract. The tract was subdivided into twenty lots as shown on recorded map of the "A. A. Primm Estate Subdivision," and these lots were sold by the commissioner. Defendant Primm and M. E. Gilliam, the commissioner, unlawfully conspired to depreciate the value of said lands of said heirs, particularly the portion thereof leased to Dogwood and to Dyers, namely, Lots Nos. 19 and 20 as shown on said map. In furtherance of said conspiracy, without notice to plaintiffs, defendant Primm and M. E. Gilliam, the commissioner, obtained an order from said clerk "excluding the sale of (the) electrical wiring and permanent plumbing fixtures from the sale of said Lots Nos. 19 and 20." The commissioner sold Lots Nos. 19 and 20, which had "a fair market value of $36,400, or more," for $26,400.00; and, in furtherance of said conspiracy, defendant Primm, through agents, "ultimately purchased" Lots Nos. 19 and 20 for $26,400.00.

Plaintiffs' further allegations, in substance, are as follows: On February 14, 1962, defendant Primm, as administrator, filed a purported final account showing he had paid or delivered to each distributee, including plaintiffs, (1) a check for $67.47, (2) 25 shares of Sun Oil Company stock, and (3) 4 shares of State Commercial Bank stock, as a final distribution. On March 2, 1962, plaintiffs returned the checks and advised the administrator they would not accept same "unless he made proper and ample restitution for the true value of properties converted to his own use and to the use of corporations in which he was an officer and stockholder, and of the funds unlawfully paid out to Marie Wright," and that "proper action would be instituted against him." Defendant Primm has not been discharged and released as administrator by said clerk. The purported final account "should be lawfully surcharged and falsified, and . . . a reference . . . had to state a just and correct account as authorized and provided for by G.S. 28-147."

Plaintiffs prayed (a) that the court "appoint a referee . . . with the authority to conduct hearings, examine and subpoena witnesses,

take evidence, . . . investigate and lawfully determine all matters complained of herein, and make a report of his findings to this Court as provided by law," and (b) "(f)or such other and further relief as these plaintiffs may be entitled."

From a judgment overruling said demurrers, each defendant excepted and appealed.

W. H. Steed for plaintiff appellees.

Russell F. Van Landingham and Walser, Brinkley, Walser & McGirt for defendant appellants.

BOBBITT, J. Plaintiffs' allegations concern separate and distinct subjects, namely, (1) the Dogwood stock, (2) the Dyers stock, (3) the Marie Wright claim, and (4) Lots Nos. 19 and 20 of the "A. A. Primm Estate Subdivision." Plaintiffs did not state separately the cause of action relating to each of these subjects as required by G.S. 1-123 and by Rule 20(2), Rules of Practice in the Supreme Court, 254 N.C. 783, 802. Hence, the complaint was subject to demurrer on the ground plaintiffs "improperly united" several causes of action. G.S. 1-127(5); G.S. 1-123; *Heath v. Kirkman,* 240 N.C. 303, 306, 82 S.E. 2d 104; *Tart v. Byrne,* 243 N.C. 409, 412, 90 S.E. 2d 692.

Here, misjoinder of parties *and* causes of action is the sole ground of demurrer. G.S. 1-123, after setting out the several causes of action "(t)he plaintiff may unite in the same complaint," provides: "But the causes of action so united must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated." Where there is a misjoinder of parties and causes of action, the action should be dismissed. *Bannister & Sons v. Williams,* 261 N.C. 586 135 S.E. 2d 572, and cases cited; *Vollers Co. v. Todd,* 212 N.C. 677, 194 S.E. 84; *Lucas v. Bank,* 206 N.C. 909, 174 S.E. 301.

No demurrer asserts plaintiffs have failed, in respect of any subject of action, to allege facts sufficient to constitute a cause of action. Hence, consideration is limited to whether there is a misjoinder of parties and purported causes of action.

A complaint must contain, *inter alia,* "(a) demand for the relief to which the plaintiff supposes himself entitled." G.S. 1-122(3). What, if anything, plaintiffs seek to recover from Dogwood or from Marie Wright is unclear. Plaintiffs assert their action was instituted under G.S. 28-147.

G.S. 28-147 authorizes actions in the superior court in the nature of bills in equity to surcharge and falsify the accounts of administrators.

Rudisill v. Hoyle, 254 N.C. 33, 39, 118 S.E. 2d 145, and cases cited. Such action may be instituted by creditors, *State v. McCanless,* 193 N.C. 200, 136 S.E. 371, or by legatees, *Thigpen v. Trust Co.,* 203 N.C. 291, 165 S.E. 720; *Davis v. Singleton,* 259 N.C. 148, 130 S.E. 2d 10, or by distributees, *Leach v. Page,* 211 N.C. 622, 191 S.E. 349. Where the action is for maladministration of the estate of an intestate, the administrator and the sureties on his bond are necessary and proper parties, *Vollers Co. v. Todd, supra.* All persons, creditors, beneficiaries or others, interested in the settlement of the estate, are proper parties and may be necessary parties. *Davis v. Davis,* 246 N.C. 307, 309-310, 98 S.E. 2d 318; *Rudisill v. Hoyle, supra,* p. 42.

The title to the personal estate of an intestate, except the portion thereof allotted as allowances for a year's support, vests in the administrator. *Sales Co. v. Weston,* 245 N.C. 621, 627, 97 S.E. 2d 267, and cases cited. According to plaintiffs' allegations, the personal estate of Archie A. Primm included the Dogwood stock, the Dyers stock and the funds (or assets from which derived) disbursed to Marie Wright; and title to the assets comprising said personal estate vested in defendant Primm as administrator. Consequently, an alleged failure of the administrator to account for these personal assets would seem the proper subject of an action under G.S. 28-147. Undoubtedly, defendant Primm is a necessary and proper party to such action in his capacity as administrator *and* individually. In view of the ground of decision, it is unnecessary to determine whether the joinder of Dogwood and Marie Wright as parties defendant in such action gave rise to a misjoinder of parties and causes of action; and, since the factual allegations are meager and unclear as to the precise nature of the purported causes of action relating to the Dogwood stock and the Marie Wright claim, we deem it inappropriate to attempt to resolve that question.

The only defendant involved in the cause of action based on the alleged conspiracy in connection with the sale by the commissioner of Lots Nos. 19 and 20, is defendant Primm, individually. Upon the death, intestate, of the owner, title to his realty vests in his heirs. *Griffin v. Turner,* 248 N.C. 678, 104 S.E. 2d 829. The facts alleged do not show any legal duty of defendant Primm in his capacity as administrator in connection with the intestate's realty. Indeed, plaintiffs' allegations negative the existence of such duty, indicating (1) the realty was sold in a partition sale proceeding to which the administrator was not a party, and (2) the availability of personal assets for distribution to the beneficiaries. Hence, defendant Primm, in his capacity as administrator, was not a necessary or proper party, and *a fortiori* Dogwood and Marie Wright were not necessary or proper parties, to the plaintiffs'

cause of action with reference to the loss sustained by the heirs in consequence of the alleged conspiracy relating to the sale of Lots Nos. 19 and 20.

Assuming, but not conceding, there was no misjoinder of parties and causes of action with reference to the Dogwood stock, the Dyer stock and the Marie Wright claim, the attempted joinder of these three causes of action with the cause of action based on the loss sustained by the heirs in consequence of said alleged conspiracy does constitute a misjoinder of parties and of causes of action, and on account thereof the demurrers should have been sustained and the action dismissed. Consequently, the judgment of the court below is reversed.

Reversed.

CENTRAL ELECTRIC MEMBERSHIP CORPORATION v. CAROLINA POWER & LIGHT COMPANY, DEFENDANT AND HALES & HUNTER COMPANY, INTERVENOR DEFENDANT.

(Filed 15 January, 1965.)

1. Electricity § 2—Evidence held for jury in action to enjoin power company from servicing customer in violation of contract with membership Corporation.

Evidence permitting the inference that a power company, upon learning of a proposed industrial development, extended its lines to within 300 feet of the site for the purpose of being able to offer electric service to the owner is sufficient to be submitted to the jury in an action by a membership corporation, whose lines were already within 300 feet of the site, to restrain the power company from supplying such electricity to the site on the ground that such act violated provisions of a contract between the power company and the membership corporation prohibiting either from serving customers more than 300 feet from its lines when such customers were within 300 feet from the lines of the other.

2. Same—

A contract between an electric membership corporation and a power company in regard to service of customers situate within 300 feet of their respective lines, when approved by the Utilities Commission, is valid.

3. Same; Utilities Commission § 4—

The Utilities Commission has authority to regulate which customers shall be served respectively by an electric membership corporation and a power company, notwithstanding the provisions of a contract between such companies with respect to service.

APPEAL by plaintiff from *Mintz, J.*, May 3, 1964 Civil Session of LEE.

This action was begun against Carolina Power & Light Company (CP&L) in August 1962. Plaintiff seeks to enjoin CP&L from supplying Hales & Hunter Company (H&H) with electricity for the operation of its plant and facilities in Lee County. Plaintiff bases its right to injunctive relief on a contract, dated January 5, 1956, between it and CP&L.

H&H was permitted to intervene. It and CP&L deny the sale of current by CP&L to H&H violates the contract between plaintiff and CP&L. H&H, as an additional defense, alleges the contract, is as to it, void.

The court, at the conclusion of plaintiff's evidence, allowed defendant's motions for nonsuit.

Crisp & Wells and Teague, Williams and Love for plaintiff appellant.

Pittman, Staton & Betts, W. Reid Thompson and A. Y. Arledge for appellee Carolina Power & Light Company.

Gavin, Jackson & Williams for intervenor defendant appellee Hales & Hunter Company.

RODMAN, J. On January 5, 1956, plaintiff and CP&L entered into a contract by which CP&L agreed to sell electricity to plaintiff for resale. Article 8 of that contract, captioned "Service Facilities," provides:

> "(a) Neither party, unless ordered so to do by a lawful order issued by a properly constituted authority, shall distribute or furnish electric energy to anyone who, at the time of the proposed service, is receiving electric service from the other, or whose premises are capable of being served by the existing facilities of the other without extension of its distribution system other than by the construction of lines not exceeding three hundred feet in length.
>
> "(b) Neither party, unless ordered so to do by a lawful order issued by a properly constituted authority, shall duplicate the other's facilities, except in so far as such duplication shall be necessary in order to transmit electric energy between unconnected points on its lines, but no service shall be rendered from such interconnecting facilities in competition with the other party."

Does the quoted portion of the contract, applied to the factual situation disclosed by plaintiff's evidence, entitle it to an order forbidding CP&L from selling electricity to H&H?

The evidence would permit a jury to find these facts: On, and prior to, January 5, 1956, plaintiff and CP&L maintained primary lines for the transmission of electric current to their respective customers in Lee County.

Current is taken from a primary line and by a "secondary" line delivered to the ultimate customer. The point of delivery is usually selected by the customer to suit his convenience.

When the contract with plaintiff was entered into, and until March 3, 1962, CP&L's primary line was on the east of, and parallel to, U. S. Highway 421; plaintiff's primary line was to the east of, and parallel to, the tracks of Southern Railway. Plaintiff had a secondary line, which crossed the tracks of the railway. This line, 85.6 feet long, carried current at 240 volts. It was constructed to serve Gas Terminal, a gasoline distribution plant located on the north side of the McNeill Road. This road provides access to U. S. 421 from points east of Southern Railway.

Until March 3, 1962, the lines of plaintiff and CP&L were more than 1200 feet apart. On that date, CP&L constructed a primary line, 930 feet in length, in an eastwardly direction along the north side of the McNeill Road. Construction of the line continued in a northwardly direction for 200 feet, or thereabouts. From that point, a secondary line, carrying 240 volts, was constructed at some later date. This secondary line was about 19 or 20 feet in length. Notwithstanding the construction of the new lines on March 3, 1962, and the subsequent construction of the short secondary line, none of CP&L's lines are within 300 feet of plaintiff's three phase line along the railroad or its extension therefrom serving the gas terminal.

On February 1, 1962, H&H acquired a leasehold estate in a tract of land north of the McNeill Road, adjacent to and west of Southern Railway. H&H leased the property for the purpose of constructing and operating a feed mill thereon. On January 29, 1962, plaintiff's manager, having learned of the proposed construction, communicated with H&H, offering to supply it with electricity. The mill constructed by H&H has a monthly demand of 300 KW and a monthly consumption of 35,000 to 40,000 KWH. Plaintiff has the capacity to supply the demands of H&H. Plaintiff continued to negotiate with H&H until late in the spring or summer of 1962. The negotiations terminated when H&H made a contract with CP&L.

Shortly after securing the lease, H&H began construction of a feed mill. The mill, when this case was tried, was in operation. Most of the building is within 300 feet of plaintiff's lines. A portion of the plant is more than 300 feet from plaintiff's line.

CP&L, on March 3, 1962, having learned of the proposed construction of the feed mill, and desirous of supplying electricity to operate the mill, extended its lines so they would be within 300 feet of the plant H&H would erect.

In July 1962, H&H and CP&L executed a contract by which CP&L agreed to provide H&H with electric current beginning December 11, 1962 (presumably the date H&H expected to begin operations), "or from the date the electricity is first taken hereunder, whichever is earlier." Pursuant to that contract, CP&L is supplying H&H with electricity. The current is delivered at the end of CP&L's secondary line, which connects with the primary line constructed in March 1962. H&H selected the point where current would be delivered to it. This point is more than 300 feet — approximately 325 feet — from plaintiff's lines. Plaintiff was willing to deliver current to any point H&H might select, even though it would require construction in excess of 300 feet.

Accepting as true the foregoing factual statement, as a jury may, has plaintiff established a violation of the provisions of Article 8 of the contract of January 5, 1956? In our opinion, the answer must be "yes." That conclusion follows naturally and inevitably, we think, from interpretations which we have heretofore placed on identical contractual provisions.

In *Membership Corp. v. Light Co.*, 255 N.C. 258, 120 S.E. 2d 749, we held that paragraph (b) did not enlarge the 300 foot area in which an exclusive monopoly was created. Bobbitt, J. said: "It seems clear that all of Article 8 relates to the area defined in paragraph (a), an area not exceeding 300 feet from existing lines of plaintiff or defendant; that paragraph (a) prohibits *competitive service* in this area; and that paragraph (b) prohibits the construction of facilities in this area except when necessary to provide service beyond its limits * * *.

"In our opinion, paragraphs (a) and (b), both under the caption, 'Service Facilities,' are in *pari materia* and must be construed together; and, when so construed, the restriction imposed upon a party who constructs an interconnecting facility, that is, one that crosses over or under a previously constructed line of the other, is that *it may not distribute electric energy therefrom to anyone served by the other or whose premises can be served by the other or whose premises can be served by the other from its existing facilities or extensions thereof not exceeding 300 feet.*" (Emphasis supplied.)

In *Membership Corp. v. Power Co.*, 258 N.C. 278, 128 S.E. 2d 405, the party seeking service was within 300 feet of the lines of plaintiff and defendant. To that extent, the position of present plaintiff, defendant and intervenor are identical with the position of plaintiff, defen-

dant and intervenor in the decision rendered in that case. There is, however, this vital distinction between that case and this. There, Power Company, in 1958, extended its lines to serve one Craig. His property was entirely outside the 300 foot area. Power Company's right to serve Craig was not challenged. We said: "Significantly, plaintiff does not suggest that Power Co. violated the letter or spirit of its contract in 1958 when it extended its distribution line for the purpose of providing current to the Raymond Craig property."

Since the Craig property was entirely in "free territory," each contracting party had a right to compete for his business. When the Power Company won that race in fair competition (or by default of Membership Corporation), it had properly secured a base on which it could claim the protection of the first paragraph of Article 8. Thus, in that case, the claims of the opposing parties neutralized each other. That result is stated in the 1962 decision, *Membership Corp. v. Power Co., supra,* in this language: "Under such circumstances, neither party would be prohibited from subsequently serving any customer within 300 feet of *its existing* distribution line." (Emphasis supplied.)

Here, the jury can fairly infer that CP&L's sole purpose in extending its lines in March 1962 was to provide service to one who *could* be served by plaintiff without extending plaintiff's lines outside the area in which it had a monopoly. To permit CP&L to construct a line for the sole purpose of serving an industry which could be served by the other party to the contract, without extending its lines more than 300 feet, would, for practical purposes, reduce Article 8 to an empty shell. Such a construction would permit a membership corporation or a private power company, upon learning that some new business is to be located in proximity to the lines of the other, to extend its lines so they are a mere two or three feet more than 300 feet from the line of the other party, and then insist it has the right to serve the new industry under the rule enunciated in *Membership Corp. v. Power Co., supra.* We cannot conceive that the parties so intended when they made their contract, or the Utilities Commission so understood when it gave its approval to this form of contract.

We are of the opinion, and hold, that plaintiff's evidence is sufficient to require submission of appropriate issues to a jury.

Intervenor's contention that it is not bound by the contract between plaintiff and CP&L is without merit. Plaintiff's evidence suffices to show the Utilities Commission has given its approval to contracts identical to the contract in this case. Because of such approval, and the express reservation of the right of the Commission to compel CP&L to render service, we have held similar contracts not unlawful. *Mem-*

bership Corp. v. Light Co., supra; Membership Corp. v. Power Co., supra; Membership Corp. v. Light Co., 253 N.C. 610, 117 S.E. 2d 764; *Power Co. v. Membership Corp.*, 253 N.C. 596, 117 S.E. 2d 812.

Notwithstanding any finding which the jury may make, or our interpretation of the contract between plaintiff and CP&L, intervenor is at liberty to apply to the Utilities Commission for an order compelling CP&L to continue to serve. Having plenary power to act, the Commission will undoubtedly do what is meet and proper under the circumstances.

Reversed.

LOIS GALLOWAY v. BENJAMIN J. LAWRENCE, JR.
AND
LAURA GENE GALLOWAY, BY HER NEXT FRIEND, DANIEL J. PARKS, v. BENJAMIN J. LAWRENCE, JR.

(Filed 15 January, 1965.)

1. Appeal and Error § 3 Pleadings § 33—

The allowance of a motion to strike a defense in its entirety amounts to sustaining a demurrer to such defense, and is immediately appealable. Rule of Practice in the Supreme Court No. 4(a).

2. Torts §§ 1, 7—

A release from liability for injuries resulting from negligence does not bar an action against a physician or surgeon for malpractice in treating the injured person, unless the language of the release makes it plainly appear that the parties intended to include therein damages resulting from malpractice, since the subsequent malpractice is a separate tort. This rule applies to a release executed by the parent of a minor for loss of earnings during minority, and hospital and medical expenses, and also a judgment of the Superior Court releasing the tort-feasor of all claims on behalf of the minor arising out of the accident. G.S. 1-540.1.

3. Constitutional Law § 20—

The Constitution does not preclude classifications provided they are not arbitrary and unreasonable and all members within a classification are treated alike.

4. Same—

G.S. 1-540.1, providing that a release from liability should not bar a subsequent action for malpractice in treating injuries which were the subject of the release unless the parties specifically so intended, *held* not to place

physicians and surgeons in an arbitrary or unreasonable classification with respect to tortious liabilities, but merely to remove them from favorable protection, since all other persons responsible for a subsequent or independent tortious injury are held responsible therefor.

APPEAL by defendant from *Gambill, J.*, July 21, 1964, Session, SURRY Superior Court.

On February 8, 1962, Laura Gene Galloway, age 3, was injured when hit by an automobile owned and operated by Jo Anne Sparger. The child was taken to the hospital where the defendant, a physician and surgeon, accepted her as his patient and undertook to treat the injuries.

On June 23, 1963, these actions were instituted against the defendant, alleging that he negligently failed to apply the required knowledge, skill, and diligence in treating the child's injuries as a result of which she has been greatly damaged. The first action is by the mother, as natural guardian, to recover the extra hospital, medical, nursing, and other expenses which were proximately caused by the defendant's improper treatment and lack of proper treatment, and for loss of services during the child's minority, all as a result of the defendent's negligence. The second action is by Next Friend to recover for the child's injuries resulting from the same causes.

The defendant filed answers denying negligence. As a further defense in the mother's cause, he pleads the payment of $2,589.26 to her and the execution by her of a complete release and discharge to "Jo Anne Sparger and all other interested persons, firms and corporations of and from any and all rights of action, causes of action, claims, demands, damages, costs, loss of society, medical expenses, including all hospital bills, doctor bills, drug bills, nursing bills, and all other expenses of any kind and nature, compensation and of consequential damages on account of the personal injuries sustained by Laura Gene Galloway on February 8, 1962, while as a pedestrian crossing Wards Gap Road and was struck by a motor vehicle being operated by Jo Anne Sparger."

As a further defense to the action on behalf of the injured child, the defendant pleads a judgment of the Superior Court for $4,910.74 discharging Jo Anne Sparger and others upon the same conditions and terms as set out in the mother's release above quoted. The judgment by Crissman, J., recited the compromise and agreement, the amount thereof, and the approval of the court after hearing.

Upon motion duly filed, Gambill, J., struck the further defenses. The defendant appealed.

Woltz & Faw by Thomas M. Faw, Womble, Carlyle, Sandridge & Rice by I. E. Carlyle, and Grady Barnhill, Jr., for defendant appellant.

White, Crumpler, Powell, Pfefferkorn & Green by James G. White for plaintiff appellees.

HIGGINS, J. The motions to strike the further defenses were equivalent to demurrers to those defenses. When allowed, the defendant had the right of immediate appeal. Our rule, 4(a), requiring *certiorari,* is not applicable. *Mercer v. Hilliard,* 249 N.C. 725, 107 S.E. 2d 554.

The order striking the pleas in bar were based on G.S. 1-540.1. "The compromise, settlement, or release of a cause of action against a person responsible for a personal injury to another shall not operate as a bar to an action by the injured party against a physician or surgeon or other professional practitioner treating such injury for the negligent treatment thereof, unless the express terms of the compromise, settlement or release agreement given by the injured party to the person responsible for the initial injury provide otherwise." The foregoing became effective on October 1, 1961; hence was in effect at the time of the injury and subsequent proceedings related thereto.

Apparently the General Assembly intended to abrogate the rule of this Court announced in *Smith v. Thompson,* 210 N.C. 672, 188 S.E. 395; and alluded to in *Bell v. Hankins,* 249 N.C. 199, 105 S.E. 2d 642, to the effect that a general release executed in favor of one responsible for the original injury protects a physician or surgeon against a claim based on negligent treatment of the injury. The facts in the *Bell* case do not call for the application of the general rule above stated, in that the settlement was for wrongful death. The release was in full settlement of that claim. Obviously, there was only one death; and upon the complete satisfaction of that claim a subsequent one for the same cause could not be maintained against the physician. The distinction is this: plaintiffs here seek to recover for a second, independent, subsequent injury following that which was inflicted by Jo Anne Sparger. These actions are based on a later and separate tort. The express terms of the releases here involved do not extend protection to the physician or surgeon.

The defendant insists that G.S. 1-540.1 violates Article I, Section 1, of the North Carolina Constitution in that it discriminates against and denies equal protection of the laws to physicians and surgeons as a class and hence is invalid. However, classifications as such are not unlawful. They become unlawful when they are arbitrary and unreasonable. In this connection the classification applies with equal force

to all members within the classification. *Motley v. Barber Examiners,* 228 N.C. 337, 45 S.E. 2d 550; *State v. Call,* 121 N.C. 643, 28 S.E. 517.

A physician or surgeon takes a patient as of the time the relationship is established. The physician or surgeon is in no wise responsible for the prior injuries, nor should a release to one who caused them be a shield by which a negligent doctor may escape liability for his own negligence. The statute does not place physicians and surgeons in an arbitrary or unreasonable classification with respect to tort liabilities but rather removes them from the favored protection in which the court had placed them by the rule stated in *Smith v. Thompson, supra.* For example: under the rule in the *Smith* case, the release to Jo Anne Sparger for running over the child, breaking its leg, would protect the physician or surgeon for malpractice in the treatment of the injuries. On the other hand, if on the way to the hospital after the injury a negligent driver ran into the ambulance, breaking the child's other leg, the original wrongdoer could not be held responsible for this second injury. The second wrongdoer should not escape liability for it. Jo Anne Sparger's release should not protect one responsible for a later and independent injury unless plainly so intended by the parties. Such is the meaning of G.S. 1-540.1; 40 N.C. Law Review, 88.

The defendant argues a distinction should be made between the release by judgment of the infant's claim and the release out of court of the mother's claim. However, the judgment was entered in the infant's case upon the basis of compromise settlement submitted to the court in a trial in which the parties waived a jury and consented for the judge to make final disposition. However, after the hearing the judge approved the settlement which the parties had entered into and submitted to him, and the judgment released Jo Anne Sparger in almost the identical words employed in the mother's release. Such a release by judgment is embraced in G.S. 1-540.1, and does not relieve a negligent doctor.

Finally, the defendant contends the court committed error by striking the further defenses in the mother's action upon the grounds she is not "an injured party," and hence the statute does not take away the right of the defendant to claim the benefits of the release to Jo Anne Sparger. The mother is an injured party for she must pay the extra expense of treatment resulting from defendant's negligence during the child's minority, and must lose its earnings for that period.

The judgments striking the further defenses are

Affirmed.

M. B. HAYNES ELECTRIC CORPORATION v. JUSTICE AERO COMPANY.

(Filed 15 January, 1965.)

1. Bailment § 1—

Evidence and allegation to the effect that plaintiff turned over possession of his airplane to defendant for repairs is sufficient to establish the relationship of bailor and bailee in regard to the airplane while in defendent's control or possession.

2. Bailment § 3—

The bailee is not an insurer, but is required to exercise ordinary care to protect bailor's property against loss, damage or destruction, and to return the property to bailor in as good condition as when he received it.

3. Same—

Plaintiff's evidence to the effect that when he turned over his airplane to defendant for repairs of the radio the airplane was in good condition and that while the plane was in defendant's possession and control it became damaged, makes out a *prima facie* case of actionable negligence against the defendant in the absence of some fatal admission or confession.

4. Trial § 23—

A *prima facie* showing is sufficient to carry the case to the jury but does not affect the burden of proof, which remains on plaintiff throughout the trial to prove his case.

5. Bailment § 3—

Plaintiff's evidence was to the effect that he turned over his airplane in good condition to defendant for repair of the radio and that while in defendant's possession the plane was damaged. *Held:* Plaintiff's further testimony that after the damage defendant's agent said that the brake on the plane was faulty does not rebut the *prima facie* case, since it does not establish defendant's contention that the damage was caused by the defective brake rather than defendant's negligence, nor does the fact that plaintiff paid the bill for the repairs preclude recovery when at the time plaintiff advised defendant that the payment was not an acceptance of responsibility for the accident.

APPEAL by plaintiff from *Martin, S. J.,* Regular March 1964 Civil Session of BUNCOMBE.

Civil action for damages for injury to an airplane while in defendant's possession for work on its radio to eliminate engine noise, and also to recover damages for loss of use of said airplane while the damage to it was being repaired.

From a judgment of involuntary nonsuit entered at the close of its evidence, plaintiff appeals.

Uzzell & DuMont by Harry DuMont and Robert D. Lewis for plaintiff appellant.

Meekins, Packer & Roberts by Loren D. Packer for defendant appellee.

PARKER, J. Plaintiff assigns as error the entry of the judgment of involuntary nonsuit.

Plaintiff's evidence tends to show: Plaintiff corporation maintains its principal office and place of business in Asheville, North Carolina. It owned a 1947 Beechcraft Bonanza airplane, which it operated for business purposes. On 12 April 1961 Marion Burton Haynes, Jr., president of plaintiff, flew this airplane from the airport near Asheville to the Raleigh-Durham Airport. N. E. Cannady, Jr., engineer, vice-president, and manager of plaintiff, was a passenger in the airplane. Haynes landed the airplane at the airport, and taxied it over to the service organization adjacent to the terminal building. Haynes went into the service organization and inquired if they had a radio shop. He was advised that it did not, but that there was a radio shop across the field at the Justice Aero Company, the defendant, which was one-fourth to one-half mile from where the service organization is situate. He and Cannady rented an automobile and drove to the defendant's building. Haynes went inside and spoke with Mr. Justice, who referred him to an employee of defendant, Boiken Roseborough, who was in the rear of the building in defendant's radio shop. He asked Roseborough if he could check the radio in plaintiff's airplane and check out the engine noise, and whether or not this could be done in the next couple of days while he was in Raleigh. Roseborough told him he could check the radio and that he could get the airplane the next day. He told Justice he wanted the airplane fixed. He gave the key to the airplane to Roseborough so he could check the radio, because the radio would not operate in the plane without the key. He told Roseborough where he had left the airplane, gave him its number, and left it to his discretion whether or not the airplane should be moved to defendant's shop.

Plaintiff alleges in his complaint in effect that it delivered its airplane to defendant for repairs. Defendant admits in its answer that "on April 12, 1961, plaintiff delivered to the defendant the said aircraft for the purpose of checking the radio therein, which, as defendant is advised and believes, was picking up motor noise on the flight of said aircraft from Asheville to the Raleigh-Durham Airport."

According to plaintiff's evidence, and according to the allegations in its complaint and the admissions in defendant's answer, the relation of plaintiff and defendant was that of bailor and bailee: defendant in its brief admits this relationship. Under the circumstances here defendant was under a legal duty — it was not an insurer — to exercise

ordinary care to protect plaintiff's airplane against loss, damage or destruction, and to return it in as good condition as when he received it, and liability for any damages to the airplane while in its possession turns upon the question of the presence or absence of actionable ordinary negligence on its part or on the part of its agent. *Dellinger v. Bridges,* 259 N.C. 90, 130 S.E. 2d 19; *Insurance Co. v. Motors, Inc.,* 240 N.C. 183, 81 S.E. 2d 416; *Vincent v. Woody,* 238 N.C. 118, 76 S.E. 2d 356; *Beck v. Wilkins,* 179 N.C. 231, 102 S.E. 313; *Hanes v. Shapiro,* 168 N.C. 24, 84 S.E. 33.

Plaintiff's evidence also tends to show the following: When Haynes delivered the airplane to the defendant, "it was in fine performing condition; the wings were in fine condition; the brakes were working fine." About 5:15 p.m. on the next day Roseborough told him over the telephone the airplane had been in a collision. On the following day, April 14, he went to defendant's place of business and saw plaintiff's airplane parked there. He testified: "When I saw the plane on April 14, 1961, it was obvious it had been in a collision, the propeller was damaged beyond repair, the wing was damaged, and it was a sickening sight to me." Haynes testified: "Mr. Roseborough reported the accident to me and he said that they were taxiing the aircraft back and had an accident. He told me that the man that was taxiing the airplane was not a pilot but was checked out in this type aircraft. When I saw him again he told me that he was operating the airplane on the way back. He said that the plane had been taken to Justice Aero and that an A & E mechanic had taken it over." He further testified: "After the accident they said that the brake was faulty."

N. E. Cannady, Jr., testified: "Mr. Roseborough said that he had been taxiing the plane back to the parking area and that it had gotten away from him and hit a tie-down rope and had swung right into the tripacer. * * * He said that the brakes had failed him when he tried to put on the left rud — (witness interrupts self) I mean left brake that it had failed him. * * * He said that there was some wind at the time, I don't remember exactly what he said pertaining to the wind but he said there was some wind at the time. * * * He said he had taxied it back into the — after someone had brought it over the previous night and had parked it that he had then taxied it from his area over to the tie-down area to be brought back the next morning to do some work on it. * * * He simply said, I mean he said that on his way when he was taking the plane back it had got away from him as he tried to apply the left brake to straighten the plane out that it caught on the tie-down rope and swung into a tripacer damaging the tripacer and this plane."

Plaintiff's evidence tends to show that it delivered its airplane to defendant in fine performing condition, with its wings in fine condition, and its brakes in fine working order, for repairs to its radio which was picking up motor noise in flight, that defendant accepted it for the purpose of checking and repairing its radio, that thereafter defendant had possession and control of it, and that the next day defendant had it in its possession and control in a damaged condition. This made out a *prima facie* case of actionable negligence against defendant, and in the absence of some fatal admission or confession, as against a demurrer to the evidence, or motion to nonsuit, a *prima facie* showing carries the case to the jury. *Dellinger v. Bridges, supra; Insurance Co. v. Motors, Inc., supra; Vincent v. Woody, supra; Wellington-Sears Co. v. Finishing Works,* 231 N.C. 96, 56 S.E. 2d 24; *Oil Co. v. Iron Works,* 211 N.C. 668, 191 S.E. 508; *Hutchins v. Taylor-Buick Co.,* 198 N.C. 777, 153 S.E. 397; *Beck v. Wilkins, supra; Hanes v. Shapiro, supra.*

Plaintiff's evidence further shows: After the airplane was damaged, Haynes instructed defendant to repair it and fix anything needing repair. Defendant kept the airplane in making these repairs about three months. Plaintiff paid defendant for such repairs. But in paying for such repairs, Cannady told Mr. Justice: "[T]hat the payment of the bill didn't constitute our accepting any responsibility of the accident and we intended to pursue the legal liability of his responsibility for the accident." Its evidence also tends to show damages for loss of use of its airplane while defendant was repairing it.

Defendant contends that the judgment of compulsory nonsuit should be sustained, for the reason that plaintiff's evidence rebuts its *prima facie* case against defendant, in that it affirmatively and clearly and unambiguously shows either that the damage to its airplane occurred in a manner not attributable to defendant's negligence, or that defendant exercised the requisite care in all that it did with respect to the airplane, so that regardless of the manner of occurrence of the damage to the airplane, it could not have been caused by any negligence on defendant's part. With that contention we do not agree.

Interpreting plaintiff's evidence with that degree of liberality required in motions of nonsuit, we think that plaintiff's evidence makes out a *prima facie* case of actionable negligence against defendant, which its evidence does not affirmatively, clearly and unambiguously rebut, that on the facts in the instant case decision on the motion for nonsuit is controlled by the decisions in *Dellinger v. Bridges, supra; Insurance Co. v. Motors, Inc., supra; Wellington-Sears Co. v. Finishing Works, supra; Oil Co. v. Iron Works, supra; Hutchins v. Taylor-Buick Co., supra; Beck v. Wilkins, supra;* and that the facts here are

easily distinguishable from the facts in *Swain v. Motor Co.*, 207 N.C. 755, 178 S.E. 560; and in *Morgan v. Bank*, 190 N.C. 209, 129 S.E. 585.

While plaintiff's evidence makes out a *prima facie* case of negligence against defendant and is sufficient to carry the case to the jury, the ultimate burden of proof of establishing actionable negligence against defendant is on plaintiff, and remains on it throughout the trial. *Dellinger v. Bridges, supra; Insurance Co. v. Motors, Inc., supra; Speas v. Bank*, 188 N.C. 524, 125 S.E. 398; *Beck v. Wilkins, supra; Hanes v. Shapiro, supra.* What is said in *Insurance Co. v. Motors, Inc., supra,* is relevant here: "While it is not required, in the circumstances of this case, that the plaintiffs establish the specific negligent act or omission proximately causing the loss or damage, it is incumbent upon the plaintiffs to satisfy the jury by the greater weight of the evidence that the loss or damage was caused by negligence on the part of the defendant."

The judgment of compulsory nonsuit was improvidently entered and is

Reversed.

JOHN GASTER v. LEAMON GOODWIN, LAYTON DENSON, INDIVIDUALLY AND TRADING AS APEX TAXI COMPANY, AND HUBERT E. GASTER.

(Filed 15 January, 1965.)

1. Judgments § 22—

When a defendant employs reputable counsel and gives him the facts constituting his defense, and counsel prepares and files answer, a default judgment due to the negligent failure of the attorney to appear and defend the cause when called for trial may ordinarily be set aside for surprise and excusable neglect.

2. Same—

Evidence to the effect that defendant's counsel duly filed answer setting up a meritorious defense, that the cause was continued from term to term for more than ten years, that defendant was in communication with his attorney at frequent intervals during this period, without evidence to indicate that defendant was or had been put on notice that his attorney was incapacitated and could not present his defense, *held* sufficient to support an order setting aside the judgment for surprise and excusable neglect.

3. Appeal and Error § 49—

Findings of fact by the lower court are conclusive on appeal when supported by competent evidence.

4. Judgments § 22—

Where defendant's counsel files answer setting up a meritorious defense and a judgment by default is entered some years thereafter for failure of the attorney to defend after notice, defendant's motion to set aside the default judgment on the ground of surprise and excusable neglect is made in apt time when made within twelve months of defendant's reasonable discovery of the entry of judgment, and the fact that motion to set aside is not made within one year of the rendition of the judgment is not fatal.

APPEAL by plaintiff from *Walker, S. J.*, 20 April 1964 non-jury Civil Session of WAKE.

This is a civil action commenced on 8 December 1947. The summons, together with a copy of the complaint, was personally served on the defendant, Layton Denson, by the Sheriff of Wake County on 11 December 1947. Defendant Denson, through his attorney, filed answer on 5 February 1948.

The case was set for trial many times after the issues were joined, but by reason of the absence of one of the defendants, who was in the military service outside the United States, it was not tried until October 1958. At the regular June 1958 Term of the Superior Court of Wake County, Judge Mallard set the case for trial at the October 1958 Civil Term of the Superior Court of Wake County and directed that the attorneys for both parties be notified.

Robert W. Johnson had been employed at the beginning of the instant litigation to represent defendant Denson. When the case was set for trial by Judge Mallard, the Clerk of the Superior Court of Wake County notified Robert W. Johnson that the matter pending between the plaintiff and the defendants herein would be tried at the October 1958 term of court.

The case was tried on 9 October 1958, and a judgment against defendant Denson was signed by the Honorable Heman R. Clark on 10 October 1958. Neither defendant Denson's attorney, Robert W. Johnson, nor defendant Denson was present at the trial.

Execution on the foregoing judgment was not issued until 4 August 1962. It was not until defendant Denson was served with the execution that he had any knowledge that a judgment had been taken against him. Within six days thereafter, defendant Denson moved to set aside the judgment on the grounds of surprise and excusable neglect. The motion to set aside the previous judgment was heard on 24 October 1962, resulting in an order setting aside the judgment. Appropriate findings of fact were made with one exception: the court failed to find facts with respect to whether or not defendant Denson had been diligent in protecting his own interest in the litigation. From the signing

of the order setting the judgment aside, the plaintiff appealed to this Court and, in *Gaster v. Goodwin,* 259 N.C. 676, 131 S.E. 2d 363, the order was set aside to the end that there might be appropriate findings with respect to the matters referred to above.

The matter was again heard in the court below on 24 April 1964 and the court again set aside the judgment entered in October 1958.

The plaintiff appeals, assigning error.

Manning, Fulton & Skinner for plaintiff appellant.

Dupree, Weaver, Horton & Cockman; Jerry S. Alvis for defendant Denson.

DENNY, C.J. In remanding this case at the Spring Term 1963 for further hearing, this Court, speaking through Moore, J., said: "It appears to us that the crucial point in this case has not been considered. If Denson over the ten year period was in contact with his attorney at reasonable intervals, observed and learned nothing which would put him on notice that the attorney was incapacitated to present his defense, and was assured that his case would be attended to and he would be notified when needed, the court may find that Denson was not in default. On the other hand, if Denson knew that his attorney was not capable of handling his business, or by inaction and inattention neglected to discover the incapacity of his attorney which had existed over a long period of time, he may not claim the benefit of the statute unless there are other considerations, not appearing on the present record, which might excuse him. There is also the question whether, if Johnson was incapacitated, this fact was known to plaintiff or his attorneys and they failed to so inform the court."

The decisions on the subject now before us, as we have heretofore pointed out, are not entirely satisfactory with respect to their consistency. In fact, many of them are irreconcilable. *Brown v. Hale,* 259 N.C. 480, 130 S.E. 2d 868. Even so, the general rule seems to be that when a defendant employs reputable counsel and gives him the facts constituting his defense, and the lawyer has prepared and filed an answer, if a judgment is obtained due to the negligent failure of the attorney to appear and defend the cause when called for trial, the client may have the judgment set aside for surprise and excusable neglect. *Gaster v. Goodwin,* 259 N.C. 676, 131 S.E. 2d 363.

The court below, in pertinent part, found the following facts:

(1) That defendant Denson did in apt time employ a duly licensed and qualified attorney to represent his interest; that he communicated to his attorney all those matters and things relevant to his defense in

this action; that he relied in good faith upon his attorney's representation that he would attend to his defense and notify him whenever necessary of all proceedings.

(2) That his attorney did file answer to the complaint in apt time and that the answer of record sets out a good and meritorious defense based upon contributory negligence and lack of responsibility under the doctrine of *respondeat superior.*

(3) That this case was continued from term to term and did not come on for trial for almost eleven years.

(4) That defendant Denson had no notice of the trial and hence was given no opportunity to present his good and meritorious defense; that in his absence and without his knowledge, he having received no court calendar, correspondence or call from his attorney of record, or any other person, court or attorney, of the pendency of the trial, a judgment was entered against him.

(5) That defendant Denson was in contact with his attorney on many occasions and at frequent intervals during the ten-year period beginning with the employment of his attorney and ending with the filing of judgment against him.

(6) That no evidence has been presented to this court which would indicate that defendant Denson was or should have been put on notice that his attorney was incapacitated to present his defense.

Upon the foregoing findings of fact, the court below ordered, adjudged and decreed that the judgment entered 10 October 1958, in the Superior Court of Wake County, be set aside and this cause reinstated on the trial docket.

The findings of fact by the judge below, in our opinion, were supported by competent evidence and must, therefore, be upheld. *Hertford Livestock & Supply Co. v. Roberson,* 245 N.C. 588, 96 S.E. 2d 734; *Moore v. Deal,* 239 N.C. 224, 79 S.E. 2d 507.

Notwithstanding the findings of fact by the court below, the plaintiff contends the judgment entered on 10 October 1958 cannot be set aside because the motion to set aside such judgment was not made within twelve months of its entry, but, instead, was made on 10 August 1962, about three years and ten months after its entry.

The plaintiff contends that where a person is personally served with summons and judgment is taken, the motion to set aside the judgment must be made within one year after the rendition of the judgment, citing *McDaniel v. Watkins,* 76 N.C. 399; *McLean v. McLean,* 84 N.C. 366; *Roberts v. Allman,* 106 N.C. 391, 11 S.E. 424; *Lee v. McCracken,*

170 N.C. 575, 87 S.E. 497; *Jernigan v. Jernigan,* 178 N.C. 84, 100 S.E. 184, and similar cases.

In each of the foregoing cases the respective defendants were personally served with process and failed to answer or take any effective steps to protect their interest. We think there is a valid distinction between this class of defendants and the defendant in the instant action, where he employed counsel, gave him the facts necessary upon which to file an answer and set up a meritorious defense, kept in touch with counsel, and was assured he would be notified when the case was set for trial. In view of these facts, we hold that defendant Denson's motion to set aside the judgment entered on 10 October 1958, in the Superior Court of Wake County, was in apt time when made within twelve months from the date of actual notice of the entry of the judgment. G.S. 1-220; *Industrial Loan & Thrift Corp. v. Swanson,* 223 Minn. 346, 26 N.W. 2d 625; *Kaplan v. Radford,* Sup. Ct., 161 N.Y.S. 374.

The judgment of the court below is

Affirmed.

JOE HAROLD PARNELL v. NATIONWIDE MUTUAL INSURANCE COMPANY.

(Filed 15 January, 1965.)

1. Pleadings § 33—

Motion to strike a defense in its entirety is in substance a demurrer.

2. Same—

The allegations of fact of a pleading are deemed admitted for the purpose of a motion to strike.

3. Parties § 2—

Every action must be prosecuted by the real parties in interest, and an agent is not such a party.

4. Same; Insurance § 66.1—

Where liability insurer has paid the entire judgment against insured, insured is no longer the real party in interest and may not maintain an action against his joint tort-feasor or the insurer of the joint tort-feasor, to recover contribution notwithstanding the judgment against insured provided that upon payment by insured he should be entitled to recover one-half of the amount from the joint tort-feasor.

APPEAL by defendant from *Bone, Emergency Judge,* August 31, 1964, Civil Session of WAKE.

The present action is a sequel to a prior action in the Superior Court of Sampson County heard on appeal at Spring Term, 1964. *Phillips v. Parnell,* 261 N.C. 410, 134 S.E. 2d 676.

In said prior action, Phillips, the plaintiff, sued Joe Parnell to recover for personal injuries allegedly caused by the actionable negligence of Parnell; and, on motion of Parnell, Ottis Davis Blue and William Elliott were made additional defendants (as alleged joint tortfeasors) for contribution under G.S. 1-240. In accordance with the verdict therein, it was adjudged that Phillips have and recover of Parnell the sum of $3,500.00; and it was adjudged further that, upon payment "by or on behalf of" Parnell of $3,500.00 to the clerk "in satisfaction of" the judgment of Phillips, Parnell have and recover of additional defendants Blue and Elliott the sum of $1,750.00. The judgment contained similar provisions with reference to the costs.

The plaintiff herein (Parnell) alleged the facts concerning said prior action and attached a full copy of the judgment entered therein. In addition, he alleged, in substance, the facts narrated in the following numbered (our numbering) paragraphs.

1. On or about October 2, 1963, the sum of $3,500.00 was paid into the office of the Clerk of the Superior Court of Sampson County "on behalf of . . . Parnell," and the portion of the judgment allowing recovery by Phillips from Parnell "was marked satisfied"; and subsequently court costs in the amount of $19.10 were paid "on behalf of . . . Parnell."

2. Elliott was the owner and Blue the operator of the 1954 Ford involved in the collision of December 22, 1962, resulting in the personal injuries for which Phillips recovered judgment in said prior action. An assigned risk policy of automobile liability insurance issued by defendant to Elliott was in full force and effect on December 22, 1962. Elliott and Blue were each an "insured" under said policy; and defendant, by the terms of said policy, was and is obligated to pay any judgment obtained against an "insured," arising out of the operation of said 1954 Ford.

3. An execution issued October 2, 1963, on said judgment of Parnell against Elliott and Blue was returned unsatisfied.

Plaintiff seeks to recover judgment of defendant under the terms of said policy in the amount of $1,750.00, together with interest thereon from October 2, 1963, plus the additional sum of $9.55, to wit, one-half of the costs of said prior action.

After answering plaintiff's allegations, defendant, for a further answer and defense, alleged the following:

"1. That sometime prior to December 22, 1962, Safeco Insurance Company of America had issued and delivered to plaintiff a certain policy of automobile insurance under the terms of which it agreed to pay on behalf of the plaintiff all sums which the plaintiff became legally obligated to pay as damages for bodily injury sustained by any person arising out of the ownership, maintenance or use of the automobile described in the policy, it being the same automobile driven by the plaintiff at the time of the collision on December 22, 1962, which is referred to in paragraph VIII of the complaint; that said policy was issued in conformity with the provisions of the financial responsibility laws of North Carolina; and that said policy was in full force and effect at the time of said collision.

"2. That on October 2, 1963, Safeco Insurance Company of America, in discharge of its liability under said policy of automobile liability insurance, issued and delivered to the Clerk of the Superior Court of Sampson County, N. C., a draft in the amount of $3500 and a draft in amount of $97.10 in full payment of the judgment referred to in the complaint, copy of which is attached to the complaint marked Exhibit 'A,' and said drafts were accepted by the Clerk and subsequently by the plaintiff in the action, Billy Ray Phillips, in full payment and discharge of the liability of Joe Harold Parnell thereunder as to principal, interest and costs.

"3. That the plaintiff herein, Joe Harold Parnell, paid no part of said judgment, principal, interest or costs.

"4. That this action is being prosecuted in the plaintiff's name by Safeco Insurance Company of America for its sole and exclusive benefit; that the plaintiff, in the event of a recovery herein, will be entitled to no part of the proceeds of the same; that the plaintiff herein will sustain no loss or damage of any kind or nature whatever in the event of the unsuccessful prosecution of this action in his name; and that the plaintiff is not the real party in interest in this action.

"4-A. That the policy of insurance issued by Safeco Insurance Company to Joe Harold Parnell contained the following provision:

> 'Subrogation. In the event of any payment under this policy, the Company shall be subrogated to all the Insured's rights of recovery therefor against any person or organization and the Insured shall execute and deliver instruments and papers and do

whatever else is necessary to secure such rights. The Insured shall do nothing after loss to prejudice such rights.'

"5. In paying the judgment as aforesaid on behalf of its policyholder, Joe Harold Parnell, Safeco Insurance Company of America simply discharged its liability under its said policy of automobile liability insurance referred to in paragraph 2 above; that said insurance company has claimed, or will claim, in the event of a recovery in this action, that it is entitled to the entire proceeds of the same for its sole and exclusive benefit; but that Safeco Insurance Company of America has no right of action against this defendant by reason of any matter alleged in the complaint herein, either in law or in equity, and is not entitled to recover any sum whatever of this defendant either by way of contribution, subrogation or otherwise."

The hearing below was on plaintiff's motion that said further answer and defense be stricken from the record on the ground the facts alleged therein do not constitute a defense to plaintiff's action. The court, allowing plaintiff's said motion, ordered that said answer and defense be stricken from the record. Defendant excepted and appealed.

Teague, Johnson & Patterson and Robert M. Clay for plaintiff appellee.

Dupree, Weaver, Horton & Cockman and Jerry S. Alvis for defendant appellant.

BOBBITT, J. Plaintiff's motion to strike is addressed to defendant's further answer and defense in its entirety and in substance, if not in form, is a demurrer. The court, in allowing plaintiff's motion to strike, in effect *sustained* a demurrer to defendant's further answer and defense. *Jewell v. Price,* 259 N.C. 345, 348, 130 S.E. 2d 668, and cases cited.

In considering plaintiff's motion to strike (demurrer), the facts alleged by defendant are deemed admitted. *Jenkins & Co. v. Lewis,* 259 N.C. 86, 88, 130 S.E. 2d 49; *Pack v. McCoy,* 251 N.C. 590, 112 S.E. 2d 118; *Trust Co. v. Currin,* 244 N.C. 102, 92 S.E. 2d 658.

"Every action must be prosecuted in the name of the real party in interest . . ." G.S. 1-57; *Morton v. Thornton,* 257 N.C. 259, 262, 125 S.E. 2d 464, and cases cited. An agent is not the real party in interest and cannot maintain an action. *Morton v. Thornton,* 259 N.C. 697, 700, 131 S.E. 2d 378.

"A real party in interest is a party who is benefited or injured by the judgment in the case. An interest which warrants making a person

a party is not an interest in the action involved merely, but some interest in the subject matter of the litigation." *Rental Co. v. Justice,* 211 N.C. 54, 188 S.E. 609.

As pertinent to whether plaintiff is a real party in interest, reference is made to *Herring v. Jackson,* 255 N.C. 537, 543, 122 S.E. 2d 366, and cases cited.

The facts alleged by defendant disclose that Safeco Insurance Company, in discharge of its obligations under the liability policy it issued to plaintiff, paid *in full* the judgment Phillips obtained against plaintiff; that this action is being prosecuted in the name of plaintiff by Safeco and solely for its benefit; and that plaintiff has made no payment or otherwise suffered loss for which he has a claim against defendant. If the facts are as alleged by defendant, plaintiff is not the real party in interest in respect of an existing cause of action, if any, against defendant on account of matters alleged in the complaint.

Whether Safeco has a cause of action against defendant is not presented by this appeal.

The order, which in effect sustains plaintiff's demurrer to defendant's further answer and defense, is reversed.

Reversed.

MARSHALL E. PEARCE AND WIFE, HILDA P. PEARCE, PLAINTIFFS V. BROADUS GAY AND LITCHFORD GAY, ORIGINAL DEFENDANTS, AND H. K. PERRY, ADDITIONAL DEFENDANT, AND W. H. PERRY, EXECUTOR OF H. K. PERRY, ADDITIONAL DEFENDANT.

(Filed 15 January, 1965.)

1. Landlord and Tenant § 4—

A conveyance of land which is subject to a valid and continuing lease gives the purchaser no right to rents then accrued, but does give the purchaser the right to collect the rents accruing after the time title passes unless the conveyance specifically reserves to the grantor the right to continue to collect the rents. Attornment by leasee is not necessary. G.S. 42-2.

2. Same—

Stipulation in a deed that it was made subject to a rental contract theretofore executed by grantors merely recognizes the rights guaranteed by G.S. 42-8, and does not have the effect of reserving to grantors rents accruing subsequent to the transfer of title.

APPEAL by defendant W. H. Perry, Executor of the will of H. K. Perry, additional defendant, from *McKinnon, J.*, April 1964 Civil Session of FRANKLIN.

In August 1962, H. K. Perry and wife, Florence, who had been adjudged mentally incompetent, owned, as tenants by the entireties, a farm containing 122 acres in Franklin County. On August 7, 1962, H. K. Perry instituted a proceeding before the Clerk of the Superior Court of Franklin County to obtain authority to sell the land at private sale. The guardian of the wife was named as defendant. On August 8, 1962, H. K. Perry leased the farm to defendants Gay for a term of one year, to begin January 1, 1963. The rental, $3,000, was by the terms of the lease to be paid "not later than the first day of September, 1963." Lessees were given the privilege of crediting on the rent the sum of $200 then owing them by lessor. The Clerk, on October 9, 1962, ordered a private sale of the farm. The commissioners on the same day reported a sale to plaintiffs, subject to a life estate, reserved to the owners in the dwelling with a curtilage of two acres," "and further subject to the rental contract for the year 1963." This sale was confirmed on October 22, 1962.

On November 3, 1962, counsel for the parties to the special proceeding, without notice to plaintiffs whose bid had been accepted, consented to an order vacating the order of sale. Present plaintiffs appealed from the consent order. In an opinion filed May 1, 1963, this Court held: "The order entered on November 3, 1962, is vacated. Unless the sale is set aside for mistake, fraud, or collusion, the purchasers, Hilda P. Pearce and husband Marshall E. Pearce, upon the payment of the purchase price, are entitled to a deed from the commissioners." *Perry v. Jolly*, 259 N.C. 305, 130 S.E. 2d 654.

On June 10, 1963, Judge Hobgood signed an order in which he recited that he acted on motion of H. K. Perry to give effect to the opinion of this Court. He directed the commissioners to convey the land to plaintiffs upon payment of their bid. They were allowed until July 1, 1963 to pay the purchase price. The conveyance was to be made subject to the life estate reserved in the two acres and "said deed shall further provide that the conveyance of said lands shall be subject to the rental contract for the year 1963."

On June 26, 1963, the commissioners executed a deed to plaintiffs. The deed recites payment of $45,000, the amount of plaintiffs' bid. The land was conveyed, subject to a reservation of a life estate in the two acres. The deed states: "This conveyance is made subject to the rental contract for the above described land for the year 1963."

On September 7, 1963, defendants Gay had not paid the rent. Plaintiffs, on that date, brought this action to collect $2,800, the rent called for in the lease, less the $200 credit there provided for.

Defendants Gay asserted plaintiffs and H. K. Perry were each demanding payment. They paid the $2,800 into court. H. K. Perry was made a party. He died in December 1963. W. H. Perry, executor of H. K. Perry's will, was made a party.

When the cause came on for trial at the April 1964 Session, the parties waived a jury trial. Judge McKinnon, based on the record in *Perry v. Jolly, supra,* and the stipulations of the parties, concluded that plaintiffs, as equitable owners from October 22, 1962 (the date of the confirmation of the sale to plaintiffs), and as legal owners from June 26, 1963 (the date of the deed to plaintiffs), were entitled to the $2,800. He thereupon adjudged plaintiffs owners of the deposit. Defendant Perry, as executor, excepted and appealed.

John F. Matthews for appellant.
Gaither M. Beam for appellees.

RODMAN, J. A conveyance of land, which is subject to a valid and continuing lease, passes to the purchaser the right to collect the rents thereafter accruing. Rents theretofore accrued are mere choses in action. Purchaser of the land acquires no title to the past due rents. *Mixon v. Coffield,* 24 N.C. 301; *Kornegay v. Collier,* 65 N.C. 69; *Rogers v. McKenzie,* 65 N.C. 218; *Bullard v. Johnson,* 65 N.C. 436; *Lancashire v. Mason,* 75 N.C. 455; *Jennings v. Shannon,* 200 N.C. 1, 156 S.E. 89; *Perkins v. Langdon,* 231 N.C. 386, 57 S.E. 2d 407; *Four-G Corp. v. Ruta,* 138 A. 2d 18; *Boteler v. Leber,* 164 A. 572; Notes, Ann. Cas. 1912B 398: "Right of Purchaser of Leased Land at Judicial Sale with Respect to Rents"; Ann. Cas. 1916D 192: "Persons to Whom Rent is Payable in Absence of Governing Statute, in Case of Sale, Mortgage or Other Grant of Reversion"; 32 Am. Jur. 104-5; 30A Am. Jur. 998; 50 C.J.S. 662.

When title passes, lessee ceases to hold under the grantor. He then becomes a tenant of grantee, and his possession is grantee's possession. Attornment is unnecessary, G.S. 42-2. If the grantor is to collect rents accruing subsequent to the effective date of the conveyance, he must, by reservation in his deed, provide that grantee shall not be entitled to possession prior to the expiration of the term fixed in the lease, or otherwise expressly reserve his right to collect subsequently accruing rents.

Appellant contends the property was conveyed subject to the rights of H. K. Perry to collect rents accruing subsequent to the confirmation of the sale, payment of the purchase price, and delivery of the deed. To support this contention, appellant relies on the statement in the deed: "This conveyance is made subject to the rental contract for the above described land for the year 1963."

We concur in the trial court's ruling that the language on which appellant relies is not sufficient to constitute a reservation of the owner's right to possession of the farm for 1963, or a reservation of the rents accruing from the use of the farm for that year. To construe it as appellant contends, would require us to insert words which do not appear in the deed. It is apparent from the deed itself, and from the proceedings leading up to the sale, that the parties and attorneys understood how to reserve an interest in land. In the deed, pleading, and order there is proper language to assure a reservation of a life estate in the dwelling.

In the original petition filed by H. K. Perry, he sought authority to sell the property for $45,000. The sale he proposed would vest immediate possession, or right of possession, in the purchaser to the entire property; he proposed no exception or reservation. The guardian of the wife opposed the sale proposed by the husband. In the guardian's amended answer, he alleged that plaintiffs would purchase the property for $45,000, which the husband wished to accept, but would purchase subject to a reservation for the life of the husband and wife, and the survivor, in the dwelling and curtilage. The guardian further explained the offer which plaintiffs made in this language: "That according to this defendant's information and belief the plaintiff has rented the above mentioned lands for the year 1963 to Broadus Gay and Litchford Gay for the price of $3,000.00, and that the sale of said lands should be made subject to the rental contract to said Broadus Gay and Litchford Gay, and that the purchasers of said lands should receive said $3,000.00 rent when the same is paid."

The commissioners reported the plaintiffs' bid of $45,000 for the property, subject to a reservation of an estate for the life of the owner in the dwelling, and "further subject to the rental contract for the year 1963." This report was confirmed. It is, we think, apparent that the phrase on which appellant relies does nothing more than bind the grantee to honor the provisions of the lease. It is nothing more than a statement of the rights guaranteed to the purchaser and the lessees by G.S. 42-8.

It is quite true, as appellant asserts, that if lessee pays the rent before a sale, or executes a note or bond for the rent in substitution of

his contract to pay the rent, and such note or bond is accepted by the then owner in discharge of lessee's obligation to pay rent, such substitution relieves the lessee of his obligation to pay rent. Since he has no obligation to pay rent, he is not obligated to pay the purchaser; his obligation is to the holder of the note or bond. *Holly v. Holly,* 94 N.C. 670; *Four-G Corp. v. Ruta, supra;* 92 C.J.S. 162. The difficulty confronting appellant is not the law but the facts. There is nothing in the record to show Gay substituted his note, bond, or other security for his obligation to pay the rent. Section 3 of the lease says: "The Lessee shall pay *as rent* (emphasis supplied) for the use of the premises." Plaintiffs bottom their action against Gay on the provision in the lease to pay rent. When sued, the Gays did not deny that they owed rent; to the contrary, they admitted their obligation to pay rent. They only asked that they be permitted to pay the rent into court in order that the court might determine who was entitled to the rent.

No error.

ELIZABETH D. LAYTON, ORIGINAL PLAINTIFF, MOVANT, AND ELIZABETH D. LAYTON, GUARDIAN OF ANNETTE DAVIS LAYTON AND ERNESTINE LAYTON, MINORS, ADDITIONAL PLAINTIFF v. E. C. LAYTON, ORIGINAL DEFENDANT, AND ORA B. LAYTON, INDIVIDUALLY, AND ORA B. LAYTON, ADMINISTRATRIX OF E. C. LAYTON, DECEASED, AND ERNEST CLINTON LAYTON AND WIFE, CLARA LEE BAILEY LAYTON; ELEANOR L. EDWARDS AND HUSBAND, DAVID EDWARDS; MARIE L. SHADDRICK AND HUSBAND, ROBERT SHADDRICK; LUCY L. CANNADY AND HUSBAND, JONES CANNADY; MAVIS L. NELMS AND HUSBAND, RUSSELL NELMS; JULIUS ("BILLIE") LAYTON AND WIFE, JENNY GREY S. LAYTON; RONALD LAYTON AND WIFE, BARBARA DELL D. LAYTON; DORA SUE LEONARD AND HUSBAND, DARRELL LEONARD; JAMES LAYTON AND WIFE, AGNES C. LAYTON, AND JOHN F. MATTHEWS, COMMISSIONER, ADDITIONAL DEFENDANTS.

(Filed 15 January, 1965.)

1. Parent and Child § 6—

The duty of a father to support his child is not a debt in the legal sense nor a property right of the child, but is an obligation imposed by law, and if the child is incapable of self-support after majority because of physical or mental disability, such obligation continues.

2. Common Law—

Principles of the common law which have not been abrogated or modified by statute are in full force and effect in this jurisdiction.

3. Parent and Child § 6—

A father may by contract create an obligation to support his child which will survive the father's death and constitute a charge against the father's estate, but in order to do so such agreement must express a clear intention that the obligation should survive the death of the father.

4. Same; Judgments § 10—

A consent order for the support of the children of the marriage is a contract and is to be construed to ascertain the intent of the parties as gathered from its language, and it cannot be modified or set aside without consent of the parties except for fraud or mistake.

5. Parent and Child § 6—

After disagreement for a period of time over the amount the father should pay for the support of the children of the marriage, and after three orders fixing different amounts for support had been successively entered, a consent order fixing a stipulated amount was entered, which consent order provided that neither party should seek change or modification thereof except for extreme emergency until a specified term of court. The children of the marriage were permanently disabled from earning a living. ***Held:*** The contractual obligation to support the children of the marriage did not survive the death of the father, the intent that it should do so not being expressed or clearly implied in the agreement.

APPEAL by plaintiff from *McKinnon, J.*, April 1964 Term of FRANKLIN.

John F. Matthews for plaintiff appellant.

William P. Pearce, Jr., for Ora B. Layton, Individually and as Administratrix.

W. H. Taylor for Adult Children of E. C. Layton, Deceased, by his First Marriage.

MOORE, J. This appeal raises the question whether a superior court order, consented to by E. C. Layton, for support and maintenance of his two minor children created an obligation which survives his death and constitutes a charge against his estate and a lien on his land.

E. C. Layton was married four times. Nine children were born to his first marriage and all are now adults and *sui juris*. There are two children of his second marriage, Annette and Ernestine, ages 18 and 16. Annette has suffered physical disability because of rheumatic fever. Ernestine is so mentally deficient that she is permanently incapable of self-support.

Layton and his second wife, Elizabeth D. Layton, mother of Annette and Ernestine, separated in 1947. Elizabeth instituted an action for alimony without divorce in September 1947. Orders for alimony *pen-*

dente lite and support of children were entered in 1948 and 1950. An order, entered by consent of the parties, on 29 January 1951, is in pertinent part as follows:

> ". . . the said E. C. Layton shall pay to the plaintiff (Elizabeth D. Layton), for the support and maintenance of the two children, Annette Layton and Ernestine Layton, the sum of Fifty Dollars per month . . . on or before the 10th day of each month, beginning the 10th day of February 1951.
>
> ". . . the plaintiff Elizabeth D. Layton and her said two children shall have the right to use and occupy the dwelling in which she is now living with her said two children."
>
> (The next paragraph deals with visitation rights of E. C. Layton.)
>
> "It is understood and agreed that this order shall not be changed or modified, and that neither of the parties will seek to have the same changed or modified, until the January Term 1952, . . . of Franklin County Superior Court, except in case of extreme emergency."

Layton made the payments provided for in this order until his death on 7 September 1961. Meanwhile he obtained an absolute divorce from Elizabeth and married twice more. His fourth wife is administratrix of his estate. He left a will, but in *caveat* proceedings it was declared null and void by reason of his two marriages subsequent to the execution of the will.

After payment of debts, the widow's year's allowance, and certain charges of administration the balance of the personal estate is $402.82. The lands were sold for partition and the commissioner has on hand for disbursement $32,920.32 from the proceeds of the sale.

The sale for partition was confirmed on 25 April 1962. On 1 May 1962 the support order of 1951 was "docketed as a judgment for the payment of money in Judgment Docket No. 12 at page 3, in the Office of the Clerk of the Superior Court of Franklin County."

On 13 August 1962 Elizabeth D. Layton filed a motion in the cause *(Elizabeth D. Layton v. E. C. Layton)* asserting that the order of 1951 requiring E. C. Layton to pay $50 per month for support of Annette and Ernestine is a money judgment for the payment of which E. C. Layton's estate is responsible after his death, and is a lien on the proceeds from the sale of land in the hands of the commissioner. The heirs at law of E. C. Layton, his administratrix, and the commissioner were made parties defendant. Answers were filed resisting the motion.

The parties waived jury trial. The matter was heard upon stipulations and parol and documentary evidence. The court found facts (substantially as set out hereinabove) and concluded as a matter of law that the 1951 support order "did not create a money obligation on E. C. Layton which survived his death and is not enforceable against his estate," and the said order and the docketing thereof in the Judgment Docket "did not create a lien against the lands . . . nor against the funds derived from the sale of said lands," and that the commissioner "should distribute the funds in his hands . . . free from the claim or alleged lien arising out of the issuance of the Order . . . on January 29, 1951." Judgment was entered accordingly. Plaintiff, as guardian of the minor children, appeals.

"The relationship of parent and child is a status, and not a property right." 67 C.J.S., Parent and child, § 2, p. 628. At common law it is the duty of a father to support his minor children. *Elliott v. Elliott,* 235 N.C. 153, 69 S.E. 2d 224; *Green v. Green,* 210 N.C. 147, 185 S.E. 651; *Blades v. Szatai,* 135 A. 841, 50 A.L.R. 232. And where a child is of weak body or mind and unable to care for itself after coming of age, the duty of the father to support the child continues as before. *Wells v. Wells,* 227 N.C. 614, 44 S.E. 2d 31, 1 A.L.R. 2d 905; 39 Am. Jur., Parent and Child, § 69, p. 710. The common law obligation of a father to support his child is not "a debt" in the legal sense, but an obligation imposed by law. *Ritchie v. White,* 225 N.C. 450, 35 S.E. 2d 414. It is not a property right of the child but is a personal duty of the father which is *terminated by his death. Elliott v. Elliott, supra; Lee v. Coffield,* 245 N.C. 570, 96 S.E. 2d 726; *Blades v. Szatai, supra. These* common law principles have not been abrogated or modified by statute and are in full force and effect in this jurisdiction. G.S. 4-1; *Elliott v. Elliott, supra.*

The support of a child by a parent may be the subject of contract and a father may by contract create an obligation to support his child which will survive his death and constitute a charge against his estate, in which case the ordinary rules of contract law are applicable. *Church v. Hancock,* 261 N.C. 764, 136 S.E. 2d 81; *Stone v. Bayley,* 134 P. 820; 39 Am. Jur., Parent and Child, § 69, p. 710. Such contracts are not against public policy, but there must be a clear intention that the obligation survive the death of the parent. *Stone v. Bayley, supra.*

"A consent judgment is the contract of the parties entered upon the records with the approval and sanction of a court of competent jurisdiction, and its provisions cannot be modified or set aside without the consent of the parties, except for fraud or mistake." 3 Strong: N. C. Index, Judgments, § 10, p. 16; *Church v. Hancock, supra.* The consent

order of January 1951 is a contract for the benefit of E. C. Layton's minor children. Our inquiry is whether it created a debt in a legal sense which survived his death and became an obligation of his estate. We look to the intent of the parties to be gathered from the contract. *Stone v. Bayley, supra; Goodyear v. Goodyear,* 257 N.C. 374, 126 S.E. 2d 113.

From the institution of the action in 1947 until January 1951 there had been considerable disagreement as to the amount the defendant, E. C. Layton, should pay monthly. There had been three orders prior to January 1951 dealing with this subject. The amount was first fixed at $40 per month; this was later changed to $60; the consent order fixed the amount at $50 and provided that neither party should make any effort to change the amount prior to January 1952, except in case of extreme emergency. It is clear that the primary purpose of the consent order was to fix the amount of support. See *Blades v. Szatai, supra.* There is no provision, express or clearly implied, that the payments were to be continued after defendant's death. The order creates no lien upon any of E. C. Layton's property. There is no special consideration running to him as was the case in *Church v. Hancock, supra.* The contract is silent as to the time of termination of support payments. See 18 A.L.R. 2d 1133. It is clearly the intention of the father to meet his common law obligation to his children, and nothing more, and it was the intent and purpose of plaintiff and defendant that this obligation be fixed and certain as to amount. There is nothing in the contract which imposes upon E. C. Layton any obligation or debt over and beyond that required and limited by the common law principles stated above.

The judgment below is

Affirmed.

STATE v. BERNARD ELMO COGGIN.

(Filed 15 January, 1965.)

1. Automobiles § 76—

Evidence to the effect that the passenger in an automobile driven by defendant was injured in a collision so as to require hospitalization, and that defendant walked from the scene to his half-brother's house on the same block and requested his half-brother to find out what had happened, *held* sufficient to be submitted to the jury on the question of whether defendant

knowingly and wilfully failed to render aid to his injured passenger. G.S. 20-166(c).

2. Same—

Evidence tending to show that defendant's passenger was unconscious from drink at the time defendant collided with a parked car, and that afterwards the passenger could not remember what had happened at the time, cannot support conviction of defendant of failing to give his name, address and operator's license to the injured party, since the law does not require a party to do a vain and useless thing.

3. Criminal Law § 107—

It is insufficient for the court merely to read the applicable statutory law, and give a summary of the evidence and the contentions of the parties, since G.S. 1-180 requires that the court apply the law to the facts in evidence.

4. Automobiles § 76—

In a prosecution under G.S. 20-166(c) the court should instruct the jury that the burden is on the State to establish beyond a reasonable doubt that defendant knowingly and intentionally failed to render reasonable assistance to the injured party, and a charge which does not instruct the jury that the failure must be with knowledge and intent is incomplete.

APPEAL by defendant from *Shaw, J.*, 3 February 1964 Session of GUILFORD (Greensboro Division).

The defendant was charged in a bill of indictment with having wilfully violated the provisions of G.S. 20-166(c), (hit and run driving), by leaving the scene of an accident without rendering aid to a visibly injured passenger or supplying the owners of the motor vehicles damaged in the accident with the requisite information tending to identify himself.

The evidence tends to show that the defendant, having been released early on the morning of 6 December 1963 from the City Jail in Greensboro, North Carolina, on bond, on a charge of driving under the influence of alcoholic beverages, together with one Carsee Hunt, likewise having been released on bond on a charge of driving without a license, left the jail in Hunt's automobile; that defendant drove Hunt's car since Hunt had no license and defendant had no car; that they drank a considerable amount of wine, beer and whiskey during the day of 6 December 1963, and about 10:30 p.m. the defendant collided with a parked automobile which in turn hit another car parked about ten feet beyond the first parked car, causing damage to both vehicles and injury to the defendant's companion and passenger, Carsee Hunt. The two parked cars belonged respectively to Thomas G. Day and his son, John R. Day. The accident occurred on Caldwell Street in Greensboro.

Carsee Hunt was either asleep or had "passed out" from drinking at the time of the accident. The evidence is to the effect that he was injured in the accident and never regained consciousness until after he had been moved to a hospital where he remained about three days. The defendant was likewise injured. He had a cut lip which was sewed up at the hospital. His injuries were not serious enough to require his admission to the hospital.

When the collision occurred causing the injuries and damage referred to above, the defendant got out of the car he was driving and proceeded away from the scene on foot, walking normally, according to the evidence. Messrs. Day saw defendant walking away and called to him to come back; the defendant turned and said to them, "I'm going to my brother's." His half-brother, Nathan Hamilton, lived on the corner of the block in which the collision occurred, 250 feet from the scene of the accident. Defendant did go to the home of his half-brother and told him he had had an accident and requested him to go to the scene and find out what had happened. The brother saw he was injured and bleeding and told him to get in his (Hamilton's) car which was parked in front of his home, and to remain there. The defendant did so until the ambulance arrived and he and Hunt were taken to the hospital. Mr. Hamilton arrived at the scene of the accident as the police arrived and before the ambulance arrived.

From a verdict of guilty and the sentence imposed thereon, the defendant appeals, assigning error.

Attorney General Bruton, Asst. Attorney General Ray B. Brady, Staff Attorney L. P. Hornthal, Jr., for the State.

E. C. Kuykendall, Jr., for defendant appellant.

DENNY, C.J. The bill of indictment upon which the defendant was tried is bottomed on subsection (c) of G.S. 20-166, which reads as follows:

"The driver of any vehicle involved in any accident or collision resulting in injury or death to any person shall also give his name, address, operator's or chauffeur's license number and the registration number of his vehicle to the person struck or the driver or occupants of any vehicle collided with, and shall render to any person injured in such accident or collision reasonable assistance, including the carrying of such person to a physician or surgeon for medical or surgical treatment if it is apparent that such treatment is necessary or is requested by the injured person, and it shall be unlawful for any person

to violate this provision, and such violator shall be punishable as provided in § 20-182."

The defendant assigns as error the failure of the court below to sustain his motion for judgment as of nonsuit, made at the close of the State's evidence and renewed at the close of all the evidence.

When the State's evidence is considered in the light most favorable to it, we think it is sufficient to carry the case to the jury on the question as to whether or not the defendant knowingly or wilfully failed to render aid to his injured passenger. This assignment of error is overruled.

We do not think the evidence in this case supports the view that the defendant is guilty of violating G.S. 20-166(c) by reason of his failure to "give his name, address, operator's or chauffeur's license number and the registration number of his vehicle," to Carsee Hunt, the injured party and owner of the car defendant was driving at the time of the accident. Hunt had turned his car over to the defendant that morning when the two were released on bond from the Greensboro jail. The two had been together all day, and, according to Hunt's testimony, "we just got out and got to riding and drinking. * * * We bought quite a bit of liquor and wine, I don't know exactly how much. It was my automobile we were riding in that night." This witness further testified that he did not remember what happened there on Caldwell Street. Moreover, other evidence by the State was to the effect that Hunt was unconscious after the accident and, certainly, no useful purpose could have been served by undertaking to give the unconscious man the information required by the statute. The law does not require a party to do a vain and useless thing. *S. v. Wall,* 243 N.C. 238, 90 S.E. 2d 383.

The appellant assigns as error the following instruction to the jury:

"If the State of North Carolina has satisfied you from the evidence and beyond a reasonable doubt of the defendant's guilt of the offense as specified in the statute, as the Court has read and explained the offense to you, and defined it, that is the offense as headed 'Duty to Stop and Report an Accident or Collision and Furnish Assistance to an Injured Person,' as contained in G.S. 20-166, as the Court has defined it to you, then it would be your duty to so find, and you would return a verdict of guilty."

The court below read subsections (a), (b) and (c) of G.S. 20-166 to the jury, then gave a summary of the evidence and the contentions of the State and of the defendant. Thereupon, the court concluded its charge to the jury with the language quoted above, followed by the statement, "If you are not so satisfied, and if you have a reasonable doubt as to the defendant's guilt, you should give the defendant the

benefit of such reasonable doubt and return a verdict of not guilty." The foregoing instruction, to which the appellant excepted, is not in compliance with the requirements of G.S. 1-180, which provides that the trial judge "shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." *S. v. Flinchem,* 228 N.C. 149, 44 S.E. 2d 724; *S. v. Sutton,* 230 N.C. 244, 52 S.E. 2d 921. It is not sufficient merely for the court to read a statute bearing on the issue in controversy and leave the jury unaided to apply the law to the facts. *Chambers v. Allen,* 233 N.C. 195, 63 S.E. 2d 212; *S. v. Sutton, supra; Lewis v. Watson,* 229 N.C. 20, 47 S.E. 2d 484.

The defendant further assigns as error the failure of the court below to charge the jury with respect to intent and wilfullness in connection with the violation of the provisions contained in G.S. 20-166(c), which statute provides that a violation of the provisions therein with respect to assistance to an injured person, *et cetera,* "shall be punishable as provided in § 20-182." In G.S. 20-182 it is provided that a defendant convicted of wilfully violating G.S. 20-166(c) may be punished by imprisonment for not less than one nor more than five years in the State prison, or fined not more than $500.00, or by both fine and imprisonment.

Therefore, we hold that the defendant was entitled to have the trial judge instruct the jury that the burden was on the State to establish beyond a reasonable doubt that the defendant knowingly or intentionally failed to render reasonable assistance to his injured passenger, including the carrying of him to a physician or surgeon for medical or surgical treatment if it was apparent that such treatment was necessary. *S. v. Ray,* 229 N. C. 40, 47 S.E. 2d 494.

In our opinion, the defendant is entitled to a new trial and it is so ordered.

New trial.

PATRICIA F. YATES, ADMINISTRATRIX OF THE ESTATE OF CLAUDE G. YATES, DECEASED v. JAMES WILLIAM CHAPPELL AND MASON R. MILLER.

(Filed 15 January, 1965.)

1. Negligence § 24c—

Circumstantial evidence, either alone or in combination with direct evidence, is sufficient to be submitted to the jury if the proven facts establish negligence and proximate cause as a more reasonable probability, even though the possibility of mere accident may also arise upon the evidence.

2. Automobiles § 41p—

Circumstantial evidence tending to show that defendant entered the car, started the motor, and was sitting under the steering wheel when decedent got in the car on the righthand side, that defendant drove the car off, and that a few minutes later the car was found resting against the abutment of a bridge with defendant sitting under the steering wheel in an unconscious condition and with decedent beside him on the right, *is held* sufficient to be submitted to the jury on the question of the identity of defendant as the driver of the car at the time of the accident.

3. Automobiles § 54f—

Stipulations that the car involved in the accident was owned by a designated person is sufficient to take the case to the jury on the issue of the agency of the driver. G.S. 20-71.1.

4. Automobiles § 41a— Circumstantial evidence of negligence in driving at excessive speed and failing to maintain control held for jury.

Evidence tending to show that a highway in its approach to a bridge from the south was downhill and curving to a point 250 feet and then straight and level to the bridge, that it had a posted speed limit of 35 miles per hour, that defendant approached the bridge from the south at a time when there was no other traffic, that there were no skid marks at the scene, that the car was found entirely on the shoulder of the highway with its front against the bridge abutment, and that the car was extensively damaged and the four foot concrete abutment cracked, and the concrete railing supported by the abutment cracked for a distance of 25 to 30 feet, *held* sufficient to permit the inference of excessive speed and loss of control, requiring the submission of the issue of negligence to the jury.

APPEAL by plaintiff from *McLaughlin, J.*, September 1964 Session of SURRY.

Allen, Henderson & Williams for plaintiff appellant.

Moore & Rousseau and R. Lewis Alexander for defendant James William Chappell, appellee.

Hudson, Ferrell, Petree, Stockton, Stockton & Robinson and I. Robert Elster for defendant appellees.

MOORE, J. This is an action to recover damages for the alleged wrongful death of Claude G. Yates, plaintiff's intestate. About 9:40 P.M. on 21 January 1963 the automobile in which Claude G. Yates was riding collided with the concrete abutment of the bridge over Cobb Creek on U. S. Highway 21 in Surry County. Yates suffered injuries from which he died on 27 January 1963. The other occupant of the car was defendant Chappell.

At the close of plaintiff's evidence the court, on motion of the defendants, entered a judgment of involuntary nonsuit. Our sole inquiry

is whether the evidence, considered in the light most favorable to plaintiff, is sufficient to make out a case for the jury as against defendants.

Defendant Chappell is *non compos mentis* as a result of injuries received by him in the accident. No persons other than Yates and Chappell were present at the time of the accident. Plaintiff relies on circumstantial evidence. Circumstantial evidence may be sufficient, either alone or in combination with direct evidence, to establish the actionable negligence of defendants. Direct evidence of actionable negligence is not required. It may be inferred from the facts and attendant circumstances, and if the facts proved establish the more reasonable probability that the defendants were guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of mere accident may arise from the evidence. *Robbins v. Harrington,* 255 N.C. 416, 121 S.E. 2d 584; *Lane v. Bryan,* 246 N.C. 108, 97 S.E. 2d 411; *Whitson v. Frances,* 240 N.C. 733, 83 S.E. 2d 879; *Powers v. Sternberg,* 213 N.C. 41, 195 S.E. 88.

Plaintiff's evidence as to the identity of the driver of the automobile is in substance as follows: About 9:00 P.M. on the night of the accident Yates and Chappell went to the home of Mrs. Shirley Garris on U. S. Highway 21 about one-half mile south of the place of the collision. They were there 30 or 40 minutes. When they were ready to leave, Chappell "went out and got in the car" and "started the motor." Yates remained on the porch 2 or 3 minutes talking to Mrs. Garris; he then went out "and got in the car on the righthand side"; he was wearing a "white London Fog jacket." Chappell "was under the wheel and drove the car away." A few minutes later the car was found headed north, resting against the abutment of the bridge. A person was attracted to the scene by the noise of the impact. Others soon arrived. Chappell was sitting under the steering wheel in an unconscious condition. Yates was lying on the front seat with his feet across the floorboard toward the right-hand side of the car and his head lying on Chappell's right leg; he was wearing a white jacket. Both were removed from the car and taken to a hospital.

The foregoing facts are sufficient to support a finding by a jury that defendant Chappell was operating the automobile in which deceased was riding at the time of the accident. The identity of the driver of a car at the time of the accident in suit may be established by circumstantial evidence. *McGinnis v. Robinson,* 252 N.C. 574, 114 S.E. 2d 365; *Stegall v. Sledge,* 247 N.C. 718, 102 S.E. 2d 115. Compare the instant case factually, on the question of driver identity, with *Thomas v. Morgan,* 262 N.C. 292, 136 S.E. 2d 700; *Pridgen v. Uzzell,* 254 N.C. 292, 118 S.E. 2d 755; *Bridges v. Graham,* 246 N.C. 371, 98 S.E. 2d 492;

in which the circumstantial evidence was held to be *prima facie* sufficient to establish the identity of the drivers. The circumstances seem as strong or stronger for identification in the case at bar.

Plaintiff alleges that Chappell operated the car as agent of defendant Miller. It is stipulated that the car involved in the accident was owned by defendant Miller. This takes the plaintiff to the jury on the agency issue. G.S. 20-71.1; *Mitchell v. White,* 256 N.C. 437, 124 S.E. 2d 137.

Finally, we come to the question whether plaintiff's evidence of actionable negligence on the part of defendants is sufficient to survive the motion for nonsuit. The evidence tends to establish the following facts: U. S. Highway 21 runs generally north and south, and the paved portion is 20 feet wide. In approaching Cobb Creek bridge from the south it is downhill and curving to a point 250 feet south of this bridge; from this point it is straight and about level to the bridge. The posted speed limit in the approach to, and in the vicinity of, the bridge is 35 miles per hour. At the time of the accident the highway was dry. The car in which deceased was riding was proceeding northwardly toward the bridge; there was no other vehicular traffic. Investigation immediately after the accident disclosed no tire or skid marks on the hard surface or shoulder of the highway. The car came to rest "head-on into the abutment" at the east side of the bridge; the abutment was at the center of the front of the car. The car was entirely on the shoulder of the highway; the abutment is about even with the east edge of the shoulder. The front end of the car had been folded or pushed back. About a third of the hood was "up in the air." The motor was driven back into the floorboard, and the panel was bent. The steering wheel was bent upward toward the top of the car. The seats were damaged and the glasses broken. The frame was completely warped and bent, more in front. The car was damaged all over; it was in such condition it could not be towed; it had to be loaded on the wrecker. The concrete abutment was cracked, and some of the concrete was knocked off. The abutment was about four feet thick and supported a concrete railing; the railing was cracked a distance of 25 to 30 feet. The bridge had to be repaired. Deceased was a married man and the father of four small children; his health was good prior to the accident and his annual earnings were about $5300.

Plaintiff alleges that defendant Chappel was negligent at the time of, and immediately preceding, the accident in that, among other things, he was operating the car at a speed greater than was reasonable and prudent under the circumstances and failed to keep the car under

reasonable control, and that such negligence was a proximate cause of the injuries to and death of plaintiff's intestate.

The doctrine of *res ipsa loquitur* does not apply in tort cases involving the operation of motor vehicles, and in such cases negligence is not presumed from the mere fact that there has been an accident and injury. *Johns v. Day,* 257 N.C. 751, 127 S.E. 2d 543; *Fuller v. Fuller,* 253 N.C. 288, 116 S.E. 2d 776; *Lane v. Dorney,* 252 N.C. 90, 113 S.E. 2d 33; *Ivey v. Rollins,* 250 N.C. 89, 108 S.E. 2d 63. An inference of negligence cannot rest upon conjecture. *Sowers v. Marley,* 235 N.C. 607, 70 S.E. 2d 670. The mere fact that a vehicle veers off the highway is not enough to give rise to an inference of negligence. *Fuller v. Fuller, supra; Ivey v. Rollins, supra.* But what occurred immediately prior to and at the moment of the impact may be established by circumstantial evidence, either alone or in combination with direct evidence. *Kirkman v. Baucom,* 246 N.C. 510, 98 S.E. 2d 922. The physical facts at the scene of an accident, the violence of the impact, and the extent of damage may be such as to support inferences of negligence as to speed, reckless driving, control and lookout. *Funeral Home v. Pride,* 261 N.C. 723, 136 S.E. 2d 120; *Punch v. Landis,* 258 N.C. 114, 128 S.E. 2d 224; *Stegall v. Sledge, supra; Aldridge v. Hasty,* 240 N.C. 353, 82 S.E. 2d 331; *Adcox v. Austin,* 235 N.C. 591, 70 S.E. 2d 837.

From the evidence in the instant case the jury may infer, among other things, that defendant Chappell was at the time of the accident operating the automobile at a speed greater than was reasonable and prudent under the circumstances then prevailing, and did not have the automobile under reasonable control, and that such conduct was a proximate cause of Yates' injury and death. The road was dry, there was no other traffic, no glaring lights facing Chappell. There is no evidence of any object in or imperfection of the highway, of any mechanical failure of the car, or of any puncture or blow-out of tires. There were no tire or skid marks on the highway indicating application of brakes. The violence of the impact and the severity of injury and damage to the car, the bridge, and the occupants of the car clearly permit an inference of excessive speed. The position of the car and the other facts and circumstances indicate loss of control. If other and contrary inferences may be drawn, the interpretation of the facts is for the jury. *Jernigan v. Jernigan,* 236 N.C. 430, 72 S.E. 2d 912; *Barlow v. Bus Lines,* 229 N.C. 382, 49 S.E. 2d 793. A case may not be withdrawn from the jury unless the only reasonable inference that can be drawn from the evidence is that there was no negligence on the part of defendant, or that his negligence was not a proximate cause of the injury. *Goodson v. Williams,* 237 N.C. 291, 74 S.E. 2d 762. Judgment

of involuntary nonsuit was upheld in *Ivey v. Rollins, supra.* The facts of that case are in many particulars similar to the facts in the instant case. But *Ivey* is distinguishable because the evidence expressly negatives speed and tends to show a complete absence of negligence or rather a lack of evidence of negligence. The principles involved in the instant case are in keeping with those applied in *Lane v. Dorney, supra; Whaley v. Marshburn,* 262 N.C. 623, 138 S.E. 2d 291.

The judgment below is

Reversed.

MARY EDITH WRIGHT SURRATT v. GLENN MARVIN SURRATT.

(Filed 15 January, 1965.)

1. Divorce and Alimony § 1; Judgments § 1; Process § 8—

In the wife's action for support and maintenance of the children of the marriage and for alimony without divorce, a judgment *in personam* may not be rendered against the husband served with process outside the State pursuant to G.S. 1-104, since the court must have jurisdiction of the person in order to render a personal judgment.

2. Estoppel § 3— Record held to disclose that defendant is a nonresident.

Where the wife files answer and participates in an action for divorce instituted by the husband in another state and accepts benefits under the decree therein entered, and some three months later, in her action instituted in this State, after return of service upon him "not to be found" gives information as to his residence in such other state, notwithstanding her allegation that he is a resident of this State, and does not allege that he departed this State with intent to avoid service, *held* the wife may not thereafter assert the husband's residence to be in this State for the purpose of asserting jurisdiction of the court over his person in her action instituted here.

APPEAL by defendant from *Walker, S. J.,* July Session 1964 of RANDOLPH.

This action was instituted by the plaintiff on 10 December 1962 for subsistence for the plaintiff and the two minor children born of the marriage between the plaintiff and defendant. No service of process was ever obtained on the defendant in North Carolina. An order was entered on 17 January 1963, awarding custody of the minor children to the plaintiff and granting temporary support to the plaintiff and her children and counsel fees for her attorney.

The defendant through counsel made a special appearance on 4 October 1963, and moved to dismiss the order for temporary subsistence for lack of service on the person or property of the defendant, and the motion was denied.

On 26 October 1963, service of process outside of the State of North Carolina was had on the defendant while he was a resident of Alachua County, Florida. No answer was filed by the defendant and no appearance made by him.

According to the defendant's brief, on 5 August 1963, the appellant herein, Glenn Marvin Surratt, instituted a civil action in the Circuit Court of the Second Judicial Circuit of Florida against Mary Edith Wright Surratt, asking for an absolute divorce. The defendant in that action, Mary Edith Wright Surratt, filed answer. The record before us does not disclose what affirmative relief Mary Edith Wright Surratt prayed for in her answer. The record, however, does contain a duly certified copy of the final decree entered in said action.

Mrs. Surratt was represented in the Florida proceeding by counsel and was present at the trial of said action in Leon County, Florida. A judgment was entered on 20 May 1964, granting Mrs. Surratt an absolute divorce, custody of the minor children, and awarding her the sum of $75.00 per month, per child, to be paid on the 5th day of each month, commencing 5 June 1964. The decree made no provision for alimony for Mrs. Surratt. Mr. Surratt states in his brief that he has been complying with the terms of the Florida decree. There is no contention to the contrary set forth in the record.

This action was tried at the 2 December 1963 Civil Session of the Superior Court of Randolph County, and a judgment entered granting the plaintiff separate maintenance and subsistence for herself, and alimony without divorce from the defendant in the sum of $300.00 per month.

On 14 January 1964, an order was issued by Latham, S.J., presiding over the Superior Court of Randolph County, North Carolina, directed to Glenn Marvin Surratt, to show cause why he should not be adjudged in contempt for failure to comply with the judgment entered at the December Session of the Superior Court of Randolph County. The foregoing order was served on the defendant on 25 January 1964 by the Sheriff of Alachua County, Florida.

The hearing on the order was continued from time to time and finally heard before Crissman, J., presiding over the courts of the Nineteenth Judicial District, at the 6 April 1964 Session of the Superior Court of Randolph County. The plaintiff appeared at the hearing and

was represented by counsel. The defendant did not appear at the hearing and was not represented by counsel.

Crissman, J. entered an order on 6 April 1964, adjudging the defendant in contempt and ordered that he be held in the custody of the Sheriff of Randolph County until he has shown compliance with the previous orders of the court. The defendant was thereafter arrested and imprisoned in the jail of Randolph County.

On 2 June 1964, Glenn Marvin Surratt applied to Walker, S.J., for a writ of *habeas corpus,* alleging that his imprisonment was illegal. The writ was granted on 2 June 1964 and made returnable before Walker, S.J. at 2:00 p.m. on the same day.

On 3 June 1964, Walker, S.J., entered an order to the effect that Glenn Marvin Surratt is held in lawful custody under an order signed by Crissman, J. on 6 April 1964, and remanded the said Glenn Marvin Surratt to the custody of Lloyd E. Brown, Sheriff of Randolph County to remain in his custody until he complies with the orders heretofore entered in this cause.

The appeal entries entered below will be treated as a petition for *certiorari* and allowed. The defendant assigns error.

Ottway Burton for plaintiff appellee.
Miller & Beck, Jerry M. Shuping for defendant appellant.

DENNY, C.J. The sole question before us on this appeal is whether or not a wife may institute an action for the custody, support and maintenance of the minor children born of the marriage, and for alimony without divorce, and procure an *in personam* judgment against her defendant husband by service of process on her non-resident husband outside the State, pursuant to the provisions of G.S. 1-104. The answer must be in the negative.

In 17 Am. Jur., Divorce and Separation, § 592, page 678, *et seq.,* it is said: "While, under statute, a personal judgment for alimony and costs may properly be entered against a resident defendant who has been served by publication, it is well settled, in accord with the general rules applicable in other cases, that a decree for alimony and costs against a nonresident defendant cannot be based upon constructive service except as against property which may be found within the jurisdiction of the court, specifically proceeded against in the divorce proceeding, and described in the petition for divorce. In other words, constructive service in itself, whether made by publication or by actual service of process upon the defendant without the state is insufficient to give jurisdiction to render a judgment for alimony against a non-

resident which will be binding upon him except as to his property within the jurisdiction. Consequently, even where a statute authorizes a court to award alimony as incidental to suits for divorce, although in terms applying to all cases where alimony is decreed, it must be considered as in harmony with the general rule that a personal decree can only be supported by personal service within the jurisdictional limits."

Likewise, in 17A Am. Jur., Divorce and Separation, § 973, page 157, it is stated: "The power to order a person to pay alimony or child support in a divorce action requires jurisdiction *in personam* over him. * * *"

Also, in 42 Am. Jur., Process, § 50, page 41, it is said: "Whatever effect constructive service of process or personal service outside the territorial jurisdiction of the court may have to give a court jurisdiction *in personam* over its own residents, it is now well and conclusively established that jurisdiction over the person of a nonresident of the state, sufficient to authorize the court to render personal judgment against such nonresident, can be acquired only by personal service of process within the territorial jurisdiction of the court by whose order or judgment his personal liability is to be ascertained and fixed, unless he waives service of process by his voluntary appearance or consents to or accepts some form of service other than personal service. A personal judgment without such personal service upon a nonresident defendant who does not appear or otherwise waive such service is void as obtained without due process of law."

The appellee contends that the defendant is not and never has been a nonresident of the State of North Carolina. Even so, while she alleged in her complaint that the defendant was a resident of Randolph County, North Carolina, when the defendant could not be found in the State of North Carolina, and therefore no personal service could be obtained on him within the State, the plaintiff, in order to get personal service on the defendant outside the State, filed an affidavit on 7 October 1963 to the effect that after due diligence personal service cannot be obtained on the defendant within the State; that the residence of the defendant, according to the best information of the applicant, was 2126 N.W. 7th Street, Gainesville, Florida. Personal service outside the State was thereafter obtained on the defendant in Alachua County, Florida, in which Gainesville is located. Moreover, there was nothing in plaintiff's affidavit to the effect that the defendant was a citizen and resident of North Carolina and "has departed therefrom or keeps himself concealed therein with intent to defraud his creditors or to avoid the service of summons," as set forth in G.S. 1-98.2, subsection 6.

Furthermore, personal service outside the State was not obtained until nearly three months after the defendant herein had instituted an action for absolute divorce from the plaintiff herein in Leon County, Florida, in which action the plaintiff filed answer, employed counsel to represent her, and was present and participated in the trial thereof, in which action she was granted an absolute divorce from the defendant herein, given custody of her children and support for them, and has been the recipient of the benefits of such judgment since it was rendered.

We hold, under the facts revealed by the record, the defendant was a nonresident of North Carolina at the time service of process was made upon him outside the State and that the judgment entered against the defendant at the December Session 1963 of the Superior Court of Randolph County was not a judgment *in personam,* and that the orders adjudging the defendant in contempt for failing to comply therewith were improvidently entered and are hereby reversed and set aside. *Church v. Miller,* 260 N.C. 331, 132 S.E. 2d 688; *Burton v. Dixon,* 259 N.C. 473, 131 S.E. 2d 27; *Stevens v. Cecil,* 214 N.C. 217, 199 S.E. 161; *Pennoyer v. Neff,* 95 U.S. 714, 24 L. Ed. 565.

The judgment of the court below is

Reversed.

SYBIL T. HINES AND HUSBAND, HARRY HINES v. O. Z. TRIPP AND WIFE, GRACIE ANNIE TRIPP.

(Filed 15 January, 1965.)

1. Frauds, Statute of § 3—

A denial of the alleged contract is equivalent to a plea of the applicable statute of frauds. G.S. 22-2.

2. Same—

Upon defendant's plea of the statute of frauds plaintiff has the burden of showing a written agreement or some memorandum or note thereof signed by the party to be charged or by some person by him thereto lawfully authorized.

3. Frauds, Statute of § 2—

The statute of frauds does not require that all the provisions of the agreement to be set out in a single instrument, but the memorandum is sufficient if the contract provisions can be determined from separate but related writings.

4. Same—

The statute of frauds permits an agent to bind his principal by signing the memorandum.

5. Same—

In this action to enforce a contract to reconvey land theretofore conveyed by plaintiffs to defendants for the purpose of securing a loan to pay off a prior mortgage executed by plaintiffs to other parties, a letter signed by plaintiffs' attorney requesting execution of the deed in accordance with the contract between the parties with a letter of defendants' attorney acknowledging the contract, and the attorney's draft of the contract for defendants' signatures, together with corroborative parol testimony, *held* competent for the purpose of showing signature of a sufficient memorandum by defendants' agent.

PLAINTIFFS appeal from a judgment of nonsuit rendered by *Braswell, J.*, at the April 1964 Civil Session of BRUNSWICK.

Plaintiffs seek specific performance of an alleged contract giving them the option to purchase a tract of land in Brunswick County. They allege a demand, and defendants' refusal to comply with their contract.

Defendants denied the alleged contract.

Kirby Sullivan and David M. Blackwell for plaintiff appellants.

Herring, Walton, Parker & Powell for defendant appellees.

RODMAN, J. Plaintiffs' assignments of error are directed to rulings excluding evidence offered for the purpose of establishing the alleged contract.

Defendants' denial of the alleged contract is equivalent to a plea of the statute of frauds, G.S. 22-2. *Hunt v. Hunt,* 261 N.C. 437, 135 S.E. 2d 195; *Pickelsimer v. Pickelsimer,* 257 N.C. 696, 127 S.E. 2d 557; *McCraw v. Llewellyn,* 256 N.C. 213, 123 S.E. 2d 575; *Humphrey v. Faison,* 247 N.C. 127, 100 S.E. 2d 524; *Jamerson v. Logan,* 228 N.C. 540, 46 S.E. 2d 561.

To bind defendants, plaintiffs had the burden of showing a written contract, "or some memorandum or note thereof * * * signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized."

Plaintiffs do not claim that they have a writing signed by defendants *in propria persona.* To establish the contract, they rely on: (1) A letter, dated February 2, 1963, from their attorney, Kirby Sullivan, to defendants; (2) the reply thereto, written by E. J. Prevatte, alleged to be the agent and attorney for defendants; (3) parol testimony by

Prevatte and others to corroborate the statements in Prevatte's reply to Sullivan's letter; and (4) Prevatte's draft of the contract prepared for signature of defendants.

Plaintiffs' evidence is sufficient to establish these facts: *Feme* plaintiff and male defendant are brother and sister, children of J. W. Tripp and wife. The other children of J. W. Tripp and wife were Olive Stanley, Ella Mae Beck, Estelle Carlisle and Leon Tripp. Male plaintiff and *feme* defendant are brother and sister.

By deed, dated 28 February 1951, recorded in Book 102, page 368, J. W. Tripp and wife conveyed to *feme* plaintiff a tract of land described by metes and bounds, recited to contain "57.6 acres as surveyed by E. M. Eutsler, *c.e.,* as appears of record in Map Book 3, at page 45, in the office of the Register of Deeds for Brunswick County, North Carolina." The specific description given in that deed omits six of the calls shown on the Eutsler map recorded in Book 3, page 45. If the calls for course and distance given in that deed are controlling, the acreage conveyed would be less than 57 acres. The land described in the foregoing deed was the homeplace of plaintiffs. They had mortgaged this land prior to 1960 to secure debts owing by them. In 1960, the mortgagee threatened to foreclose. Male defendant offered to assist plaintiffs in saving their home. He and plaintiffs went to the office of E. J. Prevatte, an attorney residing in Southport. Male defendant informed Mr. Prevatte of his desire to help his sister save her home. To accomplish that purpose, he proposed to borrow enough to pay the debt secured by the subsisting mortgage. To secure the moneys he borrowed, he would mortgage plaintiffs' property. This would require a conveyance by plaintiffs to defendants. Defendants would, after the execution of the mortgage, give plaintiffs an option by which they could, at any time within five years, compel a reconveyance. The amount to be paid for the reconveyance would be the amount defendants had invested, plus interest at 6 per cent; additionally, defendants would have the first right to re-purchase if plaintiffs should desire to sell at any time within five years subsequent to the exercise of their option.

Prevatte, when examing plaintiffs' title preliminary to the preparation of the mortgage to be executed by defendants, discovered the omission of the six calls in the deed to plaintiffs. He declined to certify good title to the 57 acres unless the other heirs of J. W. Tripp and wife would release their interest in the land, so that the mortgage to be executed by defendants would convey good title to the entire 57 acres. For that purpose, plaintiff, her brother and sisters, executed a quitclaim deed conveying to defendants the land not covered by the specific description in the deed to plaintiffs. Prevatte also prepared a deed from

plaintiffs to defendants and a contract for execution by defendants Tripp, giving plaintiffs the option to re-purchase at any time within five years. These papers were all transmitted by Prevatte to defendants.

The two deeds to defendants were executed in March 1960. Defendants executed a mortgage securing payment of the moneys borrowed to discharge plaintiffs' indebtedness. The mortgage given by plaintiffs was canceled. Defendants did not sign the option prepared by Prevatte, or, if they signed the same, they did not deliver a copy to plaintiffs. Plaintiffs inquired of Prevatte as to the written option to be executed by defendants. Prevatte explained he had sent the contract to defendants for execution and delivery to plaintiffs.

At plaintiffs' request, Prevatte re-drafted the option for execution by defendants. He delivered the new drafts to plaintiffs. They requested defendants to sign. The request was ignored. Plaintiffs then offered to pay the option price, and demanded a reconveyance. This demand was ignored. Early in 1963, plaintiffs employed Kirby Sullivan, an attorney residing in Southport. Sullivan, on February 2, 1963, wrote plaintiffs as follows:

> "Mr. & Mrs. Harry Hines are ready to re-purchase from you under the terms of their contract with you, the tract of land in Shallotte Township, Brunswick County, North Carolina, containing 57.6 acres as per survey by E. M. Eutsler, c.e., as appears of record in Map Book 3, page 45, in the office of the Register of Deeds of Brunswick County, North Carolina. Please let me know when you will have ready the deed to them so that this matter can be closed out at once."

On February 7, 1963, Mr. Prevatte addressed a letter to Mr. Sullivan. He said:

> "Mr. and Mrs. O. Z. Tripp came to see me yesterday with reference to your letter to them of 2 February, 1963, in behalf of Mr. and Mrs. Harry Hines. They asked that I reply in kind for them. * * * The original agreement between Mr. and Mrs. Hines and Mr. and Mrs. Tripp provided for a re-conveyance of the property within five years from the date of the conveyance from Mr. and Mrs. Hines to Mr. and Mrs. Tripp. The agreement provided that Mr. and Mrs. Hines should pay to Mr. and Mrs. Tripp the same amount of money that Mr.. and Mrs. Tripp paid for the property with interest at the rate of 6 per cent, plus improvements. Mr. and Mrs. Tripp do not deny this agreement. * * * The diffi-

culty in activating the agreement now is the fact that they have waited too late in this crop season, and Mr. and Mrs. Tripp have proceeded to such an investment on the present crop that they cannot now agree to anything. It goes without saying that at the end of the crop year, if your clients are interested in implementing the agreement, I shall be happy to discuss the matter with you at that time, to the end that we may resolve the matter."

The letters from Sullivan, agent for plaintiffs, to defendants and the reply of Prevatte, agent for defendants, were a sufficient memorandum to meet the requirements of G.S. 22-2. *Lane v. Coe,* 262 N.C. 8, 136 S.E. 2d 269; *Smith v. Joyce,* 214 N.C. 602, 200 S.E. 431; *Keith v. Bailey,* 185 N.C. 262, 116 S.E. 729; *Lewis v. Murray,* 177 N.C. 17, 97 S.E. 750; *Hall v. Misenheimer,* 137 N.C. 183, 49 S.E. 104; *Hargrove v. Adcock,* 111 N.C. 166, 16 S.E. 16; *MaGee v. Blankenship,* 95 N.C. 563; 49 Am. Jur. 663-4.

The statute does not require all of the provisions of the contract to be set out in a single instrument. The memorandum required by the statute is sufficient if the contract provisions can be determined from separate but related writings. *Smith v. Joyce, supra; Simpson v. Lumber Co.,* 193 N.C. 454, 137 S.E. 311; *Nicholson v. Dover,* 145 N.C. 18, 58 S.E. 444; 49 Am. Jur. 697.

The statute, by express language, permits an agent to bind his principal. The agent may do so by signing his name. *Lewis v. Allred,* 249 N.C. 486, 106 S.E. 2d 689; *McCall v. Institute,* 187 N.C. 757, 122 S.E. 850; *Hall v. Misenheimer,* 137 N.C. 183, *supra; Hargrove v. Adcock, supra.*

The court erred in excluding the proffered evidence. It was sufficient to require jury determination of the controverted issues.

The judgment of nonsuit is

Reversed.

DORIS LEE CROW, A MINOR, BY HER NEXT FRIEND, NORWOOD W. CROW v. LEWIS MICHAEL BALLARD AND LEWIS THAMER BALLARD.

AND

BESSIE SUSAN CROW, A MINOR, BY HER NEXT FRIEND, NORWOOD W. CROW v. LEWIS MICHAEL BALLARD AND LEWIS THAMER BALLARD.

(Filed 15 January, 1965.)

1. Automobiles § 54f—

Where there is no evidence that the father of the driver was the registered owner of the car and no evidence tending to establish agency under the family purpose doctrine or otherwise, nonsuit of the father, sought to be held liable under the doctrine of *respondeat superior*, is correctly entered.

2. Automobiles § 47; Courts § 20—

An action by a passenger to recover against the driver for a collision occurring in the State of Virginia is governed by the laws of that State which require a showing of gross negligence or a wilful and wanton disregard for the safety of his passengers by the driver in order to support recovery against him.

3. Automobiles § 47—

In an action by the passenger against the driver to recover for injuries sustained in an accident in a state requiring, to support recovery, a showing of gross negligence or wilful and wanton disregard for the safety of the passengers, an instruction placing the burden on plaintiff of proving gross negligence and wilful and wanton disregard for their safety, conjunctively, and an instruction that the terms are synonymous, must be held for prejudicial error, notwithstanding that in other portions of the charge the court correctly defines the terms and charges that a showing of either will support recovery.

4. Appeal and Error § 42—

An erroneous instruction upon a material aspect of the case is not cured by correct instructions on such aspect in other parts of the charge.

APPEAL by plaintiffs from *Shaw, J.*, 20 January Session 1964 of GUILFORD (Greensboro Division). Petition for *certiorari* allowed 28 April 1964 in the Supreme Court. Case set in its regular order at Fall Term 1964.

These actions arose out of an automobile accident which occurred in the State of Virginia on the Blue Ridge Parkway on 4 July 1962. The cases were consolidated for trial. The plaintiffs alleged in their respective complaints that defendant Lewis Thamer Ballard owned the Chevrolet car involved in the accident and maintained it for the use, benefit, convenience and pleasure of his family, and, more particularly, his son, Lewis Michael Ballard, age seventeen.

Plaintiffs in their respective complaints alleged that defendant driver, while driving at a high and excessive rate of speed, lost control of the

car, causing it to skid off the road and go over an embankment, a distance of approximately 140 feet. It is also alleged that before the accident occurred, the passengers in the car requested the driver to slow down and be careful, to no avail; that the injuries and damages suffered by the plaintiffs "were solely and proximately caused by the defendant's gross negligence and wilful and wanton disregard of the safety of his passengers."

At the close of plaintiffs' evidence, Lewis Thamer Ballard moved for judgment as of nonsuit in both cases for failure to show his responsibility for the operation of the automobile driven by his son, Lewis Michael Ballard. Motion allowed and the plaintiffs except.

These cases were submitted to the jury on identical issues and answered as indicated:

"1. Was the plaintiff injured by the gross negligence of the defendant, Lewis Michael Ballard; or the wilful and wanton disregard of the safety of the plaintiff by the defendant, Lewis Michael Ballard, as alleged in the complaint? Answer: No.

"2. What amount of damages, if any, is the plaintiff entitled to recover? Answer: ....."

From the judgment entered on the verdict, the plaintiffs appeal, assigning error.

Egerton & Alspaugh; James B. Rivenbark for plaintiff appellants.

Smith, Moore, Smith, Schell & Hunter; Richmond G. Bernhardt, Jr., for defendant appellees.

DENNY, C.J. The plaintiffs' first assignment of error is to the ruling of the court below in allowing the motion of defendant Lewis Thamer Ballard for judgment as of nonsuit at the close of plaintiffs' evidence.

There is no allegation in the complaints alleging that Lewis Thamer Ballard was the registered owner of the car involved. Moreover, the plaintiffs offered no evidence tending to establish ownership of the automobile involved in Lewis Thamer Ballard. Neither did they offer any evidence tending to establish agency under the family purpose doctrine or otherwise. Furthermore, no evidence was offered tending to show that the trip on which the accident occurred was made with the knowledge or consent of Lewis Thamer Ballard. Consequently, we hold that the ruling of the court below with respect to the motion of Lewis Thamer Ballard for judgment as of nonsuit must be upheld. *Lynn v. Clark*, 252 N.C. 289, 113 S.E. 2d 427; *Griffin v. Pancoast*, 257 N.C. 52, 125 S.E. 2d 310. This assignment of error is overruled.

The plaintiffs assign as error the following portions of the charge:

"Members of the jury, if the plaintiffs have satisfied you and have satisfied you by the greater weight of the evidence that the defendant was grossly negligent and was guilty of wilful and wanton disregard of the safety of the plaintiffs or each of them * * *." Exception No. 3.

"Now, we get into another field which is not before you, and that is the matter of contributory negligence. As the court understands the law, gross negligence is a higher degree of negligence than ordinary negligence, and that wilful and wanton and reckless conduct is still a higher degree of negligence or a greater degree of negligence than the negligence of gross negligence, so much so that in the wilful, wanton, and reckless conduct, the matter of contributory negligence, which might otherwise be interposed as a defense, is wiped out. * * * (I)t is important to mark the distinction between acts or omissions which constitute gross negligence, and those which are termed wilful or wanton, because it is usually held that in the former, contributory negligence on the part of the plaintiff, will defeat recovery; while in the latter, it will not, but you do not have the matter of contributory negligence before you, *but the court is of the opinion that the terms are synonymous* * * *." (Emphasis added.) Exception No. 4.

Since the automobile accident complained of occurred in the State of Virginia, liability or the lack of it must be determined according to the substantive laws of that State. *Doss v. Sewell,* 257 N.C. 404, 125 S.E. 2d 899.

The Virginia guest statute in pertinent part reads as follows: "No person transported by the owner or operator of any motor vehicle as a guest without payment for such transportation * * * shall be entitled to recover damages against such owner or operator for death or injury * * * unless such death or injury was caused or resulted from the gross negligence *or* wilful and wanton disregard of the safety of the person or property of the person being so transported on the part of such owner or operator." (Emphasis added.)

In *Doss v. Sewell, supra,* Higgins, J., speaking for the Court, said: "The Supreme Court of Appeals of Virginia has defined gross negligence and wilful and wanton disregard for safety in many cases, among them, *Crabtree v. Dingus,* 194 Va. 615, 74 S.E. 2d 54: 'Gross negligence, as we have often said, is that degree of negligence which shows an utter disregard of prudence amounting to complete neglect of the safety of another * * * the element of culpability which characterizes all negligence is in gross negligence magnified to a high degree as compared with that present in ordinary negligence. * * * It

has been described as such heedless and reckless disregard of the rights of another as should shock fair-minded men.' In *Thomas v. Snow,* 162 Va. 654, 174 S.E. 837, the court said: 'Gross negligence is a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence. But it is something less than the wilful, wanton, and reckless conduct which renders a defendant who has injured another liable to the latter even though guilty of contributory negligence. * * * It is important to mark the distinction between acts or omissions which constitute gross negligence and those which are termed wilful or wanton, because it is usually held that in the former contributory negligence on the part of plaintiff will defeat recovery, while in the latter it will not.'" (Citations omitted.) See *Morse v. Walker,* 229 N.C. 778, 51 S.E. 2d 496.

The trial judge in his charge repeatedly instructed the jury correctly with respect to the difference between gross negligence and wilful and wanton conduct. However, that portion of the charge assigned as error under Exception No. 3, placed the burden on the plaintiffs of proving by the greater weight of the evidence both gross negligence and wilful and wanton conduct on the part of the defendant, as a prerequisite to recovery by the plaintiffs. This was error.

Likewise, in that portion of the charge set out above under Exception No. 4, the court differentiated between gross negligence and wilful and wanton conduct, properly stating them in the disjunctive. However, when the court added, "but the court is of the opinion that the terms are synonymous," this was also error.

We have repeatedly held that an erroneous instruction upon a material aspect of the case is not cured by the fact that in other portions of the charge the law is correctly stated. *Mitchell v. White,* 256 N.C. 437, 124 S.E. 2d 137; *Rodgers v. Thompson,* 256 N.C. 265, 123 S.E. 2d 785; *Godwin v. Johnson Cotton Co.,* 238 N.C. 627, 78 S.E. 2d 772; *S. v. Floyd,* 220 N.C. 530, 17 S.E. 2d 658.

The plaintiffs are entitled to a new trial and it is so ordered.

New trial.

STATE v. RALPH A. JOHNSON.

(Filed 15 January, 1965.)

1. Constitutional Law § 32—

A defendant in a criminal prosecution is entitled to counsel and, if an indigent, to have court appoint counsel for him unless he intelligently and understandingly waives counsel, and the fact that defendant enters pleas of guilty does not constitute such a waiver. Sixth and Fourteenth Amendments to the Constitution of the United States.

2. Same—

The Federal decision in regard to a defendant's right to counsel is retroactive.

3. Criminal Law § 173—

Upon the hearing of a petition attacking the constitutionality of defendant's trial on the ground that he had been denied counsel, petitioner's uncontradicted evidence that he filed his petition within a year after his parole to this State after serving some eleven years as a Federal prisoner and that the petition was filed within several months of the rendition of the Federal decision declaring the right of a defendant to counsel, discloses that defendant's delay in filing the petition for more than five years from the rendition of the judgment attacked was not due to laches or negligence, and the trial court's holding to the contrary cannot stand. G.S. 15-217.

CERTIORARI to review a judgment entered October 3, 1964, by *May, Special Judge,* based on hearing pursuant to G.S. 15-217 *et seq.,* at July "A" 1964 Criminal Session of WAKE Superior Court.

At January Term, 1948, Ralph A. Johnson, then defendant and now petitioner, entered pleas of guilty to six indictments numbered and containing charges as indicated below. The court pronounced judgments as follows:

In #6623 (armed robbery), defendant was sentenced to a prison term of five years. In #6619 (forgery), #6621 (forgery), #6624 (larceny of automobile), and #6625 (forgery), which were consolidated for judgment, defendant was sentenced to a prison term of twelve months, *to run concurrently* with the five-year sentence in the armed robbery case (#6623).

In #6620, an indictment charging (1) felonious breaking and entering and (2) larceny, defendant was sentenced to a prison term of five years, to begin *at the expiration* of the five-year sentence in the armed robbery case (#6623).

In a petition filed in Wake Superior Court in June, 1963, under G.S. 15-217 *et seq.,* petitioner attacked the proceedings at January Term, 1948, *with reference to #6620,* asserting the plea and judgment, and his commitment and imprisonment under the judgment, are void on the

ground his constitutional rights were denied. Thereafter, counsel was appointed, namely, Thomas W. Steed, Jr., Esquire, to represent petitioner. At the hearing before Judge May at July "A" 1964 Criminal Session, the evidence consisted of the minutes of the January Term, 1948, of Wake Superior Court, pertaining to said indictments, and the testimony of petitioner.

Judge May, in his judgment, found facts substantially as stated above and in addition the following: Defendant was not represented by counsel in Wake Superior Court at said January Term, 1948. He was committed to the North Carolina Prison System on January 6, 1948, and remained a prisoner therein until his escape in April, 1951. In 1951, while an escapee, under sentence(s) pronounced in a federal court, defendant was committed to and remained in a federal prison until July, 1962, when he was paroled to North Carolina. Since July, 1962, he has been in the North Carolina Prison System. Judge May also found as a fact "that since his trial in 1948 the petitioner has been neither mentally nor physically ill to such an extent as to incapacitate him from requesting a review of his trial."

The judgment concludes as follows:

"Upon the foregoing findings of fact the Court concludes as a matter of the law that the petitioner in this proceeding has not shown that the delay of 15 years after the rendition of the final judgment in the complained of trial was not due to laches or negligence on his part. The Court further concludes that since the petition in this action was filed more than 5 years after rendition of the final judgment complained of that the petitioner is not entitled to relief under the provisions of G.S. 15-217, *et seq.*

"IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that this petition be, and the same is hereby dismissed, and all proceedings had by virtue of said petition are and the same is hereby dismissed."

The matter is before us on petition for *certiorari* to review said judgment and the Attorney General's answer thereto.

Attorney General Bruton and Theodore C. Brown, Jr., Member of Staff for the State.

Thomas W. Steed, Jr., for defendant petitioner.

BOBBITT, J. G.S. 15-217 contains this sentence: "No proceeding under this article shall be commenced more than five years after rendition of final judgment resulting from said conviction, or more than three years after the effective date of this article, whichever is later,

unless the petitioner alleges facts showing that the delay was not due to laches or negligence on his part."

It is not necessary or appropriate to review defendant's testimony to the effect he was not guilty of the criminal offense for which he was indicted in #6620 or his testimony relating to circumstances in explanation of his plea of guilty thereto. There are no findings of fact concerning these matters. The judgment below is based solely on the quoted provision of G.S. 15-217.

Plaintiff's uncontradicted evidence is to the effect he was arrested on January 1, 1948, in Richmond, Virginia, and tried, sentenced and committed in Wake Superior Court on January 6, 1948; that he had no lawyer and neither time nor money to get one; and that his request for counsel was denied with the explanation, in substance, that there was no provision for the appointment of counsel in such cases.

Expressly overruling *Betts v. Brady,* 316 U.S. 455, 86 L. Ed. 1595, 62 S. Ct. 1252 (1942), the Supreme Court of the United States, in *Gideon v. Wainwright,* 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792, 93 A.L.R. 2d 733 (1963), held that one of the fundamental rights made obligatory on the states by the Fourteenth Amendment is the provision of the Sixth Amendment that "(i)n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence," and that, when an indigent defendant is charged with a felony in a state court, the failure to appoint counsel for him constitutes a denial of his constitutional rights. Annotations: 93 A.L.R. 2d 747 *et seq.,* 9 L. Ed. 2d 1260 *et seq.* "(W)here the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." *Carnley v. Cochran,* 369 U.S. 506, 8 L. Ed. 2d 70, 82 S. Ct. 884 (1962). In this connection, see *Doughty v. Maxwell,* 376 U.S. 202, 11 L. Ed. 2d 650, 84 S. Ct. 702 (1963), reversing *Doughty v. Sacks,* 191 N.E. 2d 727 (Ohio 1963).

The said constitutional right to counsel is not limited to cases where defendant pleads not guilty. *United States v. LaVallee,* 330 F. 2d 303 (2d Cir. 1964); *United States v. Myers,* 329 F. 2d 856 (3d Cir. 1964); *Doughty v. Maxwell, supra.*

Nothing in the record indicates petitioner voluntarily, intelligently and understandingly (or otherwise) waived his constitutional right to counsel. In this connection, see *Johnson v. Zerbst,* 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019, 146 A.L.R. 357 (1938); *S. v. Roux, ante,* 149, 139 S.E. 2d 189. "Presuming waiver from a silent record is impermissible." *Carnley v. Cochran, supra.*

At January Term, 1948, of Wake Superior Court, *Betts v. Brady, supra,* was authoritative. However, after *Gideon v. Wainwright, supra,*

was decided, whether there *has been* a denial of constitutional rights is to be determined by application of the constitutional principles settled and declared in that decision. *Pickelsimer, et al. v. Wainwright,* 375 U.S. 2, 11 L. Ed. 2d 41, 84 S. Ct. 80 (1963); *Bottoms v. State,* 262 N.C. 483, 137 S.E. 2d 817; *United States v. LaVallee, supra; United States v. Myers, supra; Palumbo v. State of New Jersey,* 334 F. 2d 524 (3d Cir. 1964); *Doughty v. Maxwell, supra.*

Petitioner's uncontradicted testimony, which amplifies the court's findings, is to the effect that he was a federal prisoner in Atlanta, Georgia, under sentence(s) imposed by a federal court, presumably in Virginia, from 1951 until his return to North Carolina on July 3, 1962; and that he was advised the North Carolina Courts would not act upon a petition filed under G.S. 15-217 *et seq.* while he was in prison in Atlanta. Apart from the fact he was beyond the jurisdiction of our courts from 1951 until 1962, the constitutional ground on which he attacks the proceedings at January Term, 1948, in #6620, was undeclared and unavailable to him until March 18, 1963, when *Gideon v. Wainwright, supra,* was decided. In June, 1963, the petition under G.S. 15-217 *et seq.* was filed. Under these circumstances, we are of opinion that the court's conclusion of law to the effect that petitioner failed to show that the delay in filing his petition under G.S. 15-217 *et seq.* "was not due to laches or negligence on his part" is erroneous. Since the answer of the Attorney General indicates his views and those expressed herein are in substantial accord, the petition for *certiorari* is allowed; and decision is entered as stated below.

The judgment entered October 3, 1964, in post-conviction proceedings, is reversed; and the cause is remanded to the Superior Court of Wake County with directions that an order be entered vacating the plea, judgment and commitment entered at January Term, 1948, in #6620; and, unless petitioner is lawfully imprisoned in another case or cases, that provision be made for the petitioner's release under an appearance bond in an amount to be fixed by the court pending further prosecution or other disposition of the indictment in #6620.

Reversed and remanded.

MELVIN E. MOORE v. JAMES WILLIAM YOUNG.

(Filed 15 January, 1965.)

Judgments § 34; Insurance § 61.1—

Plaintiff's action to recover damages resulting from a collision, in which action defendant filed a counterclaim for his damages, consent judgment was entered dismissing the action as of nonsuit "without prejudice to defendant's counterclaim," presumably upon payment to plaintiff by defendant's liability insurer. *Held:* The consent judgment precludes plaintiff from thereafter setting up his claim or going forward with the evidence, and entitles defendant to prosecute his counterclaim, notwithstanding the possibility of the anomalous result, under the circumstances, of defendant recovering against plaintiff on the counterclaim.

APPEAL by plaintiff from *May, J.*, February 1964 Civil Term of JOHNSTON.

Plaintiff instituted this action in May 1961 to recover for personal injuries sustained in a collision between his 1953 Cadillac automobile and defendant's 1950 Chevrolet pickup truck on April 29, 1961, about 4:00 p.m. Plaintiff alleged that the collision occurred when defendant, while under the influence of intoxicants, drove his truck to his left of the center of Highway No. 242 into the path of plaintiff's automobile. Answering, defendant denied that he was negligent and alleged that the collision resulted when plaintiff, traveling at a high rate of speed, lost control of his vehicle, ran off the pavement onto the shoulder, came back onto the pavement, and skidded across the highway into defendant's lane of travel. Defendant counterclaimed for his damages. By reply, plaintiff denied the allegations of the answer, and, in bar of the counterclaim, he pled (1) defendant's contributory negligence and (2) defendant's conviction of the crime of involuntary manslaughter for the death of plaintiff's wife in the collision in suit.

On September 6, 1962, the Clerk of the Superior Court entered a judgment reciting that "all matters and things in controversy in this action have been compromised, agreed, and settled, and that the plaintiff has elected to take a voluntary nonsuit of his claim." He thereupon dismissed the action as of nonsuit. This consent judgment was signed by plaintiff and by Levinson & Levinson, one of the two firms of attorneys representing plaintiff, as well as by one of the two firms representing defendant. On September 18, 1963, defendant moved the Clerk of the Superior Court to reform the consent judgment for that by mutual mistake the language "without prejudice to the defendant's counterclaim" had been omitted as the last six words of the judgment. The Clerk allowed this motion on September 23, 1963, by an order bearing the written consent of Levinson & Levinson, attorneys for plaintiff.

When the case was called for trial at the May Session 1963, defendant stipulated that, after entering a plea of not guilty, he had been convicted of involuntary manslaughter upon an indictment arising out of the collision in suit. Upon this stipulation, the judge dismissed defendant's counterclaim, and defendant appealed. This court, noting that the "consent judgment, which dismissed *plaintiff's action* 'as of nonsuit' was entered 'without prejudice to the defendant's counterclaim,'" reversed and directed the Superior Court to enter an order striking from plaintiff's reply the allegations relating to defendant's conviction of manslaughter. *Moore v. Young,* 260 N.C. 654, 133 S.E. 2d 510.

When the case was called for trial at the February 1964 Session, on the reinstated counterclaim, plaintiff successively made the following motions, each of which the court denied in its discretion, plaintiff excepting:

1. Motion to file an amended complaint, verified February 17, 1964, but otherwise identical with the original.
2. Motion to amend the reply, to allege, as a bar to the counterclaim, "settlement made with plaintiff on the cause of action alleged in the complaint."
3. Motion for permission to read the complaint to the jury.
4. Motion that plaintiff be allowed to go forward with the evidence.
5. Motion that plaintiff be permitted to explain to the jury why defendant was going forward with the evidence.
6. Motion that the court explain to the jury why defendant was going forward with the evidence.

Each party offered evidence tending to show that immediately preceding the collision the other had lost control of his vehicle and was to his left of the center of the highway in the other's lane of travel. In addition, plaintiff offered three witnesses each of whom testified that he (or she) had observed defendant about thirty minutes before the collision in question and that he was, in the witness' opinion, staggering drunk. One of the witnesses had refused defendant's invitation to ride with him because defendant was staggering and reeking of alcohol, and was "under the influence of alcohol." Defendant himself denied that he was drunk. He testified that he had had only two beers that day and those about 10:30 a.m. He offered other evidence tending to establish his sobriety at the time of the accident.

The jury answered the issues of negligence and contributory negligence in favor of defendant and assessed his damages at $25,000. From

judgment entered upon the verdict, plaintiff appeals, assigning as error the denial of the six motions made at the beginning of the trial, the admission of certain evidence, and the failure of the judge to comply with G.S. 1-180.

Smith, Leach, Anderson & Dorsett for plaintiff.
J. R. Barefoot and C. C. Canady, Jr., for defendant.

SHARP, J. We deduce from this record that a settlement of plaintiff's claim against defendant was negotiated by and between plaintiff and defendant's liability insurance carrier without defendant's consent. Except that the settlement was made *after* plaintiff had instituted this action, and after defendant had asserted his counterclaim, presumably we would have had here a situation equivalent to that in *Beauchamp v. Clark*, 250 N.C. 132, 108 S.E. 2d 535.

It may be that the jury in this case, which found plaintiff negligent and defendant free of contributory negligence, and awarded defendant $25,000 damages for his personal injuries, was correct. If so, the jury which found defendant guilty of involuntary manslaughter in the death of plaintiff's wife in the accident in suit erred egregiously — as did defendant's insurance company, which, after investigation, concluded that defendant was solely liable for the collision and thereupon paid plaintiff his damages. But, be that as it may, we have here an anomalous situation, one not in the interest of the public, which is required to carry liability insurance and to pay for it premiums reflecting the liabilities imposed upon the carriers. The Motor Vehicle Financial Responsibility Act obliges a motorist either to post security or to carry *liability* insurance, not accident insurance to indemnify all persons who might be injured by the insured's car. *Keith v. Glenn*, 262 N.C. 284, 286, 136 S.E. 2d 665, 667. When the Legislature passed the act it was not in the legislative contemplation that each driver in a two-car collision would recover from the other's insurance carrier.

Plaintiff, having agreed that the settlement with defendant's insurance carrier was "without prejudice to the defendant's counterclaim," had no right to plead the settlement or put it in evidence.

> "(T)he words 'without prejudice' have a distinct meaning in law, and . . . they import into any transaction that the parties have agreed that as between themselves the receipt of money by one and its payment by the other shall not, because of the fact of the receipt or payment, have any legal effect upon the rights of the parties in the premises, and that such rights will be as open to settlement by legal controversy as if the money had not been turned

over by the one to the other (citations omitted)." *Hinton v. Bogart,* 79 Misc. 418, 420, 140 N.Y. Supp. 111, 113 (App. T.).

After having agreed that the compromise of his claim should be without prejudice to defendant's counterclaim, and after having taken a voluntary nonsuit as to his cause of action, plaintiff was not entitled to reinstate his complaint for the purpose of going forward with the evidence or of showing that he had first instituted the suit. By the terms of the consent judgment, plaintiff had, in effect, agreed that defendant should take the offensive in any future litigation. Each of plaintiff's six motions was properly overruled.

Had the consent judgment dismissed both plaintiff's claim and defendant's counterclaim — the latter without prejudice to the right of defendant to prosecute it later in a separate action in which he would have been the plaintiff — , the rules laid down in *Bradford v. Kelly,* 260 N.C. 382, 132 S.E. 2d 886, and followed in *Keith v. Glenn, supra,* would have been applicable. In such later suit, plaintiff here (the same as defendant in *Bradford v. Kelly, supra*) could have pled as a counterclaim the cause of action he alleged in his complaint in this cause. Defendant, as plaintiff in the second action, would then have been put to the election the consequences of which are spelled out in *Keith v. Glenn, supra,* and *Bradford v. Kelly, supra.* If defendant had refused to permit the dismissal of his counterclaim when his insurance carrier settled with plaintiff, the court, upon plaintiff's motion, doubtlessly would have relabeled defendant's counterclaim as the complaint it was and would have permitted plaintiff to withdraw his reply theretofore filed and to file an *answer* setting up his own counterclaim. When *A* and *B* have mutual personal-injury claims growing out of an automobile collision, and the insurance carrier of *A,* without his consent, settles with *B,* and when, thereafter, *A* sues *B,* every trial lawyer and every judge knows that *B's* defense is suspect if he makes no claim against *A* for his injuries, the jury having no knowledge of the settlement. On the other hand, if, by some mischance, the jury should learn of the settlement, *A's* case is suspect. If, however, the case is tried as if no settlement had been made and all knowledge of it is kept from the jury, neither party is prejudiced by it. The jury evaluates the collision in gross and appraises both claims together. In such a case, all that either party is entitled to is a fair trial and, if judgment is rendered against him, credit for whatever his insurance carrier has paid the judgment creditor in discharge of its liability. *Keith v. Glenn, supra; Bradford v. Kelly, supra.*

In this case plaintiff made every conceivable motion except one to be allowed to withdraw his reply and file an answer setting up his own

counterclaim. Had he done so, the court applying the rationale of *Keith* and *Bradford, supra,* would no doubt have allowed the motion. Whether this procedure would have changed the course of events, no one can say, and speculation would be neither sensible nor profitable. Counsel for plaintiff presented plaintiff's evidence clearly and forcefully. If the jury, had accepted it, defendant could not have recovered. Unfortunately for plaintiff, the jury decided the facts against him. We have examined this record, with its implications, microscopically, yet appellant's assignments point out no reversible error. Needless to say, no question arises, on this appeal, as to the liability of plaintiff's insurance carrier upon the judgment rendered.

No error.

TOWN OF GARNER, A MUNICIPAL CORPORATION v. W. A. WESTON AND WIFE, BERTHA B. WESTON.

(Filed 15 January, 1965.)

1. Appeal and Error § 49—

Where there are no exceptions to the findings of fact the Supreme Court is bound by the findings.

2. Municipal Corporations § 25—

Where the uncontradicted findings are to the effect that defendants were seeking to use their land in violation of a municipal zoning ordinance and that defendants had not expended any substantial sums in connection with such use prior to the effective date of the ordinance, and that therefore such use was not a nonconforming use existing at the time of the effective date of the ordinance, judgment restraining such use is proper.

3. Same; Administrative Law § 2—

Where a zoning ordinance provides for a hearing upon application to the board of adjustment for a permit to complete a nonconforming use, such administrative procedure should be exhausted before suit is instituted in the courts asserting the right to complete a nonconforming use.

4. Municipal Corporations § 25—

Petition to be allowed to complete a nonconforming use is addressed to the discretion of the board of adjustment.

APPEAL by defendants from *Hobgood, J.,* June, 1964 Regular Civil Session, WAKE Superior Court.

The Town of Garner, a municipal corporation, instituted this civil action on August 19, 1963, to enjoin the defendants from constructing

a mobile home or trailer park within one mile of the town limits in violation of its extraterritorial zoning ordinance effective April 15, 1963.

By answer, the defendants admitted they were in the process of constructing a trailer park within the one mile area but that they were entitled to complete the construction by reason of their having made plans, expended considerable amounts of money in grading streets, digging a well, building a pump house, laying waterlines, concrete patios, and buying trailers for installation on the project, all before the effective date of the ordinance. They allege that they have a vested right in completing the project as a nonconforming use.

The parties waived a jury trial, consented that Judge Hobgood should hear the evidence, make findings of fact, state his conclusions of law, and render judgment. Whereupon, Judge Hobgood heard evidence in great detail, and from both parties. With respect to how far work on the facility had gone prior to the effective date of the ordinance, the evidence was conflicting. The court's findings of fact cover 16 pages of the record. With respect to the findings, the appellant's brief contains the following: "Generally, there is no dispute as to the facts as found by the Judge in the court below, so the Supreme Court may apply the law to those facts."

Among the findings made by the court are: "Prior to the 20th day of April, 1964, . . . the land belonging to the defendants . . . had never been used for the location or occupancy of any house trailer or mobile home . . . thus no part of said land . . . was actually used . . . at the date of the adoption of the Zoning Ordinance . . . (T)here was not any map in existence showing the land of the defendants involved in this action and designated as a mobile home park or intended for use in connection with any house trailer or mobile home constructed on any part of the land . . . at any time before the effective date of the . . . ordinance, before the 9th day of October, 1963. . . ."

The defendants, by the 20th day of June, 1964, had constructed 67 slabs or patios intended for use in connection with their house trailer park. There were many other findings along the same lines.

The court found that health regulations required a permit to construct a trailer camp and approval of water and sewer facilities before construction could begin. The defendants did not have such permit. The court also found that the ordinance empowered the Board of Adjustment to issue variance permits upon a proper showing. The defendants did not apply for such permit.

The court concluded: "(T)here was no use being made of the land of the defendants involved in this action as a house trailer park or

mobile home park which existed at or before the effective date of the Zoning Ordinance." . . .

"The defendants have not shown and established any valid defense to the plaintiff's action. . . ." The court ordered that the defendants be "restrained and enjoined from conducting, maintaining, and operating any mobile home park or . . . any house trailer park . . . on their said property . . . in violation of the Extraterritorial Zoning Ordinance of the Town of Garner."

The defendants excepted and appealed.

Robert T. Hedrick for defendant appellants.

Johnson, Gamble & Hollowell by Samuel H. Johnson, Lassiter, Leager, Walker & Banks by Wm. C. Lassiter for plaintiff appellee.

Broughton & Broughton, for Mobile Home Parks Association, Inc., amicus curiae.

HIGGINS, J. The parties stipulated the Presiding Judge should hear the evidence, make findings of fact, state his conclusions of law, and enter judgment. The appellants advise us in their brief that there is no dispute with respect to the facts found in the court below. Hence the court must accept, and is bound by, Judge Hobgood's findings. The short quotations from the findings are sufficient to support the court's conclusion, which in turn sustains the judgment entered.

The constitutionality of the zoning ordinance, as such, is not challenged as we interpret the record. If it is, *Raleigh v. Morand,* 247 N.C. 363, 100 S.E. 2d 870, and the authorities therein cited repel the challenge.

The defendants contend they had completed plans for their mobile home court and in furtherance thereof had dug a well, built a pump house, laid water lines, constructed patios, graded streets, and bought trailer units to be set up before the zoning ordinance became effective. They contend by reason thereof they are entitled to complete the project as a nonconforming use. They offer evidence in partial support of their claims with respect to the extent of the construction as of April 15, 1963. However, there was evidence to the contrary. The trial judge made his findings. They do not support the defendants' claim with respect to the work done. While the findings are contrary to most of the defendants' evidence, nevertheless the defendants do not challenge them on any ground. *Coffee Co. v. Thompson,* 248 N.C. 207, 102 S.E. 2d 783; *Construction Co. v. Electrical Workers,* 246 N.C. 481, 98 S.E. 2d 852.

While the defendants' evidence to some extent parallels the facts in the *Tadlock* case, 261 N.C. 120, 134 S.E. 2d 177, the court's findings

fall short of the standards approved in *Tadlock* and in other zoning cases which have authorized the completion of the project under way at the date the ordinance became effective. The court found the zoning ordinance of the Town of Garner made provision for a hearing before the Board of Adjustment upon application for a permit to complete a nonconforming use, but the defendants have not applied for such permit and hence have not exhausted their administrative remedies. *In Re Application of Hasting*, 252 N.C. 327, 113 S.E. 2d 433; *In Re O'Neal*, 243 N.C. 714, 92 S.E. 2d 189; *In Re Pine Hill Cemeteries, Inc.*, 219 N.C. 735, 15 S.E. 2d 1.

The defendants' showing, in view of their stipulations, is not sufficient to permit reversal of the judgment. However, in view of the expenses incurred, the defendants, if so advised, may make application for a nonconforming use permit as a hardship case. Such permit, however, is discretionary with the Board of Adjustment. *In Re Tadlock, supra.*

For the reasons assigned, the judgment is

Affirmed.

STATE v. CHARLIE McCRARY.

(Filed 15 January, 1965.)

1. Larceny § 1—

Felonious intent as an essential element of the crime of larceny is the intent to permanently deprive an owner of his property, and a taking by trespass or by assault for the immediate temporary use of the taker and without any intent of depriving the owner permanently of his property does not constitute larceny.

2. Larceny § 8—

Where the State's evidence tends to show that defendant took the property of another for the taker's immediate temporary use and without any intent to deprive the owner of his property permanently, an instruction which fails to charge the jury that the requisite felonious intent was to deprive the owner permanently of its property must be held for prejudicial error.

APPEAL by defendant from *Latham, Special Judge,* August 3, 1964, Special Criminal Session of MECKLENBURG.

Appellant (McCrary) and Harold Wayne Morgan were indicted and tried for the larceny of a 1954 Ford automobile, "of the value of

more than $200.00, to wit, $400.00," the property of one Earl Jones Eudy. The jury found "each defendant guilty as charged."

As to McCrary, judgment imposing a prison sentence of not less than four nor more than seven years was pronounced. He excepted and appealed.

Attorney General Bruton and Deputy Attorney General McGalliard for the State.

Lila Bellar for defendant appellant.

BOBBITT, J. The testimony of Earl Jones Eudy, the State's principal witness, tends to show the matters set forth in the following numbered paragraphs.

1. Eudy owned a 1954 Ford. Its fair market value was approximately $300.00.

2. Morgan and Eudy are first cousins. Morgan and McCrary lived together, with McCrary's mother, in the Roberta community of Cabarrus County, some five miles from Concord.

3. On July 7, 1964, about 2:30 p.m., Eudy drove his Ford to defendants' house. Then, accompanied by defendants, he drove to Concord where Morgan registered "for the Army." They returned to defendants' house.

4. Thereafter, with Eudy driving, they went first to Concord and later to Charlotte for McCrary to pawn a radio. The radio was pawned by McCrary in Charlotte. McCrary bought one dollar's worth of gasoline. They returned to defendants' house and stayed "around there until 9:00 o'clock."

5. Thereafter, they "went out on Newell Road," and bought "six or eight beers." McCrary said he wanted to buy a pig. Thereupon, they went to the farm of Eudy's father, looked at pigs, drank beer and "sat around there and talked."

6. When they "started back up towards" Eudy's car, defendants said they wanted to go to Charlotte again. Eudy said he did not have enough gas and did not want to drive his car out on the road "after drinking that beer." Whereupon McCrary picked up a stick, hit Eudy on the back of his head and knocked him down twice. Morgan jumped in the car, started it, then McCrary jumped in and "they took off."

7. A few hours later Eudy, accompanied by a brother, set out in search of his car. Eudy testified: "We went toward Roberta and before we got to Roberta they had run out of gas and they had parked

it beside the road, pulled it off in the field, and we went on up to Charlie McCrary's house and turned around in his driveway and come back to the car and raised the hood and took the coil wire off of it." The next day, Eudy's car was parked in McCrary's yard. Eudy "went up and got it."

Defendants' evidence is in conflict with Eudy's testimony in many respects as to incidents occurring while the three were together during the afternoon and evening of July 7th. Their testimony tends to show Eudy got drunk and abandoned his car. Further consideration of defendants' testimony is unnecessary to decision on this appeal.

Whether this prosecution was subject to dismissal as of nonsuit is not presented by appellant's assignments of error. Appellant seeks a new trial, assigning as error, *inter alia,* designated portions of the court's instructions to the jury.

"Larceny, according to the common-law meaning of the term, may be defined as the felonious taking by trespass and carrying away by any person of the goods or personal property of another, without the latter's consent and with the felonious intent *permanently* to deprive the owner of his property and to convert it to the taker's own use." (Our italics) *Auto Co. v. Insurance Co.,* 239 N.C. 416, 418, 80 S.E. 2d 35, and cases cited; *S. v. Booker,* 250 N.C. 272, 108 S.E. 2d 426; 32 Am. Jur., Larceny § 2, § 37; 52 C.J.S., Larceny § 1, § 27.

Felonious intent is an essential element of the crime of larceny. *S. v. Kirkland,* 178 N.C. 810, 101 S.E. 560; *S. v. Delk,* 212 N.C. 631, 194 S.E. 94; *S. v. Friddle,* 223 N.C. 258, 25 S.E. 2d 751. "What is meant by felonious intent is a question for the court to explain to the jury, and whether it is present at any particular time is for the jury to say." *S. v. Coy,* 119 N.C. 901, 903, 26 S.E. 120. An error prejudicial to defendant in instructions as to felonious intent is ground for a new trial. *S. v. Kirkland, supra.*

The following is from the opinion of Allen, J., in *S. v. Kirkland, supra.* "In 17 R.C.L., 5, one of the latest authorities, and reliable, defines larceny: 'As the felonious taking by trespass and carrying away of the goods of another, without the consent of the latter, and with the felonious intent *permanently* to deprive the owner of his property and to convert it to his, the taker's own use,' a definition following the decisions in our State, and which we approve with the interpretation that the intent to convert to one's own use is met by showing an intent to deprive the owner of his property *permanently* for the use of the taker, although he might have in mind to benefit another." (Our italics).

While portions of the charge to which appellant excepts define or refer to felonious intent, the intent to steal, as an intent to deprive the

owner of his property and to convert it to the taker's own use, they contain no explanation that "(t)he *animus furandi* or intent to steal is the intent of the taker to deprive the owner *permanently* of his property . . ." (Our italics). 52 C.J.S., Larceny, § 27. Moreover, no instruction was given purporting to apply this element of felonious intent to the facts in evidence.

Undoubtedly, in relation to a different factual situation, the court's instructions might be considered sufficient or nonprejudicial. In this case, however, the State's evidence indicates strongly and was ample basis for a jury finding that McCrary and Morgan, assuming they took Eudy's car without his consent, took it for their immediate temporary use and not with any intent of depriving Eudy permanently of the possession and use thereof. Appellant was entitled to an instruction that, if the jury so found, he would be entitled to a verdict of not guilty.

The record does not disclose whether McCrary or Morgan, either or both, were prosecuted for the alleged assault referred to in Eudy's testimony. Suffice to say, neither was on trial for such assault in this prosecution.

It is noted: While the State's evidence was sufficient to support a conviction for violation of G.S. 20-105, (1) defendant was not charged with such violation, and (2) a defendant may not be convicted of this statutory offense upon trial on a bill of indictment for larceny. *S. v. Stinnett*, 203 N.C. 829, 167 S.E. 63.

The original transcript and agreed case on appeal, certified to this Court by the Assistant Clerk of the Superior Court of Mecklenburg County, relates solely to the appeal (*in forma pauperis*) by McCrary. Nothing therein indicates an appeal by Morgan.

On McCrary's appeal, for the reason stated, a new trial is awarded. Hence, we do not discuss appellant's other assignments of error.

New trial.

FARMERS COOPERATIVE EXCHANGE, INC. v. WILLIAM C. H. HOLDER, AND LELAND BARBOUR AND GRAYSON BYRD, TRADING AS B & B FARM EQUIPMENT COMPANY.

(Filed 15 January, 1965.)

Chattel Mortgages and Conditional Sales § 14—

Where, upon the mortgagor's claim of breach of the contract by the mortgagee in failing to service the chattel purchased, the mortgagee, with consent of the mortgagor, takes possession of the chattel and has the mortgagor execute a relinquishment of the equity of the redemption, and thereafter treats the property as if it were the absolute owner, the equitable and legal title will merge in the mortgagee, and the mortgagee may not thereafter sell the property and seek to recover from the mortgagor deficiency on the purchase money notes.

APPEAL by plaintiff from *Clark, S.J.*, March 1964 Civil Session of WAKE.

Holder, in April 1961, purchased from plaintiff through its dealer agents, Barbour and Byrd, a Cockshutt tractor. He made a down payment and executed a conditional sales contract on the tractor to secure the balance, payable in equal installments in April 1962 and April 1963. Plaintiff sold the tractor at public auction in February 1963. It credited Holder with $1,340.00, the sum received from the auction, and now seeks to recover the asserted balance of $1,521.88.

Plaintiff seeks to impose liability on Barbour and Byrd as guarantors of Holder's obligation.

Holder admitted the purchase and execution of the conditional sales contract. To defeat plaintiff's claim, he alleged a re-conveyance of the property in full discharge of the unpaid balance.

Defendants Barbour and Byrd rely on the facts alleged by Holder to defeat plaintiff's claim.

Defendants' motion for nonsuit made at the conclusion of plaintiff's evidence was allowed. Plaintiff excepted and appealed.

L. Bruce Gunter and R. P. Upchurch for plaintiff appellant.

Ferree, Anderson & Ogburn for appellee Holder, Deane F. Bell for appellees Barbour and Byrd.

RODMAN, J. Plaintiff's evidence suffices to show these facts: Plaintiff agreed to provide service when the tractor was sold. Holder, when the first installment became due, refused to pay, assigning as his reason plaintiff's failure to provide maintenance service as it had agreed. His offer to surrender possession was accepted in April or May. On July 24, 1962, Holder, at the request of plaintiff, executed a writing

denominated "RELEASE." The release recites Holder's purchase from plaintiff and the execution of the conditional sales contract to secure payment of the balance of the purchase money. Following the recitals, the instrument provides: "The undersigned hereby releases to the Farmers Cooperative Exchange, Inc. all title and interest in the foregoing merchandise and hereby authorizes the Farmers Cooperative Exchange, Inc. to repossess the foregoing merchandise, free from any and all claims on the part of the undersigned and/or any other person."

The tractor was not sheltered after delivery to plaintiff until some time in the fall of 1962. Plaintiff sought to negotiate for a private sale of the machine. It permitted one of its local directors to use the machine in harvesting silage in 1962. He "kept it somewhere in the neighborhood of three weeks." The person who used it "was interested at $2,300 but not at $2,800." "[T]he fair market value of that tractor would be somewhat less in April or February 1963, than it was back in April of 1962."

On March 4, 1963, the attorney for plaintiff wrote defendants calling attention to the fact that the tractor had been sold at auction for $1,340.00. The letter demanded payment of the difference between the amount received from the auction and the amount owing, as shown by the sales contract. Plaintiff offered no evidence to show Holder had notice of the auction, or that it made any demand on Holder after he executed the release until after the auction.

The law applicable to this case was, we think, correctly stated by Stacy, J. in *Furniture Co. v. Potter,* 188 N.C. 145, 124 S.E. 122. He said: "It is undoubtedly the general rule of law that where one who holds a mortgage on real estate becomes the owner of the fee, and the two estates are thus united in the same person, ordinarily the former estate merges in the latter. *Hutchins v. Carleton,* 19 N.H. 487. The equitable or lesser estate is said to be swallowed up, or 'drowned out,' by the legal or greater interest. But this rule does not apply where such merger would be inimical to the interests of the owner, as, for example, where it would prevent his setting up the mortgage to defeat an intermediate title — such as a subsequent lien or a second mortgage, as in the instant case — unless the parties intended otherwise; and this intention will not be presumed contrary to the apparent interests of the owner." *Land Bank v. Moss,* 215 N.C. 445, 2 S.E. 2d 378; *Lawrence v. Beck,* 185 N.C. 196, 116 S.E. 424; *Santa Cruz v. State,* 78 So. 2d 900; *Kansas Seventh Day Adventist Conf. Ass'n. v. Williams,* 134 P. 2d 626; *Gimbel v. Venino,* 39 A. 2d 489; 59 C.J.S., Mortgages, §§ 439 & 440.

We find nothing in the evidence which would prevent the application of the rule; to the contrary, the evidence offered by plaintiff suggests sound reasons for its application. Holder was making claims against the F.C.X. because of the breach of its contract. Plaintiff, not content with merely taking possession of the property, took from Holder an instrument relinquishing his equity of redemption. Plaintiff made no attempt for many months to exercise the power of sale. It made no demand for payment of the debt. It treated the property and its rights with respect thereto as if it were the absolute owner. It permitted one of its officers to use the tractor to harvest his crop. It negotiated for a private sale of the property. Stacy, J., in *Furniture Co. v. Potter, supra,* quotes approvingly this statement from 27 Cyc., "On the other hand, if he [the mortgagee] assumes to deal with the estate as absolute owner, and conveys it to another, it proves a merger."

Plaintiff's witness, D. V. Barbour, testified on direct examination that he "saw Mr. Holder sign a release just like that." He had reference to plaintiff's exhibit No. 3, which has been quoted. He was then asked by counsel for plaintiff this question: "Do you know the contents of the one you saw Mr. Holder sign?" He answered: "Yes, it was keeping me and F.C.X. from being responsible for anything by Mr. Holder." An objection was made, presumably by defendant, and sustained. The evidence which plaintiff thus sought to offer was excluded. We do not use it as a basis for the conclusion here reached; but certainly the excluded evidence does not weaken the conclusion we reach.

The judgment is

Affirmed.

ETHEL ARMSTRONG ALLEN v. GOLIAH ALLEN; A. H. PHILLIPS AND WIFE, LUCILLE PHILLIPS.

(Filed 15 January, 1965.)

1. Partition § 1—

Notwithstanding that the procedure for partition is prescribed by statute, partition proceedings are equitable in nature and the statutes do not impose strict limitations upon the authority of the court or deprive the court of jurisdiction to adjust all equities, and therefore the court has the authority to give directions to the commissioners to the end that justice be done between the parties.

2. Partition § 9—

Where, after the commissioners' report has been set aside, the court orders another partition and directs the commissioners to hear the proof and allegations of the parties before making such partition, it is error for the court to approve the commissioners' report made without hearing the proof and allegations of the parties as directed.

APPEAL by plaintiff from *Braswell, J.*, July 1964 Civil Session of CUMBERLAND.

This is a special proceeding for partition of a tract of land containing 20½ acres. Plaintiff owns a 17/28 interest; defendant Allen is her husband. Defendants Phillips own 11/28 interest. Commissioners were appointed to make partition; they filed their report 4 November 1961. Plaintiff filed exceptions. After hearing, the clerk confirmed the report. Plaintiff appealed to superior court and the appeal was heard at the June Term, 1962. The court entered judgment modifying the report so as to make certain changes in the allotments of land. Plaintiff then appealed to Supreme Court, and this Court ordered the judgment vacated and the cause remanded to superior court for hearing *de novo* upon plaintiff's exceptions to the commissioners' report. *Allen v. Allen,* 258 N.C. 305, 128 S.E. 2d 385. At the August 1963 session of the Superior Court of Cumberland orders were entered setting aside the report of the commissioners, directing that a "new partition" be made, and authorizing the commissioners to charge owelty against the more valuable dividend in favor of the dividend of inferior value, if necessary to make an equitable partition. The commissioners were given these further directions: ". . . you are now . . . further directed to *hear the proofs and allegations* of the parties, to again and further view the premises and to make such inspection and survey as you may require and *after the testimony is closed,* to report your findings and file your report with this Court." (Emphasis added). The original commissioners were continued in service. Pursuant to these orders, the commissioners filed their report on 20 November 1963. The allotments of land made by them were the same as in their first report which had been set aside, but they charged against the allotment to defendants Phillips owelty in the amount of $500 to be paid plaintiff. Plaintiff filed exceptions; the clerk confirmed the report. On appeal to superior court the report was confirmed by the judge.

Robert B. Morgan for plaintiff petitioner.
Quillin, Russ & Worth for defendant respondents.

MOORE, J. Plaintiff contends that the judge erred in refusing to set aside the report of the commissioners, for that the commissioners failed to give notice to the plaintiff "of the time and date of the purported division, and failed to give to the petitioner (plaintiff) the opportunity to offer proof and allegations as directed."

In the judgment of confirmation the judge made a finding "that the commissioners physically went upon the land in surveying and arriving at their Report of November 20, 1963; however, none of the parties were present at the time of said visit by the Commissioners to the premises." Furthermore, there is nothing in the report to indicate that the commissioners at any time heard the "proofs and allegations" of the parties before making the division and filing their report. Commissioners are required by law to "make a full and ample report of their proceedings . . . specifying therein the manner of executing their trust." G.S. 46-17. It is clear that plaintiff's proofs and allegations were not heard by the commissioners. In this respect the commissioners did not carry out the court's orders.

There is no statutory requirement that commissioners appointed to partition land shall hear and consider evidence offered by the tenants in common or their contentions prior to or at the time of making partition.

Prior to 1868 courts of equity had jurisdiction of partition proceedings in North Carolina. Since that date partition has been by special proceeding before the clerk of superior court, with right of review by the judge of superior court. *Brown v. Boger, ante,* 248. Procedure is outlined by statute. G.S., Ch. 46. But in this state partition proceedings have been consistently held to be equitable in nature. *Roberts v. Barlowe,* 260 N.C. 239, 132 S.E. 2d 483; *Mineral Co. v. Young,* 220 N.C. 287, 17 S.E. 2d 119; *Raymer v. McLelland,* 216 N.C. 443, 5 S.E. 2d 321; *Wolfe v. Galloway,* 211 N.C. 361, 190 S.E. 213; *Clark v. Carolina Homes,* 189 N.C. 703, 128 S.E. 20; *Geer v. Geer,* 109 N.C. 679, 14 S.E. 297; *Purvis v. Wilson,* 50 N.C. 22; *Weeks v. Weeks,* 40 N.C. 111; *Ramsay v. Bell,* 38 N.C. 209; *Ex Parte Skinner,* 22 N.C. 63. The statutes are not a strict limitation upon the authority of the court. Since the proceeding is equitable in nature, the court has jurisdiction to adjust all equities in respect to the property. *Henson v. Henson,* 236 N.C. 429, 72 S.E. 2d 873. As where a tenant in common has paid off an encumbrance, *Henson v. Henson, supra;* where a tenant in common has made improvements, *Jenkins v. Strickland,* 214 N.C. 441, 199 S.E. 612; where justice requires that timber be sold and the land divided, *Seawell v. Seawell,* 233 N.C. 735, 65 S.E. 2d 369; or where a cotenant owns adjoining property and desires an allotment adjacent thereto, *Windley v.*

Barrow, 55 N.C. 66, 68. The court has authority to give directions to the commissioners to the end that justice be done between the parties.

The court directed that the commissioners hear the "proofs and allegations" of the tenants in common. The court had authority to give directions which to him seemed proper to bring about an equitable partition. The commissioners failed or refused to carry out the directions in question. Where commissioners fail to carry out the orders of the court in some material respect it is error to confirm their report, especially if it appears that a party or parties have probably suffered injury by reason of such failure. *McConnell v. McConnell,* 134 S.E. 470 (Va. 1926).

Plaintiff contends, and offered evidence before the judge tending to show, that the partition is inequitable. Though the judge rejected this contention, we cannot say that the commissioners would not have viewed the matter of values and the advantages of location in a different light had they heard plaintiff's evidence and contentions before completing their work. The confirmation by the judge was undoubtedly based in a large measure on the commissioners' report and recommendations. It was error to confirm the report; it should have been rejected for failure to carry out material directions.

The cause is remanded to superior court with direction that the report of the commissioners be vacated, and *either* that there be a reappraisal by the same commissioners according to the directions of the court *or* that the present commissioners be discharged and new commissioners appointed to view the premises and make partition thereof. *Langley v. Langley,* 236 N.C. 184, 72 S.E. 2d 235. We do not wish to be understood as suggesting that the present commissioners are not entirely impartial and competent. Whether the same or new commissioners partition the land is not a question for us to determine.

Error and remanded.

J. H. WRAPE v. NORTH CAROLINA STATE HIGHWAY COMMISSION.

(Filed 15 January, 1965.)

1. State § 5—

The owner of a pond may not recover under the State Tort Claims Act for damage to the pond resulting from silt washed down from a fill necessarily incident to the improvement of a highway, the improvement having been made in accordance with the plans and specifications, and there being

no contention that the plans and specifications were faulty or negligently formulated.

2. Same—

Recovery under the State Tort Claims Act must be based upon negligence of commission on the part of a named State employee, G.S. 143-297(2), and mere omission or failure to act will not support a tort claim.

APPEAL by defendants from *Walker, S. J.*, February, 1964 Civil Session, RANDOLPH Superior Court.

The plaintiff, on August 3, 1961, filed a tort claim before the North Carolina Industrial Commission to recover $14,000.00, the estimated cost of removing the silt deposited in his fish pond by erosion from the regrading and relocation of a State Highway near, but not on his land. The items of cost constituting the claim are: $3,000.00 for cutting drainage ditch around the lake; $1,000.00 for constructing a wooden dam; $10,000.00 for removing dirt from the lake.

The claimant alleged the damages resulted from the negligence of Suber & Co., Inc., contractor, and agent for the State Highway Commission. Upon motion thereafter, the claim was amended to allege negligence on the part of W. F. Babcock, Director of Highways, W. H. Rogers, Jr., Chief Engineer, T. C. Johnston, Jr., Division Engineer, and Fred Beck, District Engineer.

The parties stipulated:

"That under State Highway Commission project #8.15803 there was a contract for the relocation and construction of N. C. Highway #49 near Asheboro, N. C., pursuant to a contract executed by and between Suber and Company, Inc., and the North Carolina State Highway Commission, according to Standard Specifications for Roads and Structures of the North Carolina State Highway Commission, dated October 1, 1952, as referred to in the contract. The contract was executed by W. F. Babcock, Director of Highways, W. H. Rogers, Jr., Chief Engineer, and approved by Mr. Brooks Peters, Assistant Attorney General, and that the work, with respect to said project, was completed by the contractors in accordance with plans and specifications of the State Highway Commission and pursuant to contract."

The claimant testified:

"I own a tract of land at or near my residence approximately twelve acres in size upon which is located a four acre pond, which I had constructed in 1938. . . . The pond was approximately twelve to fifteen feet in depth prior to construction on the reloca-

tion of N. C. #49 and it was fed from springs and streams, one stream runs under relocated N. C. #49 into the pond.

"A large portion of the relocation and reconstruction of N. C. Highway #49 is within the watershed area of my pond. I have lived here since 1936 and I have used my pond, built in 1938, for watering cattle, for fishing and swimming, and watering my garden and lawn. My pond has been used for baptismal services by various churches and the Red Cross has taught swimming lessons there. I cannot use my pond for any of these purposes now because of the mud which is in there, you will just mire down.

"Prior to the Highway construction, the pond was crystal clear and on one side where I built a pier next to the house and I hauled sand in there to make that sand beach like, where there was swimming, there was no mud or silt in the bed of the pond prior to construction of Highway Project #8.15803. The water in the pond was never muddy at any season of the year.

"There is no other drainage area feeding into my pond, which has added to the mud and silt, except that from the Highway Construction project. The silt and mud still comes into my pond."

The evidence disclosed that after the grading was completed, the Highway Commission made an effort to seed the exposed surfaces in order to stop erosion. At best, the efforts were only partially successful. Rain water carried the dirt into the pond. The plaintiff offered evidence that his damage was $14,000.00.

The hearing commissioner's finding No. 10 is here quoted:

"That the relocation of N. C. Highway No. 49, under the direction of W. F. Babcock, Director of Highways, and W. H. Rogers, Chief Engineer, State Highway Commission, and as an incident thereof the construction of a fill some five hundred feet from the plaintiff's pond, constructed in such a manner as to allow silt, dirt and other alluvium to drain from the fill as aforesaid, through the water shed feeding the plaintiff's pond and thereby filling same to a depth of from six feet down to three feet, was a wrongful, negligent and tortious act committed by the defendant through its agents as hereinabove set forth and that such negligence proximately caused the damages to the plaintiff in the amount of $12,000.00."

The deputy commissioner awarded damages in the sum of $10,000.00, the maximum allowed under the Tort Claims Act. Upon review, the Full Commission adopted the hearing commissioner's findings and conclusions, and approved the award.

The Superior Court on appeal overruled all of the defendant's exceptions and affirmed the award. The State Highway Commission appealed.

Miller & Beck by G. E. Miller, Thomas L. O'Briant for plaintiff appellee.

T. W. Bruton, Attorney General, Harrison Lewis, Assistant Attorney General, John W. Twisdale, Staff Attorney, Andrew McDaniel, Trial Attorney for defendant appellant.

HIGGINS, J. The parties stipulated the construction work on Highway #49 was completed in accordance with the plans and specifications of the Highway Commission and pursuant to its contract. A tort claim, therefore, must be based on faulty plans or faulty specifications. Consequently, a showing of negligence on the part of a designated highway agent in making the plans or in preparing the specifications, is necessary before an award may be made against the State Highway Commission. The Tort Claims Act (G.S. 143-297) provides: "That the claim must contain . . .(2) the name of the department, institution, or agency of the State against which the claim is asserted *and the name of the State employee upon whose negligence the claim is based.*" *Floyd v. Highway Commission,* 241 N.C. 461, 85 S.E. 2d 703.

An omission or failure to act will not support a tort claim. At one time, March 3, 1955, to May 16, 1955, a negligent omission was sufficient, but Chapter 1361, Session Laws of 1955, struck "omission" from the statute. *Flynn v. Highway Commission,* 244 N.C. 617, 94 S.E. 2d 571.

In this case, whose negligent act and what was it that caused the dirt to be carried by water into the claimant's pond? Suber & Co., Inc., the contractor, is let out by the stipulation. The only finding is against W. F. Babcock, Director of Highways, and W. H. Rogers, Jr., Chief Engineer. The finding that Highway #49 was relocated under their direction and as an incident to the relocation a fill was constructed within 500 feet of plaintiff's pond; that silt and dirt were carried by drainage into the pond, are insufficient bases for a finding of negligence. No way is suggested by which rain may be kept from falling on cuts and fills incident to highway construction. Erosion follows as a matter of course. The process may be retarded by grass or vegetation but the growth takes time, careful attention, suitable soil, and favorable weather.

The plaintiff is in the same legal position as other landowners whose property is taken or damaged by the construction of public roads.

Negligent planning, or negligent execution of plans may give rise to a tort claim; but in the absence of negligent acts the owner of property is entitled to compensation if the construction of highways amounts to a taking of his property. *Eller v. Board of Education,* 242 N.C. 584, 89 S.E. 2d 144. In this case a State agency, after hearing, has fixed the plaintiff's damage at $12,000.00. If by filing a tort claim rather than a suit in condemnation the plaintiff has permitted the lapse of time to close the door to the courts, nevertheless a coordinate branch of the State Government may be inclined to see the debt is paid.

The findings do not specify any negligent act on the part of either Mr. Babcock or Mr. Rogers. The Superior Court should have sustained Exception No. 6 to finding No. 10 made by the Hearing Commissioner and adopted by the Full Commission. The finding that they were negligent is without support in the evidence.

The judgment of the Superior Court is reversed. This proceeding will be remanded to the North Carolina Industrial Commission for the entry of an award denying the plaintiff's claim.

Reversed.

MARTHA JANE GREEN v. ISENHOUR BRICK & TILE COMPANY, INC. AND ANDREW D. CORRY.

(Filed 15 January, 1965.)

1. Pleadings § 12—

A demurrer admits the factual allegations of the complaint.

2. Automobiles §§ 6, 35—

Allegation that a driver violated an ordinance intended to promote safety in the use of the streets of a municipality charges negligence.

3. Automobiles § 35—

In an action for negligence the complaint must allege facts supporting the legal conclusions of negligence and proximate cause.

4. Negligence § 7—

Proximate cause is that cause which produces the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under the existing circumstances.

5. Automobiles § 35— Complaint held not demurrable as compelling conclusion of insulating negligence or contributory negligence.

Allegations to the effect that defendant driver parked his truck on the east side of a oneway street for northbound traffic in such manner that its rear extended into the lane for moving traffic in violation of ordinance, that the driver of the car in which plaintiff was a passenger was traveling in the east lane and was squeezed between the parked truck and a vehicle traveling in the center lane, and, in the emergency, struck the parked vehicle, to plaintiff's injury, *held* not to compel the conclusion that the negligence of the driver of the car in which plaintiff was riding insulated defendant's negligence nor, if it was imputed to plaintiff, that it constituted contributory negligence as a matter of law, and demurrer should have been overruled.

6. Automobiles § 48—

The fact that the driver is negligent does not preclude recovery by his passenger against the driver of the other car involved in the collision, since, if both are negligent, plaintiff is entitled to recover from either or both.

7. Automobiles § 52—

In an action by an owner-passenger against the driver of the other car involved in the collision, demurrer should not be sustained even if the facts alleged disclose negligence on the part of the driver of plaintiff's car, since plaintiff's allegation that she was a passenger would permit her to show that she had relinquished the right of control.

8. Pleadings § 3—

The complaint should contain a concise statement of the facts constituting the cause of action and it should not delineate evidentiary facts nor anticipate a defense and undertake to avoid it. G.S. 1-122.

APPEAL by plaintiff from *Crissman, J.*, in Chambers, September 4, 1964, High Point Division of GUILFORD.

Plaintiff seeks compensation for personal injuries and property damage resulting from a collision between her automobile and a truck operated by individual defendant (Corry), as agent for the owner, corporate defendant (Brick Company).

Defendants demurred to the complaint. They aver the complaint affirmatively establishes the negligence charged to them was not a proximate cause of the collision and resulting injury; and, further, the complaint affirmatively establishes negligence imputable to plaintiff, which negligence bars her right to recover.

The court sustained the demurrer. Plaintiff appealed.

Moser and Moser for plaintiff appellant.

Lovelace & Hardin for defendant appellees.

RODMAN, J. The demurrer admits the factual allegations of the complaint. *Bennett v. Surety Corp.*, 261 N.C. 345, 134 S.E. 2d 678; *Stegall v. Oil Co.*, 260 N.C. 459, 133 S.E. 2d 138.

The complaint alleges these facts: Vehicular travel on South Hamilton Street in High Point is restricted to vehicles moving, or to move, in a northward direction. The vehicular portion of the street is divided into five lanes. The easternmost and westernmost lanes are for use in parking. The three innermost lanes are for moving traffic. An ordinance of High Point requires vehicles parking in the eastern lane to park with their right wheels within one foot of the curb, and in such manner that no part of the parked vehicle shall extend over and into a lane intended for use by moving traffic. Corry, on the afternoon of July 30, 1962, parked a Dodge truck belonging to Brick Company in the easternmost lane. It was parked in such manner that its left front and rear wheels extended some two and one-half feet into the adjoining traffic lane. Plaintiff, a passenger in a Ford automobile operated by Inez Gaines, was traveling north in the lane immediately adjacent to the eastern parking lane. The driver of the Ford, seeing the parked truck extending partially into her lane of travel, pulled slightly to the left. When the Ford reached, or was about to reach, the parked truck, a vehicle using the center lane passed the automobile in which plaintiff was riding. The passing automobile cut in front of the Ford. The driver of the Ford sought to avoid a collision with the truck and the vehicle using the center lane. She pulled to her right, but, because of the extension of the truck into the lane of the Ford, she was unable to avoid a collision. Plaintiff sustained personal injuries. Her automobile was damaged when it collided with the truck.

An allegation that one violated an ordinance intended to promote safety in the use of the streets of a municipality charges negligence. *Bridges v. Jackson*, 255 N.C. 333, 121 S.E. 2d 542; *Carrigan v. Dover*, 251 N.C. 97, 110 S.E. 2d 825; *Funeral Service v. Coach Lines*, 248 N.C. 146, 102 S.E. 2d 816; 60 C.J.S. 770.

It is not sufficient for a complaint to charge a defendant with negligence. The complaint must go further and allege facts showing the negligent act was a proximate cause of the injuries of which plaintiff complains.

Winborne, C. J. defined proximate cause as: "[A] cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under all the facts as they existed." *Jackson v. Gin Co.*, 255 N.C. 194, 120 S.E. 2d 540. The

quoted definition is in accord with many other decisions by this Court. See cases assembled, 3 Strong's N. C. Index 449, note 52.

Plaintiff's statement of facts is sufficient to charge injury resulting from defendants' negligence, continuing until the moment of impact and injury. A jury may find that a prudent person, with knowledge of the density of traffic indicated by the marking of lanes for parked and moving vehicles, should have foreseen the likelihood of a collision. This is sufficient to require submission to a jury. *Davis v. Jessup,* 257 N.C. 215, 125 S.E. 2d 440; *Moore v. Plymouth,* 249 N.C. 423, 106 S.E. 2d 695; *Graham v. R. R.,* 240 N.C. 338, 82 S.E. 2d 346. The mere fact that another is also negligent and the negligence of the two results in injury to plaintiff does not relieve either. *Turner v. Turner,* 261 N.C. 472, 135 S.E. 2d 12; *Batts v. Faggart,* 260 N.C. 641, 133 S.E. 2d 504; *Tart v. Register,* 257 N.C. 161, 125 S.E. 2d 754.

Defendants contend the complaint shows Miss Gaines, operating the Ford, was negligent; and her negligence insulated defendants' negligence. This contention cannot be sustained for the reasons given above.

Defendants' second assigned ground for the demurrer is that the negligence of the operator of the vehicle bars plaintiff's right to recover. This contention is based on the following reasoning: Plaintiff owned the automobile, hence she had the right to control its operation. The operator, Miss Gaines, was negligent. Her negligence must be imputed to plaintiff under the doctrine of *respondeat superior.*

Conceding, without deciding, the right to use a demurrer to establish contributory negligence (see G.S. 1-139), it is, we think, manifest that the demurrer cannot be sustained, since the complaint does not affirmatively show contributory negligence. *Boykin v. Bennett,* 253 N.C. 725; 118 S.E. 2d 12; *Skipper v. Cheatham,* 249 N.C. 706, 107 S.E. 2d 625. It does not necessarily follow from the facts stated in the complaint that the operator of the Ford was negligent. Did she act in an emergency? Was the collision proximately caused by the negligence of defendants and the driver of the car using the center lane? Evidence is necessary to answer these questions. If Gaines, operator of the Ford, was negligent, it does not follow as a matter of law that her negligence would be imputed to the owner-occupant. The evidence may show the owner had relinquished the right to control. The presumption is evidentiary only. *Eason v. Grimsley,* 255 N.C. 494, 121 S.E. 2d 885. The allegation that plaintiff was a passenger would permit her to show she had relinquished the right to control. *Harris v. Draper,* 233 N.C. 221, 63 S.E. 2d 209; *Gaffney v. Phelps,* 207 N.C. 553, 178 S.E. 231.

When a demurrer has been interposed to defeat plaintiff's claims because of an asserted failure to state a cause of action, recognition must

be taken of the separate functions which the complaint and the evidence perform. The complaint should, by statute, G.S. 1-122, be a "concise statement of the facts constituting the cause of action * * *." Its purpose is to give the opposing party notice of the facts on which plaintiff relies to establish liability. The complaint should not delineate evidentiary facts. *Brewer v. Elks,* 260 N.C. 470, 133 S.E. 2d 159; *Tart v. Register, supra; Jones v. Loan Association,* 252 N.C. 626, 114 S.E. 2d 638. Plaintiff should not anticipate a defense and undertake to avoid it. *Scott v. Jordan,* 235 N.C. 244, 69 S.E. 2d 557.

It does not affirmatively appear from the complaint that defendants have been relieved of liability for their negligence by the negligence of others. No evidence has been offered. We cannot foretell what it may establish.

The judgment sustaining the demurrer is

Reversed.

EDNA VIRGINIA JOHNSON v. MYTOLENE GRAY.

(Filed 15 January, 1965.)

1. Contracts § 31—

An action will lie against a third person who wrongfully and maliciously prevents the making of a contract between the negotiating parties, and plaintiff need not show actual malice in order to support recovery, it being sufficient if the interference flows from a design to injure plaintiff or to gain some advantage at his expense.

2. Same; Schools § 13—

Charges implying incompetence of a teacher, made by a school principal to the superintendent of schools, which charges induce the authorities not to renew the teacher's contract, may not be made the basis for recovery of damages in an action against the principal in the absence of evidence that the charges were falsely made for the purpose of injuring the teacher or gaining some advantage at her expense, since the principal has the statutory duty to advise the superintendent in regard to teachers' proficiency.

APPEAL by plaintiff from *Clark, S. J.,* January 6, 1964 Civil Session, High Point Division, of GUILFORD.

Plaintiff appeals from a judgment of nonsuit entered at the conclusion of her evidence.

Lee and Lee for plaintiff appellant.

Lovelace & Hardin and D. P. Whitley, Jr., for defendant appellee.

RODMAN, J. For a cause of action, plaintiff alleges: She taught at Fairview Street School in High Point from 1944 to 1956. Defendant, on April 22, 1956, while serving as Principal of Fairview Street School, made false accusations against plaintiff to the Superintendent of the High Point Schools for the "purpose of having plaintiff's contract with the High Point School Board terminated and for the further purpose of having said plaintiff's renewal contract denied and refused * * *." As a result of defendant's false and malicious statements, plaintiff "lost her job and has been unable after continuous and diligent effort to regain employment in High Point or its surrounding environment, and has thereby since September of 1955 lost her employment salary in the amount of $4,000.00 per year."

On a prior appeal, we held the complaint sufficient to state a cause of action for malicious interference with plaintiff's contractual relations with the High Point City Administrative Unit of the State's Public School System. See *Johnson v. Graye,* 251 N.C. 448, 111 S.E. 2d 595.

We must now examine the evidence to ascertain if it is adequate to establish the allegations of the complaint. The evidence and the inferences, which may be fairly drawn therefrom, are, in answering the question presented for decision, considered in the light most favorable to plaintiff.

A jury could, on the evidence, find these facts: Plaintiff holds a Bachelor of Science degree awarded by Winston-Salem Teacher's College. In 1939, she obtained a Teacher's Certificate. She taught in various schools in North Carolina from 1939 to 1944. She then obtained employment at Fairview Street School in High Point. She taught there until the end of her contract for the school year 1955-56. She was not employed to teach in the High Point Schools for the year 1956-57, nor has she since that time been employed by the High Point Schools. In April or May 1956, plaintiff indicated to the Superintendent of Schools her desire to continue to teach in the High Point Administrative Unit, but at some school other than the Fairview Street School. Defendant, in a report made to the Superintendent of High Point Schools in April or May 1956, charged plaintiff with sleeping on class, failing to make the most effective use of materials provided by the schools for the instruction of pupils, insubordination, and lack of ambition to improve as a teacher. Defendant's evaluation of plaintiff's efficiency as a teacher, made in her report to the Superintendent of Schools, was repeated in the office of the Superintendent, at a meeting called by him. Those

present at the meeting were the Superintendent, plaintiff and defendant. Plaintiff does not go to sleep on class; she is not insubordinate; she is ambitious; she desires to be a proficient teacher and to that end has taken educational courses in the summer. She has endeavored to make the most effective use of all materials provided for the instruction of pupils. She sought on more than one occasion to get a transfer from the Fairview Street School to some other school in the High Point City Administrative Unit, but had not met with success. She worked until the end of the school year 1955-56. She was paid in full, as provided in her contract with the High Point City Administrative Unit.

Plaintiff's testimony completely negatives the allegations of the complaint that her contract of employment was breached; it was fully performed. Her cause of action, if any she has, must rest on her allegation that she was prevented from securing a new contract with the school authorities of High Point by the wrongful and malicious acts of defendant.

Devin, J. (later C.J.), writing in *Coleman v. Whisnant,* 225 N.C. 494, 35 S.E. 2d 647, said: "We think the general rule prevails that unlawful interference with the freedom of contract is actionable, whether it consists in maliciously procuring breach of a contract, or in preventing the making of a contract when this is done, not in the legitimate exercise of the defendant's own rights, but with design to injure the plaintiff, or gaining some advantage at his expense. [Citations]. In *Kirby v. Reynolds,* 212 N.C. 271, 193 S.E. 412, Justice Clarkson quotes from 15 R.C.L. 68, as follows: 'As a general proposition any interference with free exercise of another's trade or occupation, or means of livelihood, by preventing people by force, threats or intimidation from trading with, working for, or continuing him in their employment is unlawful.' In *Kamm v. Flink,* 113 N.J.L. 582, 99 A.L.R. 1, it was said: 'Maliciously inducing a person not to enter into a contract with another, which he would otherwise have entered into, is actionable if damage results.' The word 'malicious' used in referring to malicious interference with formation of a contract does not import ill will, but refers to an interference with design of injury to plaintiff or gaining some advantage at his expense." These legal principles and the statutes relating to the operation of the public schools provide the cup to measure plaintiff's rights and defendant's responsibility.

School teachers are employed for one year, G.S. 115-142. Superintendents of both county and city schools are ex-officio secretaries to their respective boards, G.S. 115-56. Teachers in city administrative units are elected by city boards of education, G.S. 115-21. The principal of a school is its executive officer, G.S. 115-150. As the executive officer in

charge of the operation of a school, it is the duty of the principal to keep the superintendent and, through the superintendent, the board of education informed about all phases of school operations, G.S. 115-148. The reports he makes in the performance of his duties are qualifiedly privileged. Questioned as to the motive or reason for the report, plaintiff said: "I know of no reason Miss Gray might have made these charges against me if they were not true except for personal matters that may not be connected with this case. These matters had nothing to do with my school work or our relationship as principal and teacher. They were personal matters other than school."

It may be inferred from plaintiff's testimony that there was an aloofness between plaintiff and defendant, but that is not sufficient to impose liability on defendant because plaintiff did not secure the desired employment. The Superintendent makes recommendations, but the final authority for the election of teachers is, as noted, vested in the school board.

Plaintiff's evidence fails to support her allegations that the Board of Education of the High Point City Administrative Unit was maliciously and fraudulently induced to reject plaintiff's application to teach in the schools of that Unit during the year 1956-57.

The judgment of nonsuit is

Affirmed.

W. G. REVELS, L. C. OXENDINE, NATHAN STRICKLAND, AND BRITTON OXENDINE, IN THEIR OFFICIAL CAPACITIES AS THE PEMBROKE HIGH SCHOOL DISTRICT COMMITTEE, PLAINTIFFS v. NEWMAN OXENDINE, DEFENDANT.

(Filed 15 January, 1965.)

1. Appeal and Error § 2—

The Supreme Court will take notice *ex mero motu* that upon the face of the record plaintiff had no capacity to maintain the action.

2. Courts § 2—

At any time a court finds it has no jurisdiction of the proceeding it should stay, quash or dismiss the suit.

3. Schools § 4—

School committees are not given corporate status by statute and have no right to sue and defend in the courts. G.S. 115-69 *et seq.*

REVELS *v.* OXENDINE.

APPEAL by plaintiff from *Hall, J.*, September-October, 1964 Session, ROBESON Superior Court.

The plaintiffs in their official capacity as members of the Pembroke High School District Committee instituted this action seeking to have the court enjoin the defendant "from acting or purporting to act as principal of the Pembroke High School of Robeson County, North Carolina." The complaint alleges in substance that the county superintendent of schools nominated the defendant as principal to fill a vacancy in the Pembroke High School. The committee, by vote of 4 to 1, rejected his nomination. Thereafter, no additional names were proposed. The county superintendent of schools "declared to the County Board of Education that the principalship was in a state of disagreement." Whereupon, the county board selected the defendant who is now acting as principal.

The complaint also alleges that there was not such disagreement between the superintendent and the committee as would authorize the county board of education to select a principal for the school and invest him with authority to act as such.

The defendant filed a demurrer which the court sustained on the ground the complaint failed to state a cause of action. The plaintiffs excepted and appealed.

Tally, Tally, Taylor & Henley by Nelson W. Taylor for plaintiff appellants.

Wm. E. Timberlake for defendant appellee.

HIGGINS, J. At the threshold of this case we are confronted with a question of law not discussed or alluded to by either party but which appears upon the face of the record — the incapacity of the plaintiff committee to bring this action. Hence it becomes our duty *ex mero motu* to take notice of the defect. "If a court finds at any stage of the proceedings it is without jurisdiction, it is its duty to take notice of the defect and stay, quash or dismiss the suit. . . . 'So, *ex necessitate* the court may, on plea, suggestion, motion, or *ex mero motu*, where the defect of jurisdiction is apparent, stop the proceeding.'" *Burgess v. Gibbs*, 262 N.C. 462, 137 S.E. 2d 806.

G.S. 115-27 provides: "The board of education of each county . . . shall be a body corporate . . . capable of . . . prosecuting and defending suits for or against the corporation." See *Fields v. Board of Education*, 251 N.C. 699, 111 S.E. 2d 910. G.S. 115-70 provides: "The county board of education . . . shall elect and appoint school committees for each of the several districts in their counties." G.S. 115-69

through 73 fixes the qualification and duties of school committees. The law does not give a committee corporate status; neither does it authorize a committee to sue or defend. These important functions are assigned to the county and city boards of education.

Sound reason exists for failure of the Legislature to give school committees corporate status with the right to sue and defend in the courts. In fact, committees are not given final authority. Their acts are under, subordinate to, and controlled by, the county or city boards. "County and city boards of education, subject to any paramount powers vested by law in the State Board of Education or any other authorized agency shall have general control and supervision of all matters pertaining to the public schools in their respective administrative units; they shall execute the school laws in their units." G.S. 115-27. School committees are not given the right to sue. That right does not arise by necessary implication from any duties assigned to them. We are forced to conclude, therefore, that the plaintiffs did not have the legal capacity to institute this action. For that reason we do not discuss any other questions but remand the cause to the Superior Court of Robeson County for the entry of judgment dismissing the action.

Remanded with direction.

STATE v. JACK P. MULLINAX.

(Filed 15 January, 1965.)

1. Criminal Law § 99—

On motion to nonsuit, the evidence must be considered in the light most favorable to the State, giving it the benefit of every reasonable inference deducible therefrom.

2. Burglary and Unlawful Breakings § 4— Circumstantial evidence of guilt of felonious breaking held for jury.

Evidence tending to show that defendant and another were passengers in a car, that they requested to be let out at a certain place, that one of them said something about going to a specified club to break in and told the driver to come back for them in thirty minutes, that the driver did in fact pick them up shortly thereafter, together with evidence tending to show that in the interim the club had been broken into and money taken from a drawer and a cigarette machine, and that defendant's companion, when apprehended shortly after the break-in, had in his possession over forty dollars in coins and a screw driver which fitted indentations on the broken window and door, *held* sufficient to raise a reasonable inference that de-

fendant and his companion broke into the club, or that defendant's companion did so with defendant being present, aiding and abetting.

3. Larceny § 7—

Absence of any evidence of ownership of the articles alleged to have been stolen precludes conviction of larceny.

ON *certiorari* from *Martin, S. J.*, December 1963 Session of CALDWELL.

This is a criminal action in which defendant is charged with (1) a felonious breaking or entry into a building of Lenoir Country Club, Inc., and (2) larceny of $84.22 in money belonging to the Country Club.

Plea: Not guilty. Verdict: Guilty. Judgment: on the count of breaking or entering, 4 to 7 years; on the larceny count, 18 months — the sentences to run consecutively.

Defendant appeals.

Attorney General Bruton, Deputy Attorney General McGalliard and Staff Attorney Brown for the State.

Marshall E. Cline for defendant.

MOORE, J. The sole question is whether the court erred in overruling defendant's motion for nonsuit.

Defendant did not offer any evidence. The State's evidence tends to show the following facts:

About 1:00 A.M., 17 November 1963, defendant and J. L. Johnson, Jr., were riding in an automobile driven by Elmo West. Near the clubhouse of Lenoir Country Club, Inc., West, at the request of defendant and Johnson, let them out. When they got out of the car they "said something about going to the Country Club to break in it." West "couldn't tell who was talking." They told West to come back for them in 30 minutes. West drove from Smith's Cross-roads to Whitnel and back several times while waiting to pick them up. He was observed by two police officers, who kept his "car under surveillance, staying a distance behind." West approached the country club at a slow speed and about 50 to 75 yards from the clubhouse stopped and the defendant came "out of the woods" and got in West's car. He said something to West about $41.00, but didn't say where he got it or how he got it. Defendant and West were taken into custody about ¼ mile from the country club by other police officers who had been alerted. The officers found no money on the person of defendant. The officers who had been following West returned to the vicinity of the country club

and found Johnson crouched or sitting near a tree in some bushes. He had $43.22 in coins "in his right front pocket." The officers later returned to the place they had arrested Johnson and found $41 in currency. The officers went to the clubhouse and found a window broken near a latch, the inside office door was damaged, the cigarette machine had been broken into, and the top drawer of a filing cabinet had been pushed back. There were marks on the window and door indicating they had been pried open. A screw driver, found on the person of Johnson when he was arrested, fitted as to size and shape the marks and indentations on the door and window. No finger prints were found, but Johnson had gloves.

We must consider the evidence in the light most favorable to the State, and give the State the benefit of every reasonable inference fairly deducible therefrom. *State v. Gentry,* 228 N.C. 643, 46 S.E. 2d 863. When this is done, we find the evidence sufficient to survive the motion for nonsuit on the count of housebreaking (G.S. 14-54). Immediately after the arrest of defendant and Johnson, the police found that the Lenoir Country Club building had been forcibly entered. A window had been broken and pried open. An inside door had been forced. The condition of the cigarette machine and filing cabinet indicated the entry had been made with intent to steal money and valuables. Johnson had been found nearby in a clump of bushes near the highway. He had in his possession a screw driver which fitted the marks and indentations on the broken window and forced door. He had in his possession a large number of coins, the kind of money one would expect to find in a cigarette machine. Defendant and Johnson had been riding with West; they got out of his car near the country club, one of them "said something about going to the Country Club to break in it," and they asked West to return for them in 30 minutes. When he returned defendant "came out of the woods" and got in the car. It is to be reasonably inferred that defendant and Johnson did break into the *country club, or that Johnson broke and entered and defendant was* present, aiding and abetting. *State v. Kelly,* 243 N.C. 177, 181, 90 S.E. 2d 241.

The motion for nonsuit on the larceny count should have been allowed. There is no evidence that Lenoir Country Club, Inc., found any money to be missing or had any money in the building. The evidence is silent as to whether there was, before the entry, any money in the filing cabinet or in the cigarette machine or elsewhere in the building. And if it may be inferred that there was, there is no evidence of the ownership. No official, agent or employee of the club testified at the

trial. There is simply no evidence that any money belonging to it has been stolen. The State failed to prove the larceny as alleged.

On the count of housebreaking — Affirmed.

On the count of larceny — Reversed.

STATE OF NORTH CAROLINA v. ARTHUR GOFF.

(Filed 15 January, 1965.)

1. Constitutional Law § 32—

The Federal decision that defendant in a criminal prosecution is entitled to counsel must be given retroactive effect.

2. Same—

A defendant is entitled to counsel at his post-conviction hearing attacking the constitutionality of his trial.

3. Same—

Where the assistance of counsel is a constitutional requisite, the right to have counsel does not depend upon a request.

ON petition for *certiorari* from *Parker, J.*, June 1962 Mixed Term of PITT, and from *Burgwyn, E. J.*, October 1964 Mixed Term of PITT.

These facts are established by the petition and the admission in the Attorney-General's answer: At the August 1961 Criminal Term of Pitt County, Arthur Goff, then defendant and now petitioner, was tried upon two bills of indictment. In Case No. 7751, he was charged with breaking, entering, and the larceny of property of the value of less than $100.00; in Case No. 7752, he was charged with a felonious assault. Petitioner pled guilty as charged in Case No. 7751 and received a sentence of not less than three nor more than five years in the State's Prison. In Case No. 7752, he pled not guilty. There was a jury verdict of guilty as charged, and petitioner received a sentence of not less than seven nor more than ten years in the State's Prison, to begin at the expiration of the sentence imposed in Case No. 7751. In neither case was petitioner represented by counsel.

In May 1962 petitioner, *in propria persona*, filed a petition under G.S. 15-217 *et seq.*, to review the constitutionality of his trial. He averred that he was indigent and requested the court to appoint counsel to represent him at the hearing on his petition. The court did not appoint counsel. When Judge Parker heard the matter on June 26, 1962, petitioner attempted to represent himself. In his petition he al-

leged sundry denials of his constitutional rights, none of which allegations he was able to substantiate: he did not assign his lack of counsel at his trial as such a denial. Upon the hearing it was conceded that petitioner was not represented by counsel at his trial in August 1961, and the court noted that he had not requested the appointment of counsel. Judge Parker, applying the law as we then understood it to be, held that courts were not required to assign counsel to an indigent defendant not charged with a capital felony. He dismissed the petition for lack of merit without finding any facts.

In September 1964 petitioner prepared and filed in the Superior Court of Pitt County a second petition, in which he requested a review of the constitutionality of his trial in Case No. 7752 only. He labeled this document "Petition for Writ of Habeas Corpus." He again alleged his indigency and, this time, specifically assigned as a violation of his constitutional rights the failure of the court to appoint him counsel. The court appointed William Brewer, Jr., Attorney at Law, to represent petitioner at the hearing on this petition on October 15, 1964. Judge Burgwyn, hearing the matter, held that petitioner was not entitled to relief under the Post-Conviction Act because of the previous hearing before Judge Parker on June 26, 1962. He held further that petitioner was not entitled to be released upon *habeas corpus* because the petition disclosed the petitioner to be confined under a lawful judgment of the Superior Court.

Attorney General Bruton and Andrew A. Vanore, Jr., Staff Attorney for the State.

Arthur Goff in propria persona.

SHARP, J. The petition for *certiorari* is granted and decision rendered as hereinafter stated. When, in 1963, two years after defendant was tried in August 1961, *Gideon v. Wainwright,* 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792, 93 A.L.R. 2d 733, overruled *Betts v. Brady,* 316 U.S. 455, 86 L. Ed. 1595, 62 S. Ct. 1252 (which, decided in 1942, reaffirmed the original and ancient rule that the Sixth Amendment of the national Constitution applied only to trials in the federal courts), defendant-petitioner became entitled *ex post facto* to have had an attorney at his trial in 1961. *State v. Johnson, ante,* 479, 139 S.E. 2d 692. He was entitled, also, to counsel at his post-conviction hearing before Parker, J., in June 1962. G.S. 15-219; *Griffin v. Illinois,* 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585, 55 A.L.R. 2d 1055, *rehearing den.* 351 U.S. 958, 100 L. Ed. 1480, 76 S. Ct. 844. At the trial, Goff did not request counsel; at the post-conviction hearing, he did. Where, however,

the assistance of counsel is a constitutional requisite, the right to have it does not depend upon a request. *Carnley v. Cochran,* 369 U.S. 506, 8 L. Ed. 2d 70, 82 S. Ct. 884; *State v. Roux, ante,* 149, 139 S.E. 2d 189.

The orders of Parker, J., and Burgwyn, E. J., in the post-conviction proceedings are reversed, and this cause is remanded to the Superior Court of Pitt County with directions to enter an order vacating the judgment and commitment in Case No. 7752 and instructing the solicitor to proceed with reasonable promptness to try defendant-petitioner *de novo* upon the bill of indictment returned at the August 1961 Term, unless the solicitor should otherwise dispose of the case in some manner consistent with the obligation of his office. *State v. Johnson, supra; Bottoms v. State,* 262 N.C. 483, 137 S.E. 2d 817.

Reversed and remanded.

STATE v. MARCRA SHAW SUMMERS.

(Filed 15 January, 1965.)

1. Larceny § 8; Criminal Law § 109—

Where the uncontradicted evidence discloses that the amount involved was $400 in money, the State contending the sum was stolen and defendant contending the sum was given to her, the trial court correctly refrains from submitting the question of guilt of larceny of property of the value of $200 or less, since the court is required to charge only the law arising on the evidence. G.S. 1-180.

2. Criminal Law § 120—

Where it is apparent from the record that the jury had agreed upon the verdict, subject to clarification as to its form, the court, upon clarifying the question for the jury, may accept the verdict then tendered without requiring further deliberation.

APPEAL by defendant from *Latham, S. J.,* August 1964 Criminal Session of ALAMANCE.

This is a criminal action. Defendant is charged in the indictment with the larceny of $400, the property of Willard Freeland.

Plea: Not guilty. Verdict: "Guilty as charged." Judgment: Imprisonment.

Attorney General Bruton and Deputy Attorney General McGalliard for the State.

M. Hugh Thompson and William A. Marsh, Jr., for the defendant.

MOORE, J. Defendant's appeal raises two questions.

(1) Did the court err in failing to instruct the jury that they might return a verdict of guilty of larceny of property of a value of $200, or less?

State's evidence tends to show that Willard Freeland withdrew $695 from a bank and loaned defendant $100, thereafter she took $400 from him and refused to return it, and he spent two days and nights with her at her home but she kept the money and it was never recovered. Defendant's evidence tends to show that she and Freeland were lovers, he spent several days at her home and during this time drank heavily, he bought food and liquor and gave her various sums of money as a gift to do with as she pleased, she did not steal any of his money. Defendant testified: "In all Willard gave me $420.00. I used that to pay my bills."

Under G.S. 14-72 the larceny of property of the value in excess of $200 is a felony, and the larceny of property of the value of $200, or less, is a misdemeanor (except in those instances where G.S. 14-72 does not apply, such as larceny from the person, larceny from certain buildings and houses by breaking and entering, and horse stealing). Whether a person who commits the crime of larceny is guilty of a felony or guilty of a misdemeanor depends solely upon the value of the property taken. The misdemeanor of larceny is a less degree of the felony of larceny within the meaning of G.S. 15-170. *State v. Cooper,* 256 N.C. 372, 124 S.E. 2d 91.

Defendant relies upon the following statement in the *Cooper* opinion: ". . . where a defendant is indicted for the larceny of property of the value of more than $200.00, except in those instances where G.S. 14-72, as amended, does not apply, it is incumbent upon the trial judge to instruct the jury, if they find from the evidence beyond a reasonable doubt that the defendant is guilty of larceny but fail to find from the evidence beyond a reasonable doubt that the value of the stolen property exceeds $200, the jury shall return a verdict of guilty of larceny of property of a value not exceeding $200." Further: ". . . when a defendant pleads not guilty to an indictment charging the larceny of property of the value of more than $200.00, this suffices to raise an issue and present a case of doubt as to whether the property alleged to have been stolen is of the value charged in the bill of indictment or of any value." In the instant case the court charged the jury that it could return one of two verdicts, guilty of the larceny of property of a value in excess of $200 or not guilty.

In *Cooper* the defendant was charged with the larceny of goods and chattels, about which there might be a disagreement as to value. As

to such property a jury might draw inferences as to value contrary to the State's uncontradicted evidence. In the instant case the property was money. Money is the standard of value and if the amount is known there can be no disagreement as to value. The State's evidence is that $400 was stolen; defendant testified that she received $420 of defendant's money by gift, that she stole nothing. There is no evidence from which the jury could have found the defendant guilty of larceny of a value of $200 or less. G.S. 1-180 only requires the judge to "declare and explain the law arising on the evidence." The misdemeanor of larceny does not arise here on the evidence. "The trial court is not required to charge the jury upon the question of the defendant's guilt of lesser degrees of the crime charged in the indictment when there is no evidence to sustain a verdict of defendant's guilt of such lesser degrees." 1 Strong: N. C. Index, Criminal Law, § 109, p. 788.

(2) Did the court err in accepting the verdict of the jury under the circumstances of its rendition?

After deliberating for a considerable time, the jury returned to the courtroom and one of the jurors said: "I think we have reached a verdict. There is a question needs to be resolved in the minds of some of the jurors." The juror then stated the question; the court answered in detail. Thereupon, the juror stated: "With that understanding we have reached a verdict, your Honor." The clerk took the verdict immediately.

The court did not commit error in permitting the verdict to be taken without requiring the jury to return to the jury room for further deliberation. From the statement of the foreman a verdict had been agreed upon before the jury returned to the courtroom, subject to a clarification as to the form of the verdict. The judge's explanation made no further deliberation necessary. The defendant could have tested the verdict by having the jury polled.

No error.

IN THE MATTER OF: THE PETITION OF SING OIL COMPANY FOR JUDICIAL REVIEW OF THE DECISION OF THE TAX REVIEW BOARD CONCERNING AN ASSESSMENT OF GASOLINE TAXES FOR THE PERIOD FROM JANUARY 1, 1955, THROUGH DECEMBER 31, 1957.

(Filed 15 January, 1965.)

Taxation § 29—

An oil company having fuel oil delivered on its order to another oil company direct from the port terminal is a distributor within the meaning of the statute and liable for the tax imposed by the statute and is entitled to the tare or deduction specified therein. G.S. 105-434.

APPEAL by Petitioner from *Copeland, S. J.*, May 1964 Assigned Non-Jury Civil Session of WAKE.

Sing Oil Company (Sing), a licensed distributor of motor fuels, required to account for taxes as prescribed by Art. 36, § 105, was, on April 24, 1958, charged by the Commissioner of Revenue with failing to pay all of the taxes for which it was liable. An assessment was made for the balance asserted to be owing. Sing denied liability, contending the Commissioner had misinterpreted the statute imposing the tax. It sought an administrative review, as permitted by G.S. 105-241.2. The Tax Review Board sustained the assessment. Sing, authorized by G.S. 105-241.3, appealed to the Superior Court. The Superior Court affirmed the Tax Review Board's decision. Sing excepted and appealed.

Bunn, Hatch, Little & Bunn and E. Richard Jones, Jr., for appellant.

Attorney General Bruton, Deputy Attorney General Abbott and Assistant Attorney General Barham for appellee.

RODMAN, J. A tax of seven cents per gallon is, by G.S. 105-434, levied on all motor fuels, sold, distributed or used in this State. So far as pertinent to a decision in this case, the taxing statute provides:

> "The tax hereby imposed and levied shall be collected and paid by the distributor producing, refining, manufacturing, or compounding within this State, or holding in possession within this State motor fuels for the purpose of sale, distribution, or use within the State * * *. For the purpose of determining the amount of tax, it shall be the duty of every distributor to transmit to the Commissioner of Revenue not later than the twentieth day of each month, upon forms prescribed and furnished by such Commissioner, a report under oath or affirmation showing the quantity of motor fuel sold, distributed, or used by such distributor within this State during the preceding calendar month, and such other infor-

mation as the said Commissioner may require: Provided, that any distributor may, if he elects to do so, use as the measure of the tax levied and assessed against him by this section the gross quantity of motor fuel purchased, produced, refined, manufactured, and/or compounded by such distributor, plus the amount of motor fuel on hand at the beginning of the period when such method of computation is used, less a tare of two per cent (2%) on gross monthly receipts of motor fuels not exceeding 150,000 gallons, and less a tare of one and one-half per cent (1½%) on gross monthly receipts of such fuel in excess of 150,000 gallons and not exceeding 250,000 gallons, and less a tare of one per cent (1%) on gross monthly receipts of such fuels in excess of 250,000 gallons."

The Director of the Gasoline Tax Division, in a memorandum filed with the Tax Review Board, stated the facts and the reasoning which led to the assessment. He said: "The assessment was the result of the auditor having disallowed tare allowance taken by Sing Oil Company on sales made to Tops Petroleum Corporation of Durham, North Carolina. Tops Petroleum hired Kenan Petroleum Corporation of Durham, North Carolina, to haul the gasoline from Arkansas Fuel Oil Corporation's terminals at Wilmington and Greensboro and paid Kenan Transport the freight. Therefore, since Sing Oil Company made sales to Tops Petroleum for which it furnished transportation direct from the terminals, Sing Oil Company was not entitled to the tare allowance and Auditor Goodrum disallowed the tare taken on such sales."

The tax imposed by G.S. 105-434 is a privilege tax. *Stedman v. Winston-Salem*, 204 N.C. 203, 167 S.E. 813. The distributor may determine his tax liability by either of two methods. He may compute his liability on his monthly sales, or on his monthly purchases. If he elects to use purchases to determine liability, he is entitled to a tare on his receipts.

Appellee contends Sing is not entitled to a tare or deduction from the quantity of gasoline purchased by it and resold to Tops Petroleum, another licensed distributor. Sing, it says, is not entitled to the tare because Tops employed and paid the transportation company for carrying the gasoline from the tanks of the producer, as authorized by Sing, to the tanks of Tops.

If the State's position is correct, no tare or deduction can be claimed by anyone on the sales made by Sing to Tops. The tax is payable by the first distributor, G.S. 105-431. Sing is admittedly liable for the tax. Tops has no tax liability for gas purchased from Sing. Since it has no tax liability, it can not claim credit for the tare.

The word "receipt" as used in the statute, G.S. 105-434, in our opinion, means gasoline purchased for resale or for use by the purchasing distributor. Unless given that meaning, Sing would not be liable for the tax, since, as to the gasoline purchased and sold Tops, it would not be a statutory distributor, defined as: "Any person * * * that has on hand or in his or its possession in this State or that produces, refines, manufactures or compounds such motor fuels in this State for sale, distribution or use herein." The delivery of the gasoline to Tops on Sing's order constituted technical possession and receipt by Sing. It is liable for the tax on its purchases and entitled to the tare on such purchases.

Reversed.

WAVIELINE PERRY EDWARDS v. HERBERT E. EDWARDS.

(Filed 15 January, 1965.)

1. Divorce and Alimony § 22—

Where, in the wife's action for alimony without divorce and for maintenance and support of the children of the marriage, she serves notice on the husband before the hearing that she would request the court to award to her custody of the children, and it appears that the husband has theretofore instituted in the same Superior Court *habeas corpus* proceedings for the custody of the children, the court acquires jurisdiction to hear and determine all questions raised in both proceedings, notwithstanding that in the wife's action she does not pray for the award of the custody of the children.

2. Divorce and Alimony § 24—

An order awarding custody of the children to the wife upon condition that she live without any financial support from her husband, reside in the parsonage furnished her husband and devote her energies and attention to the rearing of the children, and abandon her professional career and cease all employment, exceeds sound judicial discretion and may not be allowed to stand.

3. Appeal and Error § 46—

Where the order appealed from exceeds sound judicial discretion, the order will be set aside and the cause remanded for a hearing *de novo*.

APPEAL by plaintiff from *Latham, S.J.*, April "A" Civil Session 1964 of SCOTLAND.

The plaintiff instituted this action in Scotland County Superior Court on 20 April 1964 for alimony without divorce and maintenance

and support for the four minor children born of the marriage between the plaintiff and the defendant.

The plaintiff and defendant were married on 10 June 1956 and lived together as man and wife until 29 November 1963, at which time, according to the allegations in the complaint, the defendant assaulted the plaintiff and drove her away from home.

The plaintiff alleges that the defendant is employed by the Scotland County Public School System as a teacher, and earns an annual salary of approximately $4,800.00 after all deductions have been made; that the defendant is likewise employed as pastor of the Shiloh Baptist Church, Maxton, North Carolina, and from this profession he has an annual earning of more than $2,000.00; and in addition thereto he is engaged in farming and selling tombstones from which he receives some additional income.

The plaintiff further alleges that she has contributed her time and energies in attempting to establish a home for herself, her husband, and their children; that in addition to her domestic duties, she has used the earnings from her profession as a public school teacher to help support the family, including the defendant. It is also alleged that since the plaintiff was driven from her home on 29 November 1963, she has been forced to obtain lodging for herself and children, which she has done in Laurinburg, North Carolina; that her earnings are insufficient to provide the necessary support and subsistence for herself and said children. It is further alleged that on 9 January 1964, the defendant obtained from his Honor Leo Carr, Judge Presiding over the courts of the Sixteenth Judicial District, a writ of *habeas corpus* for the determination of the custody of the four children of the parties, which writ is still pending in the Superior Court of Scotland County.

At the hearing, the court found that (1) both parties are fit parents to have the custody of the minor children; (2) it is in the best interest of the children that the plaintiff be awarded their custody if she meets the after-mentioned conditions; and (3) the defendant has net annual earnings of approximately $4,300.00."

Based upon the foregoing findings of fact, an order was entered which, in pertinent part, reads as follows:

"FIRST: * * * (T)he motion of the plaintiff for alimony *pendente lite* is denied * * *.

"SECOND: That the care, custody and control of the minor children aforementioned, be awarded to the plaintiff, Wavieline Perry Edwards, upon the following express conditions:

"a. That before 6:00 o'clock p.m. on Saturday, 2 May 1964, the plaintiff and the minor children, who are now residing in the City of Laurinburg in rental quarters * * * shall move into the premises known as the Shiloh Baptist Church Parsonage, located on Saunders Street in the City of Maxton, North Carolina * * * and she and the children shall remain there until this court, upon proper application, permits the plaintiff to change her place of residence * * *.

"b. The plaintiff shall, at the close of the present academic year, cease all outside employment and direct her energies and attention toward rearing the four children of the parties and it is specifically ordered that, should the plaintiff return to outside employment, the custody of said children shall vest, immediately, in the defendant and the responsibility of the defendant for the payments hereinafter ordered shall terminate.

"c. The plaintiff shall permit the defendant to visit in the home with the children at all reasonable hours * * *.

"THIRD: The defendant shall:

"b. Commencing 1 June 1964, pay into the office of the Clerk of the Superior Court of Scotland County, for the sole use and benefit of the minor children of the parties, Palema Loretta Edwards, Ronald Anthony Edwards, Conald Garnell Edwards, and Herbert Darryl Edwards, the sum of $120.00 per month, each and every month until further orders of the court * * *."

The record in the instant appeal does not contain any of the evidence adduced in the hearing below. The record contains only the pleadings, findings, and the order.

From the entry of the foregoing order, the plaintiff appeals, assigning error.

Bernard A. Harrell, Ellis Nassif for plaintiff appellant.
King & Cox for defendant appellee.

PER CURIAM. The plaintiff contends the court below was without jurisdiction to award custody of the minor children born of the marriage between plaintiff and defendant, since she did not pray for custody in her action for alimony and support for the children. The plaintiff did, however, allege in her complaint that prior to the institution of her action, the defendant did procure a writ of *habeas corpus* to determine the custody of said children, which proceeding was still pending in the Superior Court of Scotland County. Moreover, the plaintiff served notice on the defendant before the hearing below, that Latham, S.J.

would be requested to award custody of the children to her. Therefore, we hold that the court below had the right to hear and determine all questions raised in both proceedings.

According to the record, the plaintiff has had custody of the minor children involved since the plaintiff and defendant separated on 29 November 1963. However, as a prerequisite to the right of plaintiff to retain custody of said children, which custody the court awarded to her, she is required to do these things: (1) live without any financial support from her husband; (2) reside in the Shiloh Baptist Church Parsonage on Saunders Street in the City of Maxton, North Carolina, and devote her energies and attention to the rearing of the four children of the parties; and (3) abandon her professional career as a school teacher and cease all employment and remain at home with her children.

In our opinion, the foregoing order does not comport with sound judicial discretion and it is set aside and the cause remanded for a hearing *de novo*. *Martin v. Martin*, 263 N.C. 86, 138 S.E. 2d 801.

Error and remanded.

RUBY DODSON MANGUM v. CHARLES YOW AND ZEDDIE BENSON BLAKELY.

AND

JAMES M. MANGUM v. CHARLES YOW AND ZEDDIE BENSON BLAKELY.

(Filed 15 January, 1965.)

Trial § 51—

The discretionary refusal to set aside a verdict as being contrary to the weight of the evidence will not be disturbed when the evidence on the crucial point is conflicting so that the verdict depends upon the resolution of factual controversy, which is peculiarly the province of the jury.

APPEAL by plaintiffs from *Olive, J.*, June 1964 Session of ORANGE.

A Ford automobile owned by male plaintiff, operated by *feme* plaintiff, and a tractor trailer owned by defendant Yow, operated by his agent Blakely, collided on U.S. 15 early on the morning of June 29, 1961.

Plaintiffs, asserting the collision was caused by defendant Blakely's negligent operation of the tractor trailer, brought these actions for compensation for the personal injuries sustained by *feme* plaintiff, and the damage to the automobile.

Defendants denied plaintiffs' allegation of negligence. As a defense, and for affirmative relief, they alleged the collision was caused by the negligence of Mrs. Mangum. Yow prayed for compensation for the damage done the truck; Blakely sought compensation for personal injuries.

By consent, the causes were consolidated for trial. Issues, based on the allegations in the pleadings, to fix responsibility for the collision and damages, were submitted to a jury. It found defendants were not negligent; defendants were damaged by the negligence of plaintiffs as alleged in the answers. It fixed the sum each defendant was entitled to recover.

Plaintiffs moved to set the verdict aside as contrary to the weight of the evidence. The motion was denied. Judgment was entered on the verdict. Plaintiffs appealed.

Phipps & Peele for plaintiff appellants.
Claude Bittle for defendant appellees.

PER CURIAM. Appellants, conforming to the requirements of Rule 27½ of this Court, 254 N.C. 809, state as the question presented by the appeal: "Did the trial judge abuse his discretion in failing to grant plaintiffs' motion to set aside a verdict as being contrary to the weight of the evidence and in signing the judgment for the defendants as set out in the record?"

Both plaintiffs and defendants offered evidence to support their respective contentions. The parties are in agreement with respect to these facts: U. S. 15 runs north and south. Both vehicles were traveling north. The highway has two lanes, one for southbound traffic, the other for northbound traffic. The Mangums live on Christopher Road. This is west of and parallels the highway. Mrs. Mangum came on the highway half or three-quarters of a mile south of the point where the vehicles collided. She was on her way home. When she came on the highway, she saw the lights of a motor vehicle to the south. The vehicles collided in their left hand lane. Mrs. Mangum, in order to reach her home, had to make a left turn and leave the highway.

There is a conflict in the evidence with respect to signals, if any, given by Mrs. Mangum indicating her intention to make a left turn. There is also a conflict as to the relative position of the vehicles when Mrs. Mangum pulled to her left intending to leave the highway. Plaintiffs' evidence would support a finding that Mrs. Mangum gave the required signal indicating her intent to turn left at a time when she could safely do so.

Defendants' evidence is to the effect that Blakely turned into the left lane intending to pass the Ford. Mrs. Mangum had not then given any signal of an intent to turn left. She had been warned of defendant's intention to pass by a repeated blinking of the trailer lights. If *feme* plaintiff ever gave any signal of her intent to turn, it was given when Blakely, because of the position of the two vehicles, could not see the signal. His vehicle was within 10 feet of the rear of the Ford car when the driver suddenly pulled to her left.

History teaches that a jury can best settle factual controversies, and for that reason jury trials "ought to remain sacred and inviolable." N. C. Constitution, Art. 1, § 19.

Plaintiffs insist that skid marks made by the tractor-trailer establish beyond question that their version of how the collision occurred is correct.

The jury had the responsibility of weighing all of the evidence, including the testimony describing the skid marks and other physical facts, before answering the issues submitted to them. We find nothing in the record to show a failure by the jury to perform its duty. That being so, it follows the trial judge was not under a duty to set the verdict aside.

No error.

STATE v. DAVID McGIRT.

(Filed 15 January, 1965.)

1. Homicide § 23—

An instruction placing the burden on defendant to prove matters in mitigation or justification upon the State's evidence establishing beyond a reasonable doubt an intentional killing with a deadly weapon, is not error.

2. Homicide § 27—

The court's charge in respect to defendant's right to self-defense when assaulted in his own home *held* without error in this case.

APPEAL by defendant from *Carr, J.*, April 1964 Criminal Session of ROBESON.

Criminal prosecution on an indictment charging defendant David McGirt with murder in the first degree on 28 November 1963 of Charlie Calahan. G.S. 15-144. Before the jury was selected the solicitor for the State announced in open court that he would only request a con-

viction for murder in the second degree or manslaughter as the facts might appear. Plea: Not Guilty. Verdict: Guilty of murder in the second degree.

From a judgment of imprisonment in the State's prison, defendant appeals.

Attorney General T. W. Bruton and Assistant Attorney General James F. Bullock.

L. J. Britt & Son by L. J. Britt and Robert Weinstein for defendant appellant.

PER CURIAM. The State's evidence shows these facts: Defendant David McGirt and Modes McGirt were husband and wife, and lived in a house together. Charlie Calahan, after his release from serving a prison term in Florida, spent considerable time in defendant's home, in spite of defendant's protests. Defendant had also served a prison term for armed robbery. He (McGirt) had said "if he took one's life, he would take the other." On the night of 28 November 1963 Calahan brought to defendant's home a bottle of vodka and a bottle of whisky. Defendant, his wife, and Calahan were drinking the vodka and whisky. Verrell Ray, Evelyn Locklear, and a baby were present. There was a TV on in one room and a piccolo was playing in another. Calahan stood up and was dragging his feet as if dancing by himself in the room where the piccolo was playing. Defendant came into the piccolo room with a shotgun and said: "Charlie, I have got you where I want you." He then shot Calahan with the shotgun inflicting a wound causing death.

Defendant's evidence shows these facts: He had repeatedly asked Calahan to quit coming to his house, and had previously had an officer to carry him away. On the fatal night he drank no intoxicants. This is defendant's testimony as to the shooting:

> "At that time I was standing in the door leading into the living room. Charlie was standing about even with the piccolo, back toward the door leading into the living room. I would say he was about like from here to the corner of her desk (indicating Reporter's desk) from me. He said, 'I thought I told you you had to leave.' I said, 'I am not going anywhere.' He said, 'You are going somewhere, or one of us is going somewhere.' He put his hands in his pants' pocket. He was coming towards me. I had backed up some when he advanced toward me. He was pulling something out of his pocket. I reached out in the hall, right around

there. I had set the gun there. I set the gun there the day before that. And so when I reached down and got the gun, he was right at me, and just as I had turned around, he had it up coming at me. I don't know whether it was a .25 or .22, or what it was. I saw a weapon. When he said that, he was almost in reach of the gun barrel. I didn't do a thing but just pulled the trigger, just did have it up. I shot him to keep him from killing me, probably. That's when I left."

Defendant has two assignments of error: each assigns as error a part of the court's charge to the jury on self-defense, the defense upon which defendant relies.

Defendant first assigns as error that the judge instructed the jury in effect as follows: If the State has satisfied the jury beyond a reasonable doubt that the defendant intentionally assaulted the deceased with a deadly weapon, and such an assault caused death, there are two presumptions that arise in the State's favor, (1) that it was an unlawful killing and (2) that it was done with malice, and then the burden is upon the defendant, not the State, to satisfy the jury, not beyond a reasonable doubt nor by the greater weight of the evidence, but merely to satisfy the jury of the legal provocation that will rob the crime of malice and thus reduce it to manslaughter, or that will excuse it altogether upon the grounds of self-defense. Defendant contends this part of the charge is erroneous, in that it places a burden upon defendant, and the burden of proof is always on the State, and the charge as to burden of proof is conflicting. When an intentional killing with a deadly weapon is admitted judicially in court by the defendant or is proven by the State beyond a reasonable doubt, self-defense is an affirmative plea, with the burden of satisfaction cast upon the defendant. The assignment of error is overruled. The challenged part of the charge is in strict accord with well-established law stated in repeated decisions of the Court. *S. v. Benson*, 183 N.C. 795, 111 S.E. 869; *S. v. Utley*, 223 N.C. 39, 25 S.E. 2d 195; *S. v. Childress*, 228 N.C. 208, 45 S.E. 2d 42; *S. v. Jernigan*, 231 N.C. 338, 56 S.E. 2d 599; *S. v. Howell*, 239 N.C. 78, 79 S.E. 2d 235; *S. v. Mangum*, 245 N.C. 323, 96 S.E. 2d 39. *S. v. Holloway*, 262 N.C. 753, 138 S.E. 2d 629, relied upon by defendant is not in point because the instruction there challenged was in respect to the recent possession of stolen property.

The second assignment of error is in respect to a defendant's right of self-defense when he is assaulted in his own home, as defendant contends he was here. This assignment of error is overruled. The judge's charge in this respect is in substantial compliance with the law as stated in the following decisions of the Court. *S. v. Harman*, 78 N.C.

515; *S. v. Roddey,* 219 N.C. 532, 14 S.E. 2d 526; *S. v. Miller,* 221 N.C. 356, 20 S.E. 2d 274; *S. v. Anderson,* 222 N.C. 148, 22 S.E. 2d 271; *S. v. Sally,* 233 N.C. 225, 63 S.E. 2d 151.

In the trial below we find

No error.

IN THE MATTER OF: THE CUSTODY OF ROBERT MARK PONDER.

(Filed 15 January, 1965.)

Divorce and Alimony § 22; Habeas Corpus § 2; Appeal and Error § 2—

Where it is made to appear upon diminution of the record that a proceeding for *habeas corpus* to obtain custody of the adopted child of the marriage was instituted by the husband in the Superior Court two days after the institution of the wife's action for alimony without divorce and custody of the child, the Supreme Court, in the exercise of its supervisory jurisdiction, will dismiss the *habeas corpus* proceeding. Constitution of North Carolina, Art. IV § 10.

APPEAL by respondent from *Huskins, J.,* at Chambers in Burnsville, North Carolina, on 31 July 1964. From MADISON.

On 27 July 1964, Starling Ponder, the petitioner herein, applied for and obtained a writ of *habeas corpus* for the purpose of obtaining custody of Robert Mark Ponder, a minor child about seven years of age.

The petitioner and the respondent, Ossie B. Ponder, were lawfully married on 30 July 1938 and lived together as husband and wife until on or about 13 July 1964, at which time they separated and have lived separate and apart since the date of their separation. There was born of this marriage one daughter, who is now 25 years of age and married and is not involved in this proceeding.

The petitioner and the respondent are the adoptive parents of Robert Mark Ponder, who was born 24 December 1957 and whose custody is in controversy.

At the hearing on 31 July 1964, upon the writ by the Resident Judge of the Twenty-fourth Judicial District, the respondent, through her attorneys, made a motion to dismiss the proceeding for lack of jurisdiction on the ground that on 18 July 1964, prior to the time the writ of *habeas corpus* was issued, an action entitled *Ossie Ponder v. Starling Ponder* was instituted in the General County Court of Buncombe County, North Carolina, in which action the plaintiff is seeking alimony without divorce and custody of the minor child, Robert Mark Ponder.

At the hearing a blank summons, unsigned, and a purported complaint, which was neither signed nor verified, were offered by the respondent to establish her plea in bar. While the court allowed the admission of these papers in evidence as respondent's Exhibits Nos. 1 and 2, the court denied the respondent's motion and proceeded to hear the matter. Custody of Robert Mark Ponder was awarded to the petitioner.

The respondent appeals, assigning error.

A. E. Leake attorney for petitioner appellee.

Robert E. Riddle, Bruce B. Briggs attorneys for respondent appellant.

PER CURIAM. When this appeal came on for argument in this Court, a motion suggesting diminution of the record was allowed and the appellant was permitted to substitute in lieu of her Exhibits Nos. 1 and 2, duly certified copies of the summons and complaint filed in the case of *Ossie Ponder v. Starling Ponder* in the General County Court of Buncombe County, North Carolina. These certified copies show that the summons was issued in said action on 18 July 1964, the complaint was filed at 11:04 a.m. on the same day, and the summons and copy of the complaint were served on the defendant on 25 July 1964. This was two days before the petition for writ of *habeas corpus* was filed and the writ granted.

On authority of *Blankenship v. Blankenship,* 256 N.C. 638, 124 S.E. 2d 857, and our supervisory jurisdiction granted by Article IV, § 10, of the Constitution of North Carolina, the order of the court below is set aside and this action is dismissed.

Action dismissed.

RUTH M. WARREN, ADMINISTRATRIX OF THE ESTATE OF TERRY LEE ENOCH, DECEASED v. ARCHIE JEFFRIES.

(Filed 15 January, 1965.)

Automobiles § 41q—

Evidence to the effect that five children got into the rear seat of defendant's car, which had been parked in the yard by defendant, and that when the fifth child, the six-year old intestate, got in and closed the door something clicked in the front and the car started rolling, without any evidence

that defendant failed to set the hand brake, or failed to engage the transmission, or neglected to maintain adequate brakes, *held* insufficient to overrule nonsuit, the doctrine of *res ipsa loquitur* not being applicable.

APPEAL by plaintiff from *Hall, J.*, February 13, 1964, Session of ALAMANCE.

Lee & Lee for plaintiff.
Sanders & Holt for defendant.

PER CURIAM. Terry Lee Enoch, a 6-year old child, was injured when a wheel of defendant's Chevrolet automobile ran over his body, and from these injuries he died. Plaintiff instituted this action to recover for his alleged wrongful death. From judgment of involuntary nonsuit entered at the close of plaintiff's evidence, plaintiff appeals.

Plaintiff's evidence, taken as true for the purposes of this appeal, discloses these facts:

Defendant drove to Terry's home to see Terry's father and parked his car in the yard. Terry's father was not at home and defendant went in the house and waited for his return. The car was left standing on an incline. During the time there were in and around the house about a dozen children, including Terry; their ages ranged from 18 months to 20 years. The car remained parked for about an hour prior to the accident, and during this interval no one had gone to the car or touched it for any purpose. One of the children needed shoe polish and defendant gave Terry's mother the keys to his automobile so she could drive it to a store for the polish. She and five children, including Terry, started to the car. It was raining and Terry didn't want to wear his glasses; he gave them to his mother and she went back in the house to put them up. The five children (eldest, 20 years) got in the rear seat of the car; it was a 4-door sedan, and none of them got in the front seat. They did not touch any of the control mechanisms of the car. Terry was the last to get in and when he "closed the door something clicked in the front and . . . the car started rolling" backwards in the direction of a large ditch. One of the older children opened the door and told the others to jump out. All jumped out, Terry first. When he jumped out he fell, and the front wheel ran over his chest.

The mother's graphic description of her son is so typical of an alert and active little boy that it is worthy of preservation. "He was full of fun at all times, he never was still unless he was asleep, he was either laughing or playing or doing something to let you know he was around. One thing I remember, the lady I worked for give *(sic)* him a little puppy and he was crazy about this little dog . . ."

Plaintiff alleges defendant was negligent in that (1) he failed to set the hand brake, (2) failed to engage the transmission, and (3) neglected to maintain adequate brakes as required by G.S. 20-124. There is no evidence as to the condition of the brakes, whether the hand brake had been set, or whether the car was in gear. Apparently the car was not examined after the accident. What caused it to make a "clicking" sound and begin rolling backwards is pure speculation. The doctrine of *res ipsa loquitur* is not applicable. *Lane v. Dorney*, 252 N.C. 90, 113 S.E. 2d 33; *Springs v. Doll*, 197 N.C. 240, 148 S.E. 251.

Affirmed.

STATE v. WILLIAM E. WILSON.

(Filed 15 January, 1965.)

1. Appeal and Error § 24; Criminal Law § 156—

An assignment of error to the charge should quote the portion of the charge to which appellant objects.

2. Same—

An assignment of error based on the failure of the court to charge should set out defendant's contention as to what the court should have charged.

3. Appeal and Error § 19; Criminal Law § 154—

An assignment of error should point out the particular matter relied upon so as to avoid the necessity of going beyond the assignment itself to ascertain the question sought to be presented.

APPEAL by defendant from *Latham, J.*, January, 1964 Criminal Session, ALAMANCE Superior Court.

This criminal prosecution was based upon a bill of indictment charging that on July 21, 1963, the defendant unlawfully, wilfully, and feloniously assaulted J. D. Greeson with a deadly weapon, to-wit: a pistol, with intent to kill, inflicting serious injury not resulting in death. The defendant entered a plea of not guilty.

The evidence for the State tended to show that the prosecuting witness, J. D. Greeson, and the defendant, William E. Wilson, were brothers-in-law. The prosecuting witness and his wife, the defendant's sister, had separated. In the afternoon the witness passed by the home where his wife lived, saw the defendant's and the defendant's father's automobiles parked in the yard, but did not stop. After night, according to his testimony, he drove back by the house. The automobiles were

gone. He went to the back of the house and called his wife's name and receiving no answer, he said "This is J. D." As he approached the house from the back, he was shot twice with a pistol. At the hospital the doctor discovered two wounds: one through the arm and one into the chest cavity. It was the doctor's opinion that one bullet inflicted both wounds. The defendant told the officer he did the shooting but he shot to scare the intruder and did not think he hit anyone. There was evidence the pistol wounds caused serious injury.

The jury returned a verdict finding the defendant "Guilty of assault with a deadly weapon." From the judgment imposed, the defendant appealed.

T. W. Bruton, Attorney General; Harry W. McGalliard, Deputy Attorney General; Richard T. Sanders, Assistant Attorney General; E. Glenn Kelly, Staff Attorney for the State.

Clarence Ross, B. F. Wood for defendant appellant.

PER CURIAM. The assignments of error based on exceptions to the charge are defective. The appellant should quote in each assignment the part of the charge to which he objects. An assignment based on failure to charge should set out the defendant's contention as to what the court should have charged. The assignments should present the questions without requiring "a voyage of discovery" through the record.

The requirement that the assignments disclose the matters alleged as error is for the benefit of all members of the Court in their pre-argument examination of the record. After the argument the author, in preparing the opinion, makes a meticulous examination of the record. Ordinarily, however, the other members of the Court examine and check the opinion in the light of appellant's exceptive assignments. "Always the very error relied upon shall be definitely and clearly presented, and the Court not compelled to go beyond the assignment itself to learn what the question is." *Nichols v. McFarland,* 249 N.C. 125, 105 S.E. 2d 294.

The assignments of error, when properly prepared, pinpoint the controversy. This Court is entitled to that assistance from appellant's counsel.

The record before us does not disclose error of law in the trial.

No error.

STATE v. HAMPTON LEE BRITT.

(Filed 15 January, 1965.)

Criminal Law § 111—

An instruction of the court to scrutinize the testimony of defendant and the testimony of defendant's brother-in-law because of their interest, but that if, after such scrutiny, the jury should find that they had told the truth, to give their testimony the same weight as that of a disinterested witness, *held* without error.

APPEAL by defendant from *Carr, J.*, May 1964 Session of ROBESON.

Criminal action in which defendant is charged with an assault with a deadly weapon upon one Frances Chavis, a female. From a conviction and judgment in Recorder's Court, defendant appealed to Superior Court where a trial *de novo* was had.

Plea: Not guilty. Verdict: Guilty.

Judgment: Active prison sentence of 2 years.

Attorney General Bruton and Assistant Attorney General Sanders for the State.

Barrington & Britt for defendant.

PER CURIAM. Defendant claimed self-defense and testified in his own behalf. His brother-in-law gave testimony tending to support the plea of self-defense.

Defendant excepts to the following excerpt from the charge: "It is your duty to scrutinize their (defendant's and his brother-in-law's) testimony because of their interest in your verdict. If, after doing so, you find that they have told the truth, it will be your duty to give their testimony the same weight as that of a dis-interested witness."

The instruction is not prejudicial. *State v. Faust,* 254 N.C. 101, 113, 118 S.E. 2d 769; *State v. Barnhill,* 186 N.C. 446, 119 S.E. 894. *State v. Turner,* 253 N.C. 37, 116 S.E. 2d 194, is factually distinguishable.

No error.

STATE v. JOHN C. LOWRY.

AND

STATE v. MAY MALLORY, RICHARD CROWDER, HAROLD REEP AND JOHN CYRIL LOWRY, DEFENDANTS.

(Filed 29 January, 1965.)

1. Common Law—

So much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of the State and which has not become obsolete or superseded by statute is in force in this State. G.S. 4-1.

2. Criminal Law § 1—

A criminal statute must be sufficiently definite to give unmistakable notice of the act proscribed, but if the statute uses a well-known common law appellation which conotes a definite offense the statute is definite and certain.

3. Same; Kidnapping § 1—

The failure of G.S. 14-39 to define kidnapping does not render the statute vague or uncertain, since the statute does not originate the offense but merely provides that kidnapping should be a felony and fixes the punishment, and the common law definition of the offense as the unlawful taking and carrying away of a person by force and against his will, is incorporated in the statute by construction.

4. Constitutional Law § 30; Criminal Law § 86—

A person formally charged with crime is entitled to a speedy and impartial trial under both the Federal and State Constitutions, but such right is a shield to protect a defendant from arbitrary and oppressive delays, and whether a speedy trial is afforded must be determined in the light of the circumstances of each particular case.

5. Same—

G.S. 15-10 is for the protection of persons held without bail and does not apply to persons allowed bail.

6. Same— Defendants were not denied speedy trial under facts of this case.

One of defendants jointly charged departed the State before she could be apprehended, and continuous effort for extradition was not successful until more than two years thereafter. In the interim the other defendants moved for trial, and at the trial moved for their discharge on the ground that their right to a speedy trial had been violated. *Held:* The absence of the fugitive and her pending extradition were sufficient basis for the denial of the motion for trial, and since the court anticipated from term to term that the fugitive would be returned, there was no abuse of discretion in denying the motion for discharge, there being nothing to show that the delay impaired in any way the abilities of the defendants to present their defenses.

7. Constitutional Law § 29; Grand Jury § 1—

The arbitrary exclusion of citizens from service on the grand jury on account of race is a denial of due process to members of the excluded race charged with indictable offenses.

8. Same—

A white person who has made common cause with Negroes in their civil rights demonstrations and who is jointly charged with them with an offense committed in connection therewith is entitled to object to the arbitrary exclusion of Negroes from the grand jury returning the indictments.

9. Same—

The placing of designations or symbols of race on the jury list is improper.

10. Same—

The statutory provisions in this State respecting the qualifications, selection, listing, drawing and attendance of jurors is fair and nondiscrimatory and meets all constitutional tests.

11. Same—

A jury list is not discriminatory merely because it is made from the tax lists, although it is a better practice to supplement such lists by resort to voter registrations and other available lists.

12. Same—

While there is no requirement of law that Negroes be represented on jury panels in proportion to their ratio to the population, proof of a disproportionately small percentage of Negroes on juries constitutes a *prima facie* showing of discrimination.

13. Same—

While the burden of proving racial discrimination in the selection of the jury lists is upon defendants, defendants' *prima facie* showing of discrimination puts the burden upon the State to overcome the *prima facie* case by competent evidence showing the absence of discrimination in fact, and if there is contradictory and conflicting evidence the trial judge must make specific findings in regard thereto.

14. Same—

Where defendants make out a *prima facie* case of racial discrimination in the selection of the jury by showing that racial designations were placed on the jury lists and that only a token number of Negroes served on grand juries, merely negative findings by the court of absence of discrimination and the absence of any positive factual showing sufficient to overcome dedendants' *prima facie* case, requires the quashal of the indictments.

15. Indictment and Warrant § 16—

Quashal of the indictment for racial discrimination in the selection of the grand jury does not entitle defendants to their discharge or the dismissal

of the charges, since the State may proceed on new bills returned by an unexceptionable grand jury.

APPEAL by defendants from *Brock, S. J.*, February 1964 Mixed Session of UNION.

Defendants May Mallory, John Cyril Lowry, Richard Crowder and Harold Reep are jointly charged in two separate bills of indictment. One indictment charges that on 17 August 1961 they "unlawfully, wilfully, feloniously and forcibly did kidnap one Mabel Stegall . . ." The other indictment is identical except that it charges the kidnapping of G. Bruce Stegall.

The State introduced evidence which we summarize briefly as follows: G. Bruce Stegall and wife, Mabel Stegall, in the afternoon of 27 August 1961, Sunday, left their home near Marshville and motored to Monroe, a distance of 10 miles. About 5:15 P.M. they stopped in front of the Monroe city hall. They learned that earlier that day there had been trouble at the courthouse square between Negroes and whites. "Freedom Marchers" had been picketing the square; there had been disorders and some of the marchers had been taken in custody by the police. Though it was quiet at the time, the Stegalls decided to leave town and drove away, Bruce was driving. While they were proceeding along Winchester Avenue they saw in front of them a crowd congregated in the Avenue. They pulled into Boyte Street and stopped, intending to back out, turn around and go in another direction. Before they could back the car it was surrounded by about 200 people, some of whom had rifles. They were threatened, forcibly taken from the car and removed at gunpoint to the home of Robert Williams, about 100 yards from the car. There Bruce Stegall was required to talk by telephone to the Monroe Chief of Police, inform him they would be held as hostages until the arrested marchers were released, and that their freedom and safety depended on such release of prisoners. Thereafter, the Stegalls were bound and carried to another building, where they remained under guard until they were released sometime between 8:00 and 9:00 P.M. All of the defendants had a part, directly or indirectly, in the taking, removal and restraint of the Stegalls.

The jury found all of the defendants "guilty as charged." Judgment of imprisonment was entered as to each.

Attorney General Bruton and Deputy Attorney General Moody for the State.

Kunstler, Kunstler & Kinoy, Walter B. Nivens and Richard J. Scupi for defendant John C. Lowry.

Samuel S. Mitchell and Walter S. Haffner (Good & Haffner) for other defendants.

MOORE, J. Defendant Lowry filed a different statement of the case on appeal from that filed by the other defendants, and a separate brief. To avoid needless repetition we discuss the appeals in one opinion. There are many assignments of error; we find it necessary to discuss only three.

I.

The defendants assert and contend that G.S. 14-39 will not support an indictment and conviction, for that its terms are vague, uncertain, ambiguous, and indefinite "so as to deprive appellants of due process of law as protected by the Fourteenth Amendment of the Federal Constitution" and Article I, section 17, of the Constitution of North Carolina.

In support of this contention appellants quote at length from 14 Am. Jur., Criminal Law, sec. 19, pp. 773-4, as follows: "The Legislature in the exercise of its power to declare what shall constitute a crime or punishable offense, must inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain understandable rule of conduct and know what acts it is his duty to avoid. . . . If a statute uses words of no determinative meaning and the language is so general and indefinite as to embrace not only acts properly and legally punishable, but others not punishable, it will be declared void for uncertainty. It is axiomatic that statutes creating and defining crimes cannot be extended by intendment. . . . A statute that either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess as to its meaning and differ as to its application lacks the first essential of due process of law." This is unquestionably a statement of sound principles. *State v. Hales,* 256 N.C. 27, 122 S.E. 2d 768; *State v. Morrison,* 210 N.C. 117, 185 S.E. 674; *State v. Partlow,* 91 N.C. 550; *Drake v. Drake,* 15 N.C. 110. But from the text cited by appellants we find the following (pp. 774-5): "A statute is not necessarily void for uncertainty because in creating a crime it does not define the offense, for if the offense is known to the common law, the common law definition may be adopted, even in jurisdictions where there are no common law crimes."

"As a general rule, when an offense is declared by statute in the general terms of the common law, without more particular definition, resort may be had to the common law for the particular acts constitut-

ing the offense. In other words, regardless whether the common law has been abrogated, when a statute punishes an act giving it a name known to the common law, without otherwise defining it, the statute is construed according to the common law definition." 22 C.J.S., Criminal Law, § 21, p. 59; *McAdams v. State,* 81 N.E. 2d 671 (Ind. 1948); *State v. Pratt,* 116 A. 2d 924 (Me. 1955); *State v. Quatro,* 105 A. 2d 913 (N.J. 1954); *State v. Johnson,* 293 S.W. 2d 907 (Mo. 1956). While all federal crimes are created by statute, common-law words used in the statute may take their intended meaning from the common law. *U. S. v. Turley,* 352 U.S. 407 (1957).

Kidnapping was a criminal offense at common law. In North Carolina "all such parts of the common law as were heretofore in force and use . . ., or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated or become obsolete, are hereby declared to be in full force." G.S. 4-1. The statutes of this jurisdiction relating to kidnapping, insofar as applicable to the instant case, did not originate the offense, they make kidnapping a felony and provide the limit of punishment. Kidnapping was a misdemeanor at common law. 1 Am. Jur., 2d, Abduction and Kidnapping, § 3, p. 161. C.S. 4221 (P.L. 1901, C. 699, § 1) provided that "If any person shall forcibly or fraudulently kidnap any person he shall be guilty of a felony, and upon conviction may be punished in the discretion of the court, not exceeding 20 years in the State's prison." This statute did not define "kidnap"; the common-law definition applied. The common-law definition is stated and explained in *State v. Harrison* (1907), 145 N.C. 408, 59 S.E. 867, as follows:

> "Blackstone and some other English authorities define kidnapping to be the 'forcible abduction or stealing away of a man, woman, or child from their own country and sending them into another.' In 1 East Pleas of the Crown, 429, it is described as 'the most aggravated species of false imprisonment,' and defined to be 'the stealing and carrying away or secreting of any person.' 'The Supreme Court of New Hampshire,' says Bishop, 'more reasonably, and apparently not in conflict with actual decisions, held that transportation to a foreign country is not a necessary part of the offense.' 2 Bish. New Crim. Law, sec. 750. The case referred to is *S. v. Rollins,* 8 N.H., 550, and sustains the author's text. Bishop states the better definition to be 'false imprisonment aggravated by conveying the imprisoned person to some other place.' "

C.S. 4221 was repealed by G.S. 14-39 (P.L. 1933, C. 542), and the limit of punishment increased. The increase in the limit of punishment and enactment of other provisions (not pertinent here) were a direct result of the Lindbergh tragedy. G.S. 14-39 does not define "kidnap," *State v. Witherington, supra;* it provides that "It shall be unlawful for any person . . . to kidnap or cause to be kidnapped any human being . . . Any person . . . violating any provision of this section, and upon conviction thereof, shall be *punishable* by imprisonment for life." This statute leaves the term of imprisonment in the discretion of the court, but increases the maximum term from 20 years to life. *State v. Kelly,* 206 N.C. 660, 175 S.E. 294.

The word "kidnap," in its application to the evidence in the case at bar, and as used in G.S. 14-39, means the unlawful taking and carrying away of a person by force and against his will (the common-law definition). *State v. Gough,* 257 N.C. 348, 126 S.E. 2d 118; *State v. Dorsett,* 245 N.C. 47, 95 S.E. 2d 90; *State v. Witherington,* 226 N.C. 211, 37 S.E. 2d 497; *State v. Harrison, supra.* It is the fact, not the distance of forcible removal of the victim that constitutes kidnapping. 1 Am. Jur., 2d, Abduction and Kidnapping, § 18, p. 172; *People v. Oganesoff,* 184 P. 2d 953 (Cal.); *People v. Wein,* 326 P. 2d 457 (Cal.), *cert. den.,* 358 U.S. 866, *reh. den.,* 358 U.S. 896.

The principles which appellants seek to apply are inapplicable. The word "kidnap" is known to the common law, and the statute is construed according to the common-law definition.

II.

Defendants Lowry, Crowder and Reep moved for their discharge and the dismissal of proceedings against them, on the ground that their right to a speedy trial had been violated.

The offenses were allegedly committed on 27 August 1961. True bills of indictment were found and returned 31 August 1961, and defendants were brought to trial at the February Session 1964. The above named defendants had moved for trial at the May 1962 term of superior court.

"It is generally the policy of the law that criminal cases be promptly disposed of, . . . and the sixth amendment to the Federal Constitution guarantees to accused in a criminal prosecution under the federal law the right to a speedy trial. While this provision does not apply to criminal prosecutions in the state courts under state laws, the right is generally guaranteed by state constitutional or statutory provisions." 22A C.J.S., Criminal Law, § 467(2), p. 20.

Defendants urgently contend that the speedy-trial guarantee of the Sixth Amendment is applicable to state proceedings under the provisions of the Fourteenth Amendment. But the affirmative of this proposition is not essential to the maintenance of defendants' rights. The fundamental law of this state secures to them the right of speedy trial. In *State v. Patton,* 260 N.C. 359, 132 S.E. 2d 891, this Court declared:

> "The right of a person formally accused of crime to a speedy and impartial trial has been guaranteed to Englishmen since Magna Carta, and the principle is embodied in the Sixth Amendment to the Federal Constitution, and in some form is contained in our State Constitution and in that of most, if not all, of our sister states, or, if not, in statutory provisions. *S. v. Webb,* 155 N.C. 426, 70 S.E. 1064 . . .
>
> "G.S. 15-10, entitled 'Speedy trial or discharge on commitment for felony,' requires simply that under certain circumstances 'the prisoner be discharged from custody and not that he go quit of further prosecution.' *S. v. Webb, supra.*
>
> "The Court said in *Beavers v. Haubert,* 198 U.S. 77, 49 L. Ed. 950, 954: 'The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.'
>
> "The constitutional right to a speedy trial is designed to prohibit arbitrary and oppressive delays which might be caused by the fault of the prosecution. *Pollard v. United States,* 352 U.S. 354, 1 L. Ed. 2d 393; *State v. Hadley,* Mo., 249, S.W. 2d 857. The right to a speedy trial on the merits is not designed as a sword for defendant's escape, but a shield for his protection.

No general principle fixes the exact time within which a trial must be had. Whether a speedy trial is afforded must be determined in the light of the circumstances of each particular case. In the absence of a statutory standard, what is a fair and reasonable time is within the discretion of the court. 22A C.J.S., Criminal Law, § 467(4), pp. 24, 25, 30. "Four factors are relevant to a consideration of whether denial of a speedy trial assumes due process proportions: the length of delay, the reason for the delay, the prejudice to defendant, and waiver by defendant. See Note, 57 Colum. L. Rev. 846, 861-63 (1957). These factors are to be considered together because they are interrelated. For example, even a short delay might constitute a violation of defendant's constitutional right where the defendant is held without bail, and there

is no reason for delay." *United States v. Fay,* 313 F. 2d 620 (C.C.A. 2C 1963).

G.S. 15-10 is for the protection of persons held without bail; it does not apply in the instant case. The movants were released on bail in September or October 1961 and have been at large at all times since. They are indicted jointly with defendant Mallory. Mrs. Mallory departed the State before she could be apprehended, and became a fugitive from justice. She went to Ohio and resisted extradition. The State of Ohio and the State of North Carolina were engaged continuously over a period of about two years in attempting to effect her return to North Carolina. She carried the question of her extradition to the Supreme Court of the United States twice, having litigated the matter through the Ohio State courts and the Federal courts (See: No. 858, Misc., Supreme Court of the United States, October Term, 1962, and No. 324, Misc., Supreme Court of the United States, October Term, 1963). The case came to trial in Union County Superior Court promptly after her return to North Carolina. The absence of defendant Mallory and her pending extradition were the basis of denial of the motion of her codefendants for trial in 1962. The court anticipated from term to term her early return, and had no way of knowing it would require two years. The desire of the prosecution to try defendants together at one trial does not seem unreasonable since they were jointly charged. We note that at the time these defendants were urging trial in 1962 they were also moving for a change of venue which, if allowed, would have required a continuance. There is no evidence in the record tending to show that the abilities of defendants to present their defenses were in any way impaired by the delay. It would seem that the delay constituted a cooling period, which, more likely than not, was a benefit to them. The court committed no abuse of discretion in denial of the motion for discharge and to dismiss. The assignment of error is overruled.

III.

Defendants moved to quash the indictments on the ground that Negroes had been systematically excluded from service on the grand juries of Union County because of their race, and particularly from the grand jury in service at the time the indictments were found. The motion was made in apt time, before pleading to the indictments. *State v. Covington,* 258 N.C. 501, 128 S.E. 2d 827. After hearing evidence and finding facts the court overruled the motion.

This Court has held in a long and unbroken line of cases beginning with *State v. Peoples,* 131 N.C. 784, 42 S.E. 814 (1902), that arbitrary exclusion of citizens from service on grand juries on account of race is a denial of due process to members of the excluded race charged with indictable offenses. The latest case is *State v. Wilson,* 262 N.C. 419, 137 S.E. 2d 109 (1964). Ordinarily it is not deemed such denial if the defendant is not a member of the excluded race. In the instant case all of the defendants are Negroes except Lowry. Though he is white, he had lived and associated with Negroes in their homes and joined with them in their marches and demonstrations. Since he made common cause with them in their demonstrations and is cast jointly with them in the trial, we think he is entitled to raise the question also.

Defendants offered evidence in support of the motion and we summarize the evidence as follows: According to the 1960 census the population of Union County is 24,467 persons over 21 years of age. Of this number 4,423 or 18% are non-white. According to the 1961 tax ledger there were 12,577 white and 2,023 non-whites assessed for taxes. Non-whites are 14% of the total. Some persons listed on the ledger are nonresidents. About 10% of those listed are women. The jury list for the county is made biennially, in odd years. A new jury list was made in June 1961. The names of all persons, regardless of race or sex, appearing on the tax ledger or scroll were put on the list. Names of females were added by taking every seventh or eighth female name, regardless of race, from voter-registration books (in 1963 all the female names in the registration books were put on the list — there had been a new registration). The list thus made was delivered to the county commissioners; they examined the list and excluded those exempt by statute; they placed an "x" beside each name to be excluded. The names approved by the county commissioners were put on separate slips of paper, one name on each slip, and these slips were placed in compartment no. 1 of the jury box. Each slip had the name, age and township of a prospective juror. If the person was colored, the designation "col." appeared after his or her name. When it was necessary to draw a venire for a term of court the names were drawn from the box by a child under 10 years of age, in the presence of the officials designated by statute, and the names were placed on a list. This constituted the jury panel for the ensuing term; the persons constituting the panel were summoned by the sheriff. At each February term or session a grand jury of 18 persons was drawn, to serve for one year. At the February terms the jury panel consisted of 48 jurors. Their names were put in a hat and 18 names were drawn from the hat by a child under 10. These constituted the grand jury. Usually 36 jurors

were drawn for regular criminal and civil terms other than the February terms; 30 for the second week of criminal terms. There was testimony that the names drawn from the jury box for jury services were placed on the jury lists regardless of race, none discarded. No copy of the original 1961 jury list, or of any lists prior thereto, was preserved. When a new list was made the slips in the box were destroyed. The grand jury which returned the indictments in the instant case was from the 1959 list. It was prepared in the same manner as was the 1961 list. From 1955 to 1958 there were no Negroes on the grand jury. From 1959 to 1962 there was one Negro on each grand jury. From November 1959 to February 1964, 706 jurors were drawn for service, and of this number 37 were Negroes. A special venire of 75 jurors was drawn in open court at the February 1964 session, for the trial of the instant case; 6 were Negroes.

Attorneys for defendants requested permission to count the names in the jury box and determine the number of whites and the number of Negroes, the sheriff to observe and assist. Upon objection by the solicitor, the request was not granted.

The judge found the following facts: The population of Union County is 83% white, 17% non-white. Three Negroes were drawn and reported for service on the panel of 48 jurors for the February Term 1961; the grand jury drawn from this panel had one Negro member — this is the grand jury that returned the bills in the case at bar. ". . . it is a general practice in Union County that the jury list carries the designation 'col.' behind the name of Negro jurors. . . . sometimes the designation 'col.' is omitted and there is no definite way to distinguish white from Negro from a study of the list." Negroes have served on the grand jury and petit jury in Union County before and subsequent to August 1961.

The court concluded that there was no evidence of systematic exclusion of qualified Negroes from jury service, defendants' constitutional rights were not abridged or violated, and the indictments are valid and proper.

We are of the opinion, and so hold, that the indictments are invalid and the court erred in denying the motion to quash.

The court found as a fact that "it is the general practice in Union County that the jury list carries the designation 'col.' behind the name of Negro jurors." It is obvious that "col." is an abbreviation of the word "colored" and is intended to designate race. This practice was in effect outlawed in *State v. Speller*, 229 N.C. 67, 47 S.E. 2d 537. In that case the names of Negroes in the jury box were printed in red, while those of whites were printed in black. When the name of a Negro was

drawn from the box it was discarded and the juror was not summoned. This Court ruled that these practices are discriminatory and arbitrary, and declared the following principle: "It has long been the holding in this jurisdiction that the law knows no distinction among those whose names are rightly in the jury box, and none should be recognized by the administrative officials. *S. v. Sloan,* 97 N.C. 499, 2 S.E. 666; *Capehart v. Stewart,* 80 N.C. 101."

Statutory provisions in this state, respecting the qualifications, selection, listing, drawing and attendance of jurors is fair and nondiscriminatory and meets all constitutional tests. *State v. Wilson, supra.* A jury list is not discriminatory merely because it is made from the tax lists. *Brown v. Allen,* 344 U.S. 443. But it is better practice to supplement such lists by resort to voter registrations and other available lists. We have no statutory requirement that the names placed in the jury box be designated according to race, and we perceive no good reason why such practice should be indulged. The reason assigned therefor in the case at bar is that many persons in Union County, white and Negro, have the same name and the racial designations make it possible to positively identify a person so that notice may be mailed to the proper individual. Jurors are usually notified of their selection by mail, and accept service by mail; if service is not thus accepted they are summoned personally. We do not consider the reason assigned for racial designations a valid one. If two white jurors have the same name, race designation would not furnish identification. The obvious solution of the identification problem would be to add the addresses where confusion might arise. Of course, the designation of race, just as sex or religious denomination, may in certain records serve a useful and necessary purpose, and the compilation of such information cannot be outlawed *per se.* But the promotion of a distinction purely on the basis of race is not justified. *Hamm v. Virginia State Board of Elections,* 230 F. Supp. 156 (ED, Va. 1964), *affd.,* 85 S. Ct. 157. It would be well for county commissioners and clerks of superior court to maintain for reference purposes statistical data with respect to the racial and sex composition of jury lists and juries which serve in the courts, so that the information may be readily available when motions such as the one under consideration are interposed. But this should not include racial designations in the jury box itself. Such practice lends itself to administrative abuses as in the *Speller* case, and casts doubt upon the administration of the jury system. As stated in *Speller:* ". . . the law knows no distinction among those whose names are rightly in the jury box."

There is in this record no direct evidence of administrative abuses or arbitrary exclusions so far as the conduct of the Union County officials is concerned. But there is a wide discrepancy in the ratio of the races in population and in jury service. Prior to 1963 there was never more than one Negro on any grand jury; during a period of 8 years, 1955 to 1962, inclusive, Negroes constituted about 5% of the petit juries. There is, of course, no requirement of law that Negro representation on jury panels be equivalent percentage-wise to population. Neither the small percentage of Negroes on the juries of Union County, nor the racial designation placed after the names of Negroes on the jury box, is conclusive proof of arbitrary and systematic exclusion of Negroes from the grand jury. But such circumstances do constitute a *prima facie* showing to that effect.

With respect to the grand jury the facts of the instant case are closely analagous to those in *State v. Wilson, supra.* There, "one Negro served on the grand jury that returned the bill of indictment in question. Another served a year earlier." Two or three Negroes served during a seven-year period. In the case at bar four of the eight grand juries, during the period 1955 to 1962, had a Negro in service. In *Wilson* we said: "When, at a hearing upon a motion to quash the bill of indictment, there is a showing that a substantial percentage of the population of the county from which the grand jury that returned the bill was drawn is of the Negro Race and that no Negroes, or only a token number, have served on the grand juries of the county over a long period of time, such showing makes out a *prima facie* case of systematic exclusion of Negroes from service on the grand jury because of race. *Arnold v. North Carolina,* 12 L. Ed. 2d 77; *Eubanks v. Louisiana,* 356 U.S. 584; *Norris v. Alabama,* 294 U.S. 587. . . . To overcome such *prima facie* case, there must be a showing by competent evidence that the institution and management of the jury system of the county is not in fact discriminatory. And if there is contradictory and conflicting evidence, the trial judge must make findings as to all material facts." Further: "The burden of proving discriminatory jury practices is upon defendant. *State v. Covington,* 258 N.C. 495, 128 S.E. 2d 822; *Miller v. State,* 237 N.C. 29, 74 S.E. 2d 513; *Akins v. Texas, supra* (325 U.S. 308). But this does not relieve the prosecuting attorney of the duty of going forward with the evidence when the defendant has made out a *prima facie* case."

In the instant case the crucial findings of fact are either indefinite or based on the absence of evidence. Defendants made out a *prima facie* case of systematic exclusion by showing the population ratio and that only a token number of Negroes had served on the grand jury, never

more than one on any grand jury, sometimes none, and that such Negroes as were approved on the biennial list were designated "col." This was enough to cast the burden on the State to go forward with the evidence and show facts with respect to the management of the jury system sufficient to clearly overcome defendants' *prima facie* showing. But the State offered no evidence except such as it could elicit on cross-examination. The sheriff and the county commissioners were best qualified to give testimony relative to the administration of the jury system, since the law places upon them the primary responsibility therefor; they were not called and did not testify. Copies of jury lists, showing the names included and those excluded, were not kept; when a new jury list was made the old one was destroyed. The judge would not permit an examination of the current jury box, or a determination of its racial composition. The court found that "there is no definite way to distinguish white from Negro from a study of the list," and "Negroes have served on the grand jury and petit jury in Union County before and subsequent to August 1961," and "there is no evidence of systematic exclusion of qualified Negroes from jury service." These findings are negative in character, or so general in nature as to be indefinite and inconclusive. They fall far short of a positive, factual showing sufficient to overcome defendants' *prima facie* evidence.

It is suggested that *State v. Perry*, 250 N.C. 119, 108 S.E. 2d 447, *cert. den.* 361 U.S. 833, 4 L. Ed. 2d 74, 80 S. Ct. 83, establishes as a matter of law that there is no systematic exclusion of Negroes from grand juries in Union County. This proposition is, of course, untenable. Each case must be decided according to the evidence adduced and the circumstances involved. There might be a different result in separate cases involving the same grand jury. Furthermore, the *Perry* case involved the 1957 grand jury, of which we have very little evidence in the instant case. Furthermore, the *Perry* case did not involve, so far as the opinion discloses, any racial designation of the names in the jury box.

Defendants made other assignments of error, but, if there were errors, they may not again arise in the event of another trial.

The indictments are quashed and the verdict and judgments are vacated for want of valid indictments to support them. It does not follow that defendants are entitled to discharge and dismissal of the charges. If the State so elects it may send new bills and if they are returned true bills by an unexceptionable grand jury, defendants may be tried thereon for the offenses alleged.

Reversed.

SPARTAN EQUIPMENT COMPANY v. AIR PLACEMENT EQUIPMENT COMPANY.

(Filed 29 January, 1965.)

1. Appeal and Error § 38—

Assignments of error not brought forward and discussed in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

2. Appeal and Error § 49—

Findings of fact supported by competent evidence are conclusive on appeal notwithstanding that there may also be evidence *contra.*

3. Process § 13—

Whether service of process on a nonresident corporation by service on the Secretary of State under G.S. 55-145 will support an *in personam* judgment against the corporation is a question of due process and must be determined in accordance with decisions of the U. S. Supreme Court. Fourteenth Amendment to the Federal Constitution; Art. I, § 17 of the Constitution of North Carolina.

4. Same—

Findings of fact, supported by evidence, to the effect that over a period of years defendant's agents paid repeated visits to this State to demonstrate the use and operation of machinery sold by defendant and instructed the purchasers thereof in its operation, *held* sufficient to support the conclusion that defendant was doing business in this State so as to render it amenable to service of process by service on the Secretary of State, and therefore order denying its motion to dismiss for lack of service will be upheld notwithstanding that other immaterial findings were not supported by evidence and that some conclusions of law were denominated findings of fact. G.S. 55-144, G.S. 55-146(a) (b).

5. Trial § 57—

The court is required to find only the ultimate facts, and when the court finds crucial facts sufficient to support its order, exception to the court's failure to find other evidentiary facts cannot be sustained.

6. Appeal and Error § 7—

A party may demur *ore tenus* in the Supreme Court.

7. Contracts § 31—

As a general rule, a third person who, by intermeddling, induces one of the negotiating parties not to enter into a contract which he would have executed except for such intermeddling, is liable for the resulting damages provided such interference is not done in the exercise of legitimate rights, but is in furtherance of malicious design to injure one of the contracting parties or to gain some advantage at this expense.

8. Contracts § 32—

Plaintiff alleged that it was a distributor of defendant and that defendant induced one of plaintiff's prospects to purchase equipment from an-

other distributor instead of plaintiff. *Held:* In the absence of allegation that the prospect would have consumated an agreement with plaintiff except for the malicious interference and in the absence of allegation of facts supporting the conclusion of malice on the part of defendant, defendant's demurrer must be allowed.

9. Pleadings § 2—

It is not sufficient for a pleader to allege conclusions, but it is required that he allege facts from which the legal conclusions arise.

10. Pleadings § 19—

The allowance of a demurrer *ore tenus* to a complaint containing a defective statement of a cause of action does not require dismissal, since plaintiff has the right to move to amend if he so desires. G.S. 1-131.

APPEAL by defendant from *Walker, S. J.*, 27 January 1964, Schedule "D" Civil Session of MECKLENBURG.

Plaintiff, a North Carolina corporation, with its principal place of business in Mecklenburg County, instituted a civil action in the superior court of Mecklenburg County against defendant, a Missouri corporation, alleging damages in two causes of action: (1) For an alleged breach of express written and oral warranties to the effect that a CP-30 concrete placer purchased by plaintiff from defendant was a high quality general purpose concrete placer which would perform well, and was merchantable, and (2) for an alleged intentional and malicious interference with plaintiff's business by diverting plaintiff's prospective customer Meredith Swimming Pool Company to Arrow Equipment Company, with the intention of damaging plaintiff's business, thereby causing plaintiff to lose a sales commission in the amount of $419.50.

This action came on to be heard by Judge Walker upon a special appearance by defendant, and upon its motion to quash the service of summons and complaint upon it upon the ground that it, a corporation organized and doing business in the State of Missouri, was not at the time of the commencement of this action, and is not now, engaged in the transaction of business in the State of North Carolina, that it has no officer, director or managing or local agent, or any person, firm or corporation performing any duties in the State of North Carolina, is engaged exclusively in interstate commerce, and to hold that the attempted service of summons in this case on it by serving it on the Secretary of State of North Carolina constitutes a proper service on it would violate the 14th Amendment to the United States Constitution, and Article I, section 17, of the North Carolina Constitution.

From an order denying its motion, and holding that service of summons and complaint on defendant in this action is valid, defendant appeals.

Dockery, Ruff, Perry, Bond & Cobb by William H. McNair for defendant appellant.

Grier, Parker, Poe & Thompson by Gaston H. Gage for plaintiff appellee.

PARKER, J. The parties stipulated "the mechanics of service and return set forth in subsections (a) and (b) of Section 55-146 of the General Statutes of North Carolina were in all respects complied with."

Judge Walker heard defendant's motion upon two affidavits of T. M. Pfaff, president of plaintiff, to which were attached and made parts thereof thirteen letters by plaintiff and defendant, and upon an affidavit of H. L. Kalousek, president of defendant, an affidavit of James B. Kelly, southeastern territorial manager for defendant, and an affidavit of Jetton King, president of Arrow Construction Equipment Company.

From the affidavits offered by the parties, and from plaintiff's verified complaint, Judge Walker made specific findings of fact. In his findings of fact, after reciting a summary of plaintiff's two causes of action, and that plaintiff is a North Carolina corporation, with its principal office in Mecklenburg County, North Carolina, and that defendant is a Missouri corporation, Judge Walker made the following findings of fact:

> "[T]hat (3) on numerous occasions defendant's agents and salesmen, and in particular the defendant's southeastern territorial manager, James B. Kelly, made visits in the State of North Carolina on behalf of the defendant corporation and therein solicited business, instructed purchasers as to the use of machines manufactured by defendant, and supervised the installations of said machines, particularly from October, 1960, to March, 1963, and the Court finds specifically as fact from the complaint and affidavits presented to the Court at the time of said hearing that (4) in particular the plaintiff's order of September 5, 1961, for a CP-30 concrete placer involved in the alleged breach of contract action and the order for a model 505 mix-elevator involved in the tort action were solicited by agents and representatives of the defendant corporation in the State of North Carolina, and that the said alleged breach of contract cause of action arose out of a contract made by and between plaintiff and defendant at the time complained of in the State of North Carolina and to be performed in the State of North Carolina, and (5) that the alleged cause of action in tort arose out of defendant's activity in the State of North Carolina at the time complained of; and (6) the Court

finds further from the affidavits presented and letters appended thereto that there was a reasonable expectation on the part of the defendant that all the said goods solicited, purchased, or installed in North Carolina were to be used within the State of North Carolina; (7) the Court finds from the evidence presented that the defendant has in fact more than the required minimum connection with the State of North Carolina and directly with customers within the State of North Carolina; (8) the Court finds that the arrangements for the payment on a model 610T Airplaco truck rig were completed by agents and representatives of defendant corporation on defendant's behalf within the State of North Carolina; and (9) the Court finds that the defendant did in fact at the time complained of have a direct financial interest in the sale of its products in the State of North Carolina made directly by defendant corporation to purchasers of its products in the State of North Carolina, such sales being handled by representatives of the defendant corporation; (10) the Court finds that Section 55-145 of the General Statutes of North Carolina as applied to the facts of this particular case would not deprive the defendant of its property without due process of law nor deny it the equal protection of the law, under the North Carolina Constitution and the United States Constitution."

Based upon his findings of fact, Judge Walker made the following conclusions of law: Defendant has sufficient contacts with the State of North Carolina so as not to be deprived of its property without due process of law, and so as not to be denied the equal protection of the law, under the United States Constitution and the North Carolina Constitution, in being compelled to submit to the jurisdiction of the courts of the State of North Carolina.

Based upon his findings of fact, and upon his conclusions of law, Judge Walker entered an order denying defendant's motion, and holding that service of summons and complaint on defendant is valid and proper by virtue of G.S. 55-145, and that such service of process would subject the defendant to a judgment *in personam*. In his order he allowed defendant 60 days from its date to answer or otherwise plead.

Defendant assigns as error the judge's findings of fact Nos. 3, 4, 5, 6, and 7, which assignments of error it has brought forward and discussed in its brief. Finding of fact No. 7 "that the defendant has in fact more than the required minimum connection with the State of North Carolina and directly with customers within the State of North Carolina" is, as defendant contends, a conclusion of law. Finding of fact No. 5 "that the alleged cause of action in tort arose out of defen-

dant's activity in the State of North Carolina at the time complained of" apparently refers to the second cause of action alleged in plaintiff's complaint, and is so discussed in defendant's brief. Even if it is not supported by competent evidence, as defendant contends, it is not decisive in the determination of defendant's motion to quash the service of process here.

The challenged findings of fact Nos. 3, 4, and 6 are supported by statements in the affidavits of T. M. Pfaff, president of plaintiff, and in letters attached thereto, and by allegations of fact in the verified complaint.

In one of Pfaff's affidavits the following facts are stated: In the latter part of April or the first part of May 1958, M. G. Parke, an agent and employee of defendant, was in Mecklenburg and Gaston Counties, North Carolina, in connection with equipment sold by his employer. Later, Parke was in High Point, North Carolina, to demonstrate the use and operation of a Model CP-10 concrete placer sold by his employer, and to instruct the purchaser thereof in its operation. M. G. Parke was again in North Carolina in the latter part of September 1959 on his employer's business to instruct the purchaser of his employer's equipment in its use. In March 1958 plaintiff signed an exclusive distributor agreement with defendant. Plaintiff signed this agreement in North Carolina. This agreement had already been signed by defendant. On 5 September 1961 plaintiff purchased from defendant a Model CP-30 concrete placer, pursuant to its distributor agreement. The distributor agreement was to be performed in North Carolina. The warranties alleged in plaintiff's first cause of action were given to plaintiff in North Carolina. The breach of warranty as to its not being merchantable occurred in the State of North Carolina. M. G. Parke was in North Carolina on his employer's business on other occasions in the year 1958 to negotiate with plaintiff on behalf of his employer, and to explain and instruct plaintiff in the use and operation of his employer's equipment. In March or April 1959 M. G. Parke was again in North Carolina on his employer's business. In February 1960 M. G. Parke was in Wilmington, North Carolina, on his employer's business in connection with the sale of his employer's equipment to Concrete Construction, Inc., to explain the use and operation of this equipment to the purchaser. James B. Kelly, territorial manager for defendant, was in Charlotte, North Carolina, on 30 and 31 March 1961 to explain defendant's new products and complete line of equipment to plaintiff. In September 1961 Kelly was again in North Carolina on defendant's business to set up and put into operation a Model CP-30 concrete placer which plaintiff had ordered from defendant.

The order for this concrete placer was solicited by defendant from plaintiff in the State of North Carolina. Prior to this defendant solicited purchases of large quantities of its equipment from plaintiff and others in the State of North Carolina. On 7 March 1961 James B. Kelly was in Charlotte, North Carolina, for the purpose of soliciting business for defendant, and making calls on customers with representatives of plaintiff. In 1963 defendant sent its representatives into the State of North Carolina for the purpose of soliciting business and promoting sales. The equipment mentioned in his affidavit was manufactured and produced by the defendant, and shipped by it into the State of North Carolina for use and distribution within the State. On 9 April 1963 Arrow Construction Equipment Company became a distributor of defendant's equipment within the State of North Carolina, and as a result large quantities of products manufactured by defendant have been shipped into the State of North Carolina for use and distribution therein.

In a letter signed by James B. Kelly, territorial manager, addressed to Pfaff, Spartan Equipment Company, and received 8 September 1961, appears the following: "We will ship the CP-30 on September 8, if possible, otherwise it will be Monday, September 11. I have advised our traffic man to expedite the shipment all possible and wire you routing and Pro No. I will schedule my trip to arrive as soon as the equipment arrives in order to set it up and put it into operation." Attached to Pfaff's affidavit is another letter by defendant signed by Kelly, addressed to an officer of plaintiff, dated 27 February 1962, which reads in part: "I will call you either on Tuesday or Wednesday and let you know my definite flight arrival time. I hope you have some really good calls lined up that I can make with Jim and close some deals for AIRPLACO." Attached to Pfaff's affidavit is a letter from defendant signed by James B. Kelly, territory manager, addressed to an officer of plaintiff, dated 23 March 1961, which reads in part: "I will be in Charlotte on Thursday and Friday, March 30 and 31. * * * I will contact you next week, either Tuesday or Wednesday and advise you of my exact arrival time. Should you be able to make arrangements for me to make some calls with you or your salesmen on Thursday, March 30, it would be appreciated. I will look forward to assisting you at your sales meeting and working with your organization."

In the other affidavit of Pfaff it is stated that in the year 1963 James B. Kelly, southeastern territorial manager for defendant, was in the State of North Carolina for the purpose of selling to R. H. Bouligny, Inc., a North Carolina corporation with its principal place of

business in Charlotte, North Carolina, a Model 610T Airplaco Truck Rig. The truck rig was sold to Bouligny and title was delivered directly from defendant to Bouligny, and plaintiff collected the purchase price thereof in the State of North Carolina as agent for defendant. Attached to this affidavit is a letter dated 27 March 1963 signed by James B. Kelly, territorial manager, addressed to Mr. Tom Pfaff and Mr. Duane Delong, Spartan Equipment Company, in which Kelly states:

> "Enclosed you will find our Credit Memo No. 1034 in the amount of $500.00 to cancel the delivery charge on the Model 610T AIRPLACO Truck Rig (ref: our Invoice No. 3484). As discussed in our telephone conversation, we will bill R. H. Bouligny, Inc. for this freight.
>
> "I have talked with Mr. Shelby of Bill's Equipment and Rentals in Miami, and his present plans are to deliver the unit to your yard in Charlotte on Saturday, March 30. * * *
>
> "The title for the truck, made out to R. H. Bouligny, Inc., is enclosed. We appreciate your taking the responsibility of collecting payment for the truck rig in exchange for the title. We will expect to receive your check immediately upon receipt of the monies from Bouligny. As you know, you cannot give them title until you have received payment in full for the rig."

We find no evidence in the record to support that part of Judge Walker's finding of fact No. 4, reading as follows: "The order for a Model 505M Mix-Elevator was solicited by agents and representatives of the defendant corporation in the State of North Carolina."

While defendant has in the record assignments of error as to findings of fact Nos. 8 and 9, they are not brought forward and discussed in its brief, and are deemed abandoned by it. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783, 810. Regardless of this, these two findings of fact are supported by competent evidence as set forth above. Finding of fact No. 10 is a conclusion of law.

Judge Walker's findings of fact Nos. 3, 4, 6, 8, and 9, with the exception of his finding in No. 4 that the order for a Model 505M Mix-Elevator was solicited by defendant in the State of North Carolina, are supported by competent evidence, and are conclusive, notwithstanding that there is evidence *contra*. *Farmer v. Ferris*, 260 N.C. 619, 133 S.E. 2d 492; Strong's N. C. Index, Vol. 4, Trial, § 57, p. 365.

The crucial question for decision is: Do the findings of fact of the trial judge, which are supported by competent evidence, show that defendant, which is a Missouri corporation and is not present within the territory of the forum, is doing business in the State of North Carolina,

the State of the forum, and that there has been a reasonable method of notification to it of this action, so that the maintenance in the State of this action *in personam* against it is not prohibited by the "due process" clause of the 14th Amendment to the United States Constitution and by the provisions of Article I, section 17, of the State Constitution, and does not offend "traditional notions of fair play and substantial justice?" This question must be decided in accord with the decisions of the United States Supreme Court. *Putnam v. Publications,* 245 N.C. 432, 96 S.E. 2d 445; *Harrison v. Corley,* 226 N.C. 184, 37 S.E. 2d 489.

Recent decisions of the United States Supreme Court have greatly expanded the concept of a state's jurisdiction over nonresident defendants and foreign corporations. *International Shoe Co. v. Washington,* 326 U.S. 310, 90 L. Ed. 95, 161 A.L.R. 1057; *McGee v. International Life Ins. Co.,* 355 U.S. 220, 2 L. Ed. 2d 223; Anno. U.S. Supreme Court Reports, 96 L. Ed., p. 495 *et seq.*

The answer to the crucial question for decision on defendant's motion to quash the service of process upon it is, Yes. "Doing business in this State means doing some of the things or exercising some of the functions in this State for which the corporation was created. [Citing authority.] And the business done by it here must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction and is, by its duly authorized officers and agents, present within the State." *Lambert v. Schell,* 235 N.C. 21, 69 S.E. 2d 11. The findings of fact supported by competent evidence show far more than the mere solicitation of orders for the purchase of goods within North Carolina, to be accepted without the State, and filled by shipment of the purchased goods interstate. The findings of fact supported by competent evidence show that the activities of defendant in North Carolina, in doing the things for which it was created, have been continuous and systematic for several years, and when such is the case presence in the State has never been doubted, and gives rise to an action *in personam* against it, though no consent to be sued or authorization to accept service has been granted. *International Shoe Co. v. Washington, supra.*

"Service on the Secretary of State [as stipulated here] is sufficient to bring into court a foreign corporation if it does not have a process agent and is doing business in this State." *Babson v. Clairol, Inc.,* 256 N.C. 227, 123 S.E. 2d 508; G.S. 55-144; *Worley's Beverages, Inc. v. Bubble Up Corp.,* 167 F. Supp. 498.

G.S. 55-146, which provides for service of process on foreign corporations by service on the Secretary of State in (d) and (e), gives defendant a reasonable time to appear and defend on the merits after being

notified of the institution of the action. "[M]odern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *McGee v. International Life Insurance Co., supra.* Judge Walker, acting under authority of G.S. 55-146(e), allowed defendant 60 days from the date of his order to answer or otherwise plead.

Defendant assigns as error that Judge Walker did not find, as requested by it, that defendant is not domesticated in, licensed to do business in, or incorporated under the laws of North Carolina, and has no registered agent in North Carolina, on the ground such facts are not contradicted. By reason of these facts plaintiff obtained service of process upon defendant by virtue of the provisions of G.S. 55-144 and G.S. 55-146(a) and (b). The parties stipulated "the mechanics of service and return set forth in subsections (a) and (b) of Section 55-146 of the General Statutes of North Carolina were in all respects complied with." A stipulation of the parties is a judicial admission, and binding upon them. *Farmer v. Ferris, supra; Moore v. Humphrey,* 247 N.C. 423, 101 S.E. 2d 460. This stipulation in effect is tantamount to the facts defendant requested the court to find, and in the face of this stipulation the court's failure to find the facts requested is not prejudicial to defendant and not vital to the question for decision.

Defendant further assigns as error Judge Walker's failure to find a large number of other facts according to its version of the facts as set forth, as it contends, in its affidavits. All these assignments of error are overruled. Judge Walker was required to find only the ultimate facts. Strong's N. C. Index, Vol. 4, Trial, p. 364. His findings of fact supported by competent evidence are conclusive, notwithstanding the introduction of evidence to the contrary by defendant. *Trust Co. v. Miller,* 243 N.C. 1, 89 S.E. 2d 765.

All defendant's assignments of error, which have been brought forward and discussed in the brief, have been considered and are overruled. All its assignments of error in the record, which have not been brought forward and discussed in the brief, are, according to the rules of this Court, deemed to be abandoned by it. Judge Walker has made findings of fact sufficient to support his order as to each determinative fact in dispute.

We conclude that the State court has jurisdiction over defendant for the purpose of the maintenance of an action *in personam.* Judge Walker's crucial findings of fact are supported by competent evidence and plainly show that defendant, a foreign corporation, has been continuously and systematically for several years doing business in North Carolina and exercising in this State some of the functions for which it was created, and also plainly show that defendant has such sub-

stantial contacts within the State that the maintenance of this suit *in personam* does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington, supra; McGee v. International Life Ins. Co., supra.* His crucial findings of fact supported by competent evidence support his conclusions of law, which are correct, and these in turn support his order refusing to quash the service of process upon defendant.

Defendant, as it had a right to do (G.S. 1-134; *Jones v. Loan Assn.*, 252 N.C. 626, 114 S.E. 2d 638), filed in the Supreme Court a *demurrer ore tenus* to the second cause of action alleged in the complaint, for the reason that it does not state facts sufficient to constitute a cause of action, in that plaintiff does not allege that it had a contract with Meredith Swimming Pool Company to sell equipment manufactured by defendant, but merely alleges that it had a prospect, and further, that the second cause of action fails to allege facts which indicate any malice or intent on the part of defendant to injure plaintiff, but on the contrary alleges that plaintiff's own prospect initiated the telephone call to defendant, and further, there is no allegation that defendant's agent, James Kelly, did anything but recommend the purchase of its products through another distributor, and that defendant had a legal right to conduct itself as alleged.

This is a summary of the allegations of fact contained in the second cause of action alleged in the complaint: In April 1963, and for a long time prior thereto, plaintiff had a prospect named Meredith Swimming Pool Company in Greensboro, North Carolina, and plaintiff's agent during that period of time had been in touch with Dave Meredith, an officer of that company, on a number of occasions in connection with a sale to that company of equipment handled by plaintiff as dealer for defendant. During this time Meredith called plaintiff in connection with the purchase by Meredith Swimming Pool Company from plaintiff of a Model 505M Mix-Elevator, which plaintiff handled as defendant's dealer. Plaintiff's agent quoted prices on this Mix-Elevator to Meredith. Thereafter, Meredith called James Kelly, defendant's agent, to get further information about the Model 505M Mix-Elevator. At that time Meredith intended for plaintiff to get the credit for the purchase of such Mix-Elevator. Kelly told Meredith in his conversation with him to purchase the equipment from Arrow Equipment Company, another dealer of defendant in North Carolina. Meredith bought the equipment through Arrow Equipment Company. The conversation between Meredith and Kelly occurred at a time when relations between plaintiff and defendant were deteriorating as a result of the bad experiences which plaintiff and its customers were having with a CP-30 concrete placer purchased by plaintiff from defendant, and because

of the inferior quality of such concrete placer. Kelly, acting as defendant's agent and employee, within the scope and course of his employment, wrongfully, intentionally, and maliciously diverted plaintiff's customer Meredith Swimming Pool Company to Arrow Equipment Company with the intention of damaging plaintiff's business, and caused plaintiff the loss of a sales commission in the sum of $419.50.

Although there is some authority to the contrary, it is generally held that to interfere with a man's business, trade or occupation by maliciously inducing a person not to enter into a contract with a third person, which he would have entered into but for the interference, is actionable if damage proximately ensues, when this interference is done not in the legitimate exercise of the interfering person's rights, but with a malicious design to injure the third person or gain some advantage at his expense. *Johnson v. Graye,* 251 N.C. 448, 111 S.E. 2d 595; *Coleman v. Whisnant,* 225 N.C. 494, 35 S.E. 2d 647; *Kamm v. Flink,* 113 N.J.L. 582, 175 A. 62, 99 A.L.R. 1; 30 Am. Jur., Interference, § 38; Anno., Liability for preventing one from making specific contract, 99 A.L.R. 12, and Anno., Liability of one who induces or causes third person not to enter into or continue a business relation with another, 9 A.L.R. 2d 228; Nims, Unfair Competition and Trade Marks, 4th Ed., Vol. 1, § 176; 86 C.J.S., Torts, § 54. See also *Bohannon v. Trust Co.,* 210 N.C. 679, 188 S.E. 390.

The allegations in plaintiff's second cause of action are deficient, *inter alia,* in that they do not allege that its prospective sale to Meredith Swimming Pool Company would have been consummated but for the malicious interference of defendant's agent Kelly. Further, the allegations in the second cause of action do not clearly state whether Meredith was in North Carolina when he talked over the telephone with Kelly. It has general allegations as to malice. General allegations which characterize defendant's conduct as malicious are insufficient as a matter of pleading. *Kirby v. Reynolds,* 212 N.C. 271, 284, 193 S.E. 412, 420; 86 C.J.S., Torts, p. 975. Plaintiff's second cause of action does not state sufficient facts to permit the Court to say on *demurrer ore tenus* that, if the facts stated are proved, plaintiff is entitled to recover. In our opinion, and we so hold, plaintiff's second cause of action contains a defective statement of a cause of action for malicious interference with a proposed or prospective contract, and the *demurrer ore tenus* filed in this Court should be sustained. However, this is without prejudice to plaintiff's right to move in the superior court, if it so desires for leave to amend its second cause of action under the provisions of G.S. 1-131. *Stamey v. Membership Corp.,* 247 N.C. 640, 101 S.E. 2d 814.

The result is this: On defendant's appeal, affirmed. The *demurrer ore tenus* to the second cause of action filed in the Supreme Court is sustained.

JAMES E. UPCHURCH v. HUDSON FUNERAL HOME, INC., A CORPORATION, AND RONALD C. JOHNSON.

(Filed 29 January, 1965.)

1. Municipal Corporations § 4—

A municipality is a creature of the legislature and has only such authority as is conferred upon it, expressly or by necessary implication.

2. Municipal Corporations § 24—

A municipal ordinance in conflict with a statute is void.

3. Municipal Corporations § 28; Automobiles § 6—

Municipal corporations are authorized by G.S. 20-169 to adopt ordinances requiring ambulances to observe traffic control lights.

4. Same—

A municipal ordinance requiring ambulances to observe traffic control lights is not in conflict with G.S. 20-156(b), since the right of way privileges accorded to ambulances by statute is not absolute and G.S. 20-158(b) grants municipalities power to require ambulances to observe traffic lights by implication at least.

5. Trial § 10—

A litigant has the right to trial of the cause before an impartial judge, and expressions from the bench which contain the slightest intimation from the judge as to the weight, importance, or effect of the evidence should be scrupulously avoided.

6. Same—

In this case, exchanges between the court and the attorneys in the presence of the jury are not approved, but under the facts of this case in which a part of the colloquy related to the obvious fact that in approaching the intersection each driver was in sight of the other at the same time, and another part contained a statement in regard to the applicable law favorable to appellant, the incident *is held* not prejudicial.

7. Damages § 12—

A self-employed plaintiff hiring extra help as needed in his work, and being remitted by his injuries largely to supervision of the work, may testify as to his income from his business before and after the injury, there being no unusual circumstances other than his condition and increased labor costs affecting his income and plaintiff having testified as to the amount of the increase of labor costs.

APPEAL by defendants from *Gambill, J.,* July 1964 Special Civil Session of DURHAM.

Action to recover for personal injuries and property damage resulting from a collision of motor vehicles.

The collision occurred about 5:20 P.M., 13 December 1959, at the intersection of Main and Duke Streets in the city of Durham. The in-

tersection is in a business district; traffic is controlled by an automatic light which alternately shows green, yellow and red, located slightly to the west of the center of the intersection. There is a business structure at each corner of the intersection. Plaintiff was driving his Chevrolet automobile southwardly on Duke Street; his speed as he approached and entered the intersection was about 15 miles per hour. Defendant Johnson was operating an ambulance owned by his employer, the corporate defendant; he was conveying a patient to Watts Hospital and was proceeding westwardly on Main Street. The ambulance had been travelling at the rate of 50 miles per hour, but had slowed to 20 by the time it entered the intersection. It passed to the left of cars standing at the intersection, and entered on a red light from a left-turn lane. Plaintiff entered on a green light. The vehicles collided about the center of the intersection, the front of the ambulance came in contact with the left rear of the Chevrolet. The evidence was conflicting as to whether the siren on the ambulance was sounding or its red light was flashing immediately before the collision. Plaintiff testified that he did not see or hear the ambulance until an instant before the impact.

Plaintiff alleges that defendants were negligent by reason of excessive speed, violation of City Ordinance 1134 in entering the intersection on a red light, failure to keep a proper lookout, failure to maintain proper control, and entering and attempting to traverse the intersection from a left-turn lane. Defendants deny they were negligent, and aver that plaintiff was contributorily negligent in failing to yield the right of way (G.S. 20-156), failing to keep a proper lookout, and failing to maintain proper control. Corporate defendant counterclaimed for damage to the ambulance.

The court nonsuited corporate defendant's counterclaim. The jury found that plaintiff was damaged by the negligence of defendants, and plaintiff was not contributorily negligent. Damages were awarded, $15,000 for personal injury, $300 for property damage. Judgment was entered on the verdict.

Everett, Everett & Everett and Smith, Leach, Anderson and Dorsett for plaintiff.

Bryant, Lipton, Bryant and Battle for defendants.

MOORE, J. Defendants assign errors which, they contend, entitle them to a new trial.

—I—

The City of Durham Traffic Code, pertaining to automatic traffic lights, and an amendment thereto, Ordinance No. 1134, were pleaded by plaintiffs and admitted in evidence. It was stipulated by the parties that the code, as amended by said ordinance, had been duly adopted. The pertinent portion of Ordinance No. 1134 provides as follows:

> "Whenever traffic is controlled by traffic control signals, placed in accordance with the traffic ordinances of the City of Durham, exhibiting the word 'Go,' 'Caution', or 'Stop', or exhibiting different colored lights successively one at a time, the driver of all ambulances public or private shall obey the instructions of such official traffic control device applicable thereto in accordance with the traffic control signal legend as provided in Section 12 of this Code, unless otherwise directed by a police officer stationed at that intersection."

Defendants contend that this ordinance was enacted without authority, is in direct conflict with G.S. 20-156(b) and is void, and that the court erred to their prejudice in giving effect thereto in the charge, and in nonsuiting corporate defendant's counterclaim by reason thereof. Corporate defendant concedes that if the ordinance is valid the nonsuit of its counterclaim was proper.

G.S. 20-156(b) provides as follows:

> "The driver of a vehicle upon a highway shall yield the right-of-way to police and fire department vehicles and public ambulances when the latter are operated upon official business and the drivers thereof sound audible signal by bell, siren or exhaust whistle. This provision shall not operate to relieve the driver of a police or fire department vehicle or public or private ambulance from the duty to drive with due regard for the safety of all persons using the highway, nor shall it protect the driver of any such vehicle from the consequence of any arbitrary exercise of such right-of-way."

In *Davis v. Charlotte,* 242 N.C. 670, 89 S.E. 2d 406, involving a city ordinance with respect to the sale of beer, it is declared: "A municipal corporation is a creature of the General Assembly. *Ward v. Elizabeth City,* 121 N.C. 1, 27 S.E. 993. Municipal Corporations have no inherent powers but can exercise only such powers as are expressly conferred by the General Assembly or such as are necessarily implied by those expressly given. *S. v. Ray,* 131 N.C. 814, 42 S.E. 960; *S. v. McGee,* 237

N.C. 633, 75 S.E. 2d 783." Further: "'Municipal ordinances are ordained for local purposes in the exercise of a delegated legislative function, and must harmonize with the general laws of the State. In case of conflict the ordinance must yield to the State law.' *S. v. Freshwater,* 183 N.C. 762, 111 S.E. 161, and cases cited therein."

State v. Stallings, 189 N.C. 104, 126 S.E. 187, is to the same effect. The Court struck down a local ordinance requiring traffic to stop at street intersections; the State law only required traffic to reduce speed to 10 miles per hour before entering intersections. This case was decided in 1925; G.S. 20-156(b) was enacted in 1937. We will have occasion to refer again to this case in the following discussion.

In the solution of the problem presented, two questions arise (1) Has the General Assembly expressly or by necessary implication authorized municipalities to adopt regulations such as Ordinance No. 1134 above; and (2) has the General Assembly by the enactment of G.S. 20-156(b) made the "right of way" of emergency ambulances absolute, so as to bring such an ordinance into conflict with State law?

Municipalities are empowered to "adopt ordinances for the regulation and use of the streets . . . as it (they) may deem best for the public welfare . . ." and "to provide for the regulation, diversion and limitation of . . . vehicular traffic upon public streets (and) highways . . . of the city (municipalities)." G.S. 160-200(11) and (31). It has been held that these provisions authorize the erection of automatic traffic control lights by municipalities. *Hamilton v. Hamlet,* 238 N.C. 741, 78 S.E. 2d 770; *Hodges v. Charlotte,* 214 N.C. 737, 200 S.E. 889.

At the time of the enactment of G.S. 20-156(b) in 1937 and as a part of the same Act (P.L. 1937, C. 407) the General Assembly enacted G.S. 20-169, providing as follows:

> "Local authorities, except as expressly authorized by § 20-141 and § 20-158, shall have no power or authority to alter any speed limitations declared in this article or to enact or enforce any rules or regulations contrary to the provisions of this article, except that local authorities shall have power to provide by ordinances for the regulation of traffic by means of traffic or semaphores or other signaling devices on any portion of the highway where traffic is heavy or continuous . . ."

Cities and towns are "local authorities." G.S. 20-38(m). Speed regulations (G.S. 20-141) are not involved in the question under consideration. G.S. 20-158 will be considered below. We have held that the above provisions of G.S. 20-169 authorize municipal corporations to install automatic traffic control signals and compel their observance by ordinance. *Cox v. Freight Lines,* 236 N.C. 72, 72 S.E. 2d 25. G.S. 20-169

was amended by S.L. 1955, C. 384, § 2, so as to expressly approve the installation of automatic traffic control lights by municipalities. The provisions of G.S. 20-169 are sufficiently broad to authorize the adoption of Ordinance No. 1134, requiring ambulances to observe traffic lights, unless it is the intent of the General Assembly that emergency ambulances have absolute right of way at all intersections.

G.S. 20-158 provides as follows:

> "(a) The State Highway Commission, with reference to State highways, and local authorities, with reference to highways under their jurisdiction, are hereby authorized to designate main traveled or through highways by erecting at the entrance thereto from intersecting highways signs notifying drivers of vehicles to come to full stop before entering or crossing such designated highway, and whenever any such signs have been so erected it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto and yield the right-of-way to vehicles operating on the designated main traveled or through highway and approaching said intersection. . . .
>
> (b) This section shall not interfere with the regulations prescribed by towns and cities.
>
> (c) When a stop light has been erected or installed at any intersection in this State outside of the corporate limits of a municipality, no operator of a vehicle approaching said intersection shall enter the same with said vehicle while the stop light is emitting a red light or stop signal for traffic moving on the highway and in the direction that said approaching vehicle is traveling. . . ."

Subsections (a) and (b) are parts of P.L., 1937, C. 407. Subsection (c) was enacted as S.L. 1949, C. 583, § 2. It will be observed that subsection (b) provides that G.S. 20-158 "shall not interfere with the regulations prescribed by towns and cities." "Regulations" necessarily means the ordinances adopted by municipalities for the control of traffic at intersections — rules pertaining to right of way. The provisions of subsection (b) were most likely included to avoid the holding of this Court in *State v. Stallings, supra.* In any event, it has that effect. G.S. 20-158 does not debar municipalities from requiring ambulances to observe traffic lights; by implication, at least, it gives municipalities plenary power to regulate traffic at intersections.

We now inquire whether it was the intent of the General Assembly to confer upon emergency ambulances unrestricted right-of-way privileges. G.S. 20-156(b) confers on police and fire department vehicles the same right-of-way privileges it grants to emergency ambulances.

G.S. 20-157 requires motorists, upon the approach of police and fire department vehicles sounding audible signals, to drive to the right-hand curb or edge of the highway and stop; this requirement does not apply to ambulances. Emergency ambulances are expressly excepted from the requirements of G.S. 20-155, which provides rules for the determination of rights of way at intersections at which there are no traffic control signs or devices. They are also expressly excepted from the requirements of G.S. 20-158.1, which authorizes "yield right-of-way" signs. But they are not, by any reference or express provision, excepted from the requirements of G.S. 20-158(a), which provides for stop signs and the observance thereof. Nor are they expressly or by reference excepted from the requirements of G.S. 20-158(c), which provides for automatic traffic control lights and the observance thereof. The presence of express exceptions in G.S. 20-155 and G.S. 20-158.1, and the absence of such exceptions in G.S. 20-158(a) and G.S. 20-158(c), must be given significance. In construing a statute it will be assumed that the legislature comprehended the import of the words employed by it to express its intent. *State v. Baker,* 229 N.C. 73, 48 S.E. 2d 61. G.S. 20-156(b) was enacted in 1937, G.S. 20-158(c) in 1949; the former was not by reference made an exception to the provisions of the latter, as had been done in other statutes before and after 1949. "Where the Legislature has made no exception to the positive terms of a statute, the presumption is that it intended to make none, and it is a general rule of construction that the courts have no authority to create, and will not create, exceptions to the provisions of a statute not made by the act itself." 57 Am. Jur., Statutes, § 432, p. 453. We conclude that the General Assembly did not intend the right-of-way privileges accorded emergency ambulances by G.S. 20-156(b) to be extended to apply to intersections controlled by automatic traffic lights. We are of the opinion, and so hold, that said Ordinance No. 1134 is valid and enforceable.

This and related questions have been the subject of many opinions by the courts in other jurisdictions. Decisions have, of course, dealt with the construction of applicable statutes. There is a comprehensive annotation, dealing with the subject, in 84 A.L.R. 2d 121, entitled "Ambulance — Injury — Liability." Our decision here is not in conflict with the principles therein stated.

II

Defendants contend that the judge erred in propounding questions and making comments during the course of the trial amounting to an expression of opinion on the weight of the evidence.

Plaintiff's first witness, a traffic officer, was under cross-examination by defendants' counsel. He was being examined with respect to the limits of vision to the east along Main Street from certain points in Duke Street north of the intersection. The judge interrupted, and the following transpired:

"COURT: Doesn't this vision work both ways? If you are traveling west on Main Street you can see so far at a certain point up Duke Street, and coming down Duke Street, you can see so far down Main Street. Doesn't it work both ways?

MR. BRYANT: (defendants' counsel): I would assume so, yes sir.

COURT: One will see as quick as the other will. I mean you would assume this, wouldn't you, according to which way you are going — one going west on Main Street would see one coming down Duke Street as quick as one coming down Duke Street would see one coming on Main Street. Wouldn't that follow?

MR. BRYANT: I don't know, sir. I don't know, sir. It sounds logical and reasonable."

Later, while plaintiff's second witness, a traffic officer, was being questioned by plaintiff's counsel on direct examination with respect to limits of vision, the judge again interrupted. The following colloquy took place between the judge and plaintiff's counsel:

"COURT: . . . it follows that if you can see 90 feet from 25 feet up Duke down Main Street, that from 25 feet down Main you can see 90 feet up Duke Street, doesn't it?

MR. EVERETT: I hate to say, I am not sure.

COURT: He says the intersection is a right angle. Isn't the meat in this coconut the question of who has the right of way in this intersection?

MR. EVERETT: Yes sir.

COURT: And it would follow if the plaintiff came in on a green light, nothing else appearing, he would have the right of way?

MR. EVERETT: Yes sir.

COURT: It also would follow if the ambulance had a business trip and had on its siren and red lights, then all traffic is to yield to that ambulance, doesn't it?

MR. SMITH: No sir, not under the Durham City Ordinance.

COURT: In other words, they would have to comply with the law, so the meat in the coconut is the situation with respect to the light and who had the right of way, isn't it?

MR. EVERETT: I think, your Honor, under the Statute, there is some additional considerations which we can present to your Honor.

COURT: We were making measurements and corners, and it is a right angle corner, and it figures itself out mathematically, go ahead.

. . . . . .

COURT: Ladies and gentlemen, the Court is expressing no opinion in this matter as to the facts and circumstances in this case. Go ahead."

The slightest intimation from the judge as to the weight, importance or effect of the evidence has great weight with the jury, and, therefore, we must be careful to see that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial. *State v. Woolard,* 227 N.C. 645, 44 S.E. 2d 29; *State v. Ownby,* 146 N.C. 677, 61 S.E. 630. "Every suitor is entitled by law to have his cause considered with the 'cold neutrality of the impartial judge' and the equally unbiased mind of properly instructed jury. This right can neither be denied nor abridged." *Withers v. Lane,* 144 N.C. 184, 56 S.E. 855.

Comments by the judge, such as appear in the present record, run counter to the intent and meaning of G.S. 1-180. They constitute error. Our inquiry is whether they were prejudicial to appellants.

The comment of the judge that the matter of vision "work(s) both ways" was, in the light of all of the evidence, the statement of an obvious fact, and it was so considered by defendants' counsel who stated, "It sounds logical and reasonable." The judge made the comment both while defendants were presenting evidence by way of cross-examination and while plaintiff was presenting evidence by direct examination. The jury must have understood that the comment applied to the evidence of both parties. The streets were relatively level and intersected at right angles. There was a tall building at the northwest corner of the intersection. The points from which the limits of vision were tested were at the centers of the streets. There were other vehicles standing at both approaches to the intersection. The Chevrolet and ambulance approached and entered the intersection at approximately the same time. The comment as to the comparative ranges of vision could not have prejudiced defendants.

The court commented that "the meat in the coconut is the situation with respect to the light and who had the right of way." The court stated further that "if the ambulance had a business trip and had on its siren and red lights, then all traffic is to yield to that ambulance." This last comment is more favorable to defendants than the law permits in the situation presented. Defendants recognize, as far as their defense is concerned, that the crucial question was, "who had the right of way?" We find the following statement in defendants' brief: "The appellant admits that if the Judge was correct in his theory that the City Ordinance prevailed, then the nonsuit of defendant's counterclaim was correct." The question of right of way was crucial and controlling in defending against plaintiff's action. Plaintiff's right of way was paramount. To avoid liability it was incumbent on defendants to show that he had forfeited his right of way by failure to keep a proper lookout or failure to maintain proper control. The court, in the charge, instructed the jury that notwithstanding plaintiff's favored position he was still under duty "to keep his motor vehicle under control, (and) to keep a reasonably careful lookout."

The judge's comments are not approved, but we do not find them sufficiently prejudicial to defendants to warrant a new trial.

III

Plaintiff was self-employed. He was an instrument maker and machinist. He had a shop in which he made repairs and did "machine work and blacksmithing." Before the accident he personally did "all of the machine and most of the blacksmith work and helped on the welding." He hired extra help as he needed it. His sole income was the profits from the business. After the accident he was largely limited to supervision of the work because of the injuries he had suffered. He had to employ additional help, and had them do much of the work he had formerly done himself. The labor costs therefore increased.

Over the objection of defendants, plaintiff was permitted to testify that his income for 1959, before the accident, was $5200, that after the accident his income was $2600 for 1960, $3100 for 1961, $3100 for 1962, and $3400 for 1963. He also testified, over objection, there were no unusual circumstances, other than his condition and increased labor costs, affecting income, and he testified as to the amount of increase in labor costs.

In our opinion the evidence was admissible; it was pertinent on the question of loss of earning power. In *Smith v. Corsat,* 260 N.C. 92, 96-7, 131 S.E. 2d 894, we said:

". . . where the business is small and the income which it produces is principally due to the personal services and attention of the owner, the earnings of the business may afford a reasonable criterion to the owner's earning power. *Bell v. Yellow Cab Co.*, 160 A. 2d 437 (Pa. 1960); 15 Am. Jur., Damages, § 96, p. 506; 12 A.L.R. 2d 292. In cases where it is not established that the employment of capital, the use of labor of others, or similar variable factors were predominant in the injured person's business or determinative, for the most part, of the receipts realized, it is held that evidence of profits, in a restricted sense, or income (even if one or more of the factors mentioned were present and influential) may be used for the purpose of aiding in establishing a standard for the calculation of damages, if it conforms to the requirements of proximate cause and certainty. It has some bearing upon the question of damages, whether of loss of time or loss or diminution of earning capacity. Such evidence furnishes as safe a guide for the jury, under proper cautionary instructions, as may be found, in the assessment of damages, and becomes useful in helping to determine the pecuniary value of loss of time or impairment of earning capacity." (Citing cases).

No error.

THEODORE RAY HALL, EMPLOYEE v. THOMASON CHEVROLET, INC., EMPLOYER; LUMBERMENS MUTUAL CASUALTY COMPANY, CARRIER.

(Filed 29 January, 1965.)

1. Master and Servant § 82—

The Industrial Commission has authority to grant a rehearing of a claim for newly discovered evidence. G.S. 97-47.

2. Master and Servant § 90—

A claim is still pending before the Industrial Commission for one year after the rendition of an award. G.S. 97-47.

3. Master and Servant § 67—

Under the Workmen's Compensation Act disability refers not to physical infirmity but to a diminished capacity to earn money.

4. Master and Servant §§ 70, 72—

Under the 1963 amendment, the Industrial Commission may make an award for both partial incapacity under G.S. 97-30 and for disfigurement under G.S. 97-31(22), for injuries occurring subsequent to 1 July 1963.

5. Master and Servant § 82—Under facts of this case, Industrial Commission had authority to reopen case for newly discovered evidence.

The Industrial Commission awarded claimant compensation for temporary disability and for disfigurement but refused to award compensation for permanent partial disability, and claimant failed to prosecute an appeal from this determination. Within twelve months of the latest award claimant filed motion to reopen the case for change of condition. Upon this hearing there was no evidence of change of condition but it was made to appear that in the prior hearing the medical experts were unable to give an opinion as to the extent of permanent disability, and further that subsequent to the hearing plaintiff attempted to engage in his occupation and empirically establish the existence of permanent partial disability from the brain injury received in the accident. *Held:* The proceeding was still pending at the time of the filing of claim for additional compensation for change of condition, and the evidence adduced invokes the jurisdiction of the Commission to reopen the award for newly discovered evidence, requiring the Commission to make a ruling on this aspect in the exercise of its discretion notwithstanding there was no evidence of change of condition. G.S. 97-30.

6. Same—

In view of the fact that the Workmen's Compensation Act does not require all damages to be assessed at one time and awarded in a lump sum, the rules in regard to *res judicata* are not to be so strictly enforced as in civil cases generally, and an award will not preclude a review for newly discovered evidence relating to the extent of disability, particularly when claimant, because of his disability and the circumstances of the case, could not reasonably have obtained the additional evidence at the time of the hearing.

7. Master and Servant § 45—

Benefits within the purport and intent of the Workmen's Compensation Act will not be denied by a narrow, technical and strict construction.

8. Master and Servant § 94; Appeal and Error § 55—

Where a proceeding before the Industrial Commission and an appeal therefrom are heard upon a misapprehension of the applicable law, the proceeding will be remanded.

APPEAL by plaintiff from *Hobgood, J.*, July 20, 1964 Session of DAVIDSON.

On November 11, 1959, plaintiff, a twenty-nine-year-old automobile mechanic, sustained an injury compensable under the Workmen's Compensation Act when a jack gave way and the automobile on which he was working fell on him. A deputy commissioner held hearings on November 15, 1961, and on January 8, 1962. At the hearings it was stipulated that, plaintiff having already been compensated for temporary total disability from the date of the accident to March 25, 1961, by agreement of the parties under G.S. 97-17, "the only question to be

determined at this hearing is what additional compensation, if any, plaintiff is entitled to receive for temporary total disability, *permanent partial disability,* and disfigurement." (Italics ours.) The deputy commissioner filed an opinion and award on February 5, 1962, in which he found, *inter alia,* these pertinent facts:

Plaintiff sustained a severe comminuted, compound, depressed fracture of the forehead, fracture of the nose, and loss of a tooth. Dr. R. H. Ames, neurosurgeon, and Dr. W. D. Farmer, opthalmologist, repaired plaintiff's injuries.

Plaintiff has been paid for temporary total disability from November 11, 1959, the date of the accident, to March 25, 1961, at which time total temporary disability ended. On July 7, 1960, Dr. Reeb of the Veterans Hospital at Winston-Salem examined plaintiff and was of the opinion that plaintiff was unable to work on account of "chronic brain syndrome due to trauma." He had no opinion as to whether this condition would be permanent. As of August 4, 1960, Dr. Ames was of the opinion that plaintiff had reached maximum improvement from his injury and that he was able to return to work. He recommended a cranioplasty to lessen plaintiff's serious disfigurement arising from the accident, and plaintiff is entitled to it. Plaintiff's employer offered plaintiff light work, but at no time has he attempted to do any work.

Upon these findings, defendants were ordered to furnish plaintiff a cranioplasty to be performed by Dr. Ames and to pay plaintiff compensation for the temporary total disability occasioned by it. The order noted that, after the operation, the case "should be reset for hearing for the purpose of determining what additional compensation plaintiff is entitled to receive." On March 26, 1962, Dr. Ames put a cosmetic plate in plaintiff's head.

On August 7, 1962, the same hearing commissioner conducted a third hearing. Plaintiff's testimony and that of his mother tended to show that he had done no remunerative work since his injury; that he continued to suffer with frequent headaches, dizzy spells which resulted in a blurring of his vision when he bent over, walked rapidly, or looked up quickly; that his memory was not thirty-minutes long; that he has no sense of smell; that except for the change in his appearance his basic condition was unchanged by the operation. Dr. Ames testified that in the accident plaintiff had sustained extensive head injury with demonstrable physical injury to the frontal lobes of the brain; that in his opinion there is some mental impairment attributable to the injury and plaintiff is functioning with a below-normal intelligence; that plaintiff had reached his maximum improvement and there had been no change in his general condition since the previous hearings; that plaintiff's present I. Q. is 80 but since he does not know what it was

before the accident, Dr. Ames has no way "to determine how much mental impairment there has been as a result of this injury." Dr. Whitener, the psychiatrist who examined plaintiff at Dr. Ames' request, testified that plaintiff has only a ninth-grade education; that he has done no work since the accident for fear that he might become dizzy and fall into a running engine; that his memory for the remote past is adequate, but "recall in one minute seems very poor"; and that of a complete name and address he recalls only the first name and that he confabulates the number of the street and the state. Dr. Whitener, like Dr. Ames, was unable to state how much the impairment of memory and cerebration might be related to the accident.

On August 16, 1962, the deputy commissioner rendered an opinion and award in which he found that, as a result of the accident, plaintiff had suffered a complete loss of smell, and of one tooth, and generalized scarring and discoloration of his forehead; "that the foregoing *disfigurement is permanent and serious* and mars plaintiff's appearance to such an extent that it may be reasonably presumed to lessen his future opportunities for remunerative employment and so reduce his future earning capacity." (Italics ours.) An award of "$2,100.00 for serious and permanent disfigurement" was made and paid.

The opinion and award of August 16, 1962, contains no findings with reference to any permanent injury to plaintiff's brain and makes no award for this injury under G.S. 97-30 for permanent partial disability resulting from it.

On September 16, 1962, plaintiff's attorney gave notice of appeal to the full Commission and assigned as error the failure of the hearing commissioner "to find as a fact serious disfigurement from personal injury to the claimant's brain and his failure to award compensation to which claimant is entitled under either subsection (21) or subsection (22) of North Carolina General Statute 97-31." The full Commission heard the matter, and, on October 31, 1962, sustained each and every finding of fact and conclusion of law of the hearing deputy commissioner and ordered "that the result reached by him be, and the same is hereby affirmed." Plaintiff did not appeal from this order.

On April 23, 1963, plaintiff requested that, as authorized by G.S. 97-47, the case be reopened for a change of condition. A hearing was held on June 19, 1963. Plaintiff's testimony tended to show that he constantly makes such errors of judgment as installing a transmission backwards; that he is unable to keep up with his tools; that he cannot recollect parts or others' names; that he walks into objects; that if he works fast he gets dizzy; that he continues to have headaches and his eyes bother him; that for these reasons he is no longer able to make his living as a mechanic; that he now earns $50.00 for a 72-hour week

as a filling-station attendant, whereas he made $70.00 for a 40-hour week as a mechanic. Dr. Ames again testified that plaintiff's condition had not changed since the last hearing. He said, also, that he had no doubt of the genuineness of plaintiff's complaints, but that they constituted a degree of disability to which he could not give a percentage rating.

On December 4, 1963, the hearing commissioner filed his opinion and award, in which he made the following findings of fact:

> (1) Plaintiff is now working at a filling station for $40.00 *(sic)* a week as compared with his average weekly wage of $70.00 while working as a master mechanic prior to his injury; that he has headaches and dizzy spells and has trouble with his memory. (To these findings there were no exceptions.)
>
> (2) Dr. Ames, who examined plaintiff two days prior to the hearing, testified that plaintiff's condition had not changed since the latest hearing.
>
> (3) Plaintiff has not had a change of condition since the review of this case by the Commission.

The deputy commissioner concluded as a matter of law that plaintiff had failed to carry his burden of proof under G.S. 97-47 and denied compensation. Plaintiff excepted to findings (2) and (3), as well as to the conclusions of law, and appealed to the full Commission, which affirmed the hearing commissioner. Plaintiff then appealed to the Superior Court on assignments that finding of fact (3) is not supported by the evidence and is inconsistent with finding of fact (1) and that finding of fact (1) entitled him to additional compensation under G.S. 97-30. On July 20, 1964, Judge Hobgood overruled each of plaintiff's exceptions and affirmed the judgment of the full Commission. Plaintiff appeals to this Court.

Harold I. Spainhour for plaintiff.

Jordan, Wright, Henson & Nichols and G. Marlin Evans for defendants.

SHARP, J. Plaintiff's evidence conclusively establishes that there has been no change in his physical or mental condition since the hearing on August 7, 1962, nor, indeed, since the hearing on January 8, 1962. *Pratt v. Upholstery Co.*, 252 N.C. 716, 115 S.E. 2d 27. The Commission's findings are correct and based upon competent evidence. This simple statement, however, does not dispose of this case.

Plaintiff's motion made April 23, 1963, to reopen the case "on the basis of change of condition as provided in G.S. 97-47" was mislabeled. Plaintiff was actually attempting to reopen the case on the grounds of newly discovered evidence. Under G.S. 97-47 the Industrial Commission "has the power, in a proper case, and in accordance with its rules and regulations, to grant a rehearing of a proceeding pending before it, and in which it has made an award, on the ground of newly discovered evidence." *Butts v. Montague Bros.*, 208 N.C. 186, 188, 179 S.E. 799, 801. "The rules of the Industrial Commission, adopted pursuant to . . . the Workmen's Compensation Act, relative to the introduction of new evidence at a review by the Full Commission, are in accord with the decisions of this Court as to granting new trials on newly discovered evidence." *Tindall v. Furniture Co.*, 216 N.C. 306, 311, 4 S.E. 2d 894, 897; *accord, Brown v. Hillsboro*, 185 N.C. 368, 117 S.E. 41; 2 McIntosh, North Carolina Practice and Procedure § 1596(8) (2d Ed. 1956).

On April 23, 1963, less than twelve months had elapsed since the latest award made under the Act; the case was therefore still pending. G.S. 97-47; *Butts v. Montague Bros., supra; Ruth v. Carolina Cleaners, Inc.*, 206 N.C. 540, 174 S.E. 445; Annot., Workmen's Compensation: time and jurisdiction for review, reopening, modification, or reinstatement of award or agreement, 165 A.L.R. 9, 291-293.

Instead of seeking a modification of the award for a change of condition, plaintiff seeks an award for permanent partial disability. Such an award, based on the injury to his brain, could have been made under G.S. 97-30 for his permanent partial incapacity to work. No such award has been made. At the time of the hearing on August 7, 1962, which resulted only in an award in the amount of $2,100.00, under G.S. 97-30(21) for external disfigurement of the head and face, plaintiff had made no attempt to go back to work. The reason, so he told the psychiatrist, was that he was afraid he would fall into a running engine. Nevertheless, according to Dr. Ames, he had reached maximum improvement in January 1962 and was then able to return to work. The cranioplasty, of course, temporarily interrupted this ability. Because he had not then tried to work since his injury, at the August hearing plaintiff was in no position to show the extent, if any, of the impairment of his wage-earning capacity, even though medical evidence had established permanent brain damage. The matter of the percentage of plaintiff's permanent partial disability attributable to the accident was a matter of speculation, both by plaintiff and by his doctors, who confirmed a permanent brain injury but confessed themselves powerless to evaluate it.

Under the Workmen's Compensation Act *disability* refers not to physical infirmity but to a diminished capacity to earn money. *Dail v.*

Kellex Corp., 233 N.C. 446, 64 S.E. 2d 438; *Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265; *Branham v. Panel Co.*, 223 N.C. 233, 25 S.E. 2d 865. The burden was on plaintiff as the claimant to show not only permanent partial disability, but also its degree. *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760. As he offered no evidence from which the Commission could make a finding with reference to such a disability, it made none. The Commission is not in a position to make a proper award until the extent of disability or permanent injury, if any, is determined. *Pratt v. Upholstery Co., supra.*

From the award of August 1962 plaintiff gave notice of appeal to the Superior Court, but failed to perfect it — doubtlessly because of the dearth of evidence. An award of the Commission is, if not reviewed in due time as provided in the Act, conclusive and binding as to all questions of fact. G.S. 97-86. We do not face here, however, a situation in which the Commission has made a determination of the extent of plaintiff's permanent partial disability upon facts fully developed at the hearing. Although, in a proper case, such an award might be modified as a result of newly discovered evidence, here the Commission has made no findings and no award with reference to the claim plaintiff now makes.

The first specific evidence which the Commission heard tending to establish actual permanent partial disability, *i.e.*, diminished capacity to earn money, came at the hearing on June 19, 1963, pursuant to plaintiff's motion for a modification of the award for a change of condition.

The evidence produced at that hearing makes a *prima facie* case of permanent partial disability resulting from the accident on November 11, 1959. Had plaintiff presented this proof at the hearing on August 7, 1962, the Commission would doubtlessly have found him entitled to an award under G.S. 97-30. The award which plaintiff received on August 16, 1962, was for external facial or head disfigurement under G.S. 97-31(21). *Davis v. Construction Co.*, 247 N.C. 332, 101 S.E. 2d 40. His failure to establish, at the hearing on August 7, 1963, the extent of permanent partial incapacity caused the claim to be disallowed. Does his failure to offer at that hearing any evidence tending to establish such permanent partial disability, after he had requested a determination and award for it, estop him from doing so now? In our view of the case, the Commission must answer this question when it reconsiders his motion as one for a rehearing upon newly discovered evidence. Under the circumstances of this case, we do not think that plaintiff, having only a ninth-grade education and suffering from a brain injury, should be precluded as a matter of law from presenting

his claim for compensation to which he might be entitled; the claim, because of plaintiff's lack of evidence at the hearing, has not been adjudicated. In *Sharmon v. Holliday & Greenwood, Ltd.*, [1904] 1 K.B. 235, 240, *Lord Justice Mathew* makes an observation applicable to plaintiff's situation here:

> "(I)f the workman afterwards solves the question (of his capacity to work) by experiment, and, on his endeavoring to obtain employment, the result proves clearly that he is incapacitated, there seems to me to be no good reason why the county court judge should be prevented from going into the matter again and reviewing the award. It would, in my opinion, be most unjust if in such a case the doctrine of *res judicata* should prevent the injured workman from applying for adequate compensation."

It is a fundamental rule that the Workmen's Compensation Act "should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation." *Johnson v. Hosiery Co.*, 199 N.C. 38, 40, 153 S.E. 591, 593; *accord, Guest v. Iron & Metal Co.*, 241 N.C. 448, 85 S.E. 2d 596. According to some authorities,

> "(T)he facts that evidence claimed as a basis of a motion to open a compensation award is not newly discovered and might have been offered at the original hearing in the exercise of due diligence, and that counsel, through inadvertence, has failed to present a ground upon which compensation might be allowed, do not in themselves prevent the compensation commissioner from granting such a motion." 58 Am. Jur., *Workmen's Compensation* § 541 (1948), citing *Olivieri v. City of Bridgeport*, 126 Conn. 265, 10 A. 2d 770, 127 A.L.R. 1471.

Had this been an ordinary civil action in which all damages are required to be assessed at one time and awarded in a lump sum, plaintiff's failure to offer evidence during the trial as to his permanent partial disability would manifestly preclude him ever after from doing so. The strict rule in civil actions, for obvious reasons, could not be applicable to proceedings under the Workmen's Compensation Act. We find convincing the following reasoning of the Connecticut court:

> "(U)nderlying the limitation upon the right of a party to have an award in a compensation case opened for newly discovered evidence is the principle 'of universal authority, whose base is public

policy, and is expressed in the maxim *"Interest reipublicae ut sit finis litium,"* which we denominated in *Burritt v. Belfy,* 47 Conn. 323, 329, 36 Am. Rep. 79, as the "embodiments of wisdom and justice." ' We have suggested, however, that this principle does not have the strict application in proceedings for workmen's compensation that it has as regards proceedings in the courts. *Glodenis v. American Brass Co.,* 118 Conn. 29, 34, 170 A. 146. As we said in the *McCulloch* case: 'In the absence of other than technical prejudice to the opposing party, the liberal spirit and policy, of the Compensation Act (Pub. Acts 1913 c. 138, as amended) should not be defeated or impaired by a too strict adherence to procedural niceties.' A party to a compensation case is not entitled to try his case piecemeal, to present a part of the evidence reasonably available to him, and then, if he loses, have a rehearing to offer testimony he might as well have presented at the original hearing. He must be assumed to be reasonably familiar with his rights and with the . . . proof necessary to establish his claim; and to permit him intentionally to withhold proof, or to shut his eyes to the reasonably obvious sources of proof open to him, would be fair neither to the commissioner and the court nor to the defendant. Where an issue has been fairly litigated, with proof offered by both parties upon an issue, a claimant should not be entitled to a further hearing to introduce cumulative evidence, unless its character or force be such that it would be likely to produce a different result. *Gonirenki v. American Steel & Wire Co., supra,* page 11 of 106 Conn., 137 A. 26. On the other hand, mere inadvertence on his part, mere negligence, without intentional withholding of evidence, particularly where there is no more than technical prejudice to the adverse party, should not necessarily debar him of his rights, and despite these circumstances a commissioner in the exercise of his discretion might be justified in opening an award. No definite rule can be formulated, but the policy that litigation should be brought to as speedy an end as is reasonably compatible with justice to the parties, prejudice, or lack of it to the opposing party, the conduct of the party seeking to open the award, particularly with regard to any reason he may have for not having produced the evidence at the original hearing, the nature of the testimony, and its probable effect upon the conclusion reached, and the other relevant circumstances, must all be considered. The matter is one which must lie very largely within the discretion of the commis-

sioner." *Kearns v. City of Torrington,* 119 Conn. 522, 177 Atl. 725.

This proceeding has been heard upon a misapprehension of applicable principles of law. Until all of an injured employee's compensable injuries and disabilities have been considered and adjudicated by the Commission, the proceeding pends for the purpose of evaluation, absent laches or some statutory time limitation. See *Pratt v. Upholstery Co., supra.* This case is remanded to the Superior Court with directions that it be returned to the Industrial Commission, which will determine, according to its own rules and the legal principles applicable to newly discovered evidence, whether it will grant plaintiff the requested rehearing with reference to his diminished earning capacity. *Thompson v. Funeral Home,* 208 N.C. 178, 179 S.E. 801.

Reversed and remanded.

WADE HAMPTON PINYAN v. HENRY CLAY SETTLE.

(Filed 29 January, 1965.)

1. Negligence § 7—

Only negligence which proximately causes or contributes to an injury has legal importance, and foreseeability is a requisite of proximate cause.

2. Negligence § 1—

Negligence is the failure to exercise that degree of care for others' safety which an ordinarily prudent man, under like circumstances, would exercise, the standard of care being constant but the degree of care varying with the attendant circumstances in proportion to the imminence of peril.

3. Evidence § 3—

It is a matter of common knowledge that a boy of average size between two and three years old is filled with activity and is likely to experiment with the operation of any mechanism which he can set in motion, and must be constantly watched to prevent injury to himself or others.

4. Trial § 21—

On motion to nonsuit, plaintiff's evidence must be considered in the light most favorable to plaintiff, giving him the benefit of every reasonable inference therefrom, and defendant's testimony will also be considered insofar as it is favorable to plaintiff.

5. Automobiles § 41q— Evidence of negligence in leaving small boy in car with key in switch held for jury.

The evidence favorable to plaintiff tended to show that defendant left his car standing at a gasoline filling station with its rear only a few feet from the rear of another car being serviced by plaintiff, that defendant left the car in reverse gear with the key in the switch and his two and one-half year old son in the car, and that the child turned the switch causing the car to move backwards, injuring plaintiff, who was standing between the two vehicles. *Held:* Defendant should have anticipated that the child would likely experiment with the mechanism, that the car would move backward if the child turned the ignition key, and that under the circumstances such action would likely result in injury or damage, and therefore defendant's motion to nonsuit was correctly denied.

6. Same—

Evidence that defendant left a two and one-half year old child alone in a vehicle is sufficient to support an allegation that he left the vehicle unattended, since unattended means leaving it without anyone present who is competent to prevent any of the probable dangers to the public.

7. Trial § 33—

An instruction which states the allegations and the evidence and the contentions of the parties, together with a general charge on the applicable law, but which fails to apply the law to the various factual situations adduced by the evidence, does not comply with G.S. 1-180.

APPEAL by defendant from *Shaw, J.*, 30 March 1964 Civil Session of GUILFORD — Greensboro Division.

Civil action to recover damages for personal injuries allegedly caused by defendant's actionable negligence.

From a judgment, entered in accordance with the verdict, that plaintiff recover from defendant the sum of $7,000, he appeals.

Jordan, Wright, Henson & Nichols by Welch Jordan for defendant appellant.

Frazier & Frazier by H. Vernon Hart for plaintiff appellee.

PARKER, J. Defendant assigns as error the denial of his motion for judgment of compulsory nonsuit entered at the close of all the evidence. Plaintiff's evidence, and the allegations of fact in his complaint, which the answer admits to be true, and defendant's testimony favorable to plaintiff (*Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307), show the following facts:

In April 1961, Kyle's Amoco Service Station in the city of Greensboro had two retail gasoline pump islands in front of the station building. These islands run in a north-south direction, with one island in line with and south of the other, and on each island are four gasoline pumps. The area around the pump islands and in front of the service station is surfaced with green concrete and asphalt.

About 1:30 p.m. on 29 April 1961, G. V. McNeill's car was standing at the north end of the south island on the west being serviced. Wade Hampton Pinyan, an employee of Kyle's Amoco Service Station, had put gasoline in the McNeill car, had serviced its four tires, and was at the back of the car with the trunk open servicing the spare tire. At this time, Henry Clay Settle drove a 1960 Chevrolet car onto the premises of the service station and south of the south gasoline pump on its west side, stopped his car, backed it up to within about a yard of the rear end of the McNeill car, and stopped. His car had a gear shift and clutch and a foot brake on the left side. He turned off the ignition switch leaving his car in reverse gear. On the front seat with him in his car was his son Winfree, a boy two years and seven months old, who was an average size boy for his age, and weighed about 35 pounds.

When Pinyan released the air hose with which he was putting air in the spare tire so it would wind back up on its reel, he noticed the rear of the Settle car about three feet from the back of the McNeill car. The door was open, and both of Settle's feet were sticking out of the door. Pinyan turned, and went back to put the valve cap on the spare tire inside the trunk, and while in this position the Settle car moved back crushing him between the bumpers of the two cars.

G. V. McNeill testified in substance: He saw Settle get out of the car and head towards Mr. Kyle's office. He does not know whether he went in the office. At that time he did not observe anyone in the Settle car. He was standing beside his car which was being serviced. When the Settle car moved back and mashed Pinyan between its rear bumper and the rear bumper of his car, he looked around and saw Settle's head and shoulders in his car. That was all he could see because he was on the opposite side. After Pinyan was hurt, he heard Settle say that his child had started his car, turned the ignition on or something — in other words, had caused the car to move, that his child had never done that before.

Kyle Henry Harris, operator of the service station, was servicing a car on the side of the south pump island opposite from the McNeill and Settle cars. He testified in substance: Settle backed up his car and stopped with its rear end about three feet or more from the back of McNeill's car. Settle told him to fill up his car when he got time. At that time Settle had his car door open. He heard Pinyan scream, and saw Settle drive his car forward. He testified: "The motor in Mr. Settle's car started up. I could hear the motor start up. It choked itself down."

Norman Reed Gordon, a policeman in Greensboro, arrived at the scene some twenty to twenty-five minutes after Pinyan was injured. In the course of his investigation he talked with Settle. He testified: "Mr. Settle stated that his vehicle was parked in reverse gear, that his two-year-old son reached over, and turned the ignition switch on, and caused the vehicle to crank up and run backwards, and pinned the legs of Mr. Pinyan between the two vehicles." On cross-examination Gordon stated that in his original notes he wrote that the Settle car had the emergency brake about half up.

Defendant Henry Clay Settle, testifying in his own behalf, said in substance, except when quoted: He backed his car to within about five feet of the rear of the McNeill car. He stopped with his car in reverse, shut the motor off, and pushed his foot brake all the way down. An attendant at the filling station came up and said he would be with him in a minute. He turned to his left, pulled his door open, and said: "It's quite all right." He shut his door, and was sitting in his car, and all at once his car started lurching backwards. It was lurching back by the force of the battery. The motor was turning over, but it never completely fired. He testified: "My son held the key, and at that particular moment, I didn't even realize that the car was lurching back in this manner. Since it was receiving no gas, the car never one time completely caught on. It was lurching back by the battery. The motor was turning over, just by force of the battery alone. * * * I looked down and saw Winfree's hand on there and just with one swipe, I slapped, and he, hand and all, went right in the seat." He put the car in gear, released his brake, and pulled out a distance of about twenty yards from the pump. He testified: "If the hand brake or parking brake was set in the manner that I have described, this particular car will move backwards when the ignition switch was held on. It would move backwards with the foot brake set." When he was home on week ends, Winfree frequently rode with him in the car. He had two cars. Winfree

rode frequently with his mother. He did not get out of his car and go into the filling station as McNeill testified. Winfree had never done anything like that before.

The complaint alleges four acts of negligence on the part of defendant: (1) He stopped his car, got out and left it unattended without engaging the emergency brake; (2) he left the car in reverse gear well knowing or should have foreseen that should the car be started while in gear, it would move without warning and could injure someone or cause damage; (3) he left his infant son in the car unattended when he could foresee or should have foreseen that a small child could play with the ignition key and switch and start the car as his son did; and (4) he left his car unattended without first removing the ignition key to prevent the car being started.

It is a fundamental principle of law that the only negligence of legal importance is negligence which proximately causes or contributes to the injury under judicial investigation. *McNair v. Richardson,* 244 N.C. 65, 92 S.E. 2d 459.

In *Osborne v. Coal Co.,* 207 N.C. 545, 177 S.E. 796, the Court said: "Foreseeable injury is a requisite of proximate cause, and proximate cause is a requisite for actionable negligence, and actionable negligence is a requisite for recovery in an action for personal injury negligently inflicted." It is well settled by our decisions that foreseeability of injury is a requisite of proximate cause. *Pittman v. Swanson,* 255 N.C. 681, 122 S.E. 2d 814; *McNair v. Richardson, supra.*

It is hornbook law that negligence is the failure to exercise that degree of care for others' safety, which an ordinarily prudent man, under like circumstances, would exercise. *Jackson v. Stancil,* 253 N.C. 291, 116 S.E. 2d 817; *Ingram v. Libes,* 250 N.C. 65, 107 S.E. 2d 920; *Moore v. Iron Works,* 183 N.C. 438, 111 S.E. 776. The invariable standard of care is constant, but the degree — that is the quantity — of care necessary to measure up to the invariable standard is as variable as the attendant circumstances. *Sparks v. Phipps,* 255 N.C. 657, 122 S.E. 2d 496; *Rea v. Simowitz,* 225 N.C. 575, 35 S.E. 2d 871; 162 A.L.R. 999.

In *Rea v. Simowitz,* the Court said: "But a prudent man increases his watchfulness as the possibility of danger mounts. So then the degree of care required of one whose breach of duty is very likely to result in serious harm is greater than when the effect of such breach is not nearly so great. * * * And whether defendant exercised or failed to exercise ordinary care as understood and defined in our law of negligence is to be judged by the jury in the light of the attendant facts and circumstances."

Campbell v. Laundry Co., 190 N.C. 649, 130 S.E. 638, was an action to recover damages for the alleged wrongful death of a four-year-old

child. In its opinion the Court said: "A child of this tender age merely indulges the natural instincts of a child and amuses himself with an empty car, a deserted horse, an automobile or an electric truck, or whatever may be in his sight. In so doing he is not negligent." It is a matter of common knowledge that a boy two years and seven months old, average size for his age and weighing about 35 pounds, is filled with activity and explores the strange, new, and fascinating world around him, and is "likely to experiment with the operation of any mechanism which can be set in motion" (*Kennedy v. Hedberg,* 159 Minn. 76, 80, 198 N.W. 302, 304), and must be constantly watched to keep him not only out of mischief, but to prevent him from injuring himself.

The case of *Barbanes v. Brown,* 110 N.J.L. 6, 163 A. 148, is helpful. This was an action to recover for damages to plaintiff's car done by the defendant's automobile. The trial judge, sitting without a jury, found for the plaintiff, and the defendant appealed from the judgment. The facts are these: Defendant parked his automobile on a public street, where there was considerable grade, facing up the hill, with the front wheel "pitched" against the curbstone, applied the emergency brake, "put the car in one of four forward speeds," and "turned the motor off," and then left. When he departed, he left two small mischievous and irresponsible children, whom he had with him, in the car. These two children, seated on the front seat, played and meddled with the machinery, and jumped out before the car started to roll backwards down the hill and damaged plaintiff's automobile. The Court in its opinion stated:

> "Of course, the unexplained presence upon a public highway of a 'runaway' automobile, without driver or occupant, running down grade along and across the street and colliding with and damaging another automobile lawfully there, raises a *prima facie* presumption of negligence upon the part of the owner of the runaway automobile. [Citing authority.]
>
> "The sole question presented and argued is whether at the close of the case the evidence adduced was of such a character as to overcome the proof and presumption of defendant's negligence, and to require the court, sitting as a jury, to find for the defendant."

The Court, after stating that it thought it was open to the judge, sitting without a jury, to find that the presumption of negligence arising from the plaintiff's proof had not been overcome, and that the defendant's negligence was the proximate cause of the injury to the plaintiff's car, said:

"As we have pointed out, he [defendant] left the car facing up the hill with the front wheel against the curbstone. It rolled down the hill backwards. The evidence tended to show that he left two small mischievous children on the front seat; that these children were without capacity to estimate or appreciate the danger of meddling with the machinery of the car, and of course it might well be inferred that, in the exercise of reasonable care, the defendant should have anticipated the ordinary behavior of children in such circumstances. It was open to the judge, sitting without a jury, to find that he knew, or should have known, that the circumstances were such as to suggest the necessity of care against possible or probable interference by the children with the machinery of the car, which, if released, would result in its rolling down the hill, considering the way it was parked. In short, the evidence, considered as a whole, amply justified the conclusion that the defendant failed to exercise reasonable care, and that such negligence was the proximate cause of the injury to the plaintiff's car.

"A jury question having been presented on the essentials of the liability of the defendant, the judgment must be affirmed, with costs."

Considering plaintiff's evidence in the light most favorable to him, and giving him the benefit of every reasonable inference to be drawn therefrom (*Bridges v. Graham,* 246 N.C. 371, 98 S.E. 2d 492), and considering so much of defendant's testimony as is favorable to plaintiff *(Bundy v. Powell, supra),* as we are required to do in passing on a motion for judgment of compulsory nonsuit, we think a jury could find the following facts and draw the following reasonable inferences from the evidence:

About 1:30 p.m. on 29 April 1961 defendant drove a car on the premises of Kyle's Amoco Service Station for the purpose of purchasing gas, and stopped it near a gasoline pump with its rear end within about a yard of the rear end of McNeill's car. At that time plaintiff was standing at the rear end of the McNeill car with the trunk door up servicing the spare tire in the trunk. Defendant saw, or in the exercise of ordinary care he could have seen, plaintiff standing between the rear bumpers of the two cars servicing McNeill's spare tire. He left his car in reverse gear, turned off the ignition switch, left the key in the ignition switch, and pushed his foot brake all the way down. He knew his car would move backwards when the ignition switch was held on with its foot brake all the way down. In the front seat with him was his son Winfree, two years and seven months old, an average size boy for his age, weighing about 35 pounds. He knew Winfree had ridden in cars

frequently with him and with his mother, and a legitimate inference is that he had seen them turn on the switch key and start the motor. Defendant then got out of the car, leaving Winfree in the front seat, and headed towards Mr. Kyle's office. A legitimate inference is that he, in the exercise of reasonable care, should have anticipated the ordinary behavior of a small boy in such circumstances to meddle with the machinery of the car and that under all the attendant circumstances he failed to exercise that degree of care for plaintiff's safety, which an ordinarily prudent man, under like circumstances, would exercise, and was guilty of negligence. The jury could further find from the evidence that he, in the exercise of the ordinary care of an ordinarily prudent man, should have reasonably foreseen that Winfree, alone in the automobile, without capacity to estimate or appreciate the danger of turning the ignition key on in the ignition switch and setting the car in motion backwards, was likely to experiment or meddle with the operation of the key in the ignition switch, which would set the car in motion, thereby causing the car to lurch or move backwards, and that if Winfree did, consequences of an injurious nature to plaintiff would ensue. That Winfree did turn on the key in the ignition switch, the motor started up, and the car lurched or moved backwards, crushing plaintiff between the rear bumpers of the two cars, and that defendant got back to the car, and had his head and shoulders in the car when plaintiff was crushed or being crushed. That defendant's negligence played a substantial part in plaintiff's injury, and was the proximate cause thereof.

Defendant contends there is a fatal variance between *allegata et probata,* because there is no evidence defendant left his car unattended. This contention is not tenable. McNeill's testimony is that defendant, when he stopped his car about a yard from his (McNeill's) car, got out and headed towards Mr. Kyle's office. At that time Winfree was alone in the car. The State of Maryland in 1949 had a statute prohibiting a person from leaving a motor vehicle unattended without removing the ignition keys. Code Supp. 1947, art. 66½, § 192 (now Md. Code Anno. 1957, art. 66½, § 247). In *Lustbader v. Traders Delivery Co.,* 193 Md. 433, 67 A. 2d 237 (1949), the Court said: "The statute does not define 'unattended,' but a reasonable interpretation is that it means without any one present who is competent to prevent any of the probable dangers to the public." We think this definition is sound, we adopt it, and McNeill's testimony would permit a jury's finding that defendant left his car unattended. There is no fatal variance between *allegata et probata.*

Defendant relies upon *Williams v. Mickens,* 247 N.C. 262, 100 S.E. 2d 511; *Herring v. Humphrey,* 254 N.C. 741, 119 S.E. 2d 913. The facts in the *Williams* case are easily distinguishable. In that case an owner

left the ignition key in the ignition lock of her car, and a thief stole it and had a wreck. In the *Herring* case the facts are quite different from the facts here. The defendant also relies on *Roberts v. Lundy,* 301 Mich. 726, 4 N.W. 2d 74. The facts in this case are factually different, in that when the driver of the car left the key in the ignition switch and got out to take two children to a rest room, the car was occupied by three adults and a boy.

The trial court correctly overruled defendant's motion for judgment of compulsory nonsuit, and submitted the case to the jury.

Defendant assigns as error that the judge in instructing the jury on the first issue of negligence failed to declare and explain the law arising on the evidence in the case as to all the substantial features of the case, and did not instruct the jury concerning what ultimate facts the jury would be required to find in order to determine that defendant was guilty of actionable negligence, and did not instruct the jury concerning what ultimate fact findings by it would require the jury to exonerate the defendant of negligence. This assignment of error is good. A reading of the charge shows that in respect to the negligence issue the court gave a summary of the allegations in the complaint and answer, a statement of the issues to be submitted to the jury, an elaborate statement of the evidence offered by the parties, placed the burden of proof of the first issue on the plaintiff, made a brief statement of the contentions of the parties, and then instructed the jury in effect that if the plaintiff had satisfied them by the greater weight of the evidence that the defendant was negligent in any of the respects alleged by the plaintiff and that the negligence of defendant was one of the proximate causes of the occurrence, then it would be their duty to answer the first issue yes, otherwise no. After the court had completed its charge and instructed the jury to retire, counsel for plaintiff called to the court's attention that by inadvertence it had failed to instruct the jury as to the elements of actionable negligence. Whereupon, the court gave the jury a general instruction as to negligence, foreseeability, and proximate cause. Such a charge does not comply with the mandatory requirements of G.S. 1-180. *Bulluck v. Long,* 256 N.C. 577, 124 S.E. 2d 716; *Glenn v. Raleigh,* 246 N.C. 469, 98 S.E. 2d 913; *Lewis v. Watson,* 229 N.C. 20, 47 S.E. 2d 484.

For error in the charge defendant is entitled to a

New trial.

HIGH POINT SURPLUS COMPANY, INC. v. ROBERT PLEASANTS, SHERIFF OF WAKE COUNTY, NORTH CAROLINA, BEN W. HAIGH, CHAIRMAN, AND BILLY K. HOPKINS, JAMES L. JUDD, WILLIAM T. GILLIAM, W. HAL TRENTMAN, JENNINGS BOOTH, AND W. W. HOLDING, III., COMMISSIONERS, BOARD OF COUNTY COMMISSIONERS FOR WAKE COUNTY, NORTH CAROLINA.

(Filed 29 January, 1965.)

1. Pleadings § 15—

A demurrer must be determined upon consideration of the pleading and instruments expressly made a part thereof without reference to facts, evidence, or instruments *aliunde* the challenged pleading, even though the parties stipulate such matters might be considered.

2. Pleadings § 12—

A pleading will be liberally construed upon demurrer, admitting for its purpose the truth of the facts alleged and relevant inferences of fact deducible therefrom, but it does not admit legal conclusions.

3. Same—

The rule of liberal construction of the pleading upon demurrer does not warrant the court in reading into the pleading facts which it does not contain.

4. Evidence § 1—

The courts will not take judicial knowledge of municipal and county ordinances, but such ordinances must be pleaded, at least to the extent stipulated by G.S. 160-272.

5. Constitutional Law § 4; Injunctions § 5—

A party has no standing to enjoin the enforcement of a statute or ordinance when he fails to show that his rights have been impinged or are imminently threatened by the operation of the statute or ordinance.

6. Same; Counties § 3.1; Municipal Corporations § 27—Where pleading in an action to enjoin enforcement of ordinance fails to show imminent threat to plaintiff's rights, demurrer is proper.

Plaintiff, alleging that it was a retailer in a named municipality, instituted this action to restrain the enforcement of a county ordinance relating to Sunday sales, alleging that it would be irreparably injured by the enforcement of the ordinance, and asserting the legal conclusion that the ordinance was unconstitutional. The county ordinance was not made a part of the pleading but the parties agreed that the case on appeal should contain a copy thereof. It appeared that the county ordinance provided that it should apply within the corporate limits of those municipalities of the county whose governing bodies should agree thereto, but the complaint contained no allegation that the governing body of the municipality in question had agreed to the ordinance, and no municipal ordinance was set forth in or made a part of the complaint. *Held:* Even if the Court should take judicial notice of the county ordinance, that ordinance, in the absence of a showing that the municipality in which plaintiff carried on its

business had agreed thereto, would not affect plaintiff, and therefore plaintiff's pleadings failed to make it appear that plaintiff's rights would be directly affected by the ordinance, and demurrer was properly sustained.

7. Pleadings § 15—

In an action attacking the constitutionality of an ordinance, the ordinance attacked should be made a part of the pleadings, since judicial notice thereof cannot be taken, and the omission of the ordinance cannot be supplied by a stipulation in another case not a part of the case on appeal in the instant case and not signed by defendants, referring to the ordinance by number, since a document *aliunde* the pleading attacked may not be considered upon demurrer.

8. Pleadings § 19—

In sustaining a demurrer to a defective statement of a cause of action, the court should not dismiss the action, since plaintiff is entitled to move to amend if he so desires.

APPEAL by plaintiff from *Bickett, J.*, in chambers on 17 April 1964. WAKE.

Civil action instituted by plaintiff on 3 April 1964 as a class action to restrain permanently defendants from enforcing the provisions of an alleged resolution by the Board of County Commissioners of Wake County regulating Sunday sales of goods, wares and merchandise, on the alleged ground that the alleged resolution violates Article I, section 17, and Article II, section 29, of the North Carolina Constitution, the 14th Amendment to the United States Constitution, and "fundamental property rights and fundamental human rights guaranteed to it by our State and Federal Constitutions." On 3 April 1964 Judge Bickett issued a temporary injunction.

On 13 April 1964 defendants filed a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action, specifying the grounds.

From an order sustaining the demurrer, dissolving the temporary injunction, and dismissing the action, but continuing the temporary injunction in full force and effect in the exercise of the judge's discretion pursuant to G.S. 1-500, until the case is disposed of on appeal by the Supreme Court, plaintiff appeals.

Cannon, Wolfe and Coggin, Broughton and Broughton by J. Melville Broughton, Jr., for plaintiff appellant.

Thomas A. Banks for defendant appellees.

Smith, Leach, Anderson & Dorsett by C. K. Brown, Jr., for the North Carolina Merchants Association, amicus curiae.

PARKER, J. The office of the demurrer here is to test the sufficiency in law of the complaint. This is a summary of the allegations of the complaint, except when quoted:

"[T]he plaintiff is a corporation organized and existing under the laws of the State of North Carolina, *with its principal place of business in the city of Raleigh, Wake County, North Carolina.*" (Emphasis ours.)

Defendant Pleasants is sheriff of Wake County, and is charged with the enforcement of all resolutions adopted by the Board of County Commissioners of Wake County. All other defendants are members of the Board of County Commissioners of Wake County.

"[O]n or about March 2, 1964 the Board of County Commissioners of Wake County adopted a resolution entitled 'Resolution Regulating Sunday Sales of Goods, Wares and Merchandise.' *That a copy of said resolution will be produced at the trial of this matter.*" (Emphasis ours.)

Plaintiff, and numerous other persons, firms and corporations not named as parties, but in whose behalf this action is instituted, "*operates* [*sic*] *a general retail and wholesale merchandising store in the City of Raleigh, Wake County, North Carolina,* which engages on Sunday in the business of selling of goods, wares and merchandise, the sale of some of which is prohibited, but the status of many articles cannot be ascertained or determined by the terms of said resolution." (Emphasis ours.)

Plaintiff, and the others in whose behalf this action is instituted, derive a substantial dollar volume of business from their Sunday sales.

The resolution passed by the Board of County Commissioners is null and void, in that:

One. "That said resolution by its very terms descriminates against this plaintiff in that Section 2 of said resolution specifically provides that it SHALL APPLY WITHIN 'THE CORPORATE LIMITS AND JURISDICTION OF ANY INCORPORATED CITY OR TOWN, WHOSE GOVERNING BODY, BY RESOLUTION, AGREES TO THIS ORDINANCE AND REGULATION' and therefore, its application does not affect all persons, firms and corporations engaged in operations similar to those of plaintiff but only those located in incorporated towns or cities that have adopted the resolution of the Board of Commissioners of Wake County, all of which is in violation of Section 17, Article I, of the Constitution of North Carolina and in violation of the Fourteenth Amendment to the Constitution of the United States of America."

Two, three, four, five, six, and seven state argumentative legal conclusions that the resolution adopted by the Board of County Commis-

sioners is unconstitutional and violates its right under Article I, section 17, and Article II, section 29, of the North Carolina Constitution, and the Fourteenth Amendment to the United States Constitution.

It is informed and believes that if defendants are not restrained, it, and others like it, will be subjected to a multiplicity of arrests and prosecutions for a violation of the said resolution after its effective date on 31 March 1964, and will suffer irreparable damage, unless defendants are permanently restrained, because it, and others like it, have no adequate remedy at law to prevent irreparable damage.

"On demurrer we take the case as made by the complaint." *Barber v. Wooten,* 234 N.C. 107, 66 S.E. 2d 690. The Court said in *Hayes v. Wilmington,* 243 N.C. 525, 538, 91 S.E. 2d 673, 683: "It is elemental that a demurrer may not call to its aid facts not appearing on the face of the challenged pleading. *Union Trust Co. v. Wilson,* 182 N.C. 166, 108 S.E. 500; *Wood v. Kincaid,* 144 N.C. 393, 57 S.E. 4; *Davison v. Gregory,* 132 N.C. 389, 43 S.E. 916."

It is a general and fundamental rule of pleading that on a hearing of a demurrer to a pleading the court ordinarily is limited to a consideration of the pleading demurred to, and an instrument or instruments expressly made a part of the pleading by apt words, and cannot consider evidence, documents, or instruments *aliunde* of the challenged pleading, such as affidavits and stipulations of the parties. *Moore v. W. O. O. W., Inc.,* 253 N.C. 1, 116 S.E. 2d 186; *Lamm v. Crumpler,* 240 N.C. 35, 81 S.E. 2d 138; *Foust v. Durham,* 239 N.C. 306, 79 S.E. 2d 519; *Towery v. Dairy,* 237 N.C. 544, 75 S.E. 2d 534; *McDowell v. Blythe Bros.,* 236 N.C. 396, 72 S.E. 2d 860; *Trust Co. v. Wilson,* 182 N.C. 166, 108 S.E. 500; *Davison v. Gregory,* 132 N.C. 389, 43 S.E. 916; 71 C.J.S., Pleading, § 257; 41 Am. Jur., Pleading, § 246.

"According to the weight of authority, matters extrinsic to a pleading may not be considered on the hearing of a demurrer thereto, even though the parties stipulate or agree that such matters may be considered by the court in determining the demurrer." 41 Am. Jur., Pleading, § 246, p. 466. To the same effect Anno. 137 A.L.R. 483.

It is familiar learning that a demurrer admits, for the purpose of testing the sufficiency of the pleading, the truth of factual averments therein well stated and such relevant inferences as may be deduced therefrom, but it does not admit any legal inferences or conclusions of law asserted by the pleader. *McKinney v. High Point,* 237 N.C. 66, 74 S.E. 2d 440. While G.S. 1-151 requires us to construe liberally the allegations of a challenged pleading, we are not permitted to read into it facts which it does not contain. *Thomas & Howard Co. v. Insurance Co.,* 241 N.C. 109, 84 S.E. 2d 337; *Johnson v. Johnson,* 259 N.C. 430, 130 S.E. 2d 876.

This Court has consistently held that our courts of general jurisdiction and the Supreme Court will not take judicial notice of a municipal ordinance. *Shoe v. Hood,* 251 N.C. 719, 112 S.E. 2d 543; *Funeral Service v. Coach Lines,* 248 N.C. 146, 102 S.E. 2d 816; *S. v. Clyburn,* 247 N.C. 455, 101 S.E. 2d 295; Stansbury, N. C. Evidence, 2d Ed., sec. 12, p. 22. This seems to be the general rule, in the absence of a statute requiring that notice be taken. Wigmore on Evidence, 3d Ed., Vol. IX, Judicial Notice, p. 552.

In G.S. 160-272, it is stated: "In all judicial proceedings it shall be sufficient to plead any ordinance of any city by caption, or by number of the section thereof and the caption, and it shall not be necessary to plead the entire ordinance or section."

In *S. v. Fox,* 262 N.C. 193, 136 S.E. 2d 761, the Court, while recognizing the general rule, held that it "does not preclude the courts, when called upon to construe an excerpt from an ordinance set out in a bill of indictment, from interpreting the excerpt correctly by construing it with the rest of the ordinance, certainly when the entire ordinance is before the court by stipulation of the parties."

"The general rule is that county, town, or municipal laws, ordinances, by-laws, or resolutions themselves are not judicially known to courts having no special function to enforce them, although the power of municipalities to pass ordinances or by-laws is judicially noticed by the courts within the state." 31 C.J.S., Evidence, § 27. To the same effect Wigmore on Evidence, 3d Ed., Vol. IX, p. 552.

We now have the task of applying the above stated principles of law to the facts stated in the complaint.

According to the facts stated in the complaint, plaintiff operates a general retail and wholesale merchandising store in the city of Raleigh, Wake County, North Carolina, and brings this action as a class action in behalf of itself and all others in the city of Raleigh engaged in similar business. Plaintiff, and the others in whose behalf this action is instituted, derive a substantial dollar volume of business from their Sunday sales. On or about 2 March 1964 the Board of County Commissioners of Wake County adopted a resolution entitled "Resolution Regulating Sunday Sales of Goods, Wares and Merchandise." The object of this action is to have this resolution adjudged unconstitutional. The words of this resolution are not set forth in the complaint. The complaint states "a copy of said resolution will be produced at the trial of this matter." Such being the facts, on demurrer we do not take judicial notice of this resolution to determine whether it is constitutional as defendants contend, or unconstitutional as plaintiff contends.

The parties agreed to the case on appeal. They agreed the case on appeal shall constitute the following: The complaint, the restraining

bond, the temporary injunction, copy of Wake County ordinance adopted 2 March 1964, demurrer of defendants, order of Judge Bickett dated 14 April 1964 continuing the hearing until 17 April 1964, the final order of Judge Bickett entered 17 April 1964, from which plaintiff appeals, and the appeal entries.

Even if on demurrer, contrary to our decisions and contrary to the weight of authority in this country, we consider the text of the resolution, a fatal defect appears in the complaint. The complaint affirmatively alleges: "That said resolution by its very terms discriminates against this plaintiff in that Section 2 of said resolution specifically provides that it SHALL APPLY WITHIN 'THE CORPORATE LIMITS AND JURISDICTION OF ANY INCORPORATED CITY OR TOWN, WHOSE GOVERNING BODY, BY RESOLUTION, AGREES TO THIS ORDINANCE AND REGULATION' * * *." According to this allegation this resolution will not apply to plaintiff, who is doing business in the city of Raleigh, and others like it who are engaged in similar business in the city of Raleigh, until and unless the governing body of the city of Raleigh "by resolution, agrees to this ordinance and regulation." The complaint has no allegation that the governing body of the city of Raleigh has by resolution agreed to this ordinance and regulation, and we do not take judicial notice of a municipal ordinance or resolution.

At the end of the case on appeal, which has been agreed upon by the parties, and which is not a part of the case on appeal, there appears a stipulation in another case, plaintiff here against the chief of police and governing body of the city of Raleigh, to the effect that the parties in that case will be bound by the decision of the Supreme Court in the instant case, "and the effectiveness of Resolution No. (1964)-252 adopted by the city council of the city of Raleigh on March 2, 1964, will be controlled by said decision." This stipulation was made by the same attorneys who appear for plaintiff here, and by Paul F. Smith for defendants, the chief of police and the governing body of the city of Raleigh, on 6 October 1964. Judge Bickett's final order in the instant case, from which plaintiff appeals, was rendered on 17 April 1964. At the end of this stipulation, there appears what purports to be Resolution No. (1964)-252 of the governing body of the city of Raleigh agreeing to a resolution adopted by the Board of County Commissioners of Wake County on 2 March 1964. Defendants here have not entered into this stipulation. According to our decisions, and the weight of authority in this country, on demurrer we will not take judicial notice of this purported resolution by the governing body of the city of Raleigh, which is not mentioned in the complaint here or in the case on appeal, and which appears in an extraneous stipulation forming no part of the case on appeal, and entered in another case, and

to which stipulation all the parties in the instant case have not appeared, and which was entered into more than five months after Judge Bickett rendered his final order from which plaintiff appeals.

Plaintiff's complaint is fatally defective, in that "the case as made by the complaint" does not show that plaintiff, engaged in business in the city of Raleigh, and those businesses like it engaged in similar business in the city of Raleigh, have been aggrieved by the resolution adopted by the Board of County Commissioners of Wake County, even if, contrary to our decisions and the weight of authority in this country, we take judicial notice of this county resolution which forms no part of the complaint. *James v. Denny,* 214 N.C. 470, 199 S.E. 617 (definition of aggrieved). "It is a firmly established principle of law that the constitutionality of a statute or ordinance may not be attacked by one whose rights are not, or are not about to be, adversely affected by the operation of the statute." 16 C.J.S., Constitutional Law, § 76. A legion of cases from a multitude of jurisdictions in this nation, including a number of ours, is cited to support this statement by C. J. S.

Judge Bickett correctly sustained the demurrer to the complaint, and dissolved the temporary injunction he had previously entered. His continuing the temporary injunction in full force and effect in the exercise of his discretion pursuant to G.S. 1-500 until the case is disposed of on appeal shall no longer be operative. However, Judge Bickett improperly dismissed the action upon demurrer, since plaintiff may move for leave to amend in accordance with G.S. 1-131. *Lumber Co. v. Pamlico County,* 250 N.C. 681, 110 S.E. 2d 278. The portion of Judge Bickett's order sustaining the demurrer and dissolving the temporary injunction is sustained, but the portion thereof dismissing the action is erroneous and should be stricken therefrom. The decision is without prejudice to plaintiff's right to move in the superior court for leave to amend its complaint pursuant to G.S. 1-131, if it so desires, so it can allege additional facts, and also allege facts, if it can, as to whether it has no adequate remedy at law so as to invoke the extraordinary power of a court of equity. *Walker v. Charlotte,* 262 N.C. 697, 138 S.E. 2d 501; *Smith v. Hauser,* 262 N.C. 735, 138 S.E. 2d 505. It is so ordered. As so modified, the order of Judge Bickett is affirmed.

Modified and affirmed.

PAUL E. THACKER v. HURSHEL E. WARD, JR., AND WILLIAM C. MARKHAM, JR., T/A WARD-MARKHAM CO., AND BILLY SANFORD McCOY.

(Filed 29 January, 1965.)

1. Damages § 11—

Where the complaint describes an injury which necessarily causes physical pain the law will presume some mental anguish, and such natural consequences need not be pleaded in detail, but plaintiff must set forth in his complaint allegations as to consequences which are not the natural or normal result of the injury, since the defendant is entitled to know from the complaint the nature of the injury to which he must answer in order to make his defense and not be taken by surprise at the trial.

2. Same— Allegations of physical pain and mental anguish and shock to nervous system held insufficient predicate for recovery for traumatic neurosis.

Plaintiff alleged that the accident in suit seriously and painfully injured his head, neck, back, chest and shoulders, that his nervous system was severely shocked and his ability to sleep impaired, and that he had suffered exhausting physical pain and mental anguish. Plaintiff's evidence tended to show, in addition to physical injury, a psychoneurotic reaction resulting in total disability, but plaintiff's expert testimony was to the effect that plaintiff's complaints were entirely without organic basis. *Held:* In the absence of allegation that plaintiff had become a victim of traumatic neurosis the court correctly instructed the jury that it might award damages for all physical incapacities, past, present, and future plus all physical and mental suffering which was the immediate and necessary consequence of the injury sustained, but that the jury should allow nothing for psychological complaints.

3. Trial § 33—

The court may not submit a case to the jury on a particular theory unless such theory is supported by both allegation and evidence.

APPEAL by plaintiff from *Hobgood, J.,* March 1964 Civil Session of WAKE.

Action for personal injuries. On April 25, 1960, plaintiff, a 41-year-old man employed by the Seaboard Airline Railroad Company as a switchman and yard conductor, was operating his automobile northerly on Boylan Avenue in the City of Raleigh. Intending to make a right turn onto Willard Place, a narrow street which forms a T intersection with Boylan, he stopped to permit a truck traveling west on Willard to clear the intersection. While waiting, he was struck from the rear by a truck owned by defendants Ward and Markham and operated by their employee, defendant McCoy. Plaintiff alleges that, as a result of this impact,

"(H)e was shocked, stunned, bruised and injured about various parts of his body; he was seriously, painfully and permanently injured about his head, neck, back, chest and shoulders; he suffered severe injuries to his cervical spine; the muscles, ligaments, nerves, tissues and bones of his neck were injured; the severe injury to his cervical spine necessitated the application of traction to his neck and the wearing of a cervical brace; he suffered and continues to suffer constant and intractable headaches; he was treated intensively with drugs and physical therapy; *his nervous system was severely shocked and damaged and his ability to sleep was and has been permanently impaired.* That as a direct result of said injuries, the interspaces between the vertebrae of his cervical spine have suffered a narrowing (cervical osteoarthritis), and the neuroforamina at all these levels of his cervical spine suffered a moderate encroachment. These painful, serious and permanent injuries have required that he receive out-patient hospitalization and will require hospitalization and major surgery (cervical fusion), and orthopedic care and treatment in the future; that as a direct result of these specific injuries plaintiff *has suffered excruciating physical pain and mental anguish.* That at the time of his injury the plaintiff was gainfully employed as a yard conductor-switchman with the Seaboard Air Line Railroad Company, Raleigh, N. C., and was earning in excess of $5,000.00 a year; that as a direct result of the injuries received in the aforementioned collision, plaintiff has been rendered totally and permanently disabled, and unable to perform the duties of such employment, and the plaintiff has been damaged in the sum of Two Hundred Thousand Dollars ($200,000.00)." (Italics ours).

Plaintiff's evidence tends to show the following: On March 14, 1960, he had passed the physical examination conducted by the Railroad's medical examiner; he was in good health on April 25, 1960. On that day, immediately after the collision, plaintiff felt numb and dazed, but he did not believe himself injured. He drove his car away from the scene and went ahead with his plans for the day. Thereafter, however, pain and stiffness, which became progressively worse, developed in his neck and back, and his head began to ache. Between April 25th and May 5th he was able to work only four days. Since May 5, 1960, he has been in constant pain and totally unable to perform his duties as a trainman. On December 29, 1960, on the basis of plaintiff's complaint to him, the Railroad's medical examiner declared plaintiff unfit for further employment by the Railroad.

On May 3, 1960, plaintiff consulted Dr. A. E. Harer, an orthopedic surgeon, who diagnosed his condition as a sprain of the cervical and lumbo-sacral spine. Dr. Harer treated him with traction, physiotherapy, and medications. By August 1960 plaintiff had developed a deformity which resulted from continuously carrying his head in a forward position, "flexed as though he could not hold his head up straight." Dr. Harer then referred plaintiff to Dr. R. W. Willett, an internist, who gained the impression that the anteflexed position of plaintiff's neck was due to *voluntary* guarding. He found his coördination to be normal and diagnosed plaintiff's case as "anxiety with tension headaches, hypochondriasis."

At intervals plaintiff consulted other specialists with reference to his injury: orthopedists at Duke Hospital in May 1960, at the veterans hospitals at Durham and Winston-Salem (7 trips from February 1961 to December 1963), and at Johns Hopkins Hospital in February 1962 and December 1963; an internist in September 1960; a neurologist in October 1960; an opthalmologist in the early part of 1962; an arthritis specialist in December 1963; and a chiropractor (time unknown). At no time did he ever stay overnight in a hospital. At the time of the trial his medical bills totaled $1,144.00.

Hereafter, chronology becomes difficult. After seeing Dr. Harer, plaintiff began to keep a diary of "where he ached and hurt from time to time." According to plaintiff, he became "absolutely stiff and rigid." He is still stiff and cannot bend over at all. He developed dizziness, strange sensations in his head and neck, a "filibrating heart," and difficulty in breathing. His ability to sleep was and is impaired; his arm movements became restricted, and he is now afflicted with "fumblingness." In August 1960 he felt "like he was up on a hinge," his shoulders "sitting up from the rest of his body." He "got to having a blue flash going through his head; somewhere along in there it felt like electrical waves were going through his hair when he combed or touched it." There was a numbness in the hair on his head. He had the sensation of "dropping and swishing in his brain." He lost his Adam's apple. His throat "felt like there was a circle or a string around it at an oblique angle — high on the right side and low on the left." After his throat went back into place "on Mother's Day," his spine began to feel as if it were enclosed in a pipe. He felt as if he had "pancakes and fishtails" in his back. Electrical impulses ran up and down his spine for months and created "a sensation as though an electric motor were generating waves in the lower spine, these working up his back, moving about three quarters of an inch per second. . . ." When these waves would get ahead on one side, there was "a terrible mixup." From time to time, however, these impulses would travel from one part of his body

to another, and queer sensations compassed him about. A pear-shaped lump with no end developed on his neck and remains there. For three years his eyeballs were painful and sore inside. In June 1960 his eyes were jumping back and forth about two inches "like a printing press." When in the early part of 1962 he began to fear blindness from the accident, he consulted an opthalmologist. He prescribed glasses, which plaintiff did not purchase, and the eye symptoms eventually disappeared. He still has pains in his head and cheeks. Seven or eight times he lost his voice; twenty-five to thirty times his voice became "a high thrilly type." In the summertime he has swelling of the feet and sensations of tight bands constricting his feet, with stringing sensations up his legs. A numbness began around his buttocks and spread into both legs. He lost all feeling in his right leg.

Because he was unable to work and wanted just "to have something to do to kill time," plaintiff began to attend the trial of personal-injury cases in the Superior Court. Having a pass on the Railroad, he traveled as much as he could in order to keep from being "charged with vagrancy." In 1961 and 1962 he spent a while at Miami Beach; in 1962 he spent the summer on the sand at Virginia Beach. Frequently he "would get on a train and ride somewhere else just spending a day and night" to save money.

Dr. Harer, as a witness for plaintiff, testified that plaintiff has a full range of motion in his entire spine, but that motion in the neck is guarded, "presumably because of pain." His reflexes are equal and active, and he has experienced no sensory changes. Neither Dr. Harer nor any other physician who examined plaintiff ever found any physiological or anatomical condition which could possibly form the basis for any of his complaints. Manual examination revealed no muscle spasm. Dr. Harer found no abnormal lumps in plaintiff's neck. X-rays were negative except that they revealed osteoarthritis, which predated April 25, 1960, in plaintiff's spine. It is Dr. Harer's opinion that although a sprain of the cervical spine could aggravate previously asymptomatic osteoarthritis, the symptoms of which plaintiff complained "actually did not affect his arthritis." It is Dr. Harer's opinion, also, based on plaintiff's complaints to him (subjective symptoms), that plaintiff now has a permanent injury.

Dr. Zadek of Johns Hopkins testified by deposition in December 1962 that, upon his examination of plaintiff, he found some limitation of plaintiff's cervical spine and "the gross defect of holding his head forward." He found "no objective pathology" to support plaintiff's complaints about his legs.

Dr. Leroy Allen, the neurosurgeon to whom Dr. Harer referred plaintiff, testified as a witness for defendants. In September 1960, when he

examined plaintiff, it was his opinion that if plaintiff would relax his neck muscles voluntarily, his cervical spine would be normal. He believed that plaintiff's complaints were all functional and entirely without organic basis, that is, that they were psychological.

The trial judge instructed the jury that it could award damages only for physical injuries, past, present, and future, plus "all physical and mental suffering which was the immediate and necessary consequence of the injury sustained." He specifically charged: "You are not to allow anything for psychological complaints but only for physical complaints."

The jury found that plaintiff had been injured by the negligence of defendants; that plaintiff was entitled to recover $5,800.00 for personal injuries and $200.00 for property damages. Plaintiff's motion to set aside the verdict upon the issue of damages was denied. From judgment on the verdict, plaintiff appeals, requesting a new trial on the issue of damages only.

Yarborough, Blanchard & Tucker; Douglass and Douglass for plaintiff.

Smith, Leach, Anderson & Dorsett for defendants.

SHARP, J. This appeal involves only a question of pleading, not the right of a plaintiff to recover for emotional disturbances precipitated by physical injuries. Upon proper allegations and medical proof as to causation, it is generally held that recovery for such a disturbance may be had. *Williamson v. Bennett*, 251 N.C. 498, 112 S.E. 2d 48 (recovery denied because no actual physical injuries); *Ford v. Blythe Brothers Co.*, 242 N.C. 347, 87 S.E. 2d 879; see, on the requisites of medical proof of causation, *Gillikin v. Burbage, ante*, 317, 139 S.E. 2d 753.

Plaintiff's evidence, viewed in the light most favorable to him, tends to show that after the automobile which he was driving was struck from the rear by the truck of defendants Ward and Markham, plaintiff developed a traumatic neurosis. Although none of the medical experts who testified used this term, the bizarre, metastatic symptoms detailed by plaintiff at the trial and to his physicians, who could find no physical basis for these complaints, are among the indicia of traumatic neurosis. This is a term loosely used to include a variety of emotional and nervous disorders which sometimes follow a physical injury and which cause pain as real as if it had a physical basis. 3 Lawyers' Medical Cyclopedia §§ 20.1, 20.3, 20.4, 20.12 (1959 Ed.).

Plaintiff has alleged that his nervous system was shocked and damaged, his ability to sleep permanently impaired, and that he has suffered excruciating physical and mental pain as a result of injuries sustained

in the collision on April 25, 1960. He has not, however, specifically alleged that his disorders and suffering are emotional rather than physical or organic in origin, *i.e.*, that he has become a victim of traumatic neurosis. May he recover for such an injury without an explicit averment of it? This is the question this appeal poses. If such an allegation is required, the judge correctly instructed the jury to allow plaintiff no damages for psychological complaints. The court cannot submit a case to the jury on a particular theory unless such theory is supported by *both* pleadings and evidence. Assuming, purely *arguendo*, that we have in this case the necessary proof of causation, "proof without allegation is as ineffective as allegation without proof." *McKee v. Lineberger,* 69 N.C. 217, 239; *accord, Calloway v. Wyatt,* 246 N.C. 129, 97 S.E. 2d 881.

The general rule with reference to pleading items of damages in personal-injury cases is this: Those injuries which are the natural and probable consequences of the hurt alleged in the complaint, and which are reasonably included therein, need not be set out in detail. The law will infer them from the facts set forth. Effects, however, which are not logical and necessary, and which do not ordinarily follow such injuries constitute special damages, which must be specifically pleaded. 15 Am. Jur., Damages, §§ 304, 311 (1938); 25 C.J.S., Damages § 135 (1941). Therefore, from an injury which necessarily causes physical pain the law assumes that the normal person will suffer some mental anguish, also. *Hargis v. Power Co.*, 175 N.C. 31, 94 S.E. 702. Although it is the better practice in a personal-injury action to aver specifically that plaintiff has suffered mental anguish as a result of his injuries (if such be the case), most courts, including this one, hold that "where a description of the injury itself is such as to indicate that pain and mental anguish would ordinarily accompany it, the specific allegation is unnecessary." McCormick, Damages § 88 (1935 Ed.); *accord, Hargis v. Power Co., supra;* 15 Am. Jur., Damages § 316 (1938).

Plaintiff contends that, he having alleged both physical pain and mental suffering, as well as severe shock to his nervous system, these allegations are a sufficient foundation for the recovery of damages for traumatic neurosis. We do not agree.

The purpose of averring that a plaintiff is afflicted with a certain condition or disease as a result of a defendant's actionable negligence is to give defendant notice that plaintiff is seeking compensation for the infirmities and discomfort attending it. A defendant is entitled to know from the complaint the character of the injury for which he must answer. The complaint, therefore, should disclose "all the facts which the defendant should know in order to make his defense" and thus pre-

vent surprise at the trial. *Barron v. Cain,* 216 N.C. 282, 283, 4 S.E. 2d 618, 619; *accord, Oberholtzer v. Huffman,* 234 N.C. 399, 67 S.E. 2d 263.

In *Connor v. Kansas City Rys. Co.,* 298 Mo. 18, 250 S.W. 574, plaintiff alleged that her entire body was strained, bruised, and contused; that she sustained a concussion of her spine; and that she would continue to lose sleep and suffer intense pain and mental anguish. In holding that evidence tending to show insanity was not admissible within this pleading, the court said: "Neither insanity, irrationality nor traumatic neurosis with its train of ills, is a necessary result of injuries such as are pleaded in the petition. Injuries to nerves do not necessarily so result, and a nervous condition does not necessarily include them . . ." *Id.* at 23, 250 S.W. at 576; *accord, Arkansas Power & Light Co. v. Toliver,* 181 Ark. 790, 27 S.W. 2d 985 (allegation of a broken rib, neck and back sprains, and a contusion on the back of the head, *Held,* not sufficient to admit evidence that plaintiff was suffering from a brain disease known as Friedman's Complex); *Chambers v. Kennedy,* 274 S.W. 726 (Mo.) (allegation of permanent injury to brain and entire nervous system, *Held,* not sufficient to admit evidence of epilepsy, which might or might not result from such injuries); *Waters v. City of Morgantown,* 110 W. Va. 43, 156 S.E. 837 (allegation of abdominal, head and neck injuries, which rendered plaintiff very nervous, *Held,* insufficient to admit evidence of insanity resulting from the accident in suit).

Although, as the testimony of one of the medical experts in this case indicates, traumatic neurosis sometimes ensues from a neck sprain such as plaintiff presumably suffered, yet it is not the necessary or the usual result. Often it is very difficult for medical experts to determine whether a plaintiff is malingering, *i.e.,* making a "*conscious* attempt to simulate some condition which is not actually present," or whether he is the victim of a neurosis, "which involves the *unconscious* production of a symptom so that the patient is unaware of its emotional origin." 3 Lawyers' Medical Cyclopedia § 20.16 (1959 Ed.). A defendant who must face a determination of this question is entitled to pleading-notice that the plaintiff seeks to recover damages for a psychoneurotic reaction.

Ordinarily, the question of the sufficiency of the pleadings in cases involving a traumatic neurosis arises upon objections to evidence of plaintiff's symptoms. Here, however, without objection, the jury heard all of plaintiff's evidence with reference to his symptoms. No question arose until defendants requested the court to charge the jury that it could not include damages for psychological injuries in any award to plaintiff. Defendants' strategy of permissiveness was based, we apprehend, upon their belief (1) that jurors, like most other people, are un-

sympathetic to a person who has no physical basis for his complaints and (2) that plaintiff would victimize himself by overstating his baroque complaints. "I pray you, sir, to understate your case, lest the full truth, falling upon untutored ears, deafen beyond belief." Whether the verdict reflects the success of defendants' strategy or the jurors' strict compliance with the court's charge, we must leave to conjecture. In any event, plaintiff has assigned no reversible error. The charge conformed to the rule of damages for personal injuries as laid down in *Smith v. Corsat,* 260 N.C. 92, 131 S.E. 2d 894, and the cases therein cited. Under the charge plaintiff was permitted to recover for all his physical and mental sufferings which were the immediate and necessary consequences of the injury sustained. Had plaintiff desired elaboration of his contentions with reference to lost wages and other items embraced by the rule, he should have especially requested it. *Peterson v. McManus,* 210 N.C. 822, 185 S.E. 462.

In the trial, we find

No error.

TROY MOORE, DEWEY PANNELL AND HERBERT PANNELL, T/A MOORE'S SERVICE STATION AND GROCERY v. BEARD-LANEY, INCORPORATED, AND LEWIS JOE TAYLOR.

(Filed 29 January, 1965.)

1. Evidence § 2—

The court will take judicial notice that gasoline is a flammable commodity.

2. Negligence § 4—

A person handling an inherently dangerous commodity, like gasoline, is under duty to use care commensurate with the known exceptional danger.

3. Negligence § 24a—

Evidence tending to show that an employee in charge of delivering gasoline to the storage tanks of a filling station was warned that one of the tanks might overflow, that the only way to see when the tank was full was by watching the air vent on the top of the tank, that the employee hooked the tank trailer to the storage tank and started pumping gasoline, then went into the store on the premises, and that the tank overflowed while he was in the store, resulting in the damage in suit, *is held* sufficient to be submitted to the jury on the issue of negligence.

4. Negligence §§ 26, 27—Evidence held not to show contributory or intervening negligence absolving defendant as a matter of law.

The evidence tended to show that one of the owners of a gasoline filling station, upon seeing one of the storage tanks overflowing gasoline being pumped from defendant's unattended tank trailer, cut off the electric switch of the pump pumping gasoline into the storage tank, there being no raw gasoline on the ground around the pump, and that a spark emitted when the pump was cut off ignited gasoline fumes, *held* not to show contributory or insulating negligence as a matter of law, since the original negligence continued and played a substantial part in proximately causing the damage, and the act of the proprietor in the sudden emergency was a natural reaction motivated by an attempt to safeguard life and property, and could have been reasonably foreseen and expected under the circumstances.

5. Negligence § 8—

The original negligence of one party cannot be insulated by the negligence of another so long as the original negligence plays a substantial and proximate part in causing the injury or loss, or so long as the intervening act and resultant injury could have been reasonably foreseen and expected by the author of the original negligence, and the question of intervening negligence is ordinarily for the jury.

ON *certiorari* from *McLean, J.*, April 1964 Civil Session of RUTHERFORD.

Civil action for damages for the destruction of plaintiffs' property by fire alleged to have been caused by defendants' actionable negligence.

Defendants in their answer deny negligence, plead contributory negligence of plaintiffs as a bar to recovery, and alleged a counterclaim for damages for the destruction of corporate defendant's tank trailer allegedly caused by plaintiffs' actionable negligence.

Plaintiffs, replying to defendants' answer, alleged the corporate defendant is not the real party in interest to recover damages for the destruction by fire of its tank trailer, for the reason that it has been paid in full for its loss by its insurer, Underwriters at Lloyds.

On motion of Underwriters at Lloyds, an order was entered by the court making them a party defendant. They filed an answer denying any negligence on defendants' part, and alleged they had paid $7,000 to the corporate defendant in full compensation for its loss by fire of its tank trailer, and consequently was subrogated to all rights which the corporate defendant had to recover from plaintiffs, and alleged a counterclaim against plaintiffs in the amount of $7,000, averring that the destruction by fire of the corporate defendants' tank trailer was caused by the actionable negligence of plaintiffs.

At the close of plaintiffs' evidence, the trial judge entered a judgment of compulsory nonsuit, and plaintiffs excepted and appealed. Whereupon, Underwriters at Lloyds took a voluntary nonsuit.

Plaintiffs for valid reasons were unable to perfect their appeal within the time prescribed by the rules of practice in the Supreme Court. We allowed *certiorari* to bring up for review the judgment of compulsory nonsuit.

J. H. Burwell, Jr. and Carroll W. Walden, Jr., for plaintiff appellants.
No counsel for defendants.

PARKER, J. These facts are alleged in the complaint and admitted in defendants' answer: The corporate defendant is a South Carolina corporation, which does business in North Carolina. The defendant Lewis Joe Taylor on 28 August 1962 was an employee of the corporate defendant, and was at all times here relevant acting as agent and employee of the corporate defendant. The plaintiffs operate a retail service station, grocery store and a wholesale petroleum products business near the village of Avondale in Rutherford County, North Carolina. They operate this business under the trade name of Moore's Service Station and Grocery. The corporate defendant is engaged in the business of transporting gasoline and other petroleum products, and that at all times here relevant the defendant Taylor was employed by the corporate defendant as a truck driver to drive its truck and deliver gasoline and other petroleum products transported by it. On 28 August 1962 the corporate defendant, acting by and through its agent and employee, the defendant Taylor, was making a delivery of gasoline to the premises of plaintiffs.

Plaintiffs' evidence, considered in the light most favorable to them, would permit a jury to find the following facts and draw these reasonable inferences therefrom: In front of plaintiffs' service station were three retail gasoline pumps erected on a concrete island. Some distance from the retail gasoline pumps (the map mentioned in the evidence showing the distances is not before us) plaintiffs had large gasoline wholesale tanks. The total capacity of all tanks on plaintiffs' premises was 22,000 gallons. On 28 August 1962 Taylor drove the corporate defendant's tractor-tank trailer loaded with gasoline to plaintiffs' place of business to deliver to them 7,000 gallons of gasoline. He went in the store and Troy Moore told him, when he hooked up the tank trailer with the storage tank, to watch closely the last compartment of his tank trailer, that it was possible that it would overflow the high-test tank of gasoline. Taylor went out of the store, hooked up the tank

trailer to the storage tanks, and started pumping gasoline. He then came back in the store.

There was an air vent on top of the storage tank to indicate whether or not it was overflowing, and whether it was overflowing or not could only be determined by watching it. The storage tank had no gauge to indicate its contents. There was an electric switch in a box on the pump which pumps the gasoline into the storage tank. This electric switch was about three feet from the gasoline storage tanks, and about eight inches from the ground.

There was a safety device on the front of the tank trailer. When the safety lever of this device is pulled, all flow of gasoline out of the tank trailer is stopped. It takes about two seconds to pull the safety lever. The tank trailer had two signal lights on blinking, when the fire occurred. The custom is that the driver of an oil tanker should be with his tanker watching the lever valves, when he is delivering gasoline, so that if anything goes wrong, he can cut off the flow of gasoline.

Dewey Moore Pannell, one of plaintiffs, arrived at the scene at 7 p.m. At that time the tank trailer was unloading premium gasoline into a storage tank through a three-inch hose which led from the rear of the tank trailer to the storage tank. He saw Taylor in the store. Percy Prince drove up in a car and stopped at a retail pump for gasoline. He went to the retail pump and was putting gasoline in Prince's car. While doing this, he saw gasoline coming out of the air vent on top of the storage tank in which gasoline was being pumped. At that time he did not see Taylor. He went to the electric switch on the pump which pumps gasoline into the storage tank and cut it off, and a fire started. His clothes caught fire. There was no raw gasoline on the ground around the switch at the time he cut it off. Taylor got in his tractor when he saw Pannell on fire, and drove his unit off without disconnecting the hose of the tank trailer leading to the storage tank, and it pulled in two. Gasoline continued to flow from the broken hose on the tank trailer, and it caught fire as it came out. The fire spread from the back of the tank trailer to the gasoline retail pumps, the store, and filling station. A considerable amount of plaintiffs' property was burned or damaged by the fire. Fire followed the tank trailer as Taylor drove it into the road. Taylor stopped his unit, jumped out, and stopped the gasoline from pouring out of the broken hose. Taylor disconnected the tractor and drove it away. The tank trailer was destroyed by fire.

A reasonable inference to be drawn from the evidence is that the gasoline overflowing from the storage tank was ignited by a spark created when Pannell cut off the electric switch on the pump which pumps gasoline in the storage tank.

We take judicial notice that gasoline is a flammable commodity. The basic duty to use ordinary or reasonable care under the circumstances requires a person handling an inherently dangerous instrumentality or commodity, like gasoline, to use care commensurate with the known exceptional danger. *Stegall v. Oil Co.*, 260 N.C. 459, 133 S.E. 2d 138; *Graham v. Gas Co.*, 231 N.C. 680, 58 S.E. 2d 757; *Rea v. Simowitz*, 225 N.C. 575, 35 S.E. 2d 871, 162 A.L.R. 999.

In the 1964 Cumulative Supplement, p. 100, to 24 Am. Jur., Gas and Oil, § 129, it is stated: "Clearly, it is negligence in one delivering fuel oil to overflow the receiving tank through inattention to the amount of fuel being delivered." In support of the text is cited the case of *J. J. Mayou Mfg. Co. v. Consumers Oil & Refining Co.*, 60 Wyo. 75, 146 P. 2d 738, 151 A.L.R. 1243. In this case defendant appealed from a judgment in favor of the plaintiff in an action for damages for the destruction of plaintiff's property by fire alleged to have been caused by defendant's negligence. The judgment was affirmed. The first headnote in this case published in A.L.R. correctly states the holding of the Court, and reads as follows:

> "The evidence is sufficient to support a finding of the jury that a seller's servant was guilty of negligence in delivering oil into the buyer's fuel tank causing the tank to overflow and setting fire to the buyer's plant, where it is shown that the servant, after he had started to pump the oil into the tank, left and went into the building to have the bill of lading receipted, although he did not know how much oil he had in the truck and had been warned not to overflow the fuel tank, and that the fuel tank was located partly over a drier operated at a high temperature, which became ignited when it came in contact with the overflow of the oil."

In its opinion, the Supreme Court of Wyoming said: "The testimony, accordingly, shows that the jury were justified in finding that the fire was caused by reason of the negligent acts of Millhouse in permitting the fuel tank to overflow."

In *Superior Oil Co. v. Richmond,* 172 Miss. 407, 159 So. 850, a judgment against the defendant Oil Company was affirmed. The facts are these: On the occasion in question, the railroad company placed a tank car, containing between seven and eight thousand gallons of gasoline, in the proper place on its spur track, near the storage tanks of the Superior Oil Company. An agent of the Oil Company in charge of its plant connected this tank car with one of its storage tanks by the metal pipe used therefor, for the purpose of transferring the gasoline to the storage tank. He turned the electric current on to the motor, thereby starting the motor, and then left the vicinity of the plant,

leaving no one there to attend to the pumping of the gasoline. While he was away, it was discovered by persons in the vicinity that the storage tank was overflowing, the gasoline running down the tank and on the ground. Stewart, who was at a nearby business plant, became aware of the situation, went to the pump house, and, at least the jury was warranted in so believing, turned the electric current off by means of the switch. Immediately thereafter Stewart was seen to leave the pump house with his clothing in flames, from the effects of which he soon died. Flames immediately appeared from burning gasoline on the transfer pipe and the ground between the pump and the storage tank. The fire chief failed to get the fire under control and called for assistance from bystanders, and went to a plant where Joe Richmond, an employee of the plant, was working, and requested the foreman to have his employees assist in fighting the fire, and the foreman told his employees that they could help. Richmond, while holding one of the hose which was playing water on the storage tank, was killed when it exploded. The Court held that the Oil Company's negligence in permitting the storage tank to overflow was not superseded by the act of a third person who turned off the electric switch connected with the motor that operated the storage pump, thereby producing electric sparks that caused the fire that resulted in Richmond's death, where the turning off of the switch was a normal response to the situation created by the Oil Company's negligence, and there was no proof that it was negligently done. The Court in its opinion said:

> "The ground on which the Superior Oil Company says it was entitled to a directed verdict is that the negligence of its servant in permitting the storage tank to overflow was superseded, and therefore was not a proximate cause of Richmond's death, first, by the intervening act of Stewart in turning off the electric current, and, second, by the act of Richmond himself in unnecessarily and recklessly exposing himself to the danger of the tank's explosion. * * *
>
> "An intervening force which combines with the negligence of another in producing injury to a third person does not necessarily supersede the original act of negligence and become the sole proximate cause of harm produced thereby. Op. cit., 2 Restatement, Torts, § 441; *Cumberland Telephone Co. v. Woodham,* 99 Miss. 318, 54 So. 890. It does not become such a cause if it 'is a normal response to a situation created by the' negligence of another 'and the manner in which it is done is not extraordinarily negligent.' 2 Restatement, Torts, § 447. When the storage tank began to overflow and to discharge gasoline, a highly inflammable substance,

and no employee of the Superior Oil Company was present to stop it, the normal things for another to do, when he saw it, was to stop it himself, and, in doing so, he would be merely discharging a duty resting on the Superior Oil Company. 45 C.J. 933. It does not appear that Stewart was guilty of any negligence in the manner in which he stopped the flow of the gasoline; the turning off and on of an electric switch is a very simple act which any normal person could do. Stewart's act in turning off the electric switch, therefore, did not supersede the negligence of the Superior Oil Company's servant in permitting the storage tank to overflow."

The discussion of the Court as to Richmond's conduct is not relevant here.

In *Nolan v. Haskett,* 186 Ark. 455, 53 S.W. 2d 996, a judgment for damages recovered against appellants for the negligent destruction of appellee's premises by fire was upheld. The Court held that the jury was warranted in finding that negligence of the defendant, who, in delivering gasoline by tank truck to plaintiff's filling station, left the truck unattended and with gasoline flowing therefrom to the underground tank, coupled with the act of a third person in throwing a match near the place, was the proximate cause of the destruction of plaintiff's premises, and was justified in finding that plaintiff was not contributorily negligent in jerking the hose from the intake pipe leading to the underground tank, although thereby gasoline was spread and the fire increased, the fact being that plaintiff was confronted with an emergency and had reason to believe that defendant had reached the truck and had shut off the flow of gasoline.

When Dewey Moore Pannell — one of plaintiffs — saw the storage tank overflowing with gasoline, considering plaintiffs' evidence in the light most favorable to them, he had reasonable grounds to apprehend, considering the very large amount of gasoline in tanks on the premises and in defendants' tank trailer, that there was danger of fire or an explosion from the overflowing gasoline presently threatening plaintiffs' property and the lives of people on the premises. Under such circumstances, his simple act in cutting off the electric switch in a box on the pump pumping gasoline into the storage tank, so as to stop the flow of gasoline therein and to remove the present threat to plaintiffs' property and the lives of persons on the premises, does not constitute contributory negligence as a matter of law, even if it was negligence at all. *McKay v. R. R.,* 160 N.C. 260, 75 S.E. 1081; *Pegram v. R. R.,* 139 N.C. 303, 51 S.E. 975; *Burnett v. R. R.,* 132 N.C. 261, 43 S.E. 797. "[A]ll of the authorities, here and elsewhere, are to the effect that it is

both the right and duty of an owner to make every reasonable endeavor to save his property from destruction, and that in passing upon his conduct full allowance shall be made for the natural impulse prompting the effort and for the emergency under which he acts." *McKay v. R. R., supra.*

The original negligence of one party cannot be insulated by the negligence of another so long as the original negligence plays a substantial and proximate part in the injury or loss, or so long as the intervening act and resultant injury could have been reasonably foreseen and expected by the author of the original negligence. The question of intervening negligence is ordinarily for the determination of the jury. *Davis v. Jessup,* 257 N.C. 215, 125 S.E. 2d 440; *Watters v. Parrish,* 252 N.C. 787, 115 S.E. 2d 1; *Bryant v. Woodlief,* 252 N.C. 488, 114 S.E. 2d 241, 81 A.L.R. 2d 239; *Shepard v. Mfg. Co.,* 251 N.C. 751, 112 S.E. 2d 380; *Henderson v. Powell,* 221 N.C. 239, 19 S.E. 2d 876; *Harton v. Telephone Co.,* 141 N.C. 455, 54 S.E. 299.

A jury could find from the evidence that defendants delivering a large amount of gasoline into a storage tank of plaintiffs were guilty of negligence in permitting the receiving tank to overflow through inattention by the corporate defendant's driver Taylor to the amount of gasoline being delivered therein, that Dewey Moore Pannell saw the overflow of gasoline and cut off the electric switch in a box on the pump pumping gasoline into the overflowing storage tank so as to remove a present threat to plaintiffs' property and to persons on the premises from fire or explosion from the overflowing gasoline, that when the electric switch was cut off a spark was created, which ignited the overflowing gasoline, that in cutting off the electric switch Pannell was not guilty of negligence, and that in doing so his act did not insulate the original negligence of defendants, in that defendants' original negligence played a substantial and proximate part in plaintiffs' damage, and further, in that defendants could have reasonably foreseen and expected under the circumstances Pannell's act and resultant damage to plaintiffs' property.

The judgment of compulsory nonsuit is

Reversed.

JOSEPH C. REYNOLDS AND WIFE, JANE C. REYNOLDS v. B. V. HEDRICK GRAVEL & SAND COMPANY.

(Filed 29 January, 1965.)

1. Mortgages and Deeds of Trust §§ 14, 29—

The trustee, pursuant to foreclosure, can convey only such title as the instrument authorizes, and the fact that the mortgagee bids in the property and assigns the bid does not enlarge the trustee's authorization, there being no merger of the estates in the mortgagee.

2. Deeds § 11—

A deed must be construed to effectuate the intent of the parties as gathered from the entire instrument, and any ambiguity must be resolved in favor of justice and common sense, and no part of the instrument should be rejected unless it is in irreconcilable conflict with the granting, holding, and warranty clauses.

3. Deeds § 14—

There is a distinction between an exception and a reservation in a deed, the legal effect of the language and not the nomenclature used by the parties is determinative.

4. Same; Deeds § 12— Deed held not to convey mineral rights in designated part of tract.

The granting and holding clauses of this deed for 71 acres were in fee simple form, but following the description was a statement that the grantor reserved the mineral rights under some 18 acres of the tract, particularly described therein, with right of access for mining purposes. The warranty was that the title to the land conveyed was free and clear "except as hereinbefore set out." Thereafter the purchaser by *mesne* conveyances negotiated with the grantor for the conveyance of the mineral rights. *Held:* The grantor's claim to the mineral rights is valid, this being in accord with the intent of the parties as gathered from the entire instrument, corroborated by the interpretation the parties themselves placed upon the instrument.

APPEAL by plaintiffs from *Froneberger, J.*, April, 1964 Civil Session, BUNCOMBE Superior Court.

The plaintiffs instituted this civil action, alleging they are the owners in fee of a specifically described tract of land containing 71 acres; that the defendant claims an adverse interest in a part of the described land; that the claim constitutes a cloud upon plaintiffs' title which the court is requested to adjudge invalid and order removed.

The defendant, by answer, admits it claims an interest in 18.2 acres which is specifically described and which is a part of the 71-acre tract claimed by the plaintiffs. In addition to its claim of ownership, the defendant alleges plaintiffs, by their acts and conduct, are estopped to deny the validity of the defendant's claim.

The parties by stipulation agreed to waive a jury trial and that the Judge should hear and decide the entire controversy.

This dispute involves reservations in a deed executed July 5, 1957, by the defendant B. V. Hedrick Gravel & Sand Company, a corporation, to Claude L. Reed and wife, Nell S. Reed. The reservations apply to 18.2 acres described by metes and bounds which constitute a part of the 71 acres, also specifically described by metes and bounds. The granting and holding clauses in the deed are in fee. However, following the description, the deed contains the following:

> "The party of the first part its successors and assigns hereby reserve the perpetual right, easement and privilege of mining, digging, milling, processing and removing all minerals, ores, clays, earths, sand and gravel in, along, under or upon that portion of said tract of land hereinafter described with the right to erect at such locations as it considers wise and expedient, buildings, or structures, and to install therein and thereon such machinery and equipment as may be reasonably necessary, with the right of ingress and egress proper for the full enjoyment and use of the rights hereby reserved. That portion of the above described tract of land hereby conveyed and to which this express reservation applies is shown on the above referred to plat and is more particularly described as follows:

(Specific description by metes and bounds.)

> "The party of the first part shall have the right to change or relocate the presently existing roadbed shown on said plat and running in a Northerly direction from the North margin of Bee Tree Road to the residence formerly occupied by George Howard if such change or relocation is necessary to the mineral or gravel operations hereby contemplated, with the express agreement on the part of the party of the first part that it will lay out and relocate a road or roadbed at another location over and across said gravel lands in order that the parties of the second part shall always have an adequate right of ingress and egress to and from said residence. * * *
>
> "It is understood and agreed that all rights, reservations, covenants and restrictions herein contained shall inure to the benefit of and be binding upon the successors and assigns of the party of the first part and the heirs and assigns of the parties of the second part to the same extent as if they were in all cases named."

The warranty clause in the deed contains the following: "(T)hat the same are free and clear of and from all liens and encumbrances, except as hereinabove set out, . . ."

On July 5, 1957, Claude L. Reed and wife executed a deed of trust to Charles G. Lee, Trustee, to secure to Hedrick Sand & Gravel Company $7,282.40, the balance due on the purchase price for the lands conveyed by the deed. The two documents are a part of a single transaction. The deed of trust contains the same descriptions of the two tracts of land and the same reservations and exceptions as those contained in the deed.

In default of payment the trustee sold the lands as required by the trust. The defendant became the last bidder and purchaser. Thereafter, it assigned its bid to Claude L. Reed and wife, Nell S. Reed, and directed the trustee to execute a deed to the assignees. The trustee's deed did not contain the reservations appearing in the deed and in the deed of trust.

On the same day the trustee executed the deed last above referred to, Claude L. Reed and wife executed a deed of trust to George W. Craig, Trustee, to secure a note for $7,282.40 to Margaret N. Smith. Apparently this amount was paid to B. V. Hedrick Gravel & Sand Company in discharge of the amount due on the original purchase price and constituted the consideration for the assignment of its bid at the trustee's sale. The description in this deed of trust refers to the deed of July 5, 1957, which contained the above recited reservations.

The Reeds having defaulted in the payment of the debt to Margaret N. Smith, the trustee sold the lands under the power of sale and executed a deed to the purchaser, Margaret N. Smith. This deed referred to the deed of July 5, 1957, from B. V. Hedrick Gravel & Sand Company to the Reeds. On June 27, 1961, Margaret Smith and husband executed a deed to the plaintiffs. The deed recites the following: "This conveyance is made subject *for* rights of way for roads, utility lines, and of mineral rights of record." All the documents introduced and offered in evidence had been duly admitted to the Buncombe County Registry. In addition to the records, the defendant offered evidence in support of its defense of estoppel as set out in the answer.

The court made findings of fact (which are sustained by the evidence) and thereon concluded and adjudged:

> "1. That the mineral interests and restrictions in favor of the defendant in that certain tract of land of 18.2 acres described in that certain deed from the defendant to Claude L. Reed and wife Nell S. Reed, dated July 5, 1957, and recorded in the office of the Register of Deeds for Buncombe County in 788 at page 495, are valid and subsisting.

"2. That these mineral interests and restrictions in favor of the defendant are not adverse to the title of the plaintiffs and do not constitute a cloud upon the plaintiffs' title.

"3. That the plaintiffs are estopped to deny the validity of the mineral interests and restrictions of the defendant in said 18.2 acre tract of land."

The plaintiffs excepted and appealed.

Wm. M. Styles for plaintiff appellants.
Lee, Lee & Cogburn by Max O. Cogburn for defendant appellee.

HIGGINS, J. The plaintiffs seek in this action to have the Court declare void the reservations in the defendant's deed to Claude L. Reed and Nell S. Reed executed July 5, 1957, upon the ground the reservations are repugnant to the granting, holding, and warranty clauses of the deed. In the alternative, they claim if the reservations are found to be valid, nevertheless, when the defendant became the last and highest bidder at the trustee's sale, the title thus acquired merged with the interest reserved and the assignment authorized the trustee to convey to the Reeds an unencumbered title which passed by *mesne* conveyances to the plaintiffs.

The defendant contends the intention of the parties is clearly expressed both in its deed to the Reeds and in their deed of trust to the trustee; that the reservations apply to a small part (18.2 acres) of the overall tract and describe the property rights intended by the parties to pass by the deed; that they relate to the *quantum* of the estate embraced in the description, are readily reconcilable with the other clauses of the deed, and are not void for repugnancy. In the alternative, it contends, in any event, plaintiffs are estopped to deny the validity of the reservations by their acts and conduct in that they agreed to purchase the reserved rights and to pay $1,000.00 per acre for a deed of release; that they actually had a deed prepared for the defendant's execution but this deed was not executed and delivered due to failure of the parties to agree upon the time for the payment.

In the view we take of this case we may disregard the alternative contentions of both parties. Mr. Lee, as Trustee, could only convey such title to the Reeds as the trust instrument authorized. The defendant merely assigned its bid. This assignment did not enlarge the trustee's authority. It merely directed to whom he should make the deed. *Military Academy v. Dockery,* 244 N.C. 427, 94 S.E. 2d 354; *Brett v. Davenport,* 151 N.C. 56, 65 S.E. 611. If the reservations are

valid, and we hold they are, the defendant's rights are established by the deed and not by estoppel.

The plaintiffs contend the reservations in the defendant's deed to the Reeds are inconsistent with its more formal and controlling clauses and must give way to them because of the irreconcilable conflict. They cite *McNeill v. Blevins*, 222 N.C. 170, 22 S.E. 2d 268; *McCotter v. Barnes*, 247 N.C. 480, 101 S.E. 2d 330; *Realty Co. v. Hobbs*, 261 N.C. 414, 135 S.E. 2d 30. We add these cases: *Ellis v. Barnes*, 231 N.C. 543, 57 S.E. 2d 772; *Jeffries v. Parker*, 236 N.C. 756, 73 S.E. 2d 783; *Oxendine v. Lewis*, 252 N.C. 669, 114 S.E. 2d 706. Generally stated, the rule is that in order for the Court to hold any part of a deed void for repugnancy, the rejected part must be irreconcilably conflicting with the granting, holding, and warranty clauses. As stated by the present Chief Justice in *Ellis v. Barnes, supra*, the rule is: "In the interpretation of the provisions of a deed, the intention of the grantor must be gathered from the whole instrument and every part thereof given effect, unless it contains conflicting provisions which are irreconcilable, or a provision which is contrary to public policy or runs counter to some rule of law." Citing *Willis v. Trust Co.*, 183 N.C. 267, 111 S.E. 163.

To determine the legal effect of the "reservation" in the defendant's deed to Mr. and Mrs. Reed, we may look to the entire instrument to determine whether the "reservation" was intended as a limitation on the estate granted, or a limitation on and a part of the description of the property conveyed, or a limitation upon the use of the property for the benefit of the grantor. True, the word "reservation" is used, but the meaning of the word may be determined by reference to other provisions of the deed. *Hardison v. Lilley*, 238 N.C. 309, 78 S.E. 2d 111. "While there is a distinction between 'exception' and 'reservation' . . . the terms are often used indiscriminately and frequently what purports to be a reservation has the force and effect of an exception when such appears to be the obvious intention of the parties. . . . The modern tendency of the courts has been to brush aside these fine distinctions and look to the character and effect of the provision itself." *Vance v. Pritchard*, 213 N.C. 552, 197 S.E. 182, citing authorities.

The mutual agreements between the defendant and the Reeds as expressed in the deed and in the deed of trust executed July 5, 1957, leave no room for doubt as to the intent and purpose that the defendant, its successors and assigns, should have the perpetual right to mine, process and remove sand, gravel, etc., from 18.2 acres specifically described within the 71-acre boundary. The condition attached by the parties to the exercise and enjoyment of the right reserved, is that 30 days written notice be given. The plaintiffs not only had record notice

but their own deed from the Smiths was made subject to "all mineral rights of record."

The negotiations between the parties for a deed of release show the interpretation the parties placed upon their respective claims to the mining, sand and gravel rights, etc., reserved in the 18.2 acres described in the defendant's deed. "Such construction of the contracts by the parties is one of the best indications of their intent and meaning . . ." *Trust Co. v. Processing Co.*, 242 N.C. 370, 88 S.E. 2d 233.

We need not now determine whether the reservations in the July 5, 1957, instruments constitute a limitation upon the quantum of the property conveyed as in *Hardison v. Lilley, supra;* a reservation upon the use of land, as in *Barrier v. Randolph,* 260 N.C. 741, 133 S.E. 2d 655; *Realty Co. v. Hobbs,* 261 N.C. 414, 135 S.E. 2d 30; or a valid exception as in *Trust Co. v. Wyatt,* 189 N.C. 107, 126 S.E. 93. The appeal is from a judgment holding the defendant's claim is not invalid and is not a cloud upon the plaintiff's title. The question presented was answered by the trial judge in favor of the defendant by holding the reservations valid.

In upholding the judgment we deem not inappropriate a quotation from *Stephens Co. v. Lisk,* 240 N.C. 289, 82 S.E. 2d 99: "And decisions of this Court uniformly hold that the courts are required to interpret a deed so as to ascertain and effectuate the intention of the parties as gathered from the entire instrument. In *Gudger v. White,* 141 N.C. 507, 54 S.E. 386, the Court, treating the subject of interpreting a deed, in opinion by Walker, J., declared: 'We are required by the settled canon of construction so to interpret it as to ascertain and effectuate the intention of the parties. Their meaning, it is true, must be expressed in the instrument; but it is proper to seek for a rational purpose in the language and provisions of the deed and to construe it consistently with reason and common sense. If there is any doubt entertained as to the real intention, we should reject that interpretation which plainly leads to injustice and adopt that one which conforms more to the presumed meaning, because it does not produce unusual and unjust results. All this is subject, however, to the inflexible rule that the intention must be gathered from the entire instrument "after looking" as the phrase is, "at the four corners of it."' "

To allow the plaintiffs to take from the defendant the mineral, sand, and gravel rights reserved in its deed would permit naked form to control over material substance. Such a decision would not be very good law and would be rather poor morals.

The judgment of the Superior Court is

Affirmed.

JOANNE JACKSON LOFQUIST v. ALLSTATE INSURANCE COMPANY.

(Filed 29 January, 1965.)

1. Insurance § 3—

Statutory requirements become as much a part of a policy of insurance as though expressly written therein.

2. Insurance § 53.2—

By statutory requirement, an operator's policy of liability insurance protects against liability resulting from the insured's operation of any motor vehicle, G.S. 20-279.21(c), while an owner's policy protects the insured and other persons using the insured vehicle with the owner's permission from liability arising out of the use of the vehicle or vehicles designated in the policy only, and whether a policy is an operator's or an owner's liability policy depends upon the intent of the parties as gathered from the language used in the written contract.

3. Insurance § 54—

The policy in suit covered liability of the named insured arising out of the ownership, maintenance and use of "the automobile." The policy prescribed the coverage of the word "automobile" and excluded a motorcycle from coverage. At the time of the issuance of the policy insured owned a motor scooter covered by the policy, but thereafter purchased, in addition to the scooter, a motorcycle which was involved in the collision in question. *Held:* The policy was an owner's and not an operator's liability policy, and the exclusion of the motorcycle from coverage of the policy is valid.

APPEAL by plaintiff from *Olive, J.*, June 15, 1964 Civil Session of ORANGE.

Plaintiff sustained personal injuries on April 24, 1959, when the automobile owned and operated by her collided with a motorcycle owned and operated by John Stephen Daves (hereafter John). John died as a result of injuries sustained in the collision. The liability of his estate, for plaintiff's injuries, and the amount to be paid were established by judgment rendered by the United States District Court for the Middle District of North Carolina in an action instituted by plaintiff against the administrator of John's estate.

Plaintiff brought this action to recover from defendant the amount awarded her by the District Court. To impose liability on defendant, she alleged defendant issued to John a liability insurance policy, as required by G.S. 20-309. Defendant admitted issuing the policy. It denied the policy insured against liability resulting from the operation of the motorcycle involved in the collision with plaintiff's car.

The parties waived a jury trial. Based on stipulations and documentary evidence, the court adjudged defendant not liable to plaintiff.

Haywood, Denny & Miller for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter by Stephen Millikin for defendant appellee.

RODMAN, J. Summarized, the pertinent facts as stipulated and found by the court are: John, son of Dewey L. Daves (hereafter Dewey) was, during the school year 1958-59, a student at State College in Raleigh. He was 19 years of age. Dewey's home was China Grove, R.F.D. John worked in the summer as a truck driver. He used his earnings to supplement funds provided by his father to pay his expenses in attending college.

John, in November 1958, purchased a 1955 Allstate motor scooter from Benny Leazer. Dewey provided the money necessary to make the purchase. The motor scooter was thereafter registered with the Department of Motor Vehicles in Dewey's name, and was so registered when plaintiff was injured. The motor scooter was kept in Raleigh and used by John until his death on April 24, 1959. It was in good condition when sold.

On March 27, 1959, John purchased and took possession of a 1954 BSA 2 cylinder motorcycle. He was riding this motorcycle when he collided with plaintiff's automobile. Defendant was not notified of the purchase of the motorcycle until after the collision. The motorcycle did not replace the motor scooter.

The only motor vehicle to which John could assert claim of ownership, when he purchased the motorcycle, was the motor scooter described in the policy of insurance. Dewey owned a 1952 Buick automobile from December 15, 1957 to April 1963. During all of that period Dewey carried automobile liability insurance on his Buick with American Employers Insurance Company.

On February 16, 1959, John applied to defendant, in his and Dewey's name, for a policy of liability insurance. Based on the application, defendant issued to John and Dewey its policy "in compliance with the North Carolina Financial Responsibility Act." The policy provided protection from 12:01 a.m. February 17, 1959 to 12:01 a.m. February 17, 1960; and obligated defendant "to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury * * * sustained by any person, caused by accident and arising out of the ownership, maintenance or use of *the automobile.*" (Emphasis supplied.)

The application and endorsement constituting a part of the policy defined "the automobile" as a "55 Allstate 1 motor scooter 266799." The word "automobile" is defined in the body of the policy as "(1) Described Automobile—the motor vehicle or trailer described in this policy * * *(4) Newly Acquired Automobile—an automobile, owner-

ship of which is acquired by the named insured * * * if (i) it replaces an automobile * * * covered by this policy, or *the company insures all automobiles owned by the named insured* * * * and (ii) the named insured * * * notifies the company within thirty days following such delivery date * * *." (Emphasis supplied.)

Attached to and made a part of the policy is an endorsement reading: "MOTOR DRIVEN BICYCLES, MOTORIZED SCOOTERS AND SIMILAR TYPES. In consideration of the premium charged, it is agreed that, anything in the policy to the contrary notwithstanding, the word 'automobile' as used in this policy * * * shall be limited to mean the motor vehicle described in the Declarations, or an equivalent motor driven bicycle or motorized scooter but not a motorcycle."

The policy contains these further provisions: "SEVERABILITY OF INTERESTS—COVERAGES A AND B. The term 'the insured' is used severally and not collectively, but the inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.

"TERMS OF POLICY CONFORMED TO STATUTE. Terms of this policy which are in conflict with the statutes of the State wherein this policy is issued are hereby amended to conform to such statutes."

Plaintiff asserts liability on this theory: The motorcycle was a newly acquired automobile, and since protection was accorded John and Dewey, severally and not jointly, each was entitled to the benefits of the provision relating to a newly acquired motor vehicle. The motor scooter was the only motor vehicle owned by John. It was insured by defendant. These facts, by express policy language, accorded John protection for thirty days from the date he purchased the motorcycle.

Whether there is merit in this contention depends on the validity of the endorsement excluding motorcycles from the policy provisions. The validity of the endorsement depends on the kind of policy issued to John. Was it an owner's policy, or was it an operator's policy? Either may be purchased, G.S. 20-279.21(a). If an owner's policy, defendant was not required to provide automatic insurance for a newly acquired motor vehicle. It had the privilege of inserting such a provision, and could limit the privilege to particular types or kinds of motor vehicles. It was required to "designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted." G.S. 20-279.21(b)(1). The endorsement excluding motorcycles was a proper exercise of insurer's right in an owner's policy.

An operator's policy, unlike an owner's policy, requires the company to "insure the person named as insured therein against loss from the liability imposed upon him by law for damages arising out of the use by him of any motor vehicle not owned by him, *and within thirty (30)*

*days following the date of its delivery to him of any motor vehicle owned by him * * *.*" G.S. 20-279.21(c). (Emphasis supplied.)

This statutory requirement for automatic insurance for thirty days for a motor vehicle acquired by an "operator" is as much a part of the policy as if expressly written therein. *Crisp v. Insurance Co.*, 256 N.C. 408, 124 S.E. 2d 149; *Nixon v. Insurance Co.*, 255 N.C. 106, 120 S.E. 2d 430.

Whether the policy insured John as an owner or as an operator depends on the intent of the parties. That intent must be ascertained from the language used in the written contract. *Hawley v. Insurance Co.*, 257 N.C. 381, 126 S.E. 2d 161; *Richardson v. Insurance Co.*, 254 N.C. 711, 119 S.E. 2d 871; *Rivers v. Insurance Co.*, 245 N.C. 461, 96 S.E. 2d 431.

The difference between an owner's policy and an operator's policy is this: An owner's policy protects the owner, as the named insured; it also protects any other person using the insured vehicle, with the owner's permission, G.S. 20-279.21(b)(2). It does not protect against liability resulting from the use of a motor vehicle not described in the policy. An operator's policy, on the other hand, protects the named insured against liability arising from the use of *any* motor vehicle. The policy on which plaintiff bases her right to recover is, by its terms, an owner's—not an operator's policy. It did not protect either of the named insured against liability arising from the use of a motorcycle. *Ransom v. Casualty Co.*, 250 N.C. 60, 108 S.E. 2d 22; *Miller v. Casualty Co.*, 245 N.C. 526, 96 S.E. 2d 860; *Howell v. Indemnity Co.*, 237 N.C. 227, *supra; Robinson v. Georgia Casualty and Surety Company*, 110 S.E. 2d 255.

Affirmed.

LEWIS C. LAWRENCE v. G. L. STROUPE.

(Filed 29 January, 1965.)

1. Landlord and Tenant § 8—

Evidence that lessee subleased for the unexpired portion of the term of one year, for which lessee had paid the rent, and that sublessee paid the lessee therefor an amount equal to one-half of the yearly rental, with further evidence that lessor knew of the sublease prior to the time of renting to a third party, who took possession, *held* sufficient to make out a *prima facie* case in the sublessee's action against the lessor, but the sublessee is entitled to only nominal damages in the absence of evidence fixing the amount of damages with any degree of certainty.

2. Landlord and Tenant § 2—

Plaintiff's evidence to the effect that his agreement with the owner of property to lease it at the expiration of the current yearly term was made subject to the condition that plaintiff could obtain an assignment from the lessee for the unexpired portion of that term, and that plaintiff did not notify the owner that he had been successful in obtaining the assignment until the owner was in the act of leasing it to a stranger, and that plaintiff did not tender any rent until some three months after plaintiff knew of the lease to the stranger, *held* insufficient to establish a lease contract.

3. Damages § 14—

In an action for breach of contract to lease land for grazing cattle, plaintiff's evidence that he purchased 80 head of cattle intending to graze them on the land, but that he did not know what he paid for the cattle and did not know what he sold them for, but that he had lost money, is insufficient predicate for an award of more than nominal damages, the burden being upon plaintiff to establish the amount of damages with reasonable certainty.

APPEAL by plaintiff from *Bickett, J.*, February Civil Session 1964 of LEE.

This is a civil action to recover damages for the alleged wrongful eviction of plaintiff from land allegedly subleased by plaintiff from defendant's lessee, in which the plaintiff alleges two causes of action: (1) That by preventing his entry on the land during the period from October 1961 to 1 May 1962, he was damaged in the sum of $1,000.00; and (2) that his negotiations with the defendant, beginning on or about 15 September 1961, resulted in a lease on the land involved from 1 May 1962 until 1 October 1963, and when defendant leased the premises to another party, he was damaged in the sum of $2,500.00.

On 22 April 1950, G. L. Stroupe, defendant, leased for a period of eight years a tract of land on U. S. 421 to L. P. Wilkins for an agreed rental of $100.00 per year, payable in advance. Wilkins leased the land for the purpose of grazing cattle thereon.

In addition to the agreement to pay the stipulated rental, Wilkins agreed to fertilize and seed the land, keep the weeds cut, build the necessary fences, and keep the property in a good state of repair.

When the original term of the lease expired in 1958, Wilkins and defendant renewed the lease on an annual basis with the same terms applicable with respect to fertilization, seeding, repair of fences, *et cetera*, but the yearly rental was increased to $400.00.

On 12 May 1961, the rental was paid which would have extended the lease period from 1 May 1961 to 1 May 1962. About 1 October 1961, Wilkins removed his cattle from the leased premises and did not return to the premises at any time subsequent thereto. During October 1961, Lewis C. Lawrence, plaintiff, agreed to sublease Mr. Wilkins' un-

expired term for the Stroupe land. Plaintiff gave Wilkins a check for $200.00 on 28 December 1961 for the sublease, but plaintiff did not put any cattle on the land at any time, nor did he make any attempt to fertilize the land or keep the land and fences in a state of good repair. Plaintiff testified that it was not until 28 February 1962 that he wanted to put his cattle on the defendant's premises.

The evidence tends to show that the plaintiff approached the defendant in September 1961, as the defendant entered the intersection of Endor and Wicker Streets in Sanford in his car, and undertook to discuss the subject of a lease while defendant was holding up traffic. No conclusion whatever was reached, and the defendant drove off. The next week, the plaintiff ran into the defendant again on Wicker Street in Sanford and inquired of the defendant as to what he had decided to do. The defendant replied, "I'd just as soon rent it to you, Lawrence, as anybody." The plaintiff then stated, "* * * I don't want it under a lease like L. P. has got it, * * * I want it from the first of May until the first of October 1963 * * *. * * * (I)f I can't rent it from you, I don't want L. P.'s — if I can get the two I will be glad to rent it." The reply of defendant, according to the testimony of plaintiff, was, "If you are going to get it from L. P., I will rent it to you for $400.00 or $600.00 to the first of October '63." The plaintiff said, "All right," and then defendant walked away, and plaintiff hollered, "Mr. Stroupe, when do you want your money?" Mr. Stroupe is purported to have said, "Any time." Plaintiff then never saw or contacted the defendant again for several months, in fact, not until the property had been leased to another party. The evidence further tends to show that at the time Lawrence and Stroupe were having their negotiations, the plaintiff had not contracted with Wilkins for the unexpired term under the lease.

In the meantime, in January 1962, the defendant and Paul Pope went to the office of L. P. Wilkins, the original lessee, and the defendant informed Mr. Wilkins that he had abandoned his lease; then for the first time, Mr. Wilkins informed the defendant that he had assigned his lease to Mr. Lawrence, the plaintiff. Defendant informed Mr. Wilkins that he had not leased the land to Mr. Lawrence.

The defendant leased the land in January 1962 to Paul Pope, who took possession, placed cattle on the premises, and put locks on the gates to the pasture.

The plaintiff testified that he bought 80 head of cattle for the purpose of putting them to pasture on the leased land. According to the lease, the premises consisted of approximately one hundred acres, and with respect to the cost of the cattle placed thereon and the losses sustained, the cost of complying with the terms of the lease with respect to cutting the weeds, seeding and fertilizing the pasture land, the plain-

tiff testified as follows: "I do not know how much I paid for that herd of 80 cattle, but they averaged around $100.00 a head. * * * I do not know what I paid for them. * * * I do not know what I sold them for. * * * I sold them myself. I don't know who I sold them to * * * I do not know what he paid me for them * * * I know I lost money."

In connection with the other requirements of the lease, the plaintiff testified, "From the standpoint of time, machinery and labor costs, the expense of mowing this pasture to cut down the grass and weeds would be anywhere from a hundred to a hundred and fifty dollars. The costs of fertilizing this pasture with the equipment I had and the fertilizer that I had available, would be about $12.00 to $15.00 per acre." None of this expense was incurred by the plaintiff.

At the close of plaintiff's evidence, the defendant moved for judgment as of nonsuit as to each cause of action. The motion was allowed.

From the judgment entered, the plaintiff appeals, assigning error.

Hoyle & Hoyle for plaintiff appellant.
Gavin, Jackson & Williams for defendant appellee.

DENNY, C.J. It is clear from the evidence on this record that the defendant received and accepted from L. P. Wilkins the full amount of the agreed rental for the year beginning 1 May 1961 to 1 May 1962, in the sum of $400.00. It is likewise clear that in January 1962, before the defendant leased the premises to Paul Pope on 19 January 1962, L. P. Wilkins informed the defendant that he had assigned his lease for the unexpired period from October 1961 to 1 May 1962 to the plaintiff, Lewis C. Lawrence.

At the trial below, the plaintiff offered evidence to the effect that he paid L. P. Wilkins the sum of $200.00 for the unexpired portion of his lease. We think this was sufficient to make out a *prima facie* case on the first cause of action. *Pappas v. Crist*, 223 N.C. 265, 25 S.E. 2d 850. However, the evidence with respect to damages is so vague and uncertain that plaintiff is not entitled to recover more than nominal damages. Furthermore, the defendant testified that he did not desire to occupy the premises prior to 28 February 1962. At that time only sixty days were left under the terms of the assigned lease.

As to the second cause of action, in our opinion the evidence is not sufficient to establish a contract between the parties with respect to the premises involved for the period beginning 1 May 1962 to 1 October 1963. The plaintiff made it plain to the defendant that he did not want a contract for the later period unless he could obtain the property for the unexpired term held by the lessee L. P. Wilkins; and it is equally clear that he had no contract with Wilkins at any time during

the negotiations between the parties in September 1961. *Richardson v. Storage Co.*, 223 N.C. 344, 26 S.E. 2d 897, 149 A.L.R. 201.

The plaintiff never notified the defendant that he had been successful in obtaining an assignment of the unexpired portion of the lease from Wilkins; defendant first learned from Wilkins in January 1962 that he had made such an assignment. This was more than four months after the last conversation between the plaintiff and the defendant in September 1961. Furthermore, the plaintiff never tendered the rent which he alleged was agreed upon in September 1961, until 17 April 1962, which was 48 days after the alleged breach and nearly three months after plaintiff knew the defendant had leased the premises to Paul Pope. Moreover, if it should be conceded that there was a contract for the extended term, the plaintiff's evidence is insufficient to support a recovery of damages in any substantial amount.

"In an action for damages for a breach of contract, in the absence of some standard fixed by the parties when they made their contract, or otherwise, the law will not permit mere profits, depending upon the chances of business and other contingent circumstances, and which are perhaps merely fanciful, to be considered by the jury as a part of the compensation." *Sprout v. Ward*, 181 N.C. 372, 107 S.E. 214; *Hardware Co. v. Buggy Co.*, 167 N.C. 423, 83 S.E. 557; *Machine Co. v. Tobacco Co.*, 144 N.C. 421, 57 S.E. 148.

Even so, in our opinion, the ruling of the court below with respect to the second cause of action should be affirmed, and it is so ordered.

The judgment as of nonsuit on the first cause of action is reversed. On the second cause of action the judgment as of nonsuit is affirmed.

Reversed as to first cause of action.

Affirmed as to second cause of action.

STATE HIGHWAY COMMISSION v. RALEIGH FARMERS MARKET, INC., RALEIGH SAVINGS & LOAN ASSOCIATION, AND L. N. WEST AND WIFE, BETSEY JOHN H. WEST.

(Filed 29 January, 1965.)

1. Eminent Domain § 7a—

Controversy between the parties whether upon the facts of the particular case the limitation of access to a highway constituted a "taking" for which compensation must be paid presents a question of law and of fact for the court. G.S. 136-108.

2. Eminent Domain § 2—

A property owner has a right to reasonable access to a public highway which abuts his land and such right of access cannot be taken from him without compensation, nevertheless such right of access must be exercised with due regard for the safety of others, G.S. 20-156(a), and if the abutting owner is afforded reasonable access he is not entitled to compensation merely because the limitation of access necessitates circuity of travel to reach a particular destination.

3. Same—

Defendants' land was, for practical purposes divided into two tracts by a railroad spur track. The construction of a limited access highway to the north of the land did not affect the access to the highway from the southern part, but as to the northern part access to the highway could be obtained only by the construction of a road some three thousand feet in length. *Held:* The construction of the limited access road substantially reduced access from the northern portion to a public way and constituted a "taking" for which compensation should be paid.

APPEAL by defendant, Raleigh Farmers Market, Inc., from *Martin*, S.J., July 27, 1964 Civil Session of WAKE.

Plaintiff instituted this action in May 1961 for the purpose of acquiring property rights necessary for the construction of a controlled access highway—a portion of the Belt Line around Raleigh. The portion of the Belt Line here involved was completed prior to July 1964.

Prior to the construction of the Belt Line, Raleigh Farmers Market, Inc. (Farmers) owned an area containing 79 acres. It had, to use the language of counsel for appellee, the appearance of a reversed L.

Race Track Road, a public highway 60 feet in width, began in U. S. 1-A. It ran eastwardly approximately 2000 feet, then turned northwardly and led to the race track, private property, where the road terminated. A portion of Farmers northern boundary, from Farmers northwest corner to the turn going to the race track, was Race Track Road. This distance is approximately 1050 feet. The remaining portion of the northern boundary of Farmers property, approximately 950 feet, is the southern line of another property owner. The right of way of Seaboard Air Line Railroad is the eastern boundary of Farmers land, and Crabtree Creek is the southern boundary. U. S. 1-A and the eastern line of other property owners constitutes Farmers western boundary. The distance from Farmers southwest corner, the junction of Crabtree Creek and U. S. 1-A, to the southwest corner of Sunshine Biscuit, Inc. is 1383 feet. The distance along U. S. 1-A from Sunshine's southwest corner to the former junction of Race Track Road and U. S. 1-A is approximately 2050 feet.

Plaintiff took complete control over .192 acres at the northwest corner of Farmers property. Plaintiff concedes its obligation to pay compensation, as prescribed by G.S. 136-112(2), for this small area.

The controlled access road (Belt Line) covers all of what was Race Track Road to a point approximately 700 feet east of Farmers northwest corner, and all of said road north of Farmers northern boundary. Property owners abutting the south side of Race Track Road are now deprived of the right to reach U. S. 1-A, or the race track, as they had the right to do prior to the construction of the Belt Line.

The parties disagreed with respect to Farmers right to compensation because prevented from using Race Track Road. To resolve this question, they requested the court to settle the issues, as prescribed by G.S. 136-108.

The court directed the appointment of commissioners to fix the damages resulting from the appropriation of the .192 acres; and adjudged "that the appropriation or control of abutters' access is non-compensable in that defendants have reasonable access to their said property and they are entitled to recover no damages for any loss of access."

Manning, Fulton & Skinner and Jack P. Gulley for defendant appellant.

Attorney General Bruton, Assistant Attorney General Lewis, Trial Attorney Rosser; Young, Moore & Henderson by Associate Counsel J. Allen Adams.

RODMAN, J. Plaintiff does not challenge, as premature, the appeal from the order purporting to settle the issues. Each party offered evidence to support its position on the question of compensation because of the closing of Race Track Road. In substance, the action of the parties amounted to a waiver of a jury trial, and the order was equivalent to a nonsuit with respect to Farmers prayer for affirmative relief.

Since the question we are asked to answer must ultimately be presented, and is in such form that an answer may be helpful to plaintiff in the performance of its duties in laying out other roads, we do not, *sua sponte*, question the right to an immediate appeal.

The language used by the court in denying compensation for the termination of Farmers right of access to a highway constituting a boundary of its property, and the argument advanced by plaintiff to support the court's conclusion, evidences, we think, a misapprehension of the scope and effect of recent decisions by this Court.

Repeated decisions by this Court have established the right of a property owner to reasonable access to a public highway which abuts his land. That is a property right which cannot be taken without compensating the owner. *Snow v. Highway Commission,* 262 N.C. 169, 136 S.E. 2d 678; *Moses v. Highway Commission,* 261 N.C. 316, 134 S.E. 2d 664; *Abdalla v. Highway Commission,* 261 N.C. 114, 134 S.E. 2d 81;

Williams v. Highway Commission, 252 N.C. 772, 114 S.E. 2d 782; *Hedrick v. Graham,* 245 N.C. 249, 96 S.E. 2d 129; *Sanders v. Smithfield,* 221 N.C. 166, 19 S.E. 2d 630; *Long v. Melton,* 218 N.C. 94, 10 S.E. 2d 699; *Glenn v. Board of Education,* 210 N.C. 525, 187 S.E. 781; *Crawford v. Marion,* 154 N.C. 73, 69 S.E. 763; *White v. R. R.,* 113 N.C. 611, 18 S.E. 330.

The property owner's right of access should not be confused with the right of the sovereign, in the interest of public safety, to regulate the flow of traffic and the manner of access. Illustrative of the power of the sovereign, for these purposes, are statutes prescribing the side of the road the traveler must use, G.S. 20-146; permissible speed, G.S. 20-141; size of vehicles and equipment they must have, G.S. 20-116, 122, 124, 129; limiting travel on parts of a highway to a particular direction, G.S. 20-165.1.

While the abutting owner has a right of access, the manner in which that right may be exercised is not unlimited. It must be exercised with due regard to the safety of others who have an equal right to use the highway, G.S. 20-156(a). To protect others who may be using the highway, the sovereign may restrict the right of entrance to reasonable and proper points. *Snow v. Highway Commission, supra; Moses v. Highway Commission, supra; Abdalla v. Highway Commission, supra; Barnes v. Highway Commission,* 257 N.C. 507, 126 S.E. 2d 732.

If the abutting owner is afforded reasonable access, he is not entitled to compensation merely because of circuity of travel to reach a particular destination. *Snow v. Highway Commission, supra; Moses v. Highway Commission, supra; Barnes v. Highway Commission, supra.*

The rules enunciated by this Court to measure the rights of property owners, when the Highway Commission acts to promote safe and expeditious travel, accord, we think, with conclusions reached by a substantial majority of the courts in other jurisdictions, concurring opinion of Currie, J., in *Nick v. State Highway Commission,* 109 N.W. 2d 71; *Warren v. Iowa State Highway Commission,* 93 N.W. 2d 60; *Tift County v. Smith,* 131 S.E. 2d 527; Petition of Burnquist, 19 N.W. 2d 394; *Nichols v. Commonwealth,* 121 N.E. 2d 56; *In Re Appropriation of Easement for Highway Pur.,* 112 N.E. 2d 411.

Plaintiff contends it should not be required to pay for the denial of access to Race Track Road, since the only purpose of that road was to furnish Farmers and other abutting owners access to U. S. 1-A, an access presently existing. To support this contention, plaintiff cites *Smith v. Gagliardi,* 148 N.Y.S. 2d 758, where it is said: "The rule, to which the courts of this state are committed, is that, where private property has means of access by way of two public streets or highways, the state or local authorities, having jurisdiction, may close or do away

with one of them without compensation to the landowner provided the other furnishes him with suitable means of access to his property."

The rule as there stated may, because of the requirement of *suitable access,* produce the same result as the rule stated in *Snow v. Highway Commission, supra.* Here, it is, we think, apparent that Farmers access to U. S. 1-A has been substantially diminished. True, the southern portion of the tract has the same access as it had prior to the construction of the Belt Line; but that is not true as to the northern portion.

Farmers was, prior to the construction of the Belt Line, obligated to build a spur track from the Seaboard Air Line Railroad to the property east of U. S. 1-A, and north of Farmers property fronting on that road. This spur, for practical purposes, divides the 79 acre tract into two parcels, one south, the other north of the spur. The southern portion, which fronts on U. S. 1-A, has not been affected by the construction of the Belt Line, but the northern portion, which formerly had access to U. S. 1-A by means of the Race Track Road, can now reach U. S. 1-A only by the construction of a road 3000 feet or more in length. The construction of such a road, by reason of the terrain, will be very expensive. The closing of the Race Track Road has substantially reduced the access heretofore enjoyed by Farmers. Farmers is entitled to compensation for the property rights taken.

The Legislature, recognizing the constitutional right of a property owner to compensation when his right of access has been taken, said: "When an existing street or highway shall be designated as and included within a controlled-access facility the owners of land abutting such existing street or highway shall be entitled to compensation for the taking of or injury to their easements of access." G.S. 136-89.53.

Reversed.

CHRISTELLE LEE TREMBLAY, NELLIE KATHERINE LEE McGILL, LOUIS L. LEE, DOROTHY LEE CRIGGER, JESSIE B. LEE AND ILA PEARL LEE JOYCE, PLAINTIFFS v. CHARLES B. AYCOCK, JR., AND WIFE, CLETA BAYLES AYCOCK, AND RACHEL AYCOCK WHITE AND HUSBAND, C. HOWARD WHITE, DEFENDANTS.

(Filed 29 January, 1965.)

1. Deeds § 13—

A conveyance to a named person and the heirs of his body creates an estate tail, converted into a fee simple by statute. G.S. 41-1.

2. Same—

Where the granting and habendum clauses are sufficient in form to convey the fee simple, provision warranting the title to the said grantee and the heirs of his body, "if any," does not affect the character of the estate when there is no limitation over.

3. Same—

Where the grantee has no children at the time of the conveyance, a deed to him and his children creates a fee tail, converted into a fee simple by the statute. G.S. 41-1.

4. Deeds § 12—

The granting, habendum and warranty clauses in the deed were sufficient in form to convey the fee simple. Following the description and preceding the habendum the instrument expressed the intent to convey a life estate to the grantor and at his death a fee simple to "the heirs of his body if any, and in the event he has no heirs of his body" to others. *Held:* If the provisions following the description be interpreted as a limitation on the fee simple they must be treated as surplusage and without effect as being repugnant to the conveyance of the fee simple estate.

RODMAN AND HIGGINS, JJ., dissent.

APPEAL by plaintiffs from *Bickett, J.*, April 1964 Civil Session of HARNETT.

This is an action for land.

On 5 January 1921 C. E. Lee conveyed to Lemon Lee by deed of bargain and sale, recorded in Book 197 at page 115, Registry of Harnett County, a one-third undivided interest in three tracts of land, containing 100 acres, 28 4/5 acres and 5 acres, respectively. Only the one-third interest in the 100-acre tract is involved in this action, and this 100-acre tract has apparently been divided and the one-third herein involved has been set off as a 34-acre tract.

The following provisions of the deed are pertinent.

(1). Naming clause — ". . . to Lemon Lee and the heirs of his body . . ."

(2). Granting clause — ". . . to said Lemon Lee and the heirs of his body . . ."

(3). *Habendum* clause — ". . . to the said Lemon Lee and the heirs of his body to their only use and behoof forever."

(4). Warranty clause — ". . . with said Lemon Lee and the heirs of his body, if any . . ."

(5). Following the description and preceding the *habendum* clause — "The intent and purpose of this deed is to convey to Lemon Lee a life estate in 1/3 of the described lands in this deed, and at his death a fee simple estate to the heirs of his body if any, and in the event he

has no heirs of his body in that event then to be equally divided among his brothers."

At the time of the execution of the above deed on 5 January 1921 Lemon Lee was unmarried and had no children; he had two living brothers. In 1924 he married Maude Pollard and one child was born to this union. Maude Pollard Lee died in 1929, and Lemon Lee thereafter married Viola Parrish who bore him five children. The six children of Lemon Lee are the plaintiffs in this action. Lemon Lee died in 1959.

Defendant Rachel Aycock White is in possession of the *locus in quo* and claims title thereto by *mesne* conveyances from Lemon Lee and wife, Viola Lee. The instruments in Mrs. White's chain of title are sufficient to vest in her a fee simple title unless plaintiffs, by virtue of the provisions of the deed from C. E. Lee to Lemon Lee, have a superior title. At the time of the trial Mrs. White was the only defendant "having a real interest in this cause." (She is hereafter the defendant.)

The cause was heard by the court below upon an agreed statement of facts, and judgment was entered declaring "that the defendant Rachel A. (Aycock) White is the owner of the . . . lands in fee." Plaintiffs appeal.

McLeod and McLeod for plaintiffs.

James M. Johnson, Bryan & Bryan and D. K. Stewart for defendants.

MOORE, J. Determination of the ownership of the *locus in quo* requires interpretation of the provisions of the deed of 5 January 1921 from C. E. Lee to Lemon Lee.

We pass over, for the present, the paragraph immediately following the description. According to the naming, granting and *habendum* clauses the conveyance was "to Lemon Lee and the heirs of his body." This provision, standing alone, vested in Lemon Lee an estate tail, which was converted to a fee simple by statute, G.S. 41-1. *Pittman v. Stanley,* 231 N.C. 327, 56 S.E. 2d 657; *Bank v. Snow,* 221 N.C. 14, 18 S.E. 2d 711; *Whitley v. Arenson,* 219 N.C. 121, 12 S.E. 2d 906; *Bank v. Dortch,* 186 N.C. 510, 120 S.E. 60; *Parrish v. Hodge,* 178 N.C. 133, 100 S.E. 256; *Byrd v. Byrd,* 176 N.C. 113, 96 S.E. 729; *Blake v. Shields,* 172 N.C. 628, 90 S.E. 764; *Revis v. Murphy,* 172 N.C. 579, 90 S.E. 573; *Patterson v. Patterson,* 2 N.C. 163. The covenants of warranty are "with Lemon Lee and the heirs of his body, if any." The words, "if any," do not affect the character of the estate, since there is no limitation over. *Glover v. Glover,* 224 N.C. 152, 29 S.E. 2d 350.

Lemon Lee had no children at the time of the conveyance, and if the words "heirs of his body," as used in the naming, granting, *ha-*

bendum and warranty clauses, could be construed to mean "children," the estate of Lemon Lee would still have been a fee simple. "It is settled law with us that when a conveyance is made to A and his children, if A has children when the deed is executed, he and they take as tenants in common. *Cullens v. Cullens,* 161 N.C. 344, 77 S.E. 228, L.R.A. 1917B, 74. But if A has no children when the deed is executed, he takes an estate tail which, under our statute, is converted into a fee. G.S. 41-1; *Cole v. Thornton,* 180 N.C. 90, 104 S.E. 74; *Boyd v. Campbell, supra* (192 N.C. 398, 135 S.E. 121)." *Davis v. Brown,* 241 N.C. 116, 84 S.E. 2d 334. However, we have found no case, in which the conveyance is merely to A and the heirs of his body, and A has children at the time, that "heirs of the body" has been construed to mean "children." See *Bank v. Snow, supra; Revis v. Murphy, supra.*

This brings us to a consideration of the provisions of the deed set out following the description and preceding the *habendum* clause: "The intent and purpose of this deed is to convey to Lemon Lee a life estate in 1/3 of the described lands in this deed, and at his death a fee simple estate to the heirs of his body if any, and in the event he has no heirs of his body in that event then to be equally divided among his brothers." Plaintiffs insist and contend that this language should be given effect, the words "heirs of his body" in this connection are not used in a technical sense, they mean "children," Lemon Lee acquired only a life estate, and plaintiffs having survived him acquired the remainder in fee. They cite *Whitson v. Barnett,* 237 N.C. 483, 75 S.E. 2d 391; *Gurganus v. Bullock,* 210 N.C. 670, 188 S.E. 85; *Lee v. Barefoot,* 196 N.C. 107, 144 S.E. 547; *Williams v. Sasser,* 191 N.C. 453, 132 S.E. 278; *Wallace v. Wallace,* 181 N.C. 158, 106 S.E. 501. On the other hand, the defendant contends that said provisions following the description are repugnant to the estate created by the granting and *habendum* clauses and are surplusage and of no effect. She also contends that, if these provisions are given effect, Lemon Lee took a defeasible fee, and, issue having survived him, the fee became absolute and she is the owner. On the question of interpretation of these provisions she cites *Turpin v. Jarrett,* 226 N.C. 135, 37 S.E. 2d 124; *Paul v. Paul,* 199 N.C. 522, 154 S.E. 825; *Walker v. Butner,* 187 N.C. 535, 122 S.E. 301; *Willis v. Trust Co.,* 183 N.C. 267, 111 S.E. 163; *Reid v. Neal,* 182 N.C. 192, 108 S.E. 769; *Smith v. Parks,* 176 N.C. 406, 97 S.E. 209; *Morrisett v. Stevens,* 136 N.C. 160, 48 S.E. 661; *Whitfield v. Garris,* 131 N.C. 148, 42 S.E. 568.

An interpretation of the language of the paragraph following the description is not necessary to a determination of the question involved. "When the granting clause in a deed to real property conveys an unqualified fee and the *habendum* contains no limitation on the fee thus

conveyed and the fee simple title is warranted in the covenants of title, any additional clause or provision repugnant thereto and not by reference made a part thereof, inserted in the instrument as a part of, or following the description of the property conveyed, or elsewhere other than in the granting or *habendum* clause, which tends to delimit the estate thus conveyed, will be deemed mere surplusage without force or effect." *Jeffries v. Parker,* 236 N.C. 756, 757-8, 73 S.E. 2d 783; *Kennedy v. Kennedy,* 236 N.C. 419, 72 S.E. 2d 869; *Edwards v. Butler,* 244 N.C. 205, 92 S.E. 2d 922; *Oxendine v. Lewis,* 252 N.C. 669, 114 S.E. 2d 706. The granting and *habendum* clauses vested in Lemon Lee an unqualified fee, and the fee simple title is warranted. If plaintiffs' construction of the language following the description is correct, it is repugnant to the fee simple estate of Lemon Lee and tends to delimit it. That language is not by reference made a part of the granting, *habendum* or warranty clause. It is, therefore, surplusage without force or effect, if plaintiffs' interpretation of the provisions is correct. If defendant's interpretation is correct Lemon Lee had a fee simple title in any event. When rules of construction have been settled they should be observed and enforced. *Davis v. Brown, supra.*

To the extent that *Lee v. Barefoot, supra,* is in conflict with this opinion, it is overruled.

Affirmed.

RODMAN AND HIGGINS, JJ., dissent.

LENOIR MEMORIAL HOSPITAL INCORPORATED v. WILLIAM EARL STANCIL AND GUARANTY SECURITY INSURANCE COMPANY, A CORPORATION.

(Filed 29 January, 1965.)

1. Insurance § 64—

Pursuant to its liability policy obligating it to pay medical expenses to or for the person injured, insurer issued its check for hospital expenses payable jointly to the injured party and the hospital. The drawee bank cashed the check upon endorsement of the injured party alone and the injured party failed to pay the hospital. *Held:* There was no contractual relation between insurer and the hospital, and under the terms of the policy insurer's liability was discharged by the payment to the injured party.

2. Waiver § 2—

Waiver is the intentional surrender of a known right or privilege and, as distinguished from estoppel, does not require misleading and does require consideration unless the waiver involves merely a formal right or privilege.

3. Estoppel § 4—

An estoppel always involves a prejudicial misleading.

4. Same; Waiver § 2—

Insurer, pursuant to its liability policy, issued its check payable jointly to the injured party and the hospital. The drawee bank paid the check with the sole endorsement of the injured party. *Held:* The fact that the insurer made its check jointly payable does not render insurer liable to the hospital upon the theory either of waiver or of estoppel, there being no consideration to support a waiver, and the hospital not having been misled to its prejudice, the latter constituting an essential element of estoppel.

APPEAL by defendant Guaranty Security Insurance Company from *Fountain, J.,* April 1964 Session of LENOIR.

Plaintiff instituted this action to recover the sum of $741.71 for hospital services rendered defendant Stancil. The case was tried as a small-claims action by the judge without a jury. The material facts are not in dispute.

Defendant Stancil sustained certain personal injuries on January 14, 1961, while riding as a passenger in an automobile operated by M. B. Randolph, to whom defendant Guaranty Security Insurance Company (Insurer) had issued a policy of automobile liability insurance containing a medical-payments clause. Stancil was a patient in plaintiff's hospital for eleven days and thereby became indebted to plaintiff in the sum of $741.71.

Under Part II, Coverage C, of its policy (Medical Payments), as applicable to this case, Insurer agreed to pay *to or for any person,* who sustained bodily injury caused by accident while occupying the Randolph automobile when it was being used by the named insured, all reasonable hospital bills incurred within one year from the date of the accident. With reference to these payments, the policy provides:

> "As soon as practicable the injured person or someone on his behalf shall give to the company written proof of claim, under oath if required, and shall, after each request from the company, execute authorization to enable the company to obtain medical reports and copies of records. The injured person shall submit to physical examination by physicians selected by the company when and as often as the company may reasonably require.
>
> "The company may pay the injured person or any person or organization rendering the services and such payment shall reduce the amount payable hereunder for such injury. Payment hereunder shall not constitute an admission of liability of any person or, except hereunder, of the company."

On July 17, 1961, Insurer issued its draft in the amount of $741.71 payable to both plaintiff hospital and defendant Stancil. Insurer mailed the draft to Stancil, who was then in prison. Stancil endorsed and deposited it without plaintiff's endorsement. Printed on the back of the draft was this notation: "This draft must be endorsed by all payees and exactly as drawn. This draft constitutes settlement in full of the claim or account described on the face hereof and the payees by endorsement below accept it as such"; notwithstanding, First National Bank of Minneapolis, Minnesota, Insurer's drawee, paid the draft. Stancil ultimately received the proceeds; and, immediately upon his release from prison, he spent them without paying plaintiff for the hospital services it had rendered him. Plaintiff never saw the draft and had no opportunity to endorse it. The only dealings which the adjuster representing Insurer ever had with plaintiff were by mail. He had written plaintiff to request its bill, which it sent.

When Insurer refused to pay Stancil's bill, plaintiff instituted this action. Upon the trial the judge found facts substantially as stated above, overruled Insurer's motion for nonsuit, and entered judgment for plaintiff in the amount of $741.71 against both Stancil and Insurer with judgment over against Stancil in favor of Insurer. Insurer appeals, assigning as error the failure of the court to sustain its motion for nonsuit.

White & Aycock for plaintiff.

Whitaker, Jeffress & Morris for Guaranty Security Insurance Company, a corporation, defendant.

SHARP, J. The terms of the policy which obligated Insurer to pay Stancil's medical bill involved in this case gave Insurer the option to pay the amount of this bill *to or for Stancil.* Upon this point the policy is positive and unambiguous. Insurer has paid Stancil. Therefore, for plaintiff to impose liability upon Insurer, it must show either a contractual obligation or conduct on Insurer's part giving rise to an estoppel or a waiver. Stancil, as the injured party, not plaintiff, is the third person for whose direct benefit Insurer and Randolph entered into the medical-payments provision of the insurance contract. Annot., Coverage, construction, and effect of medical payments and funeral expense clauses of liability policy, 42 A.L.R. 2d 983. Any benefit which plaintiff might have received under it would have been incidental. The amount of plaintiff's demand being within the limits of the medical-payments coverage of the liability policy, Insurer was, under its terms, obligated to pay that amount to or for *Stancil.*

No contractual relation ever existed between plaintiff and Insurer. Plaintiff did not render its services to Stancil upon any promise of Insurer to pay it for the services. So far as the record discloses, plaintiff had no knowledge of Insurer's obligation to Stancil until Insurer's adjuster requested information as to the amount of Stancil's bill with plaintiff. In placing plaintiff's name on the draft, Insurer made to plaintiff a unilateral concession completely without consideration. Even if Insurer had promised to make plaintiff the payee at the time it requested the bill, the promise would have been *nudum pactum,* there being no antecedent obligation on Insurer's part. 12 Am. Jur., *Contracts,* § 98 (1938). Absent any element of estoppel, the promise would have been unenforceable.

There was no estoppel. Insurer did not induce plaintiff to alter its position by any misleading act or promise. When Insurer's adjuster requested information from plaintiff as to Stancil's bill, the adjuster did nothing to lull plaintiff into indiligence in perfecting its lien under G.S. 44-50 upon any money Insurer might pay Stancil. He made no representation as to whom Insurer would name payee in the draft.

If Insurer had sent the draft to Stancil made payable to him only, clearly his collection of the proceeds would have discharged Insurer's obligation under the policy, and we take it that plaintiff would not contend otherwise. Plaintiff does contend, however, that by making both plaintiff and Stancil payees, Insured waived its privilege to pay either Stancil or plaintiff and thus became liable to plaintiff, also, when Stancil collected the draft without its endorsement and failed to pay plaintiff's bill. It is, of course, unfortunate that Stancil did not use the money to clear the moral and legal obligation for which it was provided. Nevertheless, we cannot hold that Insurer, merely by issuing its draft to both Stancil and plaintiff in the amount of plaintiff's bill to Stancil, converted its liability to Stancil alone into a liability to plaintiff, also. It goes without saying that Insurer would never intentionally have relinquished the privilege to acquit its liability under the policy by paying one of the two *permissible* payees.

Though often used interchangeably with reference to insurance contracts, the terms *waiver* and *estoppel* are not synonymous. Waiver is the intentional surrender of a known right or privilege, which surrender modifies other existing rights or privileges or varies the terms of a contract. It does not necessarily imply that the one against whom it is sought to be invoked has misled the other to his prejudice, whereas estoppel always involves a prejudicial misleading. 56 Am. Jur., *Waiver* § 3 (1947). Sometimes a waiver partakes of the nature of an estoppel and sometimes of contract. Where the facts relied upon to establish an estoppel fail to do so for lack of essential elements, they will also

fail to establish the valid waiver of a substantial right or privilege unless the waiver is supported by a consideration. *Clement v. Clement,* 230 N.C. 636, 55 S.E. 2d 459. Although there may be a valid waiver of a formal, as distinguished from a substantial, right or privilege without a consideration, to waive the latter the same consideration is required as for any other contract. *Doerr v. National F. Ins. Co.,* 315 Mo. 266, 285 S.W. 961, 54 A.L.R. 1336. There being no estoppel here, a valid waiver required consideration, which was lacking. The case comes down to this: By acquiescing in its drawee's payment of the draft in question, Insurer simply exercised its privilege, which it had not waived, to pay the injured person, Stancil.

This case, although relatively uncomplicated, would have been entirely so had either plaintiff-payee or Insurer-drawer, or had both of them, sued First National Bank of Minneapolis, the drawee, whose oversight thwarted Insurer's obvious purpose to see plaintiff paid. G.S. 25-47; *Bank v. Bank,* 197 N.C. 526, 150 S.E. 34; *Dawson v. Bank,* 197 N.C. 499, 150 S.E. 38; *accord, American National Bank v. First National Bank,* 130 Colo. 557, 277 P. 2d 951; *United States Fidel. & G. Co. v. Peoples National Bank,* 24 Ill. App. 2d 275, 164 N.E. 2d 497; Annot., Payment of check upon forged or unauthorized indorsement as affecting the right of true owner against the bank, 14 A.L.R. 764, 69 A.L.R. 1076, 137 A.L.R. 874, as supplemented. Unhappily, however, our case is not so constituted.

Insurer's motion for nonsuit should have been allowed.

Reversed.

CLAUDE LOWE AND WIFE, LELA LOWE, PORTER LOWE AND WIFE, HALLIE LOWE v. W. M. JACKSON, TRUSTEE, AND DAVID L. HIATT, SUBSTITUTE TRUSTEE FOR J. ANDERSON WHITAKER.

(Filed 29 January, 1965.)

1. Appeal and Error § 49—

Where there are no exceptions to the findings of fact, an appeal presents the questions whether the facts support the judgment and whether error of law appears on the face of the record.

2. Contracts § 12—

Where the language of a contract is plain and unambiguous it is for the court and not the jury to declare its meaning and effect.

3. Contracts § 19; Mortgages and Deeds of Trust § 18—

An instrument under which the purchaser of the equity of redemption agrees to pay the full amount of interest and principal due on notes there-

tofore executed by his grantor and secured by deeds of trust on the property, is not a novation, there being no element of a further consideration passing between the parties or a substitution of a new for an old debt.

4. Mortgages and Deeds of Trust § 21—

Where no payment of principal or interest is made on notes secured by deeds of trust for a period of ten years after maturity, the right to exercise the power of sale contained in the deeds of trust is barred, and the fact that in the interim the purchaser of the equity of redemption assumes the debt, without any payment, does not extend the period of limitation. G.S. 45-21.12.

APPEAL by defendants from *Gambill, J.*, June Session 1964 of SURRY.

On 20 June 1949, Claude Lowe and wife, Lela Lowe, executed their promissory note in the amount of $3,108.43, payable on 31 December 1949, to the order of John Anderson Whitaker, and as security therefor, simultaneously therewith executed a deed of trust to W. M. Jackson, trustee, on certain lands described in the complaint, which instrument was duly recorded in the Registry of Surry County, North Carolina, on 24 June 1949; that on 17 March 1950, the said Claude Lowe, and wife, Lela Lowe, and Porter Lowe, executed their promissory note in the amount of $695.73, payable on 1 December 1950, to the order of John Anderson Whitaker, and as security therefor, simultaneously therewith Claude Lowe and Lela Lowe executed a deed of trust on the same lands to David L. Hiatt, trustee, which instrument was duly recorded in the Registry of Surry County on 17 March 1950.

By deed dated 21 November 1957 and duly recorded 24 December 1957, plaintiffs Claude Lowe and Lela Lowe conveyed to their co-plaintiff Porter Lowe the identical lands encumbered by the deeds of trust above described. On 4 December 1957, Porter Lowe executed an instrument to the effect that having purchased the lands encumbered by the above deeds of trust, and no payments having been made on either of the aforesaid notes secured by said deeds of trust, Porter Lowe agreed "to pay the full sum of both notes amounting to $3,804.16, together with all accrued interest thereon." Subsequent thereto, John Anderson Whitaker died and said instrument was found among his valuable papers attached to the notes and deeds of trust, the subject of this litigation.

W. M. Jackson declined to act as trustee, and David L. Hiatt was appointed substitute trustee.

David L. Hiatt, as substitute trustee, on 15 January 1963, proceeded to advertise the lands involved for sale, pursuant to the power of sale contained in the original deed of trust executed on 20 June 1949.

This action was instituted on 12 February 1963 to restrain foreclosure under the aforesaid deeds of trust.

The defendants allege and contend that the agreement of Porter Lowe to pay said indebtedness constituted a novation.

The court below heard this matter on the pleadings and stipulation of the parties, and from the facts found therefrom and to which no exception was entered, the court held that the agreement of Porter Lowe did not constitute a novation and that more than ten years having elapsed since the execution of the original notes and deeds of trust, and on which no payments have been made to toll the statute of limitations, the right to foreclose thereunder is barred by the statute of limitations, and entered judgment restraining W. M. Jackson, trustee, and David L. Hiatt, substitute trustee for John Anderson Whitaker, from advertising for sale the lands described in the aforesaid deeds of trust or of exercising any other authority that they might have under said deeds of trust.

The defendants appeal, assigning error.

Blalock & Swanson and C. Orville Light for plaintiff appellees.
Hiatt & Hiatt for defendant appellants.

DENNY, C.J. Since there is no exception to the findings of fact, the appeal presents only these questions: (1) Do the facts found support the judgment, and (2) does any error of law appear upon the face of the record? *Taney v. Brown,* 262 N.C. 438, 137 S.E. 2d 827; *Dellinger v. Bollinger,* 242 N.C. 696, 89 S.E. 2d 592.

" 'Novation' may be defined * * * as a substitution of a new contract or obligation for an old one which is thereby extinguished. * * * The essential requisites of a novation are a previous valid obligation, the agreement of all the parties to the new contract, the extinguishment of the old contract, and the validity of the new contract. * * *" 66 C.J.S., Novation, §§ 1 and 3, cited in *Tomberlin v. Long,* 250 N.C. 640, 109 S.E. 2d 365.

"Novation implies the extinguishment of one obligation by the substitution of another." *Walters v. Rogers,* 198 N.C. 210, 151 S.E. 188.

It is well settled that where the language of a contract is plain and unambiguous, it is for the court and not the jury to declare its meaning and effect. *Stewart v. McDade,* 256 N.C. 630, 124 S.E. 2d 822; *Products Corp. v. Chestnutt,* 252 N.C. 269, 113 S.E. 2d 587.

There is nothing in the agreement executed by Porter Lowe that tends to show an intention on his part to do anything more than to assume the indebtedness outstanding against the property he purchased from his co-plaintiffs.

"* * * (A) debt assumption agreement by the purchaser of the equity of redemption is not a novation of the mortgage note, there be-

ing no element of a further consideration passing between the parties or a substitution of a new for an old or subsisting debt. As between the mortgagor and his grantee assuming the debt, the mortgagor is a surety. But as between the mortgagor and the mortgagee he remains primarily liable for the mortgage debt when the mortgagee does not accept or rely upon the debt assumption agreement, even though the mortgagee accepts from the purchaser of the equity partial payments on the note and extends the time of payment without notice to the mortgagor. And the mortgagee, upon default may either sue *in rem* by foreclosure, or *in personam* on the note against the mortgagor and against the purchaser of the equity of redemption on the contract made for the mortgagee's benefit. * * *" Strong's North Carolina Index, Vol. 3, Mortgages and Deeds of Trust, § 15; *Bank v. Whitehurst,* 203 N.C. 302, 165 S.E. 793; *Brown v. Turner,* 202 N.C. 227, 162 S.E. 608.

There can be no doubt from the facts as found by the court below and as they appear in the record that the original notes and deeds of trust were executed and had matured more than ten years prior to the time defendant David L. Hiatt, substitute trustee, attempted to exercise the power of sale contained in the original deed of trust; nor can there be any doubt about the fact that both notes and deeds of trust securing them are barred by the statute of limitations, since no payment has been made on either of such notes. *Spain v. Hines,* 214 N.C. 432, 200 S.E. 25.

Under the provisions contained in G.S. 45-21.12, the right to exercise any power of sale contained in a deed of trust is barred after ten years from the maturity of any note or notes secured thereby, where no payments have been made thereon extending the statute.

This Court, in *Spain v. Hines, supra,* in construing the above statute, said: "This means, of course, that the power referred to in the statute must be exercised within the ten-year period following the maturity of the note, or from the last payment thereon. The evidence here shows no payment or other transaction which would take the note out of the bar of the statute of limitations, counting from its maturity." *Serls v. Gibbs,* 205 N.C. 246, 171 S.E. 56.

The findings of fact by the court below support the judgment and we find no error of law upon the face of the record. Therefore, the judgment of the court below will be upheld.

Affirmed.

BUD STARNES, ADMINISTRATOR OF THE ESTATE OF FANNIE STARNES McMANUS v. GRADY McMANUS.

(Filed 29 January, 1965.)

1. Automobiles § 35—

Allegations that defendant operated his automobile carelessly and heedlessly and with wanton and wilful disregard for the rights and safety of others merely state conclusions of law.

2. Automobiles § 42k—

Evidence tending to show that intestate, knowing that her husband was drunk, planted herself on the highway in his lane of travel to flag him down, and remained there after bystanders warned her that he might run over her, *held* to disclose contributory negligence as a matter of law barring recovery for her wrongful death resulting when he struck her without turning or slackening speed.

APPEAL by defendant from *Brock, S. J.*, August 1964 Session of UNION.

Action for the wrongful death of a pedestrian, defendant's wife. In his complaint, plaintiff alleges that the death of his intestate was caused solely and proximately by the negligence of defendant in that he operated his automobile upon a public highway at an unlawful speed, without keeping it under control, and failed to drive it to his left in order to avoid colliding with the intestate. In these general terms plaintiff alleged, also, "(t)hat he operated his 1947 Chevrolet automobile carelessly and heedlessly and in wanton and willful disregard of the rights and safety of others then upon said road and without due care and caution and circumspection and at a speed in such a manner as to endanger persons and property then upon said road." In his answer defendant admitted that the intestate died from injuries inflicted by his automobile. He denied his actionable negligence and alleged that the intestate's own negligence contributed to her death in that "she walked out into said road in front of said automobile and stopped in its line of travel facing said automobile in complete disregard of her safety . . . and undertook to force said automobile to stop by deliberately placing herself . . . in its line of travel."

Defendant offered no evidence. There was no substantial conflict in the testimony, which, except when quoted, is summarized as follows:

On June 30, 1961, at about 6:00 p.m., plaintiff's intestate, Fannie McManus, went to her father's house, located 20 feet from the north edge of rural road No. 2115, which is unpaved, graveled, and 18 feet wide. The intestate's husband, defendant, had preceded her there. He was drunk. When defendant observed the intestate walking toward the house from the west, he told her brother, the brother's wife, and a neigh-

bor, who were seated in the front yard, that "he was going to run on down the road and turn around and come back and hear her grumble with him some." Thereupon, he drove his 1947 Chevrolet in an easterly direction toward the South Carolina line. When the intestate arrived, she stepped up onto the road bank and asked the group where her "drunken husband" was. Someone told her that he had gone "toward the state line." Almost immediately they heard defendant's car returning, and his wife walked out into the road and stopped in the middle of the west-bound lane. From there she could see, according to the varying estimates, from 100 feet to several hundred feet to the east. "Fannie was standing in the road looking in the direction that Grady was coming. She was standing there with her hands on her hips facing Grady's car. She stood that way after the car had come in sight from towards the South Carolina line, headed west . . . She said she was going to flag him down . . . The car was moving at a pretty good speed . . . If he had been looking at the road he could have seen her and she could have seen him also."

One of the group in the yard, the neighbor, said: "I told her to get out of the road, he might run over her, so sure enough he did." The intestate had made no move to get out of defendant's lane of travel until he was about 10 feet from her, when "she moved her right foot and throwed her right hand up . . . just about the time that Grady struck her." No other traffic was approaching and there was "plenty of room where he could have passed on the further side of her if he had wanted to." At no time did defendant change his course, slow down, or apply his brakes. "He just run right in facing her. She stayed on the car until they got down the road a good piece and it slung her off . . . She was dead time she hit the ground." Defendant's car was damaged on the center of the hood and there was a dent, as well as blood, on the right fender. Defendant "said that he could have missed her if he had been looking at the road but he weren't looking at the road, he was looking in the yard."

Defendant's motion for nonsuit, made at the close of the evidence, was denied. The jury answered the issues of negligence, contributory negligence, and damages in favor of plaintiff. From judgment entered on the verdict defendant appeals.

E. Osborne Ayscue for plaintiff.
Smith & Griffin for defendant.

SHARP, J. Undoubtedly, plaintiff proved the negligence he had effectively alleged. The allegations of reckless driving, stated almost in the words of the statute and without specification of wilful and wanton

conduct, are merely the pleader's conclusions, which add nothing to plaintiff's allegations of ordinary negligence. *Fleming v. Drye*, 253 N.C. 545, 117 S.E. 2d 416; *Troxler v. Motor Lines*, 240 N.C. 420, 82 S.E. 2d 342. Plaintiff likewise proved the contributory negligence of his intestate and thus barred his recovery. *Blevins v. France*, 244 N.C. 334, 93 S.E. 2d 549. Knowing that defendant was drunk, plaintiff's intestate planted herself in defendant's lane of travel to flag him down, and there she remained after the group who saw him leave warned her that he might run over her — "and sure enough, he did." It is obvious that the intestate failed to exercise for her own safety the care of an ordinarily prudent person and that her negligence was one of the proximate causes of her unnecessary death. "'A plaintiff will not be permitted to recover for injuries resulting from a hazard he helped create.'" *Id.* at 343, 93 S.E. 2d at 556. No other reasonable inference is possible from plaintiff's eivdence; so, the motion for nonsuit should have been allowed. *Holloway v. Holloway*, 262 N.C. 258, 136 S.E. 2d 559; *Blake v. Mallard*, 262 N.C. 62, 136 S.E. 2d 214.

Reversed.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1965

RURAL PLUMBING AND HEATING, INC. v. HOPE DALE REALTY, INC.; CHARLES C. CAMERON, TRUSTEE: CAMERON-BROWN COMPANY; COMMERCIAL STANDARD TITLE INSURANCE COMPANY; CHATHAM BRICK AND TILE COMPANY, INC.; CAROLINA BUILDERS CORPORATION; STANDARD CINDER BLOCK COMPANY, INC.; CALVIN RAY; BORO WOOD PRODUCTS, INC.; C. RUSSELL GOODWIN, T/A CAPITOL INSULATING COMPANY; J. N. BARNES; NORTH CAROLINA PRODUCTS CORPORATION; NORTH CAROLINA EQUIPMENT COMPANY; READY MIXED CONCRETE COMPANY; JASPER RAY McLEAN AND WIFE, RUBY W. McLEAN; BOYT LEE, JR., AND WIFE, JEAN LEE; LACY J. BYRD AND WIFE, LOIS E. BYRD; EDWARD O. CASHWELL AND WIFE, JOYCE W. CASHWELL; WALLACE BRANTLEY AND WIFE, THELMA A. BRANTLEY; BEN T. POE AND WIFE, GLENNIE POE; ELLIOTT C. CREECH AND WIFE, HILDA S. CREECH; BILLY ALLEN GLOVER AND WIFE, KATHERINE WILSON GLOVER; JAMES MELVIN RADFORD AND WIFE, GLADYS K. RADFORD; SELBY D. WATSON AND WIFE, FRANCES H. WATSON; ARTHUR S. FORBES AND DORA L. FORBES; JOHN C. BRUTON AND WIFE, SHIRLEY D. BRUTON; WILLIAM KENNETH MINGIS, JR., AND WIFE, CELESTE FERRELL MINGIS; DONALD LEE HOLLAND AND WIFE, JOANNE FRYE HOLLAND; JAMES F. BEASLEY AND WIFE, VIOLET BEASLEY; BEN L. EDWARDS AND WIFE, JUANITA M. EDWARDS; BOBBY W. BRANSON AND WIFE, BETTY H. BRANSON; WYATT L. GAY AND WIFE, ELEANOR J. GAY; ARTHUR L. WOOD AND WIFE, OLIVE K. WOOD; CHARLES E. STEPHENSON AND WIFE, EDNA M. STEPHENSON; DAVID W. CURRIN AND WIFE, LILLIE H. CURRIN; LEWIS FLOYD WILKINS AND WIFE, EVELYN A. WILKINS; FRANK

F. BAGWELL AND WIFE, SHIRLEY G. BAGWELL; DAVID TUPLIN AND WIFE, MARTHA C. TUPLIN; LEWIS CLEMENT AND WIFE, COLEEN M. CLEMENT; CHARLIE E. EARLY AND WIFE, ELLA MAE EARLY.

(Filed 24 February, 1965.)

1. Appeal and Error §§ 19, 22—

An assignment of error that the evidence is insufficient to support the findings of fact, with a sole exception to the judgment and without any exception to any of the findings, does not present for review the findings of fact or the sufficiency of the evidence to support them.

2. Appeal and Error § 21—

A general exception to the judgment presents for review only whether the findings of fact support the conclusions of law and the judgment and whether error of law appears on the face of the record proper.

3. Appeal and Error § 49—

Where there are no exceptions to the findings of fact, the findings are presumed to be supported by competent evidence and are binding on appeal.

4. Laborers' and Materialmen's Liens § 3—

Where a laborer or material furnisher files notice of lien in the county in which the realty is situate for work done and materials furnished by him in building and improving the property under contract with the owner, and files such lien within six months after the completion of the work and commences action to enforce the lien within six months of the filing of the notice, the lien relates back to the time when claimant began performance of the work, and takes precedence over deeds and deeds of trust registered after the beginning of the work, or liens created by the owner subsequent thereto. G.S. 44-1.

5. Same—

The findings of fact in this case *held* to support judgment that plaintiff plumbing and heating contractor recover from the owner the unpaid balance due it for installing plumbing and heating systems in designated houses sold by the owner after the commencement of the work, and that the unpaid balance as to each house, respectively, constituted a lien superior to the claims of the purchasers or liens thereafter created.

6. Same; Receivers § 10—

Where the owner of a development is put into receivership prior to judgment establishing the lien of a material furnisher for work in the construction of houses on the land, the materialman's claim does not constitute a lien against the property remaining in the hands of the owner, although the lien attaches to property sold by the owner prior to receivership.

7. Payment § 3—

The debtor has the right at the time of payment to specify the debt or debts to which the payment should be applied; if the debtor fails to direct application the creditor may do so; if the parties fail to direct application the duty to do so devolves upon the court.

8. Same; Laborers' and Materialmen's Liens § 3—

The general rule as to the application of payment is ordinarily applicable to payments made by an owner or contractor to a laborer or material furnisher, subject to the qualification that if payment is made from funds provided by the owner or purchaser of the property for the purpose of discharging the indebtedness against a specified part of the property, the laborer or materialman must apply the amount to the discharge of such indebtedness if he has knowledge of the source and purpose of the payment.

9. Same— Purchasers failing to obtain lien release held not entitled to object to application of payment by subcontractor.

The owner of a subdivision contracted for the installation of plumbing and heating systems in each of a number of houses at a stipulated price per house, and thereafter sold the houses to individual purchasers. In this action to enforce the heating contractor's liens, the owner and the heating contractor agreed that payments theretofore made by the owner should be applied to discharge the entire indebtedness as to some houses, a partial payment in a stipulated amount as to others, and no payments as to still others, leaving the lien as to them for the full contract price. There was no allegation or finding or averment in the agreed statement of account that any purchaser paid any sum to discharge the lien against his individual property. *Held:* The individual purchasers may not object to the application of payment.

APPEAL by "the defendants, property owners of the 26 lots, the holder of the deeds of trust, the trustee, and the title insurance company" from *Bundy, J.*, February 1964 Assigned Civil Session of WAKE. Docketed and argued as Case No. 454, Fall Term, 1964.

Midland Realty Company, Inc., hereafter called Midland, is a North Carolina corporation organized in July 1955, with its principal place of business in Wake County, North Carolina, and its business was developing land and constructing houses for the purpose of sale. Its principal stockholder and its president is W. M. Newsom. It had two other stockholders: Newsom's wife and William Dunn, Jr. In November 1958 W. M. Newsom organized Hope Dale Realty Company, Inc., hereafter called Hope Dale, a North Carolina corporation, with the same owners and officers, merely for income tax purposes to split the profits of Midland.

On 30 October 1959 W. M. Newsom, as principal stockholder of Midland and Hope Dale, instituted a separate action against each corporation in the superior court of Wake County alleging that each corporation was insolvent, and praying that a receiver be appointed for each corporation, pursuant to G.S. 55-125. Each corporation filed an answer admitting the material allegations of the complaint. On 12 November 1959 the resident judge of Wake County entered an order in each case appointing Wright T. Dixon, Jr., receiver of each corporation to liquidate its business. Each order enjoined all creditors of each

corporation from interfering with the assets of each corporation or with the receiver in the discharge of his duties. The receiver filed his report on 27 November 1961, and an addendum thereto on 3 January 1962. Exceptions were filed thereto. On 2 February 1962 Clark, J., presiding in Wake County superior court, entered an order affirming the receiver's report, "subject only to the determination of a jury upon the issues submitted by the court as appears in the record of this case." On 10 February 1962 Clark, J., entered another order in respect to the issues to be submitted to a jury. Exceptions were filed to this order.

The instant action was instituted on 4 November 1959 in the superior court of Wake County by Rural Plumbing and Heating, Inc., to have and recover judgment against Hope Dale, according to the terms of entire and indivisible contracts entered into by and between it and Hope Dale, for labor performed and materials furnished by it in connection with the installation of plumbing and heating systems in 26 houses erected on 26 lots owned by Hope Dale, and sold by Hope Dale to certain persons, and to enforce a laborers' and materialmen's lien on each of the said 26 houses and lots. On 4 September and 8 September 1959, and within six months after the labor done and the materials furnished by it in installing the plumbing and heating systems in each of the 26 houses, it filed a notice of labor done and materials furnished in each of the 26 houses in the office of the clerk of the superior court of Wake County, which were properly recorded. It named as defendants Hope Dale, the purchasers of the 26 houses and lots, and other lien claimants, the holder of the deed of trust on each of the 26 houses and lots, the trustee named in the deeds of trust, and the title insurance company which insured the lien of the holder of the note secured by a deed of trust on each of the 26 houses and lots.

All the defendants filed a joint answer in which they deny the material allegations of the complaint, except they admit plaintiff properly filed a laborers' and materialmen's lien, as alleged in its complaint, and that Hope Dale conveyed 26 lots and the houses thereon to certain individuals, as alleged in the complaint.

On 3 December 1962, Judge Clark, presiding over the superior court of Wake County, entered what is termed an order of reference in the instant case, and in 27 other cases on the docket of the superior court of Wake County. Judge Clark's order recites that there was duly calendared before him for hearing the actions of *Newsom v. Midland* and *Newsom v. Hope Dale*, which corporations are in receivership, and that it appeared to the court that, in addition to these two actions, the docket of the clerk of the superior court of Wake County had a large number of related cases, all of which arose as a result of the transactions of Midland and Hope Dale, prior to the appointment of a re-

ceiver for the two insolvent corporations; that the issues in some of these cases on the clerk's docket have been determined by the receiver, and others have not. Judge Clark then found the following facts, which we summarize: The receiver upon his appointment conducted hearings to determine the validity and priority of claims against the insolvent corporations, at which time sworn testimony was given and transcribed. Thereafter, the receiver filed reports on the claims of various creditors against Midland and Hope Dale. His report, in addition to relating to claims and priorities for work done and materials furnished to properties owned by the insolvent corporations, also applied to claims and priorities for work done and materials furnished on houses on lots which were sold by the two insolvent corporations prior to his appointment as receiver. That the lots previously sold never came into the receiver's hands and the receiver reports that he is without power to rule upon liens on real property which had been sold prior to his appointment, and consequently his findings relate only to the status of the claims within the framework of his receivership. This court has previously ruled on the receiver's reports, and that certain exceptions have been taken to his findings and the issues framed for submission to the jury. The receiver has been in the process of liquidating the properties of the two insolvent corporations, and it is expected that a final determination of the complete assets of the receivership will be immediately forthcoming. The testimony necessary to try all of the above-entitled actions in which Midland and Hope Dale are parties would involve the taking and hearing of long and complicated accounts, and would be in great part repetition, requiring a multiplicity of actions and creating delay, unnecessary work and expense. A consolidation of all the actions is not prejudicial to the rights of the parties. Whereupon, he ordered and decreed as follows, in substance: The issues heretofore framed in *Newsom v. Midland* and *Newsom v. Hope Dale* shall be submitted to a jury, at such time as the other issues resulting from this order are ready for determination. The court in its discretion is hereby consolidating for the purpose of further action and trial all of the above-entitled cases for complete determination and final judgment. Wright T. Dixon, Jr., is appointed referee in each of the above-entitled cases, except in the actions of *Newsom v. Midland* and *Newsom v. Hope Dale,* in which he is presently the duly appointed receiver. His appointment as referee is not to be construed as a part of his duties as receiver in the actions of *Newsom v. Midland* and *Newsom v. Hope Dale.* The referee is directed to set hearings, take evidence, and make findings to be submitted to the court, and he is allowed to make use of the transcripts of testimony, books or papers of the receivership, as well as testimony presented for determining the facts in all of said

cases as a basis for his findings of fact. So far as the record shows, no exception was taken to Judge Clark's order.

The referee filed his report in the superior court of Wake County on 15 October 1963. His report recites, in substance, that the parties stipulated Hope Dale conveyed to the individual defendants the lots on the dates set out in Exhibit "A," which is attached to his report and made a part thereof. Exhibit "A" shows the lots conveyed were numbered 4, 35, 37, 38, 42, 43, 46, 72, 73, 74, 75, 76, 79, 80, 81, 83, 94, 95, 104, 106, 113, 114, 115, 121, 124, and 125, the names of the purchasers of each lot and the house situate thereon, the recorded date of the purchase, the recorded date of plaintiff's notice of lien, and the date the lien relates back to.

FINDINGS OF FACT BY REFEREE

"1. That in December of 1958 Hope Dale Realty Company, Inc. made a contract with Rural Plumbing and Heating, Inc. to install plumbing and heating in houses to be constructed on lots owned by it in Hope Dale Subdivision upon the same terms as was being done for Midland Realty Company, Inc.: $1145 per house. [The original record on file in the office of the clerk of the Supreme Court shows that the entire report of the referee was typewritten, and that in finding of fact No. 1 the word "furnaces" was typed, and that the word "furnaces" has been stricken out with a pen or pencil, and above it are the words "plumbing and heating" written in pen or pencil.]

"2. Rural Plumbing and Heating, Inc. was instructed to continue its method of operation in furnishing and installing plumbing and heating without regard to the existence of the Hope Dale Realty Company, Inc.

"3. That prior to August 3, 1959, the amounts due by the two corporations to the plaintiff, Rural Plumbing and Heating, Inc., were paid by one corporation or the other on the total amount due by both corporations and without regard to allocation.

"4. That during the period of construction Hope Dale Realty Company, Inc., on occasions, ran a payroll account for personnel constructing houses on the lots in said subdivision.

"5. That the parties hereto on August 3, 1959, agreed to allocation of payments by the two corporations as appears in Exhibit 'B' attached hereto."

Exhibit "B" attached to the referee's report is as follows:

"AGREED STATEMENT OF ACCOUNT BETWEEN
RURAL PLUMBING AND HEATING, INC.
(hereinafter referred to as RURAL)
and
"HOPE DALE REALTY CO., INC. and MIDLAND REALTY CO., INC. (hereinafter jointly referred to as OWNERS)

"WHEREAS, RURAL has heretofore furnished certain labor and materials for the plumbing and heating systems in certain residential buildings constructed by the OWNERS in Hope Dale Subdivision, St. Mary's Township, Wake County; sixty-seven of said buildings having been completed and sold, and eleven of said buildings now being under construction; and

"WHEREAS, certain payments for said labor and materials have been made by said OWNERS to RURAL without specific designation as to which buildings said payments should be applied to; and

"WHEREAS, the parties hereto desire to set forth the application of the aforesaid payments and to set forth the status of the unpaid accounts due to RURAL:

"NOW, THEREFORE, in consideration of these premises, and in further consideration of the covenants hereinafter set forth, the parties hereto agree as follows:

"1. [Omitted because it is not relevant here.]

"2. That all of the charges of RURAL for the labor and materials furnished in the construction of the thirty houses first completed in said subdivision, shall be marked as paid and satisfied in full, except for the charges against Lot No. 36 (this being job No. 6299 on the records of RURAL), upon which there is now due a balance of $509.65, with interest at the rate of 6% per annum from the 11th day of February, 1959.

"3. That no payments have been made to RURAL on account of the plumbing and heating systems in the buildings constructed on the following lots and that there is now due to RURAL the sum of $1145.00 with interest at the rate of 6% per annum from the date set forth beside each lot number, all of said lots being owned by HOPE DALE REALTY COMPANY, INC.:

Lot No.	Date of Completion of Work
74	6 March 1959
35	7 March 1959

38	9 March 1959
79	12 March 1959
80	12 March 1959
81	12 March 1959
72	24 March 1959
73	24 March 1959
76	31 March 1959
75	31 March 1959
46	2 April 1959
83	4 April 1959
37	6 April 1959
42	8 April 1959
43	22 April 1959
4	20 June 1959

"4. That payments in the amount of $700.00 per lot have been made to RURAL on account of the plumbing and heating systems in the buildings constructed on the following lots and that there is now due to RURAL the sum of $445.00 with interest at the rate of 6% per annum from the date set forth beside each lot number:

Lot No.	Owner	Date of Completion of work by RURAL
104	Hope Dale Realty Co., Inc.	16 June 1959
106	Hope Dale Realty Co., Inc.	16 June 1959
121	Hope Dale Realty Co., Inc.	16 June 1959
86	Hope Dale Realty Co., Inc.	23 June 1959
113	Hope Dale Realty Co., Inc.	23 June 1959
115	Hope Dale Realty Co., Inc.	23 June 1959
122	Hope Dale Realty Co., Inc.	23 June 1959
125	Hope Dale Realty Co., Inc.	23 June 1959
34	Midland Realty Co., Inc.	29 June 1959
95	Hope Dale Realty Co., Inc.	1 July 1959
33	Midland Realty Co., Inc.	2 July 1959
85	Midland Realty Co., Inc.	2 July 1959
107	Hope Dale Realty Co., Inc.	3 July 1959
119	Hope Dale Realty Co., Inc.	3 July 1959
94	Hope Dale Realty Co., Inc.	6 July 1959
124	Hope Dale Realty Co., Inc.	6 July 1959
114	Hope Dale Realty Co., Inc.	8 July 1959

120	Hope Dale Realty Co., Inc.	8 July 1959
118	Hope Dale Realty Co., Inc.	10 July 1959
84	Hope Dale Realty Co., Inc.	17 July 1959
117	Midland Realty Co., Inc.	17 July 1959

"5, 6, 7, and 8. [Omitted because they are not relevant here.]"

CONCLUSIONS OF LAW BY REFEREE

"1. That the labor done and materials furnished on the lots set up in Exhibit 'A' were done so under contract between Rural Plumbing and Heating, Inc. and Hope Dale Realty Company, Inc.

"2. That the agreement to allocation of payments to specific lots, Exhibit 'B', was proper and is binding on the Hope Dale Realty Company, Inc., and on the individual defendants through Hope Dale Realty Company, Inc.

"3. That upon filing the liens as set up in Exhibit 'A' the claim of the plaintiff relates back to the date the material was furnished or work done on the individual said lots as appears in Exhibit 'A'."

Whereupon, the referee's decision was that plaintiff have and recover from each of the 26 purchasers of the 26 houses and lots from Hope Dale the amount with interest set forth particularly as to each purchaser, *e.g.*, Lot No. 4; purchaser, Jasper Ray McLean and wife, Ruby W. McLean; judgment against property $1,145, with interest from 9 March 1959.

Exceptions to the referee's report were filed by plaintiff, Rural Plumbing and Heating, Inc., and by "the defendants, present property owners, the holder of the deeds of trust, the trustee thereunder, and the title insurance company."

These exceptions came on to be heard by Bundy, J., at the February 1964 Assigned Civil Session of Wake, who entered the following judgment:

"This cause coming on to be heard before the undersigned Judge upon exceptions filed by the plaintiff and defendants to the Referee's Report herein, and being heard, upon review of the record of the case, and arguments of counsel; and the Court being of the opinion that there should be certain modifications in the Findings of Fact, as follows:

"1. That in Finding of Fact No. 1 the word 'furnaces' be deleted and 'plumbing and heating systems' be inserted in lieu thereof.

"The Court finds the following additional facts:

"1. The work of installing plumbing and heating systems was done by the plaintiff in accordance with the contracts.

"2. The liens were proper and filed in time.

"3. The action was commenced in time.

"The Court being of the opinion, for the sake of clarity, that the Referee's decision be modified by striking out the first two lines, and inserting in lieu thereof the following, 'that the plaintiff have and recover of the defendant Hope Dale Realty Company, Inc. the amount set forth in the third column below and that each said amount is a valid and subsisting lien against each of the lots listed below opposite the amount in the third column, which said lien is prior and superior to the claims of all other parties to this action.'

"Except as above modified the Referee's Report as to Findings of Fact, Conclusions of Law and Decision is affirmed."

From the judgment "the defendants, property owners of the 26 lots, the holder of the deeds of trust, the trustee, and the title insurance company" appeal.

Bunn, Hatch, Little & Bunn by James C. Little and E. Richard Jones, Jr., and Herman Wolff, Jr., for "the defendants, property owners of the 26 lots, the holder of the deeds of trust, the trustee, and the title insurance company," appellants.

Lassiter, Leager, Walker & Banks by James H. Walker for plaintiff appellee.

PARKER, J. Appellants' first assignment of error is that Judge Bundy "erred in signing the judgment affirming the report of the referee for the reason that the evidence is insufficient to support the findings of fact and that the findings of fact are insufficient to support the conclusions of law contained in said report. (Exception #1, R. p. 121.)"

Appellants have no exception to any specific finding of fact they wish to challenge. In fact, they have no exception to any of the findings of fact. In the appeal entries, they object to the judgment and except to the signing and rendition thereof, and after the appeal entries appears their Exception #1. Their appeal entries were filed on 24 February 1964, and the judgment from which the appeal was taken was entered on 12 February 1964. Their assignment of error "that the evidence is insufficient to support the findings of fact" does not present for review the findings of fact or the sufficiency of the evidence to sup-

port them, for three reasons: (1) This part of the assignment of error is not based on an exception or exceptions duly noted, and an assignment of error must be based on an exception, Strong's N. C. Index, Vol. 1, Appeal and Error, § 19; (2) an exception to the judgment does not present for review the findings of fact or the sufficiency of the evidence to support them, *Equipment Co. v. Johnson, Comr. of Revenue*, 261 N.C. 269, 134 S.E. 2d 327; *Merrell v. Jenkins*, 242 N.C. 636, 89 S.E. 2d 242; Strong's N. C. Index, Vol. 1, Appeal and Error, § 22; and (3) the assignment of error as to the findings of fact is broadside. They do not point out specifically the alleged error. *Logan v. Sprinkle*, 256 N.C. 41, 123 S.E. 2d 209; *Merrell v. Jenkins, supra; Heath v. Manufacturing Co.*, 242 N.C. 215, 87 S.E. 2d 300; *Suits v. Insurance Co.*, 241 N.C. 483, 85 S.E. 2d 602; *Burnsville v. Boone*, 231 N.C. 577, 58 S.E. 2d 351.

Appellants have four other assignments of error, all based on their Exception #1, which is to the judgment. They have no other exception set forth in their assignments of error.

Therefore, appellants' appeal presents only this one question: Their general exception to the judgment of Judge Bundy brings here for review the question as to whether or not the findings of fact support his conclusions of law and judgment, and as to whether or not error of law appears on the face of the record proper. *Merrell v. Jenkins, supra; Columbus County v. Thompson*, 249 N.C. 607, 107 S.E. 2d 302; *Salisbury v. Barnhardt*, 249 N.C. 549, 107 S.E. 2d 297; *Logan v. Sprinkle, supra; Schloss v. Jamison*, 258 N.C. 271, 128 S.E. 2d 590. It is hornbook law that where no exceptions have been taken to the findings of fact, such findings are presumed to be supported by competent evidence and are binding on appeal. *Schloss v. Jamison, supra; Insurance Co. v. Trucking Co.*, 256 N.C. 721, 125 S.E. 2d 25; *Goldsboro v. R. R.*, 246 N.C. 101, 97 S.E. 2d 486.

The findings of fact of the referee confirmed by Judge Bundy and Judge Bundy's additional findings of fact are to this effect: Plaintiff rendered services for, and furnished materials to, Hope Dale, the owner of 26 lots and 26 houses situate on these lots in Hope Dale subdivision, Wake County, in installing plumbing and heating systems in each of these 26 houses, under a contract with Hope Dale that Hope Dale would pay plaintiff $1,145 for each house in which plaintiff installed a plumbing and heating system. This gave rise to a debtor-creditor relationship between plaintiff and Hope Dale. Indubitably, the installation of a plumbing and heating system in each one of these 26 houses increased the value of each house and the lot on which it is situate. After the installation of the plumbing and heating systems in each of the 26 houses, according to a stipulation by the parties here, Hope

Dale conveyed by deed these 26 lots and the 26 houses situate thereon to the individual defendants here. Hope Dale has made no payments to plaintiff for installing the plumbing and heating systems in each house situate on lots numbered 4, 35, 37, 38, 42, 43, 46, 72, 73, 74, 75, 76, 79, 80, 81, and 83. Hope Dale has made a payment of $700 to plaintiff for installing the plumbing and heating systems in each house situate on lots numbered 94, 95, 104,, 106, 113, 114, 115, 121, 124, and 125. Plaintiff properly filed in the office of the clerk of the superior court of Wake County notices of its liens for labor rendered for, and materials furnished to, Hope Dale in each of the 26 houses within six months after the completion of the work and the final furnishings of the materials in installing a plumbing and heating system in each of the 26 houses on the 26 lots, G.S. 44-38 and 44-39; *Assurance Society v. Basnight,* 234 N.C. 347, 67 S.E. 2d 390, and instituted the instant action to enforce its lien on each of the 26 lots and on each of the 26 houses situate thereon within six months from the date of the filing of the notice or claim of lien on each of the 26 lots and on each house situate thereon, G.S. 44-43 and 44-48(4); *Assurance Society v. Basnight, supra.* The record apparently shows that all subsequent encumbrances and interested parties have been made parties except the receiver of Hope Dale. At least nothing in the record shows otherwise.

Upon these facts Judge Bundy in modifying and affirming the referee's report adjudicated in substance, that plaintiff recover from Hope Dale the unpaid amount due it for installing a plumbing and heating system in each of the 26 houses situate on the 26 lots, and that the unpaid amount due for the installation of the plumbing and heating system in each of the 26 houses situate on the 26 lots is a valid and subsisting lien against each one of the 26 lots, which lien is superior to the claims of all other persons to this action, and that upon the filing of the lien on each of the 26 houses and lots, plaintiff's claim relates back to the time when plaintiff, the lien claimant, began the performance of the work and the furnishing of materials in each of the 26 houses.

G.S. 44-1 provides in relevant part: "Every building built * * * or improved, together with the necessary lots on which such building is situated, * * * shall be subject to a lien for the payment of all debts contracted for work done on the same, or material furnished." G.S. 44-43 provides for an action to enforce the lien. G.S. 44-46 provides for an execution upon a judgment rendered in favor of the claimant of a lien.

Where a lien claimant files notice of a laborers' and materialmen's lien against a building and the lot on which it stands in the office of the clerk of the superior court in the county in which the property is

situate, for work done and materials furnished by him in building and improving the building under contract with the owner of the lot, within six months after the completion of the work and a final furnishing of the material, and commences an action to enforce the lien within six months from the date of filing the notice of the lien in the county where the lot is situate, the lien relates back to the time when the lien claimant began the performance of the work and the furnishing of the materials, and takes precedence by reason of such relationship back over an intervening recorded deed of trust made by the owner of the lot since then, or other liens created by the owner since then. The doctrine of relationship back has been established by uniform decisions of this Court and is also inherent in G.S. 44-1 granting such lien. *Assurance Society v. Basnight, supra; Horne-Wilson, Inc. v. Wiggins Bros., Inc.*, 203 N.C. 85, 164 S.E. 365; *King v. Elliott*, 197 N.C. 93, 147 S.E. 701; *Harris v. Cheshire*, 189 N.C. 219, 126 S.E. 593; *Dunavant v. R. R.*, 122 N.C. 999, 29 S.E. 837; *Pipe & Foundry Co. v. Howland*, 111 N.C. 615, 16 S.E. 857, 20 L.R.A. 743; *Burr v. Maultsby*, 99 N.C. 263, 6 S.E. 108, 6 Am. St. Rep. 517; *Chadbourn v. Williams*, 71 N.C. 444.

In North Carolina, and in other jurisdictions, a laborers' and materialmen's lien on property takes priority over all the property conveyances to purchasers for value and without notice subsequent to the time when labor and materials are furnished, provided notice of the lien is filed for record within the statutory time, and action to enforce the lien is instituted within the statutory time. *Burr v. Maultsby, supra; Pipe & Foundry Co. v. Howland, supra; Conlee v. Clark*, 14 Ind. App. 205, 42 N.E. 762, 56 Am. St. Rep. 298; *Glass v. Freeburg*, 50 Minn. 386, 52 N.W. 900, 16 L.R.A. 335; *Green v. Williams*, 92 Tenn. 220, 21 S.W. 520, 19 L.R.A. 478; *Thorn v. Barringer*, 73 W. Va. 618, 81 S.E. 846, Ann. Cas. 1916B, 625; 36 Am. Jur., Mechanics' Liens, § 190; 41 N.C.L.R. 185.

Plaintiff has acquired no lien under the judgment here on any of the property owned by Hope Dale at the time of the rendition of the judgment here, because such property, if any, owned by Hope Dale vested in the receiver prior to the rendition of the judgment here. *Surety Corp. v. Sharpe*, 236 N.C. 35, 72 S.E. 2d 109.

Appellants stoutly contend that the Agreed Statement of Account between plaintiff and Midland and Hope Dale on 3 August 1959, which is set forth verbatim above, and which was entered into after the 26 individual defendants had purchased their homes from Hope Dale, to the effect that payments by Midland and Hope Dale to plaintiff for the installation of plumbing and heating systems in houses on lots owned by them should be applied to the payment in full of the in-

stallation in the 30 houses first completed (except Lot 36), and $700 each should be applied to 10 of the houses owned by individual defendants here for such installation, and none should be applied in payment of such installation in 16 of the houses owned by individual defendants here, precludes the assertion by plaintiff of the liens against these 26 houses and lots. Appellants contend this amounted to a charging of the lots not released for services done and material supplied on the lots which were released. Appellants further contend that plaintiff waived its lien on 30 lots, and partially waived it on 21 more lots by crediting them with $700 each — only 10 of these 21 lots are involved here — and as a result has waived any right to claim a lien on the 26 lots here involved. This argument is untenable for reasons set forth below.

It is a well-settled principle of both the common and civil law, which seems to be universally applied, that where a debtor, who owes a number of debts to a creditor, makes a payment to the creditor, he has the right at the time of the payment to specify the debt or debts to which the payment will be applied, and if he fails to do so, the creditor may make the application. If the parties fail to make an application to a specific debt or debts, the duty to do so devolves upon the court. The rationale for the rule is that up to the time of payment the money is the property of the debtor, and being such may be applied as he sees fit. *Stone v. Rich,* 160 N.C. 161, 75 S.E. 1077, and the cases therein cited; *Baker v. Sharpe,* 205 N.C. 196, 170 S.E. 657; *Power Co. v. Clay County,* 213 N.C. 698, 197 S.E. 603; *Moore v. Parkerson,* 255 N.C. 342, 121 S.E. 2d 533; 40 Am. Jur., Payment, §§ 110, 111, 112, 113, 117, and 129; 70 C.J.S., Payments, § 50. This rule is applicable to payments made by an owner or contractor to one who might assert a mechanics', laborers' or materialmen's lien, unless the circumstances show a different intent. *Northern Virginia Sav. & L. Ass'n v. J. B. Kendall Co.,* 205 Va. 136, 135 S.E. 2d 178; *Bateson & Co. v. Baldwin Forging & Tool Co.,* 75 W. Va. 574, 84 S.E. 887, 891; *J. S. Schirm Co. of Orange County v. Rollingwood Homes Co.,* 56 Cal. 2d 789, 17 Cal. Rptr. 1, 366 P. 2d 444, 446, 448; 36 Am. Jur., Mechanics' Liens, § 227, pp. 145, 146; 57 C.J.S., Mechanics' Liens, § 248, p. 823.

This general rule as to application of payments is subject to the qualification, apparently adopted in a majority of the jurisdictions, that where money is paid by a contractor or the seller of property to a mechanic or materialman out of funds received by the contractor or seller of property from an owner or purchaser whose property is subject to a mechanics' or materialmen's lien, or both, and the purpose of the payment to the contractor or seller was to discharge the indebtedness against a specific house, the mechanic or materialman must

apply the payment to discharge the indebtedness if he had knowledge of the source and purpose of the payment. *Northern Virginia Sav. & L. Ass'n v. J. B. Kendall Co., supra; Herrman v. Daffin* (Mo. App.), 302 S.W. 2d 313, and the many authorities there cited; *Farr v. Weaver,* 84 W. Va. 182, 99 S.E. 395; 57 C.J.S., Mechanics' Liens, § 249; 70 C.J.S., Payment, § 64; 36 Am. Jur., Mechanics' Liens, §§ 227 and 228; 40 Am. Jur., Payment, § 123; Anno., 166 A.L.R. 641.

This qualification to the general rule has no application in the instant case for the following reasons: (1) The joint answer of the defendants has no allegation that *any money* paid by them or by the 26 individual defendants, or any one of them, to Hope Dale was paid by Hope Dale to plaintiff; (2) there is nothing in the findings of fact to indicate that any money paid by defendants, and especially by the 26 individual defendants, or any one of them, to Hope Dale was paid by Hope Dale to plaintiff; and (3) the Agreed Statement of Account between plaintiff and Midland and Hope Dale shows payments of 10 lots involved here, but it does not show that any of this money came from the defendants, and particularly from the 26 individual defendants here, or any one of them.

Appellants rely upon the case of *Weaver v. Harland Corporation,* 176 Va. 224, 10 S.E. 2d 547, 130 A.L.R. 417, and cases with somewhat similar facts from other jurisdictions. However, these cases are clearly distinguishable on their facts from the instant case, and do not support appellants' contentions. In the *Weaver* case, the Virginia Supreme Court of Appeals declared several mechanics' liens invalid. There the amount and value of the labor and materials furnished each house upon which a lien was claimed was impossible to determine because of the manner in which the accounts of the claimants were kept. The evidence showed that liens had been released upon the sale of lots with buildings thereon to individual purchasers, and it appears that the amount of the released liens had been transferred to the properties which the owners had not sold. Thus, liens were claimed on these properties in greater amounts than the value of the labor and materials actually furnished to enhance the value of the houses.

In the instant case, according to the findings of fact, the value of the labor done and materials furnished in installing a plumbing and heating system in each of the 26 houses here was $1,145. Liens in the amount of $1,145 are claimed on each of the 16 houses on which nothing has been paid for such installation, and in the amount of $445 on each of the 10 houses on each of which $700 has been paid by Hope Dale for such installation. Consequently, it plainly appears that liens were not claimed by plaintiff on any of the 26 houses here in an

amount greater than the value of the labor and materials actually furnished to enhance the value of each of the 26 houses here.

Under the facts shown by the record in the present case, plaintiff had the right on 3 August 1959 to apply the payments previously made to it by Midland and Hope Dale without any specification by Midland and Hope Dale as to the application of the payments to the debts owed by them to plaintiff, as it did in the Agreed Statement of Account between them. To hold plaintiff's liens invalid would permit appellants to take advantage of their failure to follow the prudent practice of requiring Hope Dale to furnish proof that it had obtained releases from laborers, mechanics, and materialmen for the specific houses they bought from it, before they paid the money to it for such houses. If Hope Dale by its principal stockholder, W. M. Newsom, or W. M. Newsom, perpetrated a legal wrong on appellants to the effect that all the mechanics', laborers', and materialmen's liens had been paid by Hope Dale on these houses when they had not been paid, they must seek redress from the doer of the legal wrong. The findings of fact support the crucial conclusions of law and they in turn support Judge Bundy's judgment, and no error of law appears on the face of the record proper. The conclusion we have reached finds support in the case of *Northern Virginia Sav. & L. Ass'n v. J. B. Kendall, Co., supra.*

All appellants' assignments of error are overruled. The judgment of Judge Bundy is

Affirmed.

CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, PETITIONER v. ELLEN R. SPRATT, RESPONDENT.

(Filed 24 February, 1965.)

1. Eminent Domain § 5—

The measure of compensation for the taking of a part of a tract of land is the value of the land taken together with the diminution in value of the remaining land caused by the severance and the use to be made by the condemnor of the land taken.

2. Eminent Domain § 1—

Where private property is taken for a public purpose by an agent having the power of eminent domain, the owner, in the exercise of his constitutional rights, may maintain an action at common law to obtain just compensation when there is no applicable or adequate statutory remedy.

3. Eminent Domain § 11; Pleadings § 8— Right to recover damages for temporary flight easement may not be joined in action to condemn a part of the tract obviating the flight easement.

This action was instituted to assess compensation for the taking of a strip through the respondent's land to lengthen the runway of an adjacent airport. By amendment, respondents sought to recover damages resulting from the use of respondent's property as an approach way for air planes entering and leaving the airport. *Held:* Since the runway would be extended on a portion of the strip of land condemned, the necessity for a flight easement with respect to respondent's remaining property would then be obviated, and such flight easement was temporary and counterclaim to recover damages therefor, theretofore caused, G.S. 1-137, does not arise from the condemnation of the strip of land described in the petition, G.S. 40-12, and therefore allegations relating to such flight easement were properly stricken on motion.

4. Aviation § 2—

G.S. Chapter 63 contemplates full cooperation and compliance with Federal statutes and rules and regulations of appropriate Federal agencies in the operation of aircraft.

APPEAL by respondent from *Riddle, J.*, April 20, 1964, Schedule "D" Session of MECKLENBURG, docketed and argued as No. 246 at Fall Term 1964.

This condemnation proceeding was instituted December 4, 1963, in accordance with the procedure prescribed in G.S. 40-11 *et seq.*, before the Clerk of the Superior Court of Mecklenburg County, North Carolina.

Petitioner, City of Charlotte, a municipal corporation, seeks herein to acquire the fee simple title to the land described in the petition, referred to as containing 12½ acres, for the enlargement, expansion and extension of the north-south runway of petitioner's Douglas Municipal Airport. While inexact, the 12½ acres as shown on map attached to the petition may be described for present purposes as running north-south at a width of approximately 800 feet for a distance of approximately 800 feet.

Answering, respondent did not controvert petitioner's right to condemn the described 12½ acres. She alleged matters relevant to the value of the 12½ acres, namely, (1) that her homeplace and another dwelling were located thereon, and (2) that the 12½ acres include all of her frontage on both sides of Wilmount Road, a paved main thoroughfare running generally north-south through the 12½ acres. Too, she alleged matters pertinent to the alleged diminution in value of the remainder of her 78-acre tract, namely, (1) that the 12½ acres "lies in the heart" of the 78-acre tract and (2) that the re-

mainder of her 78-acre tract, after condemnation of the 12½ acres, will consist of two noncontiguous tracts.

By order dated March 6, 1964, the clerk appointed commissioners "to appraise the value of the real property of the respondent herein to be taken or condemned for public use."

By order dated March 19, 1964, the clerk, "in the discretion of the court," ordered, adjudged and decreed "that the respondent be, and she is hereby allowed to file an amendment to her answer in this cause." Thereupon, respondent filed a pleading entitled "Amendment to Answer," being the pleading directly involved in this appeal. The pertinent allegations of said "Amendment to Answer" are quoted below.

"(1) (Allegation as to residence of respondent.)

"(2) That the City of Charlotte . . . owns and operates the Douglas Municipal Airport in Mecklenburg County near the City of Charlotte pursuant to authority granted to it by the Legislature of the State of North Carolina, and as a part of its operation of said airport causes large numbers of aircraft both civilian and military to take off and land on said airport at all times of the day and night, the City charging the owners of said planes fees for the privilege of taking off and landing and using the facilities of said airport.

"(3) (Allegations substantially the same as those set forth in original answer.)

"(4) That in the last several years the plaintiff in the maintenance and operation of said Douglas Municipal Airport adjacent to the respondent's aforesaid 78 acres of land has caused more and more aircraft in ever increasing numbers to fly at increasingly lower altitudes over the respondent's aforesaid lands and because of the failure of the plaintiff to provide adequate facilities and approachways at its aforesaid airport for planes landing and taking off, the respondent's property aforesaid has been and is continuing to be used as an approachway for airplanes entering and leaving the airport, many planes flying over the respondent's land at altitudes as low as 100 feet or lower, and as the result of the noise and jar thus produced the value of all of said land has been substantially diminished, said planes flying over the respondent's lands at extremely low altitudes at all times of the day and night.

"(5) That although the plaintiff herein now has and has had at all times herein complained of the power to acquire the respondent's property as an approachway or an easement of flight under its power of eminent domain it has failed and refused to do so and even now when the plaintiff is again extending its long runways for the purpose of flying ever larger numbers of aircraft in their use of said airport and

is now taking by its petition in this proceeding a strip out of the heart of the plaintiff's aforesaid 78-acre tract of land for the purpose of clearing and grading said strip which extends a distance of approximately 800 feet from one side of the respondent's property to the other, it still fails and refuses to take the necessary steps by eminent domain proceedings to condemn the remaining portion of the respondent's lands for a flight easement in order to provide reasonable and adequate compensation to the respondent for the damage to her adjacent property by reason of the flight easement it has thus taken and the burden of which easement it is daily causing to increase.

"That by reason of the foregoing facts the value of the respondent's entire tract of land hereinabove referred to has been substantially diminished and the respondent's property taken and appropriated by the plaintiff, City of Charlotte, for a public use without payment of just compensation to the respondent and the respondent is entitled to have her damages assessed for such taking in addition to the damages for the total value of the 12½ acres of land which the petitioner proposes to condemn by its original petition in this action.

"WHEREFORE, the respondent respectfully prays the court that adequate damages be assessed and awarded for the value of the 12½ acres of land which the petitioner seeks to take by its petition in this action and in addition to this that the respondent have and recover of the plaintiff reasonable and adequate damages to her entire 78-acre tract of land by reason of the taking of a permanent flight easement over her entire tract of land herein referred to; that the costs of this action be taxed against the petitioner and for such other and further relief as to the court may seem just and proper."

On April 10, 1964, petitioner demurred "to the new matter" contained in respondent's said "Amendment to Answer." After a hearing on said demurrer, the clerk, on April 17, 1964, entered an order which, after recitals, provided:

"And . . . it appearing to the court that the petitioner by this proceeding seeks to condemn a certain portion of a tract of land of the respondent; and it appearing to the court that the measure of damages is the difference between the fair market value of the entire tract of land immediately before the taking, which date of taking is the date of the filing of the petition, and the fair market value of the property remaining to the respondent immediately after the taking; or, stated in another manner, as being the value of the property actually taken and the consequent damages to the remainder of the property;

"It further appearing to the court that the petition does not contain a demand for a flight easement over the property of the respondent; and the question of the existence of a flight easement over the prop-

erty at this time is extraneous to this proceeding, and the question of the existence of a flight easement should not be considered by or included in the award to be made by the commissioners; it appearing to the court that the issue of whether or not a flight easement exists is a question to be determined by a jury in an action that may be brought for that purpose;

"It further appearing to the court and the court finding as a fact that the award to be issued by the commissioners should be restricted according to the requests of the petitioner set out in the petition, and that it is not relevant to this proceeding to raise the question of a flight easement;

"NOW, THEREFORE, the demurrer of the petitioner to the amendment to answer is sustained on the basis of Paragraph 2 and Paragraph 4, the court finding it not necessary to pass on the other two paragraphs contained in the demurrer;

"It is further ordered that the amendment to answer be and it hereby is stricken."

Respondent objected and excepted "(t)o the foregoing findings of fact, conclusions of law, and the signing of the order," and gave notice of appeal. Thereupon, the clerk, on April 17, 1964, entered the following order:

"The appeal is not allowed by the court at this stage of the proceedings, the court finding the notice of appeal being premature, being from an interlocutory order.

"IT IS ORDERED that the commissioners convene at the earliest possible date to continue their consideration of this proceeding."

On April 22, 1964, on motion of respondent, Judge Riddle ordered that the clerk transmit to him forthwith "all original records of the proceedings had before him."

On April 23, 1964, after hearing in superior court, Judge Riddle entered an order which, after recitals, provided:

"IT IS, THEREFORE, ORDERED that the order of the Clerk of Superior Court of Mecklenburg County dated, signed and filed April 17, 1964, sustaining the demurrer filed by the petitioner, be, and it hereby is, affirmed, and the appeal by the respondent is denied." Respondent excepted and appealed.

Subsequent to said order and appeal entries of April 23, 1964, to wit, on April 24, 1964, the commissioners filed their report and therein assessed respondent's damages at $40,200.00. On May 13, 1964, respondent filed exceptions to the commissioners' report and moved that it be set aside. Apparently, there has been no hearing before the clerk

on respondent's exceptions to the commissioners' report or on a motion, if any, that the commissioners' report be confirmed.

The record includes an undated paper writing entitled, "Exceptions to Findings of Fact and Conclusions of Law," in which respondent objects and excepts specifically to designated portions of the clerk's order of April 17, 1964. The record includes evidence offered by respondent before the commissioners at a hearing held March 19, 1964. Over petitioner's objection, Judge Riddle ordered that the commissioners' report and said evidence offered by respondent be included as part of the record and case on appeal.

Respondent assigns as error: "(1) The action of the court in sustaining the petitioner's demurrer to the respondent's amendment to answer containing counterclaim and to the signing and entry of the judgment sustaining demurrer. (2) The action of the court in finding as facts and concluding as a matter of law that the existence of a flight easement over the property in question was irrelevant to this proceeding, being a question to be determined by separate action and that the award to be issued by the commissioners should be restricted to the issue of damages raised by the petitioner only as set out in respondent's exceptions to findings of fact and conclusions of law."

As indicated, respondent's appeal is from Judge Riddle's order of April 23, 1964, in which he affirmed the clerk's order of April 17, 1964, which sustained petitioner's demurrer "to the new matter" alleged in respondent's "Amendment to Answer."

John T. Morrisey, Sr., and Ray Rankin for petitioner appellee.
Carswell & Justice for respondent appellant.

BOBBITT, J. In *United States v. Grizzard,* 219 U.S. 180, 31 S. Ct. 162, 55 L. Ed. 165, 31 L.R.A. (N.S.) 1135, Mr. Justice Lurton said: "Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder *resulting from that taking,* embracing, of course, *injury due to the use to which the part appropriated is to be devoted.*" (Our italics). This excerpt from Mr. Justice Lurton's opinion has been quoted with approval by this Court: *Power Co. v. Hayes,* 193 N.C. 104, 136 S.E. 353; *Moses v. Morganton,* 195 N.C. 92, 141 S.E. 484; *Ayden v. Lancaster,* 197 N.C. 556, 150 S.E. 40; *Light Co. v. Rogers,* 207 N.C. 751, 178 S.E. 575; *Light Company v. Creasman,* 262 N.C. 390, 137 S.E. 2d 497.

Under legal principles declared in *Light Company v. Creasman, supra,* and cases cited therein, respondent, based on the facts alleged in

the petition and original answer, was entitled to compensation for the value of the 12½ acres condemned by petitioner and for damage to the remainder of her 78-acre tract caused by (1) the severance of the 12½ acres therefrom and (2) the use to be made by petitioner of the 12½ acres.

Ordinarily, "for the purpose of determining the sum to be paid as compensation for land taken under the right of eminent domain, the value of the land taken should be ascertained as of the date of the taking, and . . . the land is taken within the meaning of this principle when the proceeding is begun." *Power Co. v. Hayes, supra.*

In condemnation proceedings, the petition, when filed by the condemnor, "must contain a description of the real estate which the corporation seeks to acquire." G.S. 40-12; 29A C.J.S., Eminent Domain § 259; 18 Am. Jur., Eminent Domain § 325; *Gastonia v. Glenn,* 218 N.C. 510, 11 S.E. 2d 459; *Light Company v. Creasman, supra.* The obligation of commissioners appointed pursuant to G.S. 40-17 is to appraise the lands described in the petition and "ascertain and determine the compensation which ought justly to be made by the corporation to the party or parties owning or interested in the real estate appraised by them."

Admittedly, petitioner does not seek herein to condemn a flight easement over the remaining portion of respondent's land.

As we interpret said "Amendment to Answer," the thrust of respondent's allegations is that petitioner, prior to the commencement of this proceeding, *had appropriated* a flight easement over her entire 78-acre tract. Even so, respondent does not allege such appropriation as the basis for a counterclaim in which, upon payment of a determined fair value, petitioner would acquire a flight easement clearly defined as to location and elevation. Rather, respondent alleges what occurred prior to this proceeding constitutes a basis for the award of *additional* compensation herein.

In *United States v. Brondum* (C.A. 5th), 272 F. 2d 642, Wisdom, Circuit Judge, in discussing the distinction between a clearance or obstruction easement and an avigation or flight easement, said: "An avigation easement may or may not contain provisions dealing with obstructions, but, unlike a clearance easement, in express terms it permits free flights over the land in question. It provides not just for flights in the air as a public highway — in that sense no easement would be necessary; it provides for flights that may be so low and so frequent as to amount to a taking of the property."

Respondent cites and relies upon decisions in actions for "inverse condemnation," a term often used to designate "a cause of action against a governmental defendant to recover the value of property

which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *City of Jacksonville v. Schumann (Fla.),* 167 So. 2d 95, 98; *Thornburg v. Port of Portland (Or.),* 376 P. 2d 100; *Martin v. Port of Seattle (Wash.),* 391 P. 2d 540.

The legal doctrine indicated by the term, "inverse condemnation," is well established in this jurisdiction. Where private property is *taken* for a public purpose by a municipality or other agency having the power of eminent domain under circumstances such that no procedure provided by statute affords an applicable or adequate remedy, the owner, in the exercise of his constitutional rights, may maintain *an action* to obtain just compensation therefor. *McKinney v. High Point,* 237 N.C. 66, 74 S.E. 2d 440; *Eller v. Board of Education,* 242 N.C. 584, 89 S.E. 2d 144; *Sale v. Highway Commission,* 242 N.C. 612, 89 S.E. 2d 290; *Cannon v. Wilmington,* 242 N.C. 711, 89 S.E. 2d 595; *Rhyne v. Mount Holly,* 251 N.C. 521, 112 S.E. 2d 40; *Insurance Co. v. Blythe Brothers Co.,* 260 N.C. 69, 131 S.E. 2d 900.

"Inverse condemnation" actions in which a defined flight easement was vested in the United States by judicial decree and in which the landowner was awarded compensation therefor include the following: *Herring v. United States (Ct. Cl.),* 162 F. Supp. 769; *Highland Park v. United States (Ct. Cl.),* 161 F. Supp. 597; *Matson v. United States (Ct. Cl.),* 171 F. Supp. 283. In *Herring,* it was adjudged that the United States, upon payment of compensation in the amount of $7,500.00, "shall have an easement of flight for light, propeller-driven, single-engine airplanes at a minimum elevation of 45 feet above the surface of the ground and higher." In *Highland Park,* it was adjudged that the United States, upon payment of compensation in the amount of $65,000.00, "is vested with a perpetual easement of flight over plaintiff's property at an elevation of 100 feet or more above the ground, with airplanes of any character." In *Matson,* it was adjudged that the United States, upon payment of compensation in the amount of $5,800.00, was entitled to "a perpetual easement of flight . . . for its planes over the entire property of plaintiffs' 357.7 acres at elevations above eighty-five feet"; and it was further adjudged that the plaintiffs execute a deed conveying to the United States such an easement.

In *Avery v. United States (Ct. Cl.),* 330 F. 2d 640, where the United States had theretofore acquired by condemnation a defined flight easement, it was held that "the introduction of larger, heavier, noisier aircraft can constitute a fifth amendment taking of an *additional* easement *even though* new aircraft do not violate the boundaries of the initial easement" and entitle the landowner to additional compensation for "an uncompensated expansion of the existing easement."

Other pertinent decisions are cited and discussed in Annotation, "Airport operations or flight of aircraft as taking or damaging of property," 77 A.L.R. 2d 1355 *et seq.*, and supplemental decisions.

In *United States v. Causby,* 328 U.S. 256, 90 L. Ed. 1206, 66 S. Ct. 1062 (1946), "a case of first impression," the Supreme Court of the United States reviewed the decision of the United States Court of Claims in *Causby v. United States (Ct. Cl. 1945),* 60 F. Supp. 751. The claimants (Causby) owned land adjacent to the Greensboro-High Point Municipal Airport. The airport had been leased by the United States. The path of glide of aircraft taking off from or landing upon the (paved) northwest-southeast runway was directly over the Causby property. Various aircraft of the United States, including bombers, transports and fighters, used said runway. The findings of the Court of Claims were to the effect that there was a diminution in value of the Causby property caused by frequent, low-level flights of United States aircraft.

The Supreme Court agreed "that a servitude has been imposed upon the land." However, the decision of the Court of Claims was reversed. The ground for reversal was stated as follows: "The Court of Claims held, as we have noted, that an easement was taken. But the findings of fact contain no precise description as to its nature. It is not described in terms of frequency of flight, permissible altitude, or type of airplane. Nor is there a finding as to whether the easement taken was temporary or permanent. Yet an accurate description of the property taken is essential, since that interest vests in the United States."

Thereafter, in *Causby v. United States (Ct. Cl. 1948),* 75 F. Supp. 262, the Court of Claims found: "There is no proof that subsequent to November 1, 1946, the defendant asserted or exercised such an easement. The easement taken was temporary and was for the period from June 1, 1942, to November 1, 1946." As a result of the taking of said temporary easement, Causby was awarded compensation in the amount of $1,435.00 consisting of (1) $1,060.00 for decrease in rental value during said period, and (2) $375.00 on account of destruction of chickens.

In *Griggs v. Allegheny County,* 369 U.S. 84, 7 L. Ed. 2d 585, 82 S. Ct. 531, rehearing denied, 369 U.S. 857, 8 L. Ed. 2d 16, 82 S. Ct. 931, the Greater Pittsburgh Airport, owned and operated by Allegheny County, was involved. The opinion of Mr. Justice Douglas states: "The airport was designed for public use in conformity with the rules and regulations of the Civil Aeronautics Administration within the scope of the National Airport Plan provided for in 49 U.S.C. §§ 1101 *et seq.*" Again: "The airlines that use the airport are lessees of respondent; and the leases give them, among other things, the right 'to

land' and 'take off.' No flights were in violation of the regulations of C.C.A.; nor were any flights lower than necessary for a safe landing or take-off. The planes taking off from the northeast runway observed regular flight patterns ranging from 30 feet to 300 feet over petitioner's residence; and on let-down they were within 53 to 153 feet." It was held, in accordance with *Causby,* that there had been *a taking* of an easement by Allegheny County for which Griggs was entitled to compensation. The basis of the dissent of Mr. Justice Black, with whom Mr. Justice Frankfurter concurred, is that the United States of America rather than Allegheny County should pay for an easement necessary to be acquired to comply with federal statutory provisions and rules and regulations of federal agencies.

Our statutes, codified as G.S. Chapter 63, entitled "Aeronautics," contemplate full cooperation and compliance with federal statutes and rules and regulations of appropriate federal agencies.

While the *factual* allegations in respondent's "Amendment to Answer" are meager, analysis thereof discloses respondent seeks additional compensation as in an "inverse condemnation" action for the diminution in value of her 78-acre tract prior to the commencement of the present proceeding allegedly caused by the actual use of her property "as an approachway for airplanes entering and leaving the airport." It does not appear whether any particular line of flight over respondent's 78-acre tract had been designated by petitioner or by any federal agency as an approachway to the north-south runway (as then constructed) of the airport. Be that as it may, upon final adjudication in this proceeding (G.S. 40-19; *Topping v. Board of Education,* 249 N.C. 291, 299, 106 S.E. 2d 502), petitioner will own in fee simple the 12½ acres on which the extension of the north-south runway is constructed. After construction of said extension, there will be no need for planes approaching or taking off from said airport to fly over any portion of respondent's remaining property. A portion of the north-south runway as extended will be on the 12½ acres condemned in this proceeding. Hence, no permanent flight easement with reference to respondent's remaining property is presently involved.

As of the date this proceeding was commenced, no "inverse condemnation" action had been commenced by respondent. If she was entitled to compensation for a flight easement previously used by petitioner, the nature and duration of such flight easement had not been determined. The extension of the north-south runway, partly on the 12½ acres condemned herein, radically changes the north-south "approachway" to said airport. Whatever flight easement, if any, petitioner had taken prior to the commencement of this proceeding must be considered a temporary easement.

We reach the following conclusions:

The compensation to be awarded respondent herein for the 12½ acres condemned herein is to be determined in accordance with the rules set forth in the first two paragraphs of this opinion. In making such determination, both the 12½ acres condemned and the remainder of respondent's 78-acre tract *are to be considered free and clear of flight easements of any kind.*

The foregoing determination herein will be without prejudice to respondent's right, if so advised, to institute an independent action to recover compensation for the damages, if any, she sustained on account of flights over her 78-acre tract prior to the commencement of this proceeding.

Legal principles pertinent to such independent action are discussed in *Causby* and other cited cases. Suffice to say, whether respondent can recover in such independent action will depend upon legal principles and evidence that have no place in determining the compensation to be paid respondent for the 12½ acres condemned herein. Such action, in our opinion, may not be considered a cause of action "arising out of the . . . transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the (plaintiff's) action," within the meaning of G.S. 1-137. The statutory procedure for condemnation, G.S. 40-11 *et seq.*, does not contemplate that commissioners pass upon issues of fact prerequisite to an adjudication as to whether respondent is entitled to recover for *an alleged appropriation by use* of an easement of flight.

Having reached the conclusion respondent may not assert herein "the new matter" alleged in said "Amendment to Answer," the order of Judge Riddle, which affirmed the clerk's order of April 17, 1964, is affirmed.

Affirmed.

GEO. A. HORMEL & COMPANY, INC. v. THE CITY OF WINSTON-SALEM.

(Filed 24 February, 1965.)

1. Pleadings § 28—

Plaintiff must make out his case according to his allegations, and the allegations and proof must correspond in order to establish a cause of action.

2. Municipal Corporations § 15—

In this action to recover damages resulting from the overflow of waters from a culvert conveying surface waters under a building leased by plaintiff, recovery cannot be had against the city on the theory of its liability for negligence in the maintenance and repair of drains and culverts constructed by it when plaintiff's evidence is to the effect that plaintiff's lessor constructed the culvert which caved in and caused the damage.

3. Same—

Mere evidence that defendant city bolted down a manhole in a private drainage line and sealed the holes therein and regularly sent an employee through the private drainage system to see that it was open for the drainage of surface waters from the streets, is insufficient to show that the city adopted and controlled the drainage culvert complained of so as to render the municipality liable for damages resulting from its failure to keep it in repair.

4. Same—

In an action to recover for damages resulting from the overflow of waters from a culvert conveying surface water under a building leased by plaintiff, plaintiff may not recover on the theory that defendant municipality gathered and concentrated surface waters into artificial drains and diverted them into the culvert when the theory of the complaint is that the city negligently failed to maintain and repair the drains and there is no allegation of divertion or concentration of surface waters into the culvert.

5. Pleadings § 25; Appeal and Error § 7—

Where the theory of liability alleged in the complaint is that defendant municipality negligently failed to maintain and keep its culvert in repair after it had actual or constructive notice of defects, a motion to amend, made several days before the call of the case in the Supreme Court, so as to allege the theory of liability that the municipality wrongfully diverted the natural flow of surface waters into the culvert and drains, will be denied, since the proposed amendment sets up a wholly different cause of action or substantially changes the action originally sued upon.

APPEAL by plaintiff from *McConnell, J.*, 25 May 1964 Session of FORSYTH. Docketed and argued as Case No. 383, Fall Term 1964.

An action of tort to recover for property damage from water allegedly caused by defendant's negligence.

From a judgment of compulsory nonsuit entered at the close of plaintiff's evidence, it appeals.

Deal, Hutchins and Minor by Fred S. Hutchins, Sr. and Edwin T. Pullen for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice by I. E. Carlyle and Grady Barnhill, Jr., for defendant appellee.

PARKER, J. From 1942 until 1962 plaintiff occupied as tenant under lease and used as a manufacturing and distributing branch of its meat packing business parts of certain warehouse buildings in the city of Winston-Salem at 232 South Liberty Street Annex, erected and owned by Liberty Storage Company. C. H. Cherry, branch manager of plaintiff on 26 May 1960, testified: "We occupied both the basement and the main floor of this second building and the one adjacent to it."

This is a summary of the essential allegations of fact in its complaint, based on information and belief:

Many years ago defendant, or its predecessor the city of Winston or town of Salem, installed metal drainpipes for surface waters upon and through the premises owned by Liberty Storage Company, and afterwards leased by it to plaintiff, and covered the same with dirt, and that these pipes were furnished by defendant, or by one or more of its predecessors the city of Winston or the town of Salem. This pipeline has from time to time been inspected and repaired by defendant.

Prior to the spring of 1958 this pipeline had been defective and inadequate so that water "busted out" of one or more manholes, and at such times defendant inspected it and made temporary repairs thereto. In the spring of 1958 defendant bolted and cemented a manhole on the premises occupied by one Lawrence Levy, trading as Lar Mel Displays, which premises are a short distance northwest of the premises occupied by plaintiff, to prevent surface waters from being forced up through a manhole into Levy's premises. When defendant bolted and cemented this manhole, its officers and agents discovered, or should have discovered, that the metal pipes of the drain were decomposed, rotten, and full of holes, and that dirt and rocks had washed or fallen into the pipes so that waters flowing into them would be blocked and cause the metal pipes "to give way" resulting in "washouts" and rendering the drain less adequate to carry off the surface waters of unusual or ordinary rains. With this knowledge defendant should have repaired or replaced these metal pipes.

Paragraph 9. "This plaintiff is further informed, advised and believes and so alleges that the defendant City of Winston-Salem had from time to time bottled more surface waters and channelled same into these drain pipes so that the volume of water passing through same was and had been gradually increasing for some time and because of the defective condition of said drain pipes, they were insufficient to take care of surface waters."

These drainpipes were full of holes and weak, and consequently surface waters ran out of them and washed the earth around them away, causing the metal pipes to collapse and earth to fall in them blocking the flow of surface water and causing the surface water to burst out

and damage its property, and such negligence on defendant's part proximately caused its loss to its property.

Plaintiff alleges, not on information and belief, that on 26 May 1960, during a rain, the drain pipes gave way, collapsed, and the earth surrounding them filled and clogged the drainpipes to such an extent that the surface waters became blocked, causing further washouts, and the surface waters overran the drain, flowed into the building, and washed out the earth surrounding said pipes doing great damage to plaintiff's property therein.

These essential allegations were denied by defendant in its answer.

Plaintiff in its complaint alleges, and defendant in its answer admits, that plaintiff, according to the requirements of defendant's charter, filed a claim against defendant in apt time for its loss.

Plaintiff's evidence tends to show the following facts: Old Tar Branch in the city of Winston-Salem is a natural water course carrying water at all times. The upstream end of its watershed begins approximately at 5th Street and Trade Street in the city, and from thence the natural flow of water from its watershed is southwardly down this branch for about one-half to three-quarters of a mile, until the branch merges with Salem Creek west of South Main Street in the city. Waters from the east and west side of this branch within its watershed flow into it as a natural water course. The ground in the watershed area slopes north to south. As this branch flows southwardly, it passes through culverts under 4th, 3rd, 2nd, and 1st Streets, under Expressway I-40, and under Brookstown Avenue. The defendant built and maintains the culverts through which the waters of this branch flow under its street rights-of-way. Feeder lines within the street rights-of-way situate in the Watershed of Old Tar Branch were built by the defendant, and the waters therein flow into Old Tar Branch.

North of Brookstown Avenue are the Winston-Salem Southbound Railway Company's station, warehouse, and railway yards. Sometime prior to 1915, the railway built a culvert, running north 457½ feet from Brookstown Avenue to a point where the south line of the buildings now occupied by plaintiff is located, to carry the waters of Old Tar Branch under its railway yard and tracks. Defendant has never maintained or repaired this culvert. At that time this branch north of this culvert was an open stream. This branch at present south of Brookstown Avenue is an open stream.

During the period 1925 to 1929 Liberty Storage Company installed on its property a 54-inch corrugated metal culvert or pipes, beginning at the north end of the railway culvert and running in a northwardly direction 425 feet to the north edge of its property, to carry the waters of Old Tar Branch. Defendant has never maintained or repaired this

metal culvert or pipes. About 1930 Liberty Storage Company built on its property over this metal culvert the buildings leased in part to plaintiff. On the extreme northern end of its property Liberty Storage Company erected over this metal culvert or pipes a two-story brick building, which is 196.25 feet from the northern end of the buildings leased in part by plaintiff, and which was occupied at the times here relevant by one Lawrence W. Levy, trading as Lar Mel Displays, as a tenant. This metal culvert or pipes terminated in a manhole, which defendant did not build, and which was within the building, which Levy afterwards leased. Liberty Storage Company — no date appears in the record — installed two 36-inch metal pipes which run northward from the manhole within the Levy building some 30 feet beyond the northern end of its property to a junction box. This junction box is about 4 x 8 feet across the top and 8 or 10 feet deep. The trial court found as a fact that Robert W. Neilson, director of public works for defendant and a witness for plaintiff, was a registered engineer, and held he was entitled to express an opinion as such. He expressed the opinion that the 54-inch metal culvert installed by Liberty Storage Company on its property was of sufficient size to carry off any water that came to it from the two 36-inch metal pipes installed by Liberty Storage Company. Defendant has never maintained or repaired these two 36-inch pipes.

From this junction box up to the source of Old Tar Branch near 4th Street, its waters flow through pipes built, maintained, and controlled by the property owners through whose lands it flows, except the parts under street rights-of-way. Drainage from streets in the branch's watershed flows into these pipes. Surface waters from catch basins and drains on Belews Street and Academy Street flow into the drainage pipes carrying the waters of Old Tar Branch just north of the properties owned by Liberty Storage Company. Just south of the drainage pipes installed by Liberty Storage Company on its property, defendant directed surface waters from Cemetery Street through a 30 x 38-inch brick culvert into the drainage pipes of Old Tar Branch. In the last 25 or 30 years, defendant has made larger storm inlets, when necessary, within the watershed of Old Tar Branch. From Brookstown Avenue to 4th Street many private owners have built buildings on their lands over the metal pipes or culverts through which flow the waters of Old Tar Branch. Robert W. Neilson testified: "The piping inlets and culverts were put in to carry water underground which normally would have fallen on and run over the surface of the ground in the same direction."

Pursuant to a contract between the State Highway and Public Works Commission and defendant, the Commission built I-40 Express-

way through defendant. The work began around July 1954 and was completed in 1957. The Expressway passed the property of Liberty Storage Company, but did not take any of it. Prior to the building of the Expressway, the surface water that fell on that part of the ground where the Expressway now is within the watershed of Old Tar Branch drained off on top of the ground over the low part of the tracks of Winston-Salem Southbound Railway Company. Since the building of the Expressway, all the surface water that falls on the paved portion of the Expressway and its bridge in the place above specified is carried by a 36-inch pipe installed by the Commission south of the Expressway into the junction box north of the Levy building, and from thence it flows into the 54-inch drainage pipes installed by Liberty Storage Company on its property. The water coming down 41 feet from the top of the bridge, with greater force and concentration that if there were no bridge, would have more head and more force. Because of this pressure and force, "the same size pipe could carry more water." In building the Expressway a cloverleaf was constructed on Main Street about a block north and east of the buildings leased by plaintiff. This 36-inch pipe installed by the Commission, by means of thirty inlets on the Expressway and its approaches, drains an area about 600 to 800 feet east of Old Tar Branch, perhaps 1200 feet. Several of these inlets are in the cloverleaf and others are east of the cloverleaf on Church Street, one block east of Main Street. Manholes and catch basins built in connection with the Expressway drain into metal culverts carrying the waters of Old Tar Branch. The construction of the Expressway did not increase or extend the watershed area drained by Old Tar Branch.

Defendant ordinarily inspects drainage systems carrying water under its public streets to see that they are open and waters could leave its streets. The metal culvert under the property leased by plaintiff had been carrying street and surface waters since it was installed. Galveston Ellis has been an employee of defendant for 42 years. His job is to go through all the different drainage pipes all over the city of Winston-Salem and to clean them out about every two weeks. If a big rain fell, he went through them the next day. He could walk through the 54-inch drainpipe installed by Liberty Storage Company. When he went through these pipes, he had a flashlight. He never found anything wrong with the drainage pipes underneath the building occupied by Levy or the buildings occupied by plaintiff. He went through the drainpipes from 4th Street to Brookstown Avenue hundreds of times and he never saw any holes in, or anything wrong with, the pipes. It never was broken when he went through.

Inside the Levy building owned by Liberty Storage Company was a concrete area about 10 or 12 feet square, and in the middle of this was a manhole installed by Liberty Storage Company, as above set forth. Over this manhole was a lid with four 1½-inch or 2-inch holes. Prior to 26 May 1960, if there was a very heavy rain, Levy found about two inches of water in the bottom area of the building. He placed above the manhole a 4 x 4 plank which extended to the ceiling, and had it wedged in to keep the manhole down. In the fall or spring of 1959 water came up out of the drain with such force that it knocked the manhole cover off and there was water on the bottom area of the building. As a result of contact by him, several inspectors from the city came to the building and inspected the manhole. He was told to contact the owners of the building. Later, employees of defendant bolted the manhole cover down and sealed the holes.

Between 1957 and 26 May 1960 there was no flooding or water trouble in the parts of the buildings leased by plaintiff. On the night of 26 May 1960 in the city of Winston-Salem there was a heavy rainstorm for a short duration, followed by a normal rainfall. That night the corrugated metal pipes installed by Liberty Storage Company, over which it had erected buildings leased in part to plaintiff, collapsed. Robert W. Neilson testified for plaintiff as follows:

> "When I went down there I found the corrugated metal pipe in this area had collapsed. By 'this area' I mean this southern part of the building occupied by Hormel, the first part of it. This part of the building is on columns above the stream level or pipe level, with no basement in it, floors above it, and this pipe had collapsed, and one joint had curled up and washed through the culvert and landed in the open stream just south of Brookstown Avenue. The other pipes were crushed and blocking the drainageway in this area. Including the section that went down through the Winston-Salem Southbound Railway culvert and the other sections I found collapsed there under the building, there were three sections involved there; I believe those sections were about 10-foot lengths. I checked the date on one of those sections; it had a metal date stamped on the pipe with the name 'Armco, 1925.' Armco was the name of the company that manufactured the pipe."

As a result of the collapse of the galvanized metal pipes, water waist high flooded the lower part of the building occupied by plaintiff, which caused damage to its property there stored in an alleged amount of over $25,000.

Robert W. Neilson testified in substance: After the flooding of the premises occupied by plaintiff, he went there and saw the rusted-out

places in the pipes which Liberty Storage Company had installed on its premises. As a rule, the bottom of the pipes would corrode first. Where these pipes had rusted-out holes, dirt would wash up between these holes to some extent. When there are holes like the picture shows, they would be visible to one on the inside of the pipes, provided there was no water or dirt covering them up. The deterioration he saw in the pipes might happen in 25 years, and the pipes might last 50 years.

C. H. Cherry, branch manager of plaintiff in May 1960, testified: "Yes, sir; in my opinion the drain was overloaded. The water that actually did the damage came from not that drain but from the street above the drain. * * * The drain did not give way until after we had 47 inches of water in the building."

Plaintiff introduced in evidence a part of defendant's answer reading: "* * * it is admitted that on or about the 26th day of May, 1960, during a rain, the drain pipe under the building occupied by the plaintiff became clogged up, causing the premises occupied by the plaintiff to be flooded."

Our task in stating the essential facts necessary to a decision of this appeal has been laborious and difficult by reason of the fact that plaintiff's witnesses testified in great detail as to the drainage of water into Old Tar Branch and referred to maps, but there is nothing in the record to identify what maps the witnesses were referring to. Three large maps of this area have been brought forward on appeal, and it has been most laborious to determine the map or maps the witnesses were referring to. The witnesses refer to photographs. These photographs are not before us.

Plaintiff in its complaint alleges a cause of action based on installation by the city of Winston-Salem, or its predecessor the city of Winston or the town of Salem, of metal drainage pipes for surface waters upon and through the premises owned by Liberty Storage Company and afterwards leased by this company to plaintiff; inspection and repair of these drainage pipes by defendant; the deterioration of these pipes prior to 1958 and temporary repair of them by defendant; negligent failure by defendant to repair or replace these pipes, after they had become defective to the knowledge, actual or constructive, of defendant; channeling of more surface waters into these drainage pipes than they could carry by reason of their defective condition; and that because of such negligence on 26 May 1960 during a rain the drainage pipes collapsed and earth fell in them blocking the flow of water, and water burst out and damaged plaintiff's property.

In *Vickers v. Russell*, 253 N.C. 394, 117 S.E. 2d 45, the Court said: "A plaintiff must make out his case *secundum allegata*. He cannot re-

cover except on the case made by his pleading. Proof without allegation is no better than allegation without proof."

Plaintiff cannot invoke the application of the general rule that a municipality is liable for damages caused by its negligence in the maintenance and repair of its sewers and drains constructed by it (63 C.J.S., Municipal Corporations, § 876(c); 38 Am. Jur., Municipal Corporations, § 636; McQuillin, Municipal Corporations, 3d Ed., Vol. 18, § 53.118), which is the cause of action it has alleged in its complaint, for the simple reason that all its proof is that the drainage pipes which collapsed causing its damage were not only constructed and installed by an individual, Liberty Storage Company, on its own property, but were actually under the control of Liberty Storage Company. Further, plaintiff cannot invoke the application of the general rule that municipal adoption and control of drainage culverts or pipes complained of, constructed or owned by an individual, is sufficient to render the municipality liable for defects or obstructions therein (63 C.J.S., Municipal Corporations, § 877; 38 Am. Jur., Municipal Corporations, § 636), for the reason that it has neither allegation nor proof to call this rule of law into play. The mere fact, as shown by plaintiff's evidence, that defendant in the Levy building bolted the manhole down of Liberty Storage Company's private drainage line and sealed the holes therein, and that defendant regularly sent an employee through the private drainage system of Liberty Storage Company to see that it was open and waters could leave its streets did not constitute municipal adoption and control of Liberty Storage Company's private drainage system on its premises. This is said in 63 C.J.S., *ibid,* p. 261: "Hence, it does not adopt a private sewer or drain merely by cleaning and repairing it or by constructing a drain, manhole, and intake which does not conduct into the sewer any extra water, or by attempting to work out an agreement for the reconstruction of the private drain or sewer." In accord, *City of Irvine v. Smith,* 304 Ky. 868, 202 S.W. 2d 733; *Munn and Barton v. Pittsburgh,* 40 Pa. 364. In the case of *City of Irvine,* the Court of Appeals of Kentucky held that where sewers constructed by the city were placed to catch surface water as it drained naturally, the fact that such culverts and sewers crossing streets were connected with private sewers did not constitute a dedication of private sewers to public use.

In *Johnson v. Winston-Salem,* 239 N.C. 697, 81 S.E. 2d 153, Johnson, J., with clarity and accuracy, said for a unanimous Court:

> "[T]he general rule is that a municipality becomes responsible for maintenance, and liable for injuries resulting from a want of due care in respect to upkeep, of drains and culverts constructed

by third persons when, and only when, they are adopted as a part of its drainage system, or the municipality assumes control and management thereof. [Citing authority.] Accordingly, there is no municipal responsibility for maintenance and upkeep of drains and culverts constructed by third persons for their own convenience and the better enjoyment of their property unless such facilities be accepted or controlled in some legal manner by the municipality. * * * Moreover, the fact that a private line of drainage is connected with a municipal culvert under circumstances involving no dedication by the private owner or control by the municipality, ordinarily does not make the latter liable for damages to private property caused by a break in the private line."

Plaintiff relies upon the principle of law stated in *Yowmans v. Hendersonville,* 175 N.C. 574, 96 S.E. 45; and *Eller v. Greensboro,* 190 N.C. 715, 130 S.E. 851, to the effect that a municipality cannot escape liability if it gathers and concentrates surface waters into artificial drains or sewers and turns them on a person's property in such manner and such volume that the injuries complained of were likely to occur and did result under and from such condition. This general rule of law is not relevant here, because plaintiff's complaint alleges no such case. Plaintiff's allegation is that defendant from time to time has channeled more surface waters "into these drain pipes so that the volume of water passing through same was and had been gradually increasing for some time and because of the defective condition of said drain pipes, they were insufficient to take care of surface waters." We are fortified in our opinion that plaintiff's complaint does not allege a cause of action to invoke the application of the principle of law stated in the *Yowmans* and *Eller* cases by reason of the fact that plaintiff filed in this Court on 16 October 1964, and the appeal was set for argument and heard on 21 October 1964, a motion to amend paragraph 9 of its complaint by striking out the words "because of the defective condition of said drain pipes," which paragraph 9 is set forth verbatim above, and by inserting a new paragraph 9½ after paragraph 9 in its complaint, as follows:

"That between the years 1925 and 1929 the Liberty Storage Company had provided sufficient pipe to convey the water then flowing through its said lot without injury thereto or the property thereon. That thereafter, the defendant, City of Winston-Salem, carelessly and negligently, without providing sufficient outlet therefor and in disregard of the duty it owed the said plaintiff and its predecessor in title, collected much greater than the natural quantity of surface water from various parts of the city of Winston-Salem and wrongfully diverted the natural flow of said sur-

face water and drainage and concentrated and collected the said increased flow of water and drainage in artificial drains and thence into and through said property without providing sufficient outlets for its proper outflow, and by reason thereof plaintiff's property has been flooded and its property damaged as herein set out."

Defendant has filed a reply to this motion and opposes it, on the ground it seeks to change the cause of action alleged in the original complaint, and comes too late.

G.S. 1-163 vests in the judge broad discretionary powers to permit amendments to any pleading, process or proceeding either before or after judgment. The Court said in *Perkins v. Langdon,* 233 N.C. 240, 63 S.E. 2d 565: "An analysis of this statute [G.S. 1-163] lends support to the view that the scope of the court's power to allow amendments is broader when dealing with amendments proposed before trial than during or after trial." Under the original complaint, the crucial question is whether the drainage pipes installed by defendant had become defective, and whether defendant had knowledge, actual or constructive, of such defects. Under the proposed amendment, the crucial question is whether defendant collected a much greater flow of surface water than the natural quantity of surface water from various parts of the city of Winston-Salem, and wrongfully diverted the natural flow of such surface water, and concentrated and collected the increase flow of water and drainage into artificial drains and thence into the private drainage system installed by Liberty Storage Company on its premises without providing sufficient outlets for its proper outflow. Plaintiff's proposed amendment sets up a wholly different cause of action or changes substantially the action originally sued upon, and G.S. 1-163 does not permit this to be done five days before the appeal was to be heard in the Supreme Court. The motion is denied. *Perkins v. Langdon, supra; Anderson v. Atkinson,* 235 N.C. 300, 69 S.E. 2d 603; *Electric Co. v. Dennis,* 255 N.C. 64, 120 S.E. 2d 533.

Plaintiff assigns as error the exclusion of testimony of Robert W. Neilson, a registered engineer and director of public works of defendant, to this effect: After the flooding of the premises occupied by plaintiff on 26 May 1960, Liberty Storage Company was concerned with a plan to replace the old pipes installed by it under its buildings occupied by plaintiff. He, at the request of Liberty Storage Company, suggested a plan for Liberty Storage Company to cross the Winston-Salem Southbound Railway Company's right-of-way west of the buildings of Liberty Storage Company, which would bypass its buildings and join in with the railway's culvert. "Our plan showed a 84-inch concrete pipe." Plaintiff's contention is the testimony as to the sug-

gested plan for an 84-inch concrete pipe is competent. The mere fact of this suggested plan furnished by defendant at the request of Liberty Storage Company for a reconstruction of Liberty Storage Company's private drain could impose no liability on defendant, 63 C.J.S., Municipal Corporations, p. 261, and if it had been admitted in evidence, it would not, in the light of plaintiff's allegations and proof, have entitled plaintiff to go to the jury, or changed the result here.

The other assignments of error to the exclusion of and admission of evidence were not prejudicial to plaintiff, when we consider the allegations of its complaint.

Plaintiff introduced in evidence the contract entered into by and between the State Highway and Public Works Commission and defendant in respect to the building through defendant of I-40 Expressway. The provisions of this contract are of no benefit to plaintiff on the case made out by its complaint.

Plaintiff has failed to make out a case by proof of actionable negligence against the city of Winston-Salem according to the allegations of its complaint, which would carry its case to the jury. It is hornbook law that a plaintiff "cannot recover except on the case made by his pleading." *Probata* without *allegata* is insufficient. Both must concur to establish a cause of action. *Aiken v. Sanderford,* 236 N.C. 760, 73 S.E. 2d 911.

The judgment of compulsory nonsuit is

Affirmed.

PAUL WOFFORD AND WIFE, LUCILLE PASCHAL WOFFORD, FRED M. PARRISH AND WIFE, MARY ANNE PASCHAL PARRISH, AND HENSEL WOOD PRODUCTS v. THE NORTH CAROLINA STATE HIGHWAY COMMISSION.

(Filed 24 February, 1965.)

1. Municipal Corporations § 28—

The owner of property abutting a street has a right in common with all other citizens to the free use of the street subject to the rules, regulations, restrictions and limitations promulgated pursuant to the police power of the State, and a private easement appurtenant entitling him to reasonable access to the street or highway his property abuts.

2. Same; Highways § 5—

The General Assembly has authorized the Highway Commission to construct and maintain limited access highways in both rural and urban areas

in the exercise of the police power, and has authorized the Commission and the governing bodies of cities and towns to enter into agreements with each other respecting the maintenance and use of controlled access streets within their respective jurisdictions. G.S. 136-89.48 *et seq.*

3. Same; Eminent Domain § 2—

Where a limited access highway is constructed across a municipal street in accordance with statutory authority, the owners of property abutting the street who are thus placed in a *cul-de-sac* and deprived of access to one of the adjacent intersecting streets are not entitled to compensation for the diminution in value of their property resulting from such limitation of access, there being no taking of their property or any interference with their easement of reasonable access to the butting street. Art. I, § 17 of the Constitution of North Carolina, 14th Amendment to the Constitution of the United States.

4. Same—

The construction of a limited access highway across a city street so as to place property along the street in a *cul-de-sac*, does not result in the taking of any property right from the owners along the abutting street, since a property owner has no vested right to have traffic pass his property, and his inconvenience from circuity of travel made necessary to reach streets in other areas of the city is different only in degree and not in kind with that suffered by the public generally. This result is not affected by the fact that the city acquired the street by dedication.

5. Dedication § 2—

The sale of lots in a subdivision with reference to a map showing streets gives the purchaser of each lot the right to have the streets kept open insofar as necessary to afford him reasonable ingress or egress to his lot, but as to the public the selling of the lots with reference to a map is only an offer to dedicate, and neither burdens nor benefits may be imposed on the public unless in some proper way it accepts the dedication.

6. Same; Municipal Corporations § 28—

The fact that a city acquires streets by acceptance of the offer of dedication made by the owner of a subdivision in selling lots with reference to a map showing such streets does not limit the city's control over the streets, or affect its authority to close the streets upon compliance with statutory procedure, G.S. 153-9(17), G.S. 160-200(11), and the purchaser of a lot abutting a public street, whatever the origin of the street, takes title subject to the authority of the city to control and limit its use in the valid exercise of the police power.

PARKER, J., dissenting.

APPEAL by plaintiffs from *Olive, E. J.*, August 31, 1964, Non-jury Session of FORSYTH. Docketed and argued as No. 397 at the Fall Term, 1964.

Proceedings to recover damages for the alleged appropriation of property for highway purposes.

Individual plaintiffs own an 8.1-acre tract of land in the city of Winston-Salem, a portion of which they leased to corporate plaintiff. The property is in an industrial zone, and corporate plaintiff operates a wood processing plant thereon. The land lies to the south of and abuts 21st Street, which intersects Ivy Avenue a short distance to the west of the property, and prior to May 1963 intersected Liberty Street about 200 feet to the east of the property. Prior to May 1963 "a large percentage of all traffic going to and from plaintiffs' property was by way of the Liberty Street intersection." Liberty Street is "one of the main arteries of travel in the City of Winston-Salem," and prior to May 1963 "was the main street connecting 21st Street to the business and residential areas to the north, east and south of plaintiffs' property, and to the general system of streets and highways in the City of Winston-Salem." In May 1963 the defendant, State Highway Commission, began construction of highway project 8.17378, which is commonly called the North-South Expressway through the city of Winston-Salem, and is designated U.S. Highway 52. The Expressway crosses 21st Street between plaintiffs' property and Liberty Street.. Defendant caused 21st Street to be "blocked, cut off and closed" from Liberty Street by a dirt fill made in the course of construction of the Expressway. Thus 21st Street is blocked and terminated about 100 feet east of plaintiffs' property, creating a *cul-de-sac*. The closest access from plaintiffs' property to Liberty Street is now by way of 21st Street, Ivy Avenue and 25th Street. The intersection of 25th and Liberty Streets is four blocks north of 21st Street.

Plaintiffs allege and contend they had "a public and private" easement in 21st Street in both directions, the blocking of 21st Street has damaged their property and amounts to a taking without compensation. Defendant avers and contends that plaintiffs have suffered no compensable damage.

The facts, as above summarized, were stipulated. The trial court ruled that the blocking of 21st Street "did not constitute an appropriation of plaintiffs' property or an interest in plaintiffs' property," and that plaintiffs suffered no compensable damage. Judgment was entered dismissing the proceedings.

Attorney General Bruton, Assistant Attorney General Lewis, Trial Attorney Rosser and Spry, Hamrick and Doughton for the State Highway Commission.

Deal, Hutchins and Minor and Edwin T. Pullen for plaintiffs.

MOORE, J. The question is whether the closing of 21st Street about 100 feet east of plaintiffs' property, so as to leave it on a *cul-de-sac*,

constitutes an appropriation of a property right of plaintiffs for which they are entitled to compensation from the State.

The same legal question, on similar facts, arose in *Hiatt v. Greensboro,* 201 N.C. 515, 160 S.E. 748 (1931). In holding that the property owner had suffered compensable damage this Court said: "He has an easement in the street, which is appurtenant to his lot. This easement is his private property of which he cannot be deprived even for the use of the public, without just compensation. . . . 'An abutting owner has two distinct kinds of rights in a highway, a public right which he enjoys in common with all other citizens, and certain private rights which arise from his ownership of property contiguous to the highway, and which are not common to the public generally; and this regardless of whether the fee of the highway is in him or not. These rights are property of which he may not be deprived without his consent, except upon full compensation and by due process of law. They include . . . the right to have the highway kept open as a thoroughfare to the whole community for the purpose of travel . . .' 29 C.J. p., 547." Further: "The plaintiffs in the instant case have suffered special damages in the depreciation of the value of their property resulting from the deprivation of their right of access to their property from the northern section of the city and from the stopping of all travel by their property from the southern section of the city. They have been deprived of rights which differ in kind and degree from the rights of the public." This decision, at the time of its rendition, was in accord with the weight of authority in other jurisdictions. 49 A.L.R. 351; 93 A.L.R. 642.

The *cul-de-sac* principle was again presented to this Court, this time involving rural property, in *Snow v. Highway Commission,* 262 N.C. 169, 136 S.E. 2d 678 (1964). There it was held that the damages were not compensable. The rationale of that decision is fully set out in the opinion and a detailed repetition here would only overburden the Reports. We are paraphrasing the opinion as follows: To entitle the landowner to damages, he must show that land has been taken or physically damaged, or that some easement or right appurtenant to the land has been taken or interferred with. The landowner has an easement consisting of the right of reasonable access to the particular highway on which his land abuts. He has no constitutional right to have anyone pass by his premises at all; highways are built and maintained for public necessity, convenience and safety in travel and not for the enhancement of property along the route. An abutting landowner is not entitled to compensation because of circuity of travel to and from his property; such inconvenience is held to be no different in kind, but merely in degree, from that sustained by the general public, and is *damnum absque injuria.* When the Highway Commission acts in the

interest of public safety, convenience and general welfare, in designating highways as controlled-access highways, its action is the exercise of the police power of the State; the impairment of the value of property by the exercise of police power, where property itself is not taken, does not entitle the owner to compensation. (See the opinion in *Snow* for citation of authorities.)

The *cul-de-sac* principle (followed in *Hiatt*) has been generally limited to property abutting the streets in cities and towns. *Snow v. Highway Commission, supra.* The different treatment accorded owners of rural property abutting a road and the owner of urban property abutting a street has been held to be unsound in well-reasoned recent opinions. *Tift County v. Smith,* 131 S.E. 2d 527 (Ga. 1963); *State v. Silva,* 378 P. 2d 595 (N.M. 1963); *Warren v. State Highway Commission,* 93 N.W. 2d 60 (Iowa 1958); *Department of Highways v. Jackson,* 302 S.W. 2d 373 (Ky. 1957). Weighing the factors in the light of modern conditions, there is no reason to distinguish between rural and urban property on the question under consideration.

As stated in *Hiatt,* the owner of land abutting a street has two distinct rights, (1) a public right which he enjoys in common with all other citizens, and (2) a private right which arises from his ownership of property contiguous to a street. All citizens have right to the free use of a street or public way subject to the rules, regulations, restrictions and limitations promulgated pursuant to the police power of the State; this right the owner of land abutting the street or public way has in common with the public. Where a *cul-de-sac* is created, or the movement of traffic has been limited to one direction, the landowner's right to use the street is no more restricted than is that of other citizens making use thereof, and the landowner has no constitutional right to have others pass his premises. *Barnes v. Highway Commission,* 257 N.C. 507, 126 S.E. 2d 732. The restriction upon the landowner and the restriction upon the public generally, in the use of the street for travel, is no different in kind, but merely in degree. A property owner is not entitled to compensation for mere circuity of travel. Absolute equality of convenience cannot be achieved, and those who purchase and occupy property in the proximity of public roads or streets do so with notice that they may be changed as demanded by the public interest. *Snow v. Highway Commission, supra; Moses v. Highway Commission,* 261 N.C. 316, 134 S.E. 2d 619; *Barnes v. Highway Commission, supra; Sanders v. Smithfield,* 221 N.C. 166, 19 S.E. 2d 630; *Mosteller v. R. R.,* 220 N.C. 275, 17 S.E. 2d 133. The private right of the owner of land abutting a street or highway is an easement appurtenant to the land, consisting of the right of reasonable access to the particular street or highway which his property abuts. *Snow v. Highway Com-*

mission, supra; Moses v. Highway Commission, supra; Abdalla v. Highway Commission, 261 N.C. 114, 134 S.E. 2d 81; *Hedrick v. Graham,* 245 N.C. 249, 96 S.E. 2d 129. In the instant case, no part of plaintiffs' land was taken or physically injured. Their right of reasonable access to 21st Street has not been appropriated, limited or interfered with.

In final analysis, plaintiffs seek to recover damages for the alleged impairment of the value of their property resulting from the obstruction of 21st Street 100 feet to the east of the property. Such damage is not compensable. The General Assembly has found, determined and declared that controlled-access highways are necessary for the preservation of the public peace, health and safety, the promotion of the general welfare, the improvement and development of transportation facilities in the state, the elimination of hazards at grade intersections, and other related purposes. G.S. 136-89.53. When the Highway Commission acts in the interest of public safety, convenience and general welfare, in designating highways as controlled-access highways, its action is the exercise of the police power of the State. And the impairment of the value of property by the exercise of police power, where property itself is not taken, does not entitle the owner to compensation. *Barnes v. Highway Commission, supra; Nick v. State Highway Commission,* 109 N.W. 2d 71 (Wis. 1961). If plaintiffs were permitted to recover for impairment of property value, because of the circuity of travel thereto and therefrom and the dwindling of traffic by their property, resulting from the street obstruction, practically every property owner in a town could recover for the same reasons when the Highway Commission constructs a by-pass to expedite traffic. *Moses v. Highway Commission, supra.*

Where the State has authorized the construction of a barricade across a street, thereby closing it to vehicular traffic in one direction, the owner of land abutting the street on the *cul-de-sac* thus created has not been deprived of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, though the value of his property has been impaired and the State has not compensated him for such loss of value. *Meyer v. Richmond,* 172 U.S. 82. In North Carolina such action by the State, in the exercise of its police power, does not violate Article I, section 17, of the State Constitution. *Barnes v. Highway Commission, supra.* ". . . such questions must be for the final determination of the state court. It has authority to declare that the abutting land owner has no easement of any kind over the abutting street; it may determine that he has a limited easement; or it may determine that he has an absolute and unqualified easement." *Sauer v. City of New York,* 206 U.S. 536.

Hiatt v. Greensboro, supra, is expressly overruled insofar as it is in conflict with this opinion.

Plaintiffs contend that the instant case includes and affects a property right not involved in *Hiatt.* It is asserted, and defendant does not deny, that plaintiffs' land and 21st Street, from the Ivy Avenue intersection to the Liberty Street intersection, are parts of a tract of land which was subdivided by the owner into streets and lots, a map of the subdivision was made and recorded, lots (including plaintiffs') were sold with respect to the map, and 21st Street is shown on the map. Though the record is not clear and specific as to such subdivision, we accept the assertion as true for the purposes of the appeal. Our inquiry is whether the fact that plaintiffs' land originated in a subdivision gives its owners a superior right of easement in the streets and thereby distinguishes it from lots having a different origin, so far as the State and its agencies are concerned.

As a general proposition, where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into subdivisions of streets and lots, such streets become dedicated to public use, and the purchaser of the lot or lots acquires the right to have all and each of the streets kept open. *Steadman v. Pinetops,* 251 N.C. 509, 112 S. E. 2d 102; *Blowing Rock v. Gregorie,* 243 N.C. 364, 90 S.E. 2d 898; *Foster v. Atwater,* 226 N.C. 472, 38 S.E. 2d 316; *Conrad v. Land Company,* 126 N.C. 776, 36 S.E. 282. The right of a purchaser with respect to the streets of the subdivision is in the nature of an easement appurtenant to his lot. *Realty Company v. Hobbs,* 261 N.C. 414, 135 S.E. 2d 30. This right of easement is not absolute; it extends only to streets or portions of streets of the subdivision necessary to afford convenient ingress or egress to the lot of the purchaser. Under certain circumstances the seller-dedicator or other lot owners may abandon and close a street or a portion of a street. As to the purchaser, opposing such closing, the question is whether the street is reasonably necessary for the use of his lot. G.S. 136-96; *Janicki v. Lorek,* 255 N.C. 53, 120 S.E. 2d 413; *Hine v. Blumenthal,* 239 N.C. 537, 80 S.E. 2d 458; *Rowe v. Durham,* 235 N.C. 158, 69 S.E. 2d 171; *Russell v. Coggin,* 232 N.C. 674, 62 S.E. 2d 70; *Sheets v. Walsh,* 217 N.C. 32, 6 S.E. 2d 817.

The streets of a subdivision are not dedicated to the public merely by reason of the subdivision of the land and the recordation of a map thereof. This is only an offer to dedicate; dedication to the public is complete only when the offer is accepted by the responsible public authority, and neither the burdens nor benefits with attendant duties may be imposed on the public unless in some proper way it has consented to accept and assume them. *Owens v. Elliott,* 258 N.C. 314, 128 S.E. 2d

583; *Steadman v. Pinetops, supra; Lee v. Walker,* 234 N.C. 687, 68 S.E. 2d 664. The offer to the public may be revoked at any time before acceptance; but this does not affect the rights of a lot owner as against the seller-dedicator and other lot owners. *Janicki v. Lorek, supra; Rowe v. Durham, supra; Irwin v. Charlotte,* 193 N.C. 109, 136 S.E. 368. A city or town may in its discretion accept or reject an offer of dedication; it has the right to determine where its streets shall be located. *Steadman v. Pinetops, supra; Lee v. Walker, supra.* It may accept a part of a street and determine the width of the street, and the width need not conform to the offer of dedication. *Sugg v. Greenville,* 169 N.C. 606, 86 S.E. 695. The duty of a city or town to the owner of a lot in a subdivision is not the same as that of the seller-dedicator and his assigns.

With respect to the rights of the owner of a lot abutting a street, as against the city, the fact that the lot is one of a subdivision rather than of some other origin is, so far as the instant case is concerned, a distinction without a difference. Whether a street lies in a subdivision or is of other origin, the city may close all or part of it upon compliance with statutory procedure. G.S. 153-9(17); G.S. 160-200(11). Of course the closing must not deprive a property owner of reasonable ingress or egress. See *Blowing Rock v. Gregorie, supra.* An individual may restrain the wrongful obstruction of a public way, of whatever origin, if he will suffer injury thereby as distinct from the inconvenience to the public generally, and he may recover such special damages as he has sustained by reason of the obstruction. *Owens v. Elliott,* 257 N.C. 250, 125 S.E. 2d 589; *Scott v. Shackelford,* 241 N.C. 738, 86 S.E. 2d 453. The purchaser of a lot abutting a public street, whatever the origin of the street, takes title subject to the authority of the city to control and limit its use, and to abandon or close it under lawful procedure. *Re Joiner Street,* 164 N.Y.S. 272, involved the question of special property right by reason of ownership of a lot abutting a street of a subdivision. The Court made inquiry and response as follows: ". . . Does such dedication of the spaces designated as streets give the owners of such lots, after the spaces become streets of a municipality by acceptance of the public authorities, any special privileges not possessed by owners of lots situated on streets otherwise acquired? We think not. Such spaces so designated as streets and so dedicated, when accepted by the public authorities, become streets under the charter of the municipality, and subject to all its provisions. If the fee to the space in the front of the lots is conveyed to the owners of the lots, in case of the abandonment of such a street by the municipal authorities, the land in such space would belong to the owners of the lots. Aside from such rights possessed by the owners of the lots, we see no validity in any

claim put forward by them to peculiar private rights, differing in any respect from the rights possessed by abutting owners upon streets having a different origin."

The General Assembly has conferred upon the State Highway Commission the authority and duty to establish, construct and maintain "controlled-access Facilities" (G.S. 136-89.48 to G.S. 136-89.58) in both rural and urban areas, and has authorized the Commission and the governing bodies of cities and towns to enter into agreements with each other respecting the financing, planning, establishment, maintenance and use of controlled-access facilities or other public ways in their respective jurisdictions, G.S. 136-89.54. There is no suggestion that the statute was not fully complied with in regard to the North-South Expressway in Winston-Salem. In the establishment, construction and maintenance of that controlled-access facility, the Commission and the City of Winston-Salem, as agencies of the State, were exercising the police power of the State.

For the reasons hereinbefore set out we hold that plaintiffs have suffered no compensable damage.

Affirmed.

PARKER, J., dissenting: The majority opinion at its beginning states the question for decision, and then says: "The same legal question, on similar facts, arose in *Hiatt v. Greensboro,* 201 N.C. 515, 160 S.E. 748 (1931)." After quoting *in extenso* from the opinion in the *Hiatt* case, the majority opinion states: "This decision, at the time of its rendition, was in accord with the weight of authority in other jurisdictions. 49 A.L.R. 351; 93 A.L.R. 642."

This is stated in 29A C.J.S., Eminent Domain (1965), § 105(1):

> "An easement or servitude, whether in the nature of a right of way, a restrictive covenant, or a negative or equitable easement, is an interest in land for which the owner is entitled to compensation, as much so as if the land to which the easement is appurtenant were taken or injured.
>
> "Thus the owner of land abutting on a street or highway has a private right in such street or highway, distinct from that of the public, which cannot be taken nor materially interfered with without just compensation, and this is so, even though another owns the fee in the highway."

This statement of the law is supported by the citation of a legion of cases from many jurisdictions in this country; included among the North Carolina cases cited is the *Hiatt* case; and it still seems to be the majority rule in this country. To the same effect, see Nichols on Emi-

nent Domain, 3d Ed., Vol. 2, pp. 117-118 (1963), which cites many cases from many jurisdictions, including several cases from North Carolina, and among them the *Hiatt* case. See also to the same effect Anno., 150 A.L.R. 644 (1944). To deny compensation to plaintiff in this case, this Court has to overrule the *Hiatt* case, and to approve the taking of a property right of plaintiffs without requiring the payment of just compensation, in violation of Article I, section 17, of the North Carolina Constitution, and in violation of the 14th Amendment to the United States Constitution. The majority opinion also gravely impairs, if it does not in effect overrule, *Davis v. Alexander*, 202 N.C. 130, 162 S.E. 372; *Long v. Melton*, 218 N.C. 94, 10 S.E. 2d 699. I think the *Hiatt* case is sound law, is in accord with the general rule in a majority of the jurisdictions, and I do not agree to overruling it. I vote to reverse the judgment below.

CLAUDE HOOKS, A. G. GOINS, D. J. POWELL, D. J. SHELLEY, ELWOOD ROBINSON, MICKEY LONG, CECIL GURKIN, H. H. COLLINS, HENRY MERRITT, LUTHER HIGH, AND DANIEL M. SPELL, OFFICERS AND TRUSTEES OF SMYRNA BAPTIST CHURCH v. INTERNATIONAL SPEEDWAYS, INCORPORATED AND MARIE D. CARTER.

(Filed 24 February, 1965.)

1. Nuisance § 1—

A race track is not a nuisance *per se*, but its operation may, under certain circumstances, become a nuisance *per accidens*.

2. Nuisance § 7; Injunctions § 7—

Equity will not enjoin an anticipated nuisance *per accidens* incident to the operation of a lawful business unless it is shown with reasonable certainty, and not as a mere probability, that the operation of the business will constitute a nuisance which could not be obviated by restrictions as to the time or method of operation.

3. Injunctions § 3—

Irreparable injury as a basis for injunctive relief is not an injury which is beyond the possibility of repair or possible monetary compensation, but is such a continuous and recurring injury that no reasonable redress is afforded at law and one to which the complainant in equity and good conscience should not be required to submit.

4. Pleadings § 12—

A demurrer admits the truth of the factual averments well stated and relevant inferences of fact reasonably deducible therefrom.

5. Nuisance § 7; Injunctions § 7—

Allegations that defendants had taken action preparatory to the construction of an automobile race track for the purpose of racing motor vehicles on Sundays and holidays about half a mile from an established church, and that the noise incident to such racing operations would render practically impossible the conduct of Sunday church services, constitute sufficient basis for the continuance to the hearing at the instance of the church authorities of a temporary order restraining the construction of the race track.

6. Nuisance § 2—

Mere noise may be so great at certain times and under certain circumstances as to amount to an actionable nuisance and entitle the party subjected to it to an injunction.

7. Nuisance § 7; Injunctions § 7—

Injunction to enjoin the construction of an automobile race track will not be denied on the ground that only the operation of the race track and not its construction could constitute a nuisance, since the erection of a structure may be enjoined if its contemplated use must necessarily result in a nuisance, and an allegation that the noise from the contemplated race track would disrupt services at the church is not a mere conclusion but is an allegation of ultimate fact which, even though conclusory in nature, is susceptible of proof.

8. Appeal and Error § 50; Injunctions § 13—

In the absence of specific findings of fact or a request therefor it will be presumed that the court found facts supporting its order continuing a temporary order to the hearing, and the order will not be disturbed when the allegations of the verified complaint, treated as an affidavit, are sufficient to warrant the relief.

9. Injunctions § 7; Highways § 10—

The operation of a lawful business may not be enjoined on the ground that its operation would create such additional traffic as would interfere with the customary use of the adjacent highway by plaintiffs, since plaintiffs have no authority over, or right to control the use of a public highway, which must be open alike to all.

APPEAL by defendant, International Speedways, Inc., from *Mallard,* J., at Chambers 4 April 1965 in Whiteville, N. C. — from COLUMBUS. Docketed and argued as No. 608 at the Fall Term 1964.

Suit to perpetually enjoin the construction and operation of facilities, including a race track, for the racing of automobiles.

The complaint (summarized in part and verbatim in part) alleges:

1, 2, 3, 4, 5 and 6. Plaintiffs constitute the Board of Deacons and Trustees of the Smyrna Baptist Church, and are duly authorized to prosecute this action on behalf of the membership of said church. Defendant Carter has executed to corporate defen-

dant an option to purchase 60 acres of land situate about 2500 feet west of the church, and has executed and delivered, or is about to deliver, a deed to corporate defendant for said land.

"7. That the defendants have announced publicly and started the process of building a large race track or speedway on the lands in question (which speedway will be used particularly on Sundays and holidays for the purpose of staging long races between automobiles for profit from public admissions.) That the defendants propose to erect various buildings on said land including grandstand of twelve thousand capacity, garages, paved tracks, concession stands, and other structures and parking lots (incident to promoting races of all sorts of motor vehicles.) That the defendants have already started engineering surveys and plan to be in operation sometime in the spring of 1964. That the facilities which the defendants threaten to erect will lie just west of the Smyrna Baptist Church (and will be opened to the public all day on most or all Sundays.)

"8. That the Smyrna Baptist Church has been located in its approximate present position for around eighty years and constitutes a neighborhood church which holds regular Sunday morning services, in addition to frequent services throughout the Sabbath, including youth meetings, homecomings, prayer services, weddings and funerals. That Smyrna Church, which serves approximately three hundred people, including members and friends, (started a building program early in the 1950's) and now has physical facilities valued at approximately One Hundred Seventy Five Thousand Dollars. That the church is located on the North side of the road leading from the direction of Clarkton towards Chadbourn. That the Smyrna road leads from Whiteville and ends directly in front of the church so that traffic converges from the South, East and West, as well as feeding in from the North. That the Smyrna cemetery is large and is frequently used by most members of the congregation to inter their deceased loved ones and said cemetery lies South of the church approximately five hundred feet on the road toward Whiteville. (That of all the traffic which would feed into the Carter property in question, about three fourths thereof would come immediately by the Church facilities. That on occasion of funerals at the Church or cemetery the persons attending either walk or ride to the cemetery and park on the edges of the Smyrna Road.)

"9. (That operation of a race track as threatened by the defendants creates noise which can be heard for miles away, and as

close as the track is to the Church, the noise from automobile engines and squealing tires will completely disrupt any service being held at Smyrna Church. That the attendant noise of crowds and traffic would only add to the already unbearable condition. That the operation of a race track carries with it extremely indecent persons and behavior, including gambling, drinking, peddling and immorality. That a Sunday afternoon race would make it impossible to have weddings, funerals, or other functions and due to noise of tuning engines and practicing on Sunday morning, any Sunday morning service would be disturbed and disrupted. That the traffic problem would be a hazard to all persons attending church functions and during congested hours it would be virtually impossible to get in and out of the church parking lot. That during church functions children will be playing on the grounds and there is a great danger to their health and safety.)

. . . . . .

"11. (That the operation of a race track by the defendants will so annoy and disturb the plaintiffs and other members of Smyrna Church in the use of the church property and render them so uncomfortable as to constitute a continuing private and public nuisance. That the plaintiffs and those they represent would be irreparably injured by the operation of the race track and for such injuries and damages there would be no possibility of repair or compensation. That there is no adequate remedy at law for the damages that the plaintiffs will inevitably suffer.)"

The complaint was filed 11 March 1964, and on the same date Braswell, J., signed an order temporarily restraining defendants from constructing the race track facilities, and directing them to appear at a time certain and show cause why the restraining order should not be continued to the final hearing.

Defendant Carter demurred *ore tenus* and moved that the action be dismissed as to her. The demurrer and motion were overruled by Mallard, J., on 4 April 1964. Defendant Carter does not appeal.

Corporate defendant moved to strike portions of the complaint and at the hearing upon return of the restraining order demurred *ore tenus* to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. The motion to strike was sustained in part and overruled in part. The portions stricken are not set out in the complaint as copied above; the portions which the court refused to strike are enclosed in parentheses. The court overruled the demurrer, and continued the restraining order until the hearing on the merits.

Powell, Lee & Lee for plaintiffs.

Powell & Powell and Nance, Barrington, Collier & Singleton for defendants.

MOORE, J. Plaintiffs seek to permanently enjoin an alleged prospective private nuisance. The substance of their complaint is that corporate defendant is in the process of constructing a race track and other facilities for the racing of automobiles on Sundays and holidays, the facilities to accommodate 12,000 or more spectators, and the race track to be located about 2500 feet from the Smyrna Baptist Church, an active church established 80 years ago and having a large membership and owning buildings and facilities valued at $175,000 and regularly holding religious services throughout each Sabbath and at other times, and that the noise from the racing motors, and the squealing of tires and the crowds assembled at the track will disrupt, and make impossible the conducting of, the usual church services on Sundays, and plaintiffs and those they represent will be irreparably injured by the construction and operation of the race track.

A race track is not a nuisance *per se*. But its operation may, under certain circumstances, be a nuisance *per accidens, i.e.*, a nuisance in fact. *Kohr v. Weber,* 166 A. 2d 871 (Pa. 1960); *Smilie v. Taft Stadium Board of Control,* 205 P. 2d 301 (Okla. 1949); *Rohan v. Detroit Racing Asso.,* 22 N.W. 2d 433, 166 A.L.R. 1246 (Mich. 1946); 66 C.J.S., Nuisances § 31, pp. 784-5. A race track may be a nuisance in a rural area. *Kohr v. Weber, supra.*

It is well settled that a court of equity may, under proper circumstances, enjoin a threatened or anticipated nuisance. Courts are reluctant to interfere by injunction in a legitimate business enterprise. Where the thing complained of is not a nuisance *per se,* but may or may not become a nuisance, according to the circumstances, and the injury apprehended is merely eventual or contingent, equity will not interfere. *Wilcher v. Sharpe,* 236 N.C. 308, 72 S.E. 2d 662. "Where it is sought to enjoin an anticipated nuisance, it must be shown (a) that the proposed construction or the use to be made of property will be a nuisance *per se;* (b) or that, while it may not amount to a nuisance *per se,* under the circumstances of the case a nuisance must necessarily result from the contemplated act or thing. . . . The injury must be actually threatened, not merely anticipated, it must be practically certain, not merely probable. It must further be shown that the threatened injury will be an irreparable one which cannot be compensated by damages in an action at law." *Pennsylvania Co. v. Sun Co.,* 138 A. 909, 55 A.L.R. 873 (Pa. 1927). In *Causby v. Oil Co.,* 244 N.C. 235, 93 S.E. 2d 79, it is said: " 'The mere apprehension of a nuisance is insufficient

to warrant equitable relief, and in order to restrain future acts with respect to the use of a proposed building, it is necessary to set forth facts which show with reasonable certainty that such result would likely follow.' *Wilcher v. Sharpe, supra.* As was said by Walker, J., in *Durham v. Cotton Mills,* 141 N.C. 615, 54 S.E. 453; 'When the interposition by injunction is sought to restrain that which it is apprehended will create a nuisance, the proof must show that the apprehension of material and irreparable injury is well grounded upon a state of facts from which it appears that the damage is real and immediate.' " See *Missouri v. Illinois,* 180 U.S. 208; *Commerce Oil Ref. Corp. v. Miner,* 281 F. 2d 465, 86 A.L.R. 2d 1307 (1st Cir. 1960), *cert. den.* 364 U.S. 910; *Phillips v. Adams,* 309 S.W. 2d 205 (Ark. 1958); *McPherson v. First Presbyterian Church,* 248 P. 561, 51 A.L.R. 1215 (Okla. 1926); *Edmunds v. Duff,* 124 A. 489, 33 A.L.R. 719 (Pa. 1924); *Lewis v. Berney,* 230 S.W. 246 (Tex. 1921); *Lansing v. Perry,* 184 N.W. 473 (Mich. 1921); 39 Am. Jur., Nuisances, § 63, pp. 346-7; 55 A.L.R. 724; 26 A.L.R. 937; 7 A.L.R. 749.

In *Barrier v. Troutman,* 231 N.C. 47, 55 S.E. 2d 923, it is said: "Where the nuisance is continuous and recurrent and the injury irreparable, and remedy by way of damages inadequate, equity will restrain even though the enterprise be in itself lawful." Further: "To constitute irreparable injury it is not essential that it be shown that the injury is beyond the possibility of repair or possible compensation in damages, but that the injury is one to which the complainant should not be required to submit or the other party permitted to inflict, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law."

Where a nuisance is private and arises out of the manner of operating a legitimate business or undertaking, a court of equity will, of course, do no more than point to the nuisance and decree adoption of methods calculated to eliminate the injurious features. *Rohan v. Detroit Racing Asso., supra.* In other words, a court of equity will not outlaw the entire operation if a decree restricting the time or method of operation will eliminate the injury. But if regulation will not abate the nuisance, the entire operation will be enjoined.

Mere noise may be so great at certain times and under certain circumstances as to amount to an actionable nuisance and entitle the party subjected to it to an injunction. *Kohr v. Weber, supra.* To amount to a nuisance, noise must be unreasonable in degree. Where noise accompanies an otherwise lawful pursuit, whether such noise is a nuisance depends on the locality, the degree of intensity and disagreeableness of the sounds, their times and frequency, and their effect, not on peculiar and unusual individuals but on ordinary, normal

and reasonable persons of the locality. *Smilie v. Taft Stadium Board of Control, supra.* See *Clinic & Hospital v. McConnell,* 236 S.W. 2d 834, 23 A.L.R. 2d 1278 (Mo. 1951); 66 C.J.S., Nuisances, § 22, pp. 772-775.

A pursuit which will create conditions rendering the appropriate enjoyment of surrounding properties impossible invades the rights of others, and equity will restrain the persistent pursuit of such injuries. No one is justified in establishing, adjacent to a church, a business or amusement the noise of which will render practically impossible the continuance of the customary religious services in the church. *First M. E. Church v. Cape May Grain & Coal Co.,* 67 A. 613 (N.J. 1907); *McPherson v. First Presbyterian Church, supra.*

Applying the foregoing principles to the complaint in the instant case, we are of the opinion that plaintiffs have alleged facts sufficient to constitute a cause of action for permanent restraint of the construction and operation of the race track. For the purpose of testing the sufficiency of the complaint, the demurrer admits the truth of the factual averments well stated and relevant inferences of fact reasonably deducible therefrom, 3 Strong: N. C. Index, Pleadings, § 12, pp. 625-6. The complaint pictures a rural church where for generations the people of the neighborhood have gathered each Sabbath to worship according to their faith in pastoral serenity, participate in various religious services throughout the day, and on special occasions to witness and celebrate marriages and to pay their last respects to their dead and inter them in the cemetery nearby. Corporate defendant is taking the initial steps toward the construction of a race track and other facilities, about one-half mile from the church, for the purpose of racing motor vehicles on Sundays and holidays; the facilities are to be sufficient for the accommodation of thousands of racing fans and spectators. The sound of motors racing at high speed, the noise of squealing brakes and the yelling and screaming of the crowds will disrupt and render practically impossible the conduct of Sunday church services. Corporate defendant, if sufficiently solvent, could pay in damages the value of the church buildings and property. But to require the abandonment of Sunday services on the Sabbath, or the removal of the place of worship from the neighborhood and from the vicinity of the cemetery to a place remote from the homes of the church members, would amount to irreparable damage, an injury to which plaintiffs and those they represent should not in equity be required to submit.

Defendant contends that the only question raised by the complaint and the prayer for relief is whether the race track and related structures should be erected. It asserts that the matter of operation and any injury which might flow therefrom is not pertinent, that there is no

operation and what the operation may be in the future is a mere apprehension. Defendant's analysis is too restricted. The erection of a structure or a building may be enjoined if its contemplated use must necessarily result in a nuisance. *Causby v. Oil Co., supra; Edmunds v. Duff, supra; Pennsylvania Co. v. Sun Co., supra.* It is not logical to suppose that a race track for automobiles will not be used for racing automobiles. The complaint alleges that it has been publicly announced that the race track will be used "particularly on Sundays and holidays." Defendant's refined and technical construction of the complaint is rejected.

Defendant contends that the crucial allegations of the complaint are not based on any existent fact, refer to a purely imaginary situation, and are conclusions of the pleader and therefore should have been stricken from the complaint in compliance with defendants' motion. *Broadway v. Asheboro,* 250 N.C. 232, 108 S.E. 2d 441. Defendant refers to such allegations as the following: the "speedway will be used particularly on Sundays . . ."; "operation of a race track as threatened by defendants creates noise which can be heard for miles away"; "the noise from automobile engines and squealing tires will completely disrupt any service being held at Smyrna Church." We do not agree that such allegations are mere conclusions of the pleader. In a system of logic they would be conclusions; but, indeed, all statements of ultimate fact are conclusory in nature. They are allegations of fact susceptible of proof. Whether plaintiffs will be able to make satisfactory proof at the trial upon the merits does not concern us here. We have said: "The reasons for preventing a prospective nuisance are at least as cogent as those for abating a present one. In the latter instance the courts act more readily because they are sure of their ground. The evil is visible. However, the call for protection against an apprehended injury, reasonably certain to befall, is as imperative as that for relief from one now felt. Nor is complainant required to wait until some harm has been experienced or to show with absolute certainty it will occur. One requirement will make the remedy largely useless, the other impracticable." *Causby v. Oil Co., supra.*

The court below, after considering the allegations of the complaint and many affidavits, continued the restraining order until the final hearing on the merits. There was no request for findings of fact, and the court made none. It is, therefore, presumed for the purpose of the order made that the court found facts sufficient to support the order. *Exterminating Co. v. Griffin,* 258 N.C. 179, 128 S.E. 2d 139. The court concluded that there "has been a showing by the plaintiff of equitable grounds for continuing the restraining order and of preserving the *status quo.*" The affidavits are not in the record, but the verified com-

plaint is sufficient to warrant the conclusion reached by the court. *Pleaters, Inc. v. Kostakes*, 259 N.C. 131, 129 S.E. 2d 881.

We think that the court's order on the motion to strike should in one respect be modified. Plaintiffs allege in substance that the maintenance and operation of the race track would cast upon the highways adjacent to the church grounds and cemetery much additional traffic which would interfere with the customary use of the highway for funeral occasions, would be a hazard to persons driving to and from the church parking lot, and would endanger children playing on the church grounds. Such allegations should be stricken. Plaintiffs have, with respect to the highways, no property rights which would be involved in this action, and have no authority over and right to control the public highways. They are primarily ways of public travel and open alike to all. *Smilie v. Taft Stadium Board of Control, supra.*

Modified and affirmed.

STATE v. WILLIE GUY FENNER.

(Filed 24 February, 1965.)

1. Statutes § 5—

The doctrine of *ejusdem generis*, when applicable, requires that general words of a statute which follow a designation of particular subjects or things be restricted by the particular designations to things of the same kind, character and nature as those specifically enumerated.

2. Same—

The doctrine of *ejusdem generis* is but a rule of construction to aid in ascertaining the legislative intent and may not be used to defeat the legislative will, and the rule does not apply to restrict the operation of a general expression when such expression and the specific things enumerated have no common characteristic.

3. Disorderly Conduct and Public Drunkenness—

The doctrine of *ejusdem generis* does not apply to G.S. 14-335, and the statute applies to drunkenness at any public place and is not limited to a public highway or meeting.

4. Same—

"Public place" within the purview of G.S. 14-335 is not limited to places devoted solely to uses of the public but includes any place visited by many persons and to which the neighboring public may have resort, and a mercantile establishment during business hours is such a public place.

5. Arrest and Bail § 6—

A peace officer may arrest without a warrant when the person to be arrested has committed a misdemeanor in the presence of the officer or when the officer has reasonable grounds to believe that the person to be arrested has committed a misdemeanor in his presence. G.S. 15-41(a).

6. Arrest and Bail § 3—

Where the evidence shows that defendant was drunk and disorderly at a public place, it raises for the jury the question of whether an officer present at the time had reasonable ground to believe that defendant had committed a misdemeanor in his presence.

7. Arrest and Bail § 6—

A warrant for resisting arrest must allege the identity of the officer alleged to have been resisted and describe his official character with sufficient certainty to show that he is a public officer, and indicate the official duties the officer was discharging or attempting to discharge, and state in a general way the manner in which defendant resisted, delayed or obstructed the officer. The warrant in this case *is held* to meet these requirements.

8. Indictment and Warrant § 12—

The Superior Court on appeal from an inferior court has the power to allow an amendment to the warrant provided the amendment does not change the offense with which defendant was originally charged, and this rule applies even though the inferior court has exclusive original jurisdiction of the offense, since the amendment in such instance relates only to procedural matters.

9. Arrest and Bail § 6—

Where a warrant charging resisting arrest is amended by asserting the offense defendant was committing in the presence of the officer, the amendment does not alter in any way the charge, since irrespective the amendment the State would have the burden of showing the offense defendant was committing in the presence of the officer so as to establish that the arrest was lawful.

10. Disorderly Conduct and Public Drunkenness—

The charge in this prosecution for violation of G.S. 14-335 *is held* to define correctly the words "drunk," "intoxicated" and "intoxication," and to define a public place within the purview of the statute.

11. Criminal Law § 159—

Assignments of error not brought forward and discussed in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

APPEAL by defendant from *Morris, J.*, November 16, 1964, Session of CRAVEN.

This is a criminal action in which defendant is charged with the violation of G.S. 14-223, entitled "Resisting Officers."

Plea: Not guilty. Verdict: Guilty. Judgment: Imprisonment for a term of 12 months.

Attorney General Bruton and Assistant Attorney General Bullock for the State.

Reginald L. Frazier, Samuel S. Mitchell and J. LeVonne Chambers for defendant.

MOORE, J. Defendant presents three assignments of error.

—I—

Defendant excepts to the denial of his motion for nonsuit.

The State's evidence, taken as true on the motion for nonsuit (*State v. Horner,* 248 N.C. 342, 103 S.E. 2d 694), discloses these facts: On 28 March 1964 defendant was at Baleather Fisher's Store — Service station, which is located in Craven County on a paved highway known as Temple Point Road. He was cursing and using offensive language. Fisher put him out of the store two or three times but he would come back in when a customer entered. In response to a call, deputy sheriff S. Bruce Edwards went to the store. When he arrived defendant was outside the store between the gasoline pumps and a car which was standing between the pumps and the highway. Defendant was staggering and leaned toward the car to speak to someone. The deputy told him he was under arrest and put his hand on defendant's wrist; defendant snatched away and backed off. The deputy told him he would have to come with him and he replied: "You ain't taking me nowhere." Defendant snatched away again and had his hands raised, his fists balled up. The deputy pulled his gun and shot into the ground and told him, "I don't want to hurt you but you're under arrest and you're going to have to go with me." He backed away again, his fists clenched, saying, "You white son-of-a-bitch, you ain't taking me nowhere." The deputy hit him with the pistol. It accidentally discharged, the bullet taking effect in defendant's neck; defendant fell and was lying partly on the hardsurface of the highway and partly off. He was taken to the hospital. A warrant, charging resisting arrest, was later served on him. In the opinion of the deputy sheriff defendant was "drunk and intoxicated" on the occasion in question.

The gist of defendant's argument in support of his motion for nonsuit is that drunkenness off the highway and on the premises of a mercantile establishment is not a criminal offense, and the officer had no authority or duty to arrest defendant. If the officer had no authority to make the arrest, defendant cannot be guilty of resisting. *State v. Mobley,* 240 N.C. 476, 83 S.E. 2d 100.

G.S. 14-335 makes it a criminal offense to be "drunk or intoxicated on the public highway, or at any public place or meeting in any county" named in the statute. Craven County is one of the counties specified. See subsection 12. Defendant contends that under the doctrine of *ejusdem generis* the general term "public place" is restricted in meaning to the specific terms, "public highway" and "meeting," or places or things similar to a public highway or meeting. Defendant cites *State v. Dew*, 248 N.C. 188, 102 S.E. 2d 774, and points to the reasoning of the Court therein in construing the term "other public place" as used in G.S. 18-51. G.S. 14-335 is not a state-wide statute and applies only to the counties and localities named in the statute. Defendant Dew contended that G.S. 14-335 is unconstitutional in that it is a local law in conflict with the general law of the state as declared in general statutes relating to public drunkenness, G.S. 18-51, G.S. 14-334, and G.S. 14-275. In holding that G.S. 14-335 is constitutional and not in conflict with these general statutes, the Court said:

> ". . . there is no general law making public drunkenness a crime."
>
> ". . . G.S. 18-51, is captioned: 'Drinking or offering drinks on premises of (liquor) stores and public roads or streets; Drunkenness, etc., at athletic contests or other public places.' As to this, it is unnecessary to quote the text, for, as the Attorney General points out, under the doctrine of *ejusdem generis,* the latter part of the statute would apply to any place similar to an athletic contest, — hence there is a difference between the two statutes. (Parentheses added.)
>
> ". . . G.S. 14-334, relates to public drunkenness *and disorderliness.* (Emphasis added.)
>
> ". . . G.S. 14-275, relates to disturbing religious congregations.
>
> ". . . For the reasons given there seems to be no general law in North Carolina, other than G.S. 14-335, relating to drunkenness 'on the public highway, or at any public place or meeting.' "

The *Dew* case is not authority for defendant's position. It is authority to the contrary. G.S. 14-335 is designed to fill the gap and make drunkenness *in public places* a criminal offense in the localities affected. In the construction of statutes, the *ejusdem generis* rule is that where general words *follow* a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as

those specifically enumerated. The rule does not necessarily require such limitation in scope of the general words or terms. It is but a rule of construction to aid in ascertaining and giving effect to the legislative intent where there is uncertainty. The rule does not apply to restrict the operation of a general expression where the specific things enumerated have no common characteristic, and differ greatly from one another. It does not warrant the court subverting or defeating the legislative will. 50 Am. Jur., Statutes, §§ 249, 250, pp. 244-248; Black's Law Dictionary, 4th Ed. (1951). In G.S. 18-51 the expression is "at any athletic contest *or other public place.*" This statute grew out of legislative authorization of the sale of liquor in ABC stores, and sought to restrict its use after purchase. The last part of the statute was designed to prohibit drunkenness and public display of liquor at football games and other athletic contests. "Other public place" was added, unquestionably, to prevent a too narrow construction of the term, "at any athletic contest," and not for the purpose of including public places of all kinds. "Other public place" *follows* the specific designation "athletic contest." The word "other" commonly occurs in a general expression, following specific designations, in statutes where the *ejusdem generis* rule is applied. G.S. 14-335 was intended for general application in the localities affected. "Public place" does not *follow* the terms "public highway" and "meeting," in the wording of this statute. It is inserted between them, and is a coordinate term, and must be given effect.

As used in statutes relating to drunkenness, "public place" means a place which in point of fact is public as distinguished from private, but not necessarily a place devoted solely to the uses of the public, a place that is visited by many persons and to which the neighboring public may have resort, a place which is accessible to the public and visited by many persons. *Ellis v. Archer,* 161 N.W. 192; *People v. Lane,* 32 N.Y.S. 2d 61. A mercantile establishment and the premises thereof is a public place during business hours when customers are coming and going.

A peace officer may arrest without a warrant when the person to be arrested has committed a misdemeanor in the presence of the officer or when the peace officer has reasonable grounds to believe that the person to be arrested has committed a misdemeanor in his presence. G.S. 15-41(a). Under the evidence in the instant case the question whether defendant committed a misdemeanor in the presence of the officer, or the officer had reasonable grounds to believe he did, is for the jury.

The motion for nonsuit was properly overruled.

— II —

G.S. 14-223 provides: "If any person shall wilfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a misdemeanor." Defendant is prosecuted for violation of this statute.

The prosecution originated in the Recorder's Court of Craven County and defendant was tried in that court on a warrant charging as follows (omitting formalities):

> ". . . at and in said County of Craven, . . . on or about the 28th day of March, 1964, Willie Guy Fenner, did unlawfully and willfully resist, delay and obstruct a public officer, to wit: S. Bruce Edwards, a deputy sheriff of Craven County, North Carolina, while the said S. Bruce Edwards, D. S., was attempting to discharge and was discharging the duties of his office, to wit: placing the defendant, Willie Guy Fenner, under arrest and attempting to take him into custody and transport his person to the Craven County Jail, by threatening bodily harm to said officer, refusing to accompany said officer to said Jail, and attempting to escape from the custody of said officer, . . ."

Defendant pleaded not guilty. From an adverse verdict and judgment pursuant thereto defendant appealed to the superior court. In superior court the judge allowed the State to amend the warrant as follows:

> "Did unlawfully and willfully resist, delay and obstruct a public officer, to wit: S. Bruce Edwards, a Deputy Sheriff of Craven County, North Carolina, while he, the said S. Bruce Edwards, was attempting to discharge and was discharging the duties of his office, to wit: while the said officer was arresting the said Willie Guy Fenner for the offense of unlawfully and willfully being found drunk and intoxicated at a public place, to wit: at Beleather Fisher's Service Station, in violation of N. C. General Statute, Section 14-335, which said offense was then and there being committed in the presence of said officer, by pulling away from, and cursing said officer and threatening said officer with his fist."

Defendant noted an exception, after judgment moved that judgment be arrested, and now assigns as error the allowance of the amendment and denial of the motion. In this connection, defendant contends: (1) The warrant upon which he was tried in recorder's court was insufficient, defective and invalid; (2) the jurisdiction of the superior court was derivative and the judge was without authority to allow an

amendment; and (3) the amendment allowed charges a different criminal offense from that charged in the original warrant.

(1). A warrant charging a violation of G.S. 14-223 must, in addition to formal parts, the name of accused, the date of the offense and the county or locality in which it was alleged to have been committed, (a) identify by name the person alleged to have been resisted, delayed or obstructed, and describe his official character with sufficient certainty to show that he was a public officer within the purview of the statute, (b) indicate the official duty he was discharging or attempting to discharge, and (c) state in a general way the manner in which accused resisted or delayed or obstructed such officer. *State v. Harvey,* 242 N.C. 111, 86 S.E. 2d 793; *State v. Eason,* 242 N.C. 59, 86 S.E. 2d 774; *State v. Jenkins,* 238 N.C. 396, 77 S.E. 2d 796. Applying these rules to the original warrant in the case at bar, we are of the opinion that defendant was tried in recorder's court upon a proper, sufficient and valid warrant. Compare the warrant in *State v. Taft,* 256 N.C. 441, 124 S.E. 2d 169.

(2). As a general proposition the superior court, on an appeal from a recorder's court or other inferior court upon a conviction of a misdemeanor, has power to allow an amendment to the warrant, provided the charge as amended does not change the offense with which defendant was originally charged. G.S. 7-149, Rule 12; *State v. Thompson,* 233 N.C. 345, 64 S.E. 2d 157; *State v. Carpenter,* 231 N.C. 229, 56 S.E. 2d 713; *State v. Brown,* 225 N.C. 22, 33 S.E. 2d 121. Defendant contends that this general rule does not apply here for the reason that the Recorder's Court of Craven County has *exclusive* original jurisdiction of all misdemeanors committed within the county (G.S. 7-64; G.S. 7-222; *State v. Morgan,* 246 N.C. 596, 99 S.E. 2d 764), the jurisdiction of the superior court, on appeal from the recorder's court, is wholly derivative, and the superior court must take the case, including the warrant, as it finds it. We think that defendant has misinterpreted certain language of the opinion in *State v. Perry,* 254 N.C. 772, 119 S.E. 2d 865. It is true that the jurisdiction of the superior court over defendant and the subject-matter of the action is wholly derivative. But the amendment of the warrant is a procedural matter. We dealt with the exact question here presented in *State v. Wilson,* 227 N.C. 43, 40 S.E. 2d 449. That case originated in a municipal county court of Guilford County which had *exclusive* original jurisdiction of the misdemeanor involved. The Court said: "At the trial in Superior Court, on an appeal from an inferior court having exclusive original jurisdiction, the solicitor may amend the warrant, *S. v. Patterson,* 222 N.C. 179, 22 S.E. (2d), 267, *S. v. Brown,* 225 N.C. 22, *S. v. Grimes,* 226 N.C. 523, or he may put the defendant on trial under a bill of indict-

ment, charging the same offense, returned in the case. *S. v. Razook,* 179 N.C. 708, 103 S.E. 67; *S. v. Thornton,* 136 N.C. 610; *S. v. Crook,* 91 N.C. 536; *S. v. Quick,* 72 N.C. 241. The appeal vests the jurisdiction in the court. Thereafter all questions of procedure and pleadings, including the form in which the charge is to be stated, come within the purview of the presiding judge." *State v. Dove,* 261 N.C. 366, 134 S.E. 2d 683; *State v. Perry, supra;* and *State v. Morgan, supra,* cited and relied on by defendant, involve an entirely different question of law and do not support defendant's position.

(3). The amendment does not change the offense with which defendant is charged in the original warrant. It is in the nature of a bill of particulars, and charges the violation of G.S. 14-223 in more detail. It does not, as defendant suggests, require him to defend against the additional charge of having violated G.S. 14-335. It was incumbent upon the State to satisfy the jury from the evidence beyond a reasonable doubt that defendant violated G.S. 14-335 in the presence of the officer, or that the officer had reasonable grounds to believe the defendant had done so, in order to establish the authority and duty of the officer to make the arrest without a warrant. G.S. 15-41(a). This the State would have been required to do under the original warrant. The reference in the amendment to G.S. 14-335 neither adds to nor subtracts from the State's burden. It does not change defendant's position in any wise.

— III —

Defendant contends that the judge, in charging the jury, did not comply with the requirements of G.S. 1-180 in that he failed to fully explain to the jury the law with respect to G.S. 14-335. Specifically, he complains of the definitions given of the words and expressions, "public place," "drunk" and "intoxicated or intoxication." The judge defined these terms in strict accord with the definitions appearing in Black's Law Dictionary, and applied these definitions to the facts in the instant case. In this we find no error. The definition of public place is in substantial accord with that heretofore set out in this opinion. The definition of "drunk" complies with that approved and adopted by this Court. *State v. Painter,* 261 N.C. 332, 134 S.E. 2d 638; *Wilson v. Casualty Co.,* 210 N.C. 585, 188 S.E. 2d 102. Black's Law Dictionary cites the latter case. This Court has said that "drunk" and "intoxicated" are synonymous terms. *S. v. Painter, supra.* The dictionary definition of "intoxication" casts a greater burden on the State than the definition adopted by this Court, and is therefore not prejudicial to defendant.

Defendant made several assignments of error which were not brought forward and discussed in his brief. Therefore, they are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 810. Nevertheless we have carefully considered them; we find in them no prejudicial error.

No error.

STATE OF NORTH CAROLINA, EX REL., UTILITIES COMMISSION v. LEE TELEPHONE COMPANY.

(Filed 24 February, 1965.)

1. Utilities Commission § 6—

G.S. 62-133 which supercedes G.S. 62-124 is not in conflict with the former statute but merely codifies the former statute as interpreted by the Supreme Court.

2. Same—

Whether a given rate is just and reasonable depends largely upon whether the Utilities Commission has placed a fair value on the property of the utility useful in producing its revenue in this State.

3. Same—

A finding by the Utilities Commission as to the fair value of a utility's property within this State, which finding is made without giving any consideration to replacement costs as required by G.S. 62-133(b)(1), cannot be allowed to stand, since it is not supported by competent, material and substantial evidence.

4. Same—

When a utility operates in two or more states the operations must be treated as separate businesses for the purpose of rate regulation, and the Commission must fix a rate which will give a reasonable or fair return on the company's investment within this State without reference to the company's return on property in another state or its overall return on all its operations.

5. Utilities Commission § 1—

It is the function of the Utilities Commission and not the courts to fix rates of a public utility, and upon a petition for increase in rates the Commission is not required to accept the proposed rates or to reject them all together.

APPEAL by defendant from *Copeland, S.J.*, September 1964 nonjury Civil Session of WAKE. This case was docketed in the Supreme Court as No. 480 and argued at the Fall Term 1964.

This proceeding originated upon the written application of Lee Telephone Company, hereinafter called Company, which application was filed on 16 August 1963 with the North Carolina Utilities Commission, hereinafter called Commission, for an order permitting the Company to adjust its existing rates for local telephone service within the State of North Carolina.

The Honorable T. Clarence Stone filed a protest to the application.

The home of the Company is in Martinsville, Virginia. Through its telephone exchanges in Virginia, at the time of the hearing before the Commission, the Company served 28,776 stations. The company rendered local and toll telephone service in the counties of Rockingham, Stokes and Forsyth within the State of North Carolina, and maintained exchanges in those counties in Madison, Stoneville, Walkertown, Walnut Cove and Danbury. These exchanges served 7,610 stations in North Carolina, or 21% of the total stations served by the Company in North Carolina and Virginia combined.

The proposed increase in rates for local service in North Carolina is calculated to provide $55,633.00 in additional gross revenue, of which only $23,595.00 would accrue to the Company's use. This income would add an average of $7.31 in additional charges annually for each station in North Carolina. Toll rates are not involved in this proceeding.

The Commission's findings of fact are as follows:

"1. Lee Telephone Company is a public utility engaged in rendering local and toll telephone service under a certificate of public convenience and necessity issued by this Commission and is subject to regulation of this Commission.

"2. It operates in the States of North Carolina and Virginia.

"3. The fair value of the Company's property in North Carolina used and useful in rendering service and producing revenue is $2,100,000.00.

"4. The rates and charges in effect for the Company as of July 31, 1963 and which the Company applied during the 12 months' period ending July 31, 1963 are just and reasonable.

"5. The rates and charges attached to the Company's application reflecting increases on local telephone service in North Carolina are unjust and unreasonable, and the application for the approval thereof should be denied.

"6. The Company was earning a fair rate of return on the fair value of its property in North Carolina as of July 31, 1963."

In its conclusions, the Commission sets out that the North Carolina operation on its present rates, after deducting fixed charges, dividends

and other allowable deductions, will produce a surplus of $243.00 annually, and would produce, if the requested increase were allowed, a surplus in the North Carolina operation of $23,838.00.

The Commission further sets out in its conclusions the following:

> "Including allowance for working capital and accounting and *pro forma* adjustments, which includes $84,124.00 of Virginia property allocated to North Carolina plant, the Staff arrived at an average net investment in North Carolina of $1,963,236.00 before proposed increases and $1,950,455.00 after increase effect. It (the Staff) determines the net end of the period investment in North Carolina, including cash working capital and after accounting and *pro forma* adjustments, which involves the allocation of some $84,000.00 of Virginia property to North Carolina plant, to be $2,152,949.00."

The exhibit of the Commission's Staff, among other things, states:

> "The Staff has not included a schedule reflecting the rate of return on an end-of-period rate base (which test period was from 1 August 1962 through 31 July 1963); however, using the formula adopted by the Staff, that is, applying a station growth factor to the net operating income for return, the rate of return after *pro forma* adjustments would be 4.92% and 6.06% after the requested increase in rates."

The Company, according to the Commission, did not use average net investment. It determined North Carolina net investment as of the end of the period, including allowance for cash working capital and after accounting and *pro forma* adjustments, which includes $84,124.00 of Virginia property allocated to North Carolina and giving effect to interest which was capitalized on plant under construction at $2,112,-810.00. The Company offered evidence to the effect that the fair value of the North Carolina property was at least $2,250,000.00.

The Commission, based on a valuation fixed by its Staff of $1,-963,236.00, determined that the Company's rate of return on said valuation was 5.20%.

The Company offered evidence tending to show that its gross investment in its plant in service in North Carolina in 1949, when the present rates went into effect, was $476,000.00, or an average investment per station of $266.00; that on 31 July 1963 the gross investment was $2,853,500.00, or an average investment per station of $375.00.

The capital structure of the Company as a whole, on 31 July 1963, consisted of long term debt in the amount of $4,630,000.00, short term bank notes in the amount of $875,000.00, and equity capital in the

amount of $4,256,725.00. The ratio of debt capital to total capitalization, including short term bank notes, is 56.4%. Exclusive of the short term bank notes, the debt ratio is approximately 52%. The last two issues of bonds sold by the Company, maturing in 1978 and 1986 respectively, totaling $1,600,000.00, bear 5% interest, and all the short term bank notes are financed at 5%.

Based on the cost of a new exchange at Walkertown, which presently serves 1,374 stations, the evidence tends to show a cost per station of $410.00. Using $410.00 as replacement cost of the Company's 7,610 stations in North Carolina, the current cost of the Company's North Carolina plant would be $3,120,100.00, less depreciation of 28.94% heretofore taken, amounting to a deduction or reserve of $902,-957.00, leaving the cost of the North Carolina plant, less depreciation, at $2,217,143.00. When the additional cost of plant under construction is added thereto, plus the allocated portion of the properties in Virginia chargeable to the North Carolina operation, the total current cost, according to the Company's evidence, on all properties used and useful in rendering service in North Carolina, is $2,354,174.00.

The Commission denied the Company any increase in its rates and dismissed the proceeding.

The defendant appealed to the Superior Court which overruled all the defendant's exceptions, affirmed the order of the Commission and dismissed the appeal. The defendant appeals, assigning error.

Maupin, Taylor & Ellis; Lake, Boyce & Lake for defendant.

Edward B. Hipp for the Commission.

Attorney General Bruton, Asst. Attorney General Charles W. Barbee, Jr., and Thomas J. White for protestant.

DENNY, C.J. The appellant assigns as error the failure of the court below to sustain its exception to the Commission's finding of fact No. 3, as follows: "The fair value of the Company's property in North Carolina used and useful in rendering service and producing revenue is $2,100,000.00," for that such finding of fact is unsupported by competent, material and substantial evidence.

G.S. 62-124 governed the manner of ascertaining the value of property for rate purposes at the time the petition herein was filed on 16 August 1963. However, Chapter 1165 of the 1963 Session Laws of North Carolina repealed G.S. 62-124 as of 1 January 1964, which was prior to the date the Commission's order was signed. Even so, we hold there is no conflict between the provisions of the former statute and the present one, that the present statute merely codified the former statute

as interpreted by this Court. The present statute, now codified as G.S. 62-133, reads as follows:

"(a) In fixing the rates for any public utility subject to the provisions of this chapter, other than motor carriers, the Commission shall fix such rates as shall be fair both to the public utility and to the consumer.

"(b) In fixing such rates, the Commission shall:

"(1) Ascertain the fair value of the public utility's property used and useful in providing the service rendered to the public within this State, considering the reasonable original cost of the property less that portion of the cost which has been consumed by previous use recovered by depreciation expense, the replacement cost of the property, and any other factors relevant to the present fair value of the property. Replacement cost may be determined by trending such reasonable depreciated cost to current cost levels, or by any other reasonable method.

"(2) Estimate such public utility's revenue under the present and proposed rates.

"(3) Ascertain such public utility's reasonable operating expenses, including actual investment currently consumed through reasonable actual depreciation.

"(4) Fix such rate of return on the fair value of the property as will enable the public utility by sound management to produce a fair profit for its stockholders, considering changing economic conditions and other factors, as they then exist, to maintain its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise, and to compete in the market for capital funds on terms which are reasonable and which are fair to its customers and to its existing investors.

"(5) Fix such rates to be charged by the public utility as will earn in addition to reasonable operating expenses ascertained pursuant to paragraph (3) of this subsection the rate of return fixed pursuant to paragraph (4) on the fair value of the public utility's property ascertained pursuant to paragraph (1).

"(c) The public utility's property and its fair value shall be determined as of the end of the test period used in the hearing and the probable future revenues and expenses shall be based on the plant and equipment in operation at that time.

"(d) The Commission shall consider all other material facts of record that will enable it to determine what are reasonable and just rates.

"(e) The fixing of a rate of return shall not bar the fixing of a different rate of return in a subsequent proceeding."

According to the Commission's conclusions, its own Staff determined the net end of period investment of the defendant in North Carolina to be $2,152,949.00, while the Company determined the depreciated value of its property in North Carolina at the end of the test period to be $2,112,810.00. Insofar as the record shows, no consideration was given to replacement costs in arriving at either of the above figures. Moreover, the Commission's Staff in arriving at a return of 5.20% used "an average net rate base, including working capital and after accounting and pro forma adjustments, and before any increase, of $1,963,236.00." The Company offered evidence tending to show the depreciated replacement costs of its North Carolina properties to be $2,354,174.00.

Whether a 4, 5 or 6% return is just and reasonable depends very largely on whether the Commission has placed a fair value on the property of the utility which is used and useful in producing its revenue. *Utilities Com. v. Gas Co.*, 254 N.C. 536, 119 S.E. 2d 469; *Smyth v. Ames*, 169 U.S. 466, 42 L. Ed. 819, 18 S. Ct. 418.

In *Utilities Com. v. State* and *Utilities Com. v. Telegraph Co.*, 239 N.C. 333, 80 S.E. 2d 133, Barnhill, J., later C.J., said:

"Necessarily, what is a 'just and reasonable' rate which will produce a fair return on the investment depends on (1) the value of the investment — usually referred to in rate-making cases as the Rate Base — which earns the return; (2) the gross income received by the applicant from its authorized operations; (3) the amount to be deducted for operating expenses, which must include the amount of capital investment currently consumed in rendering the service; and (4) what rate constitutes a just and reasonable rate of return on the predetermined Rate Base. When these essential ultimate facts are established by findings of the Commission, the amount of additional gross revenue required to produce the desired net return becomes a mere matter of calculation. * * *"

On the findings in this record we are unable to determine whether the value of $2,100,000.00 fixed by the Commission was as of the end of the test period or not. Furthermore there is no evidence tending to show that the Commission gave any consideration whatever to replace-

ment cost as required by the statute. In our opinion, finding of fact No. 3 is not supported by competent, material and substantial evidence.

In *Utilities Com. v. Gas Co., supra,* the Commission said it gave only minimal consideration to replacement cost but did not exclude it from consideration. In affirming an order of the court below, remanding the case to the Commission for further hearing, Higgins, J., speaking for the Court, said:

> "In these times of increased construction costs and decreased dollar value, trended cost evidence deserves weight in proportion to the accuracy of the tests and their intelligent application. The objections to such evidence apparently came from jurisdictions where the base rate is fixed at 'book value' or 'original cost' rather than present value. Of course, the book value or original cost can be ascertained with exactness from the books and records. Trended cost is useful only when it becomes necessary to fix the present value of facilities constructed when the cost was low and replacement has become expensive — our case. The trended cost takes into account the type of facility, its age, its original and replacement cost, terrain, location, its probable useful life, and other factors. Such evidence is not conclusive but it does appear to be a useful guide in determining value of facilities * * *. Engineers and accountants have, through examination, investigation and experience in the field, devised tables, studies, and indices designed and intended as guides in translating original cost into present value. A better method * * * is not suggested."

The mere minimal consideration of the replacement cost was held to be erroneous, citing *City of Richmond v. Henrico County,* 185 Va. 176, 37 S.E. 2d 873, modified 185 Va. 859, 41 S.E. 2d 35; *Duquesne Light Co. v. Pennsylvania Public Utilities,* 176 Pa. Super. 568, 107 A. 2d 745; *Railroad Commission v. Houston Nat. Gas Corp.,* 155 Tex. 502, 289 S.W. 2d 559.

This assignment of error is sustained.

It is apparent from a perusal of the record that the Commission and its Staff found it difficult to consider the rate of return from the North Carolina properties separate and apart from the rate of return of the Company as a whole.

The Utilities Commission of this State does not have the right to fix less than a reasonable or fair rate of return on the Company's investment in North Carolina because the Utilities Commission in Virginia may have fixed rates in that State which, in the opinion of the Utilities Commission in this State, gives the Company a reasonable return

on its entire properties when its Virginia and North Carolina revenues are combined. *Smyth v. Ames, supra.*

In the case of *Corporation Com. v. Mfg. Co.*, 185 N.C. 17, 116 S.E. 178, in considering the same question involved here, this Court held:

> "* * * (T)he Corporation Commission (now the Utilities Commission) in this State is empowered and directed to make reasonable and just rates as applied to the distribution and sale of power in this State and not otherwise, and such power cannot be directly controlled or weakened by conditions existent in other states, either from the action or nonaction of official bodies there, or the dealings between private parties. To hold otherwise would, in its practical operation, be to withdraw or nullify the powers that the statute professes to confer and should not for a moment be entertained. * * *"

In *United Gas Pipe Line Co. v. Louisiana Public Serv. Com'n.*, 241 La. 687, 130 S. 2d 652, the Supreme Court of Louisiana recently said:

> "* * * '(T)he reasonableness of the rates to be fixed by the state must be decided with reference exclusively to what is just and reasonable in respect of domestic business.'"

When a company operates in two or more states, the operations are treated as separate businesses for the purpose of rate regulation. An inadequate return in Virginia would not of itself justify a rate increase in North Carolina, nor would a high rate of return in Virginia justify less than a fair and reasonable rate in North Carolina. G.S. 62-133.

The responsibility for fixing rates rests with the Utilities Commission and not on this Court. However, there is nothing in the statutes that requires the Commission to accept the rate or rates proposed, or to reject them altogether. *Utilities Com. v. Light Co.* and *Utilities Com. v. Carolinas Committee*, 250 N.C. 421, 109 S.E. 2d 253.

The Superior Court of Wake County will remand this proceeding to the Utilities Commission for further hearing in accord with the provisions of G.S. 62-133 and this opinion.

Remanded.

CHARLES STORES COMPANY, INC. v. JUSTUS M. TUCKER, CHIEF OF POLICE FOR THE CITY OF WINSTON-SALEM, NORTH CAROLINA; M. C. BENTON, MAYOR OF THE CITY OF WINSTON-SALEM; AND FLOYD S. BURGE, JR., ARCHIE ELLEDGE, GEORGE W. CHANDLER, W. N. SCHULTZ, CARL H. RUSSELL, CARROLL E. POPLIN, DR. FRANK R. SHIRLEY, AND DOUGLAS B. ELAM, MEMBERS OF THE BOARD OF ALDERMEN FOR THE CITY OF WINSTON-SALEM, NORTH CAROLINA.

(Filed 24 February, 1965.)

1. Municipal Corporations § 27—

The requiring of the observance of Sunday has a reasonable relationship to the public peace, welfare, safety and morals, and therefore rests within the police power of the State, and the State has delegated such power to its municipalities. G.S. 160-52, G.S. 160-200(6), (7), (10). Private Laws of 1927, ch. 232, § 37.

2. Constitutional Law § 14—

A municipal ordinance proscribing all merchandising within the city on Sunday and exempting from the ordinance merchants selling certain commodities having a relationship to the public health and the enjoyment of Sunday as a day of rest and recreation, is constitutional in its application to a general department store merchant prohibited Sunday operations, even though such merchant sells some items also sold by other merchants exempt from the ordinance, provided the ordinance prohibits all merchants in plaintiff's classification from Sunday operations, since the validity of the classification depends upon whether all similiarly situated are treated alike and not whether competition is preserved as to all items of merchandise.

3. Criminal Law § 1—

The municipal Sunday observance ordinance in question *held* sufficiently definite to enable a citizen of reasonable intelligence to determine what goods could or could not be legally sold within the city on Sunday, and therefore the ordinance is not void as being unconstitutionally vague. Difficulty as to classification of a few inconsequential items does not warrant declaring the ordinance invalid.

4. Constitutional Law § 4—

A merchant prohibited from Sunday operations may not attack the Sunday observance ordinance on the ground of its uncertainty as to what articles were permitted by the ordinance to be sold by other merchants exempt from the ordinance, since a person is entitled to attack the constitutionality of a legislative act only if he himself is in immediate danger of sustaining a direct injury therefrom.

APPEAL by plaintiff from *McConnell, J.*, June 1964 Session of FORSYTH. This appeal was docketed in the Supreme Court as Case No. 392 and argued at the Fall Term 1964.

Plaintiff corporation, in its own behalf and in behalf of "numerous other persons, firms, and corporations" similarly situated, instituted this action on June 12, 1964, for the purpose of permanently restrain-

ing defendants — the Chief of Police, the Mayor, and the Board of Aldermen of the City of Winston-Salem — from enforcing Winston-Salem Code ch. 26, "Sunday Observance," which became effective June 14, 1964, on the ground that it violates the N. C. Const. art. I, § 17, and of U. S. Const. amend. XIV, § 1. A copy of this ordinance was attached to and made a part of the complaint.

On June 12, 1964, Judge McConnell issued a temporary restraining order, returnable on June 24, 1964, at which latter time defendants were directed to show cause why the temporary restraining order should not be continued. When the matter came on for hearing pursuant to this order, defendants demurred *ore tenus* to the complaint. Judge McConnell sustained the demurrer *ore tenus*, and plaintiff appeals to this Court. Pending this appeal, Judge McConnell, in his discretion, continued the restraining order in full force and effect.

Cannon, Wolfe & Coggin; Hatfield & Allman for plaintiff.
Womble, Carlyle, Sandridge & Rice for defendants.

SHARP, J. The General Assembly, by G.S. 160-52 and G.S. 160-200(6), (7), and (10), has delegated to municipalities the power to enact ordinances requiring the observance of Sunday. In addition to these general powers granted to all municipalities, it has granted to the City of Winston-Salem in its charter the specific authority "to regulate the due observance of Sunday." N. C. Priv. L. (1927) ch. 232, § 37, p. 434. The provisions of the ordinance in question are quoted and summarized as follows:

"Sec. 26-1. Required.

(a) It shall be unlawful for any person to sell, offer or expose for sale any goods, wares or merchandise in the city on Sunday, nor shall any store, shop, warehouse or any other place of business in which goods, wares or merchandise are kept for sale, be kept open between 12:00 midnight Saturday and 12:00 midnight Sunday, unless such store, shop, warehouse or other place of business is expressly allowed to open and sell goods under the provisions of this chapter; provided, however, that notwithstanding any other provisions of this chapter, on Sunday no such store, shop, warehouse or other place of business shall sell, offer or expose for sale any of the following:

(1) Clothing and wearing apparel;
(2) Clothing accessories;
(3) Furniture, housewares, home, business, or office furnishings;

(4) Household, business or office appliances;

(5) Hardware, tools, paints, building and lumber supply materials;

(6) Jewelry, silverware, watches, clocks, luggage, musical instruments or recordings.

(b) Each separate sale or offer to sell shall constitute a separate offense.

* * *

"Sec. 26-4. Cigar and tobacco stores and newsstands.

Cigar and tobacco stores or stands and newsstands may keep open on Sunday for the sale of tobacco, tobacco products, papers and periodicals and accessories, together with soft drinks, ice cream, candy and cakes.

"Sec. 26-5. Drug stores.

Drug stores having a licensed pharmacist may keep open on Sunday for all purposes, including the operation of soda fountains located therein.

* * *

"Sec. 26-7. Sale of fruits and melons.

Stands for the sale of fruits and melons may remain open on Sundays during the hours of 7:00 to 9:00 a.m. and from 12:00 noon to 12:00 midnight, and such establishments shall remain closed on Sunday except during these hours.

"Sec. 26-8. Garages and filling stations.

Public garages and filling stations may be kept open for the hiring and storage of automobiles and for the sale of gasoline and oils, soft drinks, ice cream, candy, cakes and tobaccos at all hours.

"Sec. 26-9. Grocery stores and curb markets.

Grocery stores and curb markets, including those selling confectionery items as defined in section 26-10, may remain open on Sunday during the hours of 7:00 to 9:00 a.m. and from 12:00 noon to 12:00 midnight, for the sale of any items not otherwise prohibited by law. All such establishments, including those selling confectionery items, shall remain closed on Sunday except during these hours."

The sections of ch. 26 not quoted above deal with matters not specifically involving plaintiff and others similarly situated. Section 2 permits bootblack stands to operate on Sunday. Section 3 authorizes the

sale of Christmas greenery on Sundays during the month of December. Section 6 authorizes moving pictures, baseball, football, basketball, golf, tennis, dog and horse shows on Sunday and the sale of tickets to these performances between the hours of 12:30 p.m. and 12:00 midnight. All other sports and amusements are prohibited on Sunday. Soft drinks, ice cream, candy, cakes, wrapped sandwiches and tobacco may be sold on Sundays at all lawful exhibitions of baseball, football, basketball, golf or tennis. Section 10 permits hotels, boarding-houses, confectioneries, wiener stands, and cafes and restaurants, which "are also conducted as restaurants or cafes on other days of the week," to remain open. Section 11 permits manufacturers and dealers in ice to make sales of ice and certain deliveries. Section 12 permits manufacturers of ice cream, dairies and creameries to sell their products on Sundays. Section 13 authorizes the publication of newspapers and the sale of newspapers and magazines by newsstands or newsboys in the streets. Section 14 permits tobacco warehouses to open their doors on Sundays long enough to receive vehicles loaded with tobacco. Section 15 prohibits street sales of newspapers, and all other printed matter except programs for the service, from midnight until after the sunrise services of the Moravian Church on Easter Sunday in the area of the city involved in the services.

Winston-Salem Code § 1-8 makes the violation of any provision of ch. 26 punishable by a fine of $50.00 or 30 days' imprisonment for each separate violation. Each day any violation continues constitutes a separate offense.

These pertinent facts are alleged in the complaint and admitted by the demurrer: (1) plaintiff operates a general retail and wholesale merchandising store in the City of Winston-Salem, where it engages on week days and Sundays in the business of selling goods, wares and merchandise, the sale of some of the articles being absolutely prohibited on Sunday by said ch. 26; (2) the ordinance requires plaintiff and those similarly situated to close on Sunday, though permitting drug-stores, food stores, tobacco stores and newsstands, which sell some of the items plaintiff also sells, to remain open on Sunday; (3) plaintiff, as well as those "in whose behalf this class action is instituted, derives from each Sunday's sales of its merchandise a substantial dollar-volume of business"; (4) defendants will make or cause to be made, after the effective date of the ordinance, "arrests of any persons, firms, or corporations (including plaintiff) herein for the violation of the aforesaid resolution and ordinance."

Plaintiff avers that these repeated arrests under "the continuing offense aspect" of the ordinance will result in a multiplicity of actions, fines and penalties, destroy the good will plaintiff has acquired in the

community, damage the morale of personnel, and thereby subject plaintiff to irreparable damage for which it has no adequate remedy at law. It is plaintiff's contention that the ordinance violates the equal-protection clause of the Fourteenth Amendment to the Federal Constitution, as well as its due-process clause, and the synonymous law-of-the-land provision of the State Constitution, *State v. Ballance,* 229 N.C. 764, 51 S.E. 2d 731, in that (a) its application does not affect all persons, firms or corporations engaged in operations similar to this of plaintiff; (b) the classification of articles prohibited by the ordinance is arbitrary and discriminatory; (c) the ordinance has no reasonable relationship to the public peace, welfare, safety, and morals; and (d) it is so indefinite and general that men of ordinary intelligence must differ as to its meaning.

These identical contentions were all made with reference to a similar ordinance, and overruled by this Court, in *Clark's Charlotte, Inc. v. Hunter,* 261 N.C. 222, 134 S.E. 2d 364. The reasoning in that opinion is decisive of this case. In *Clark's Charlotte, Inc.,* the Sunday-closing ordinance of the City of Charlotte withstood the challenge to its constitutionality by a plaintiff which, as here, operated a general merchandising business. The full text of the Charlotte ordinance appears at 261 N.C. 225, 134 S.E. 2d 366. Briefly, it prohibited the operation of *any business* within the city and then entirely exempted from its operation certain businesses. In addition, it permitted "drugstores furnishing medical or surgical supplies, foodstuffs, beverages, tobacco products, books, newspapers and magazines only; food stores furnishing foodstuffs, beverages, tobacco products, books, newspapers and magazines only" to remain open. The exempted businesses sold some of the same goods which Clark's Charlotte, Inc., as the operator of a large department store, sold. In general, that ordinance exempted those businesses rendering essential services or furnishing products considered as necessary for health or as contributing to the recreational aspect of Sunday.

The Winston-Salem ordinance under consideration imposes no ban upon either services or manufacturing. It merely prohibits *merchandising* in Winston-Salem on Sunday, and requires all places wherein merchandise is kept for sale to remain closed from Saturday midnight until Sunday midnight. It then exempts certain types of stores, stands, and businesses from the closing requirements. Some of these exempted businesses sell on Sunday some of the same articles which plaintiff sells. Drugstores having a licensed pharmacist are unrestricted; the other businesses are restricted either as to the hours of operation or as to products which may be sold, leased, or received for storage. No business permitted to open on Sunday, however, is permitted to sell any of

the proscribed merchandise contained in the six categories listed in § 26-1.

Thus, it will be seen that both the Charlotte and the Winston-Salem ordinances generally prohibit a broad range of Sunday activities and then exempt specified activities. Ordinances prohibiting *the exercise of all occupations generally* on Sunday "except those of necessity and charity" are constitutional. *Surplus Store, Inc. v. Hunter,* 257 N.C. 206, 125 S.E. 2d 764; *State v. McGee,* 237 N.C. 633, 75 S.E. 2d 783. Exceptions are valid if they are reasonable and do not discriminate within a class between competitors similarly situated. *Clark's Charlotte, Inc., supra; State v. McGee, supra;* Annot., Validity of discrimination by Sunday law between different kinds of stores or commodities, 57 A.L.R. 2d 975; Comment, Sunday Laws, 43 N.C.L. Rev. 123; Note, 32 N.C.L. Rev. 552.

Here, as in *Clark's Charlotte, Inc., supra,* plaintiff does not contend that the ordinance discriminates against it insofar as it applies to other general retail and wholesale merchandising stores; ch. 26 requires *all* such stores to remain closed on Sunday. Plaintiff complains, just as did the merchants in *Clark's Charlotte, Inc., supra; State v. Towery,* 239 N.C. 274, 79 S.E. 2d 513; and *State v. McGee, supra,* that the ordinance permits drugstores, grocery stores, newsstands and tobacco stores, which sell some of the same merchandise plaintiff sells, to remain open on Sunday. This being so, it argues the ordinance is discriminatory and hence unconstitutional. This argument, as Denny, J. (now C. J.) pointed out in *State v. Towery, supra* at 277, 79 S.E. 2d at 516, undertakes "to make competition as between classes the test rather than discrimination within a class." Competition, or the right generally to conduct a business, is not the determining factor.

> "'Legislative bodies may distinguish, select, and classify objects of legislation. It suffices if the classification is practical. They may prescribe different regulations for different classes, and discrimination as between classes is not such as to invalidate the legislative enactment. The very idea of classification is inequality, so that inequality in no manner determines the matter of constitutionality. The one requirement is that the ordinance must affect all persons similarly situated or engaged in the same business without discrimination.'" *State v. McGee, supra at* 639, 75 S.E. 2d at 787. (Citations omitted.)

In effect, the Winston-Salem ordinances makes two categories of merchandise: (1) commodities which sustain life, promote health, and advance the enjoyment of Sunday as a day of rest; and (2) all other commodities. By this ordinance, the Board of Aldermen as the legisla-

tive body of Winston-Salem clearly indicated an intent to suspend on Sunday all merchandising not primarily related to the first category. In doing so, it did not act arbitrarily. The classification which the Board has made affects alike all persons similarly situated. It is both reasonable and practical to require people to do their serious shopping for clothing, furniture, automobiles, household and office appliances, hardware, and building supplies on week days. Although the discount merchants on the highway do not share the downtown merchants' liking for Sunday quiet — *vérité en deçà des Pyrénées, erreur au delà* — yet "it so happens that the great majority of people desire to observe Sunday as the day of rest," Denny, J. (now C. J.) in *State v. McGee, supra* at 644, 75 S.E. 2d at 790. Nevertheless, on the first day of the week, these same people desire also to eat and drink, to drive to church and other places, to read, and otherwise to divert themselves from their working activities. Nowadays, such an unrelenting, theocratic observance of Sunday as the Puritans imposed on the populace of New England during the seventeenth century would be impractical, to say the least; yet the racks of contemporary living under our competitive system make Sunday's change of pace ever more important to the average citizen. The exemptions in Winston-Salem's Sunday-observance ordinance recognize his need and his desire for recreation, and this recognition, in the ordinance, has a reasonable relation to the public welfare.

In holding certain Sunday-closing laws of Maryland to be constitutional, Mr. Chief Justice Warren has said:

> "It would seem that a legislature could reasonably find that the Sunday sale of the exempted commodities was necessary either for the health of the populace or for the enhancement of the recreational atmosphere of the day — that a family which takes a Sunday ride into the country will need gasoline for the automobile and may find pleasant a soft drink or fresh fruit; that those who go to the beach may wish ice cream or some other item normally sold there; . . . that newspapers and drug products should always be available to the public. . . .
>
> "The record is barren of any indication that this apparently reasonable basis does not exist, that the statutory distinctions are invidious, that local tradition and custom might not rationally call for this legislative treatment. Likewise, the fact that these exemptions exist and deny some vendors and operators the day of rest and recreation contemplated by the legislature does not render the statutes violative of equal protection since there would appear to be many valid reasons for these exemptions. . . ." *Mc-*

Gowan v. Maryland, 366 U.S. 420, 426, 6 L. Ed. 2d 393, 399, 81 S. Ct. 1101, 1105.

In accordance with the ruling in *Clark's Charlotte, Inc., supra,* we hold that the provisions of this ordinance "insofar as it has been challenged on this appeal," *Id.* at 233, 134 S.E. 2d at 372, are not unreasonable, not arbitrary, and not discriminatory as applied to plaintiff.

That Sunday-observance laws have a reasonable relationship to the public peace, welfare, safety and morals, and are for that reason a proper exercise of the police power, has been heretofore decided by this Court so many times that citation of authority seems unnecessary. See, nonetheless, *Clark's Charlotte, Inc., supra; State v. Towery, supra; State v. McGee, supra.*

There is likewise no merit in plaintiff's contention that this ordinance is unconstitutionally vague; that the categories of prohibited goods in § 26-1 constitute such a "grey area" that reasonably intelligent persons cannot be certain what goods can or cannot be legally sold. See *Surplus Store, Inc. v. Hunter, supra.* The constitutionality of a legislative enactment should not ordinarily turn upon such trivia as whether a safety pin is a "clothing accessory" or whether a pencil is "office equipment." This Court was of the opinion that the ordinance which the plaintiff challenged in *Clark's Charlotte, Inc., supra,* was clear enough for the reasonably intelligent person to know what it prohibited. We have no more reason here to be apprehensive that § 26-1 of the Winston-Salem ordinance will baffle average intelligence. *Two Guys v. McGinley,* 366 U.S. 582, 6 L. Ed. 2d 551, 81 S. Ct. 1135; *accord, State v. Hales,* 256 N.C. 27, 122 S.E. 2d 768; *State v. Towery, supra.*

Be that as it may, as defendants point out, plaintiff has no standing to challenge the constitutionality of that portion of the ordinance listing items of merchandise which may not be sold on Sunday by businesses allowed to remain open. These categories do not concern plaintiff; they can cause no agonies of decision for its management because plaintiff is allowed to sell *nothing* on Sunday. Only one who is in immediate danger of sustaining a direct injury from legislative action may assail the validity of such action. It is not sufficient that he has merely a general interest common to all members of the public. *Watkins v. Wilson,* 255 N.C. 510, 121 S.E. 2d 861; *Fox v. Commissioners of Durham,* 244 N.C. 497, 94 S.E. 2d 482; *Turner v. Reidsville,* 224 N.C. 42, 29 S.E. 2d 211.

For the reasons stated herein, and amplified by Parker, J. in *Clark's Charlotte, Inc., supra,* we hold that the Sunday-observance ordinance

of Winston-Salem, Code ch. 26, withstands the challenges to its constitutionality which have been made on this appeal.

The judgment below is

Affirmed.

MORPUL RESEARCH CORPORATION v. WESTOVER HARDWARE, INC.

(Filed 24 February, 1965.)

1. Corporations § 8—

The position of manager of a corporation implies that the person holding that corporate office is in charge of the affairs of the company with respect to the property and business with which he is associated, with the power to do those things necessary for the discharge of such duties.

2. Same; Principal and Agent § 5—

The principal is bound by those acts of the agent which are within the authority actually conferred upon him and those acts within his apparent authority, and an agent has the apparent authority to do the usual things necessary to the transaction of the business which the agent is employed to do.

3. Same—

Evidence tending to show that plaintiff delivered certain appliances to defendant's store upon order of the manager of the store and that the store received the appliances, demonstrated and offered them for retail sale, *is held* sufficient to overrule nonsuit upon the question of the manager's apparent authority to order the appliances for his principal.

4. Same—

The doctrine of apparent authority cannot obtain when the superior of the alleged agent has affirmatively denied the agent's authority in the premises to the knowledge of the person dealing with the agent.

5. Same—

Where plaintiff's evidence is sufficient for the jury on the question of the apparent authority of defendant's agent to order the appliances in question, but defendant introduces evidence that the agent's superior told plaintiff's salesman that the appliances might be delivered only upon consignment, it is error for the court to fail to instruct the jury that on defendant's evidence the agent had no authority to purchase the goods.

6. Trial § 33—

It is error for the court to fail to instruct the jury upon a substantial feature of the case presented by the evidence, even in the absence of a request.

APPEAL by defendant from *Shaw, J.*, February 17, 1964, Civil Session of GUILFORD, Greensboro Division, docketed and argued as No. 594 at Fall Term 1964.

Plaintiff instituted this action August 20, 1963, in the Greensboro Municipal-County Court to recover for ten portable steam cabinets delivered by plaintiff, a corporation, to defendant, a corporation, on or about January 26, 1963.

Plaintiff alleged that defendant "through its authorized agent, accepted and agreed to pay for the said steam cabinets the total sum of $1,499.50 within a period of thirty (30) days, a cash discount of 2% being allowed for payment within ten (10) days." Defendant, denying there was a sale, alleged that, pursuant to agreement, said cabinets were delivered and received solely on a consignment basis.

A trial, without a jury, in said municipal-county court resulted in a judgment that plaintiff "have and recover nothing of the defendant," from which plaintiff appealed to the superior court.

Upon trial *de novo* in the superior court, the court submitted, and the jury answered, the following issues: "1. Did the plaintiff and defendant enter into a contract for the purchase of steam cabinets as alleged in the complaint? Answer: Yes. 2. If so, what amount, if any, is the plaintiff entitled to recover from the defendant by reason thereof? Answer: $1,349.75."

Judgment for plaintiff, in accordance with said verdict, was entered. Defendant excepted and appealed.

Smith, Moore, Smith, Schell & Hunter and Jack W. Floyd for plaintiff appellee.

Jordan, Wright, Henson & Nichols and Karl N. Hill, Jr., for defendant appellant.

BOBBITT, J. Plaintiff's evidence tends to show the alleged contract of sale was entered into by Ernest W. Azer, then employed by plaintiff as "a special representative," and Robert Bartel, then employed by defendant as manager of defendant's Westover Shopping Center store in Charlotte, N. C., or of its appliance department.

Defendant's evidence tends to show Bartel was sales manager of the appliance department of said store; that Bartel had no authority to act for defendant in the purchase of merchandise; that all purchases by defendant were made on (serially numbered) purchase order forms; that no purchase was authorized unless and until a purchase order therefor was approved and signed by Jerry Melton, the president, also the "owner and manager," of defendant; and that no purchase order was issued for said steam cabinets.

Azer testified that, while his negotiations were with Bartel, he was introduced to Jerry Melton and knew he "was the owner." Evidence for defendant includes the following: Azer brought the ten cabinets to defendant's store. One was unpacked and hooked up for demonstration. Azer was introduced to Melton as owner. Melton testified: "I told Mr. Azer in no uncertain terms, I said, 'I do not want anything to do with these steam cabinets except on a consignment basis — if they sell, okay — if they don't sell, you come down here, load them up in your station wagon and like you brought them down here, and take them back with you.' " Defendant offered evidence in corroboration of said testimony. Azer testified no such statement was made to him by Melton.

Other evidence tends to show: The efforts of defendant's salesmen to sell the cabinets were unsuccessful. Plaintiff demanded payment. Defendant insisted the cabinets were received on consignment. In June 1963, defendant returned to plaintiff "eight chairs, and five steam generators." "One chair and the five (?) steam generators" ("the delivery boy apparently overlooked them") are still "over in the back" of defendant's said store. One unit was given by Melton to a friend. Defendant's check in the amount of $149.75 was issued to and cashed by plaintiff as payment for this unit.

The foregoing indicates the gist of the evidence tending to support the respective contentions of plaintiff and defendant. Further discussion of the evidence is unnecessary to decision.

We consider first defendant's assignments of error addressed to the denial of its motion for judgment of nonsuit.

There was plenary evidence that Bartel, acting for defendant, ordered the ten cabinets upon the terms alleged; that Bartel was *manager* of defendant's Westover Shopping Center store (defendant had one or more other stores) or of the appliance department of said store; and that, pursuant to Bartel's order, the cabinets were delivered to and placed in defendant's said store and demonstrated and offered for sale by defendant's salesmen.

In *Kelly v. Shoe Co.*, 190 N.C. 406, 409, 130 S.E. 32, the opinion of Varser, J., states: "The term 'manager,' applied to an officer or representative of a corporation, implies the idea that the management of the affairs of the company has been committed to him with respect to the property and business under his charge. Consequently, his acts in and about the corporation's business, so committed to him, is within the scope of his authority. (Citations.) The designation 'manager' implies general power, . . . (Citations.) The term 'manager' implies the exercise of judgment and skill. (Citations.) The term 'general manager'

may imply still greater authority, . . . (Citations.)" See also *Gillis v. Tea Co.*, 223 N.C. 470, 474, 27 S.E. 2d 283.

An oft-quoted excerpt from the opinion of Hoke, J. (later C.J.), in *Powell v. Lumber Co.*, 168 N.C. 632, 635, 84 S.E. 1032, states the pertinent rule as follows:

"A general agent is said to be one who is authorized to act for his principal in all matters concerning a particular business or employment of a particular nature. Tiffany on Agency, p. 191. And it is the recognized rule that such an agent may usually bind his principal as to all acts within the scope of his agency, including not only the authority actually conferred, but such as is usually 'confided to an agent employed to transact the business which is given him to do,' and it is held that, as to third persons, this real and apparent authority is one and the same, and may not be restricted by special or private instructions of the principal unless the limitations sought to be placed upon it are known to such persons or the act or power in question is of such an unusual character as to put a man of reasonable business prudence upon inquiry as to the existence of the particular authority claimed. (Citations.)

"The power of an agent, then, to bind his principal may include not only the authority actually conferred, but the authority implied as usual and necessary to the proper performance of the work intrusted to him, and it may be further extended by reason of acts indicating authority which the principal has approved or knowingly or, at times, even negligently permitted the agent to do in the course of his employment. (Citations.)"

Our decisions adopt and quote the following statement from Tiffany on Agency, pp. 180-181, *viz.*: "The principal is liable upon a contract duly made by his agent with a third person — (1) When the agent acts within the scope of his actual authority; (2) When the contract, although unauthorized, has been ratified; (3) When the agent acts within the scope of his apparent authority, unless the third person has notice that the agent is exceeding his actual authority. 'Apparent authority,' as the term is used in the foregoing section, includes authority to do whatever is usual and necessary to carry into effect the principal power conferred upon the agent and to transact the business which he is employed to transact; and the principal cannot restrict his liability for acts of his agent within the scope of his apparent authority by limitations thereon of which the person dealing with the agent has not notice. The principal may be estopped to deny that a person is his agent, or that his agent has acted within the scope of his authority." *Wynn v. Grant*, 166 N.C. 39, 47, 81 S.E. 949; *Brimmer v. Brimmer*,

174 N.C. 435, 439-440, 93 S.E. 984; *Jones v. Bank,* 214 N.C. 794, 797, 1 S.E. 2d 135.

Here, the evidence favorable to plaintiff tends to show that Jerry Melton had knowledge: (1) that, pursuant to negotiations between Bartel and Azer, the cabinets had been delivered to defendant; (2) that defendant received an invoice for said cabinets setting forth the terms of sale alleged in the complaint; and (3) that thereafter defendant's salesmen demonstrated and endeavored to sell the cabinets. Moreover, the evidence favorable to plaintiff tends to show plaintiff had no knowledge or notice of limitations, if any, upon Bartel's authority to act for defendant in purchasing the cabinets. In this connection, it is noteworthy that the alleged contract was for articles in the nature of appliances and not excessive in respect of quantity or cost. See *R. H. Kyle Furniture Co. v. Russell Dry Goods Co. (Ky.),* 340 S.W. 2d 220.

The conclusion reached is that the evidence, when considered in the light most favorable to plaintiff, was sufficient to support a finding that Bartel, acting for defendant, ordered the cabinets on the terms alleged, and that in so doing he was acting within the apparent scope of his authority. It is noted: The complaint does not allege ratification or facts on which such plea could be based. Hence, our consideration of the motion for nonsuit has been restricted to whether the evidence was sufficient to support a finding that Bartel acted within the apparent scope of his authority.

Defendant's motion for judgment of involuntary nonsuit was properly overruled.

Defendant excepted to each of the following three consecutive paragraphs of the court's charge, *viz:*

"Now, where the act of the agent, although it is beyond the actual scope of his authority, is within the apparent scope, and the person dealing with the agent acts in good faith and with reasonable prudence, the principal is bound. The apparent authority, so far as the third person is concerned, is the real authority, and when a third person has ascertained the apparent authority with which the principal was clothed as agent, he is under no further obligation to inquire into the agent's actual authority.

"However, the authority must have been actually apparent to the third person, that is, Mr. Azer, who, in order to avail himself of the rights thereunder, must have dealt with the agent, that is, Mr. Bartel, in reliance thereon, in good faith, and in the exercise of reasonable prudence. In which case, the principal, that is, Mr. Melton, or the Westover Hardware, Inc., will be bound by the action of the agent performed in the usual and customary mode of doing business.

"Although Mr. Bartel may have acted in violation of private instructions given to him by Mr. Melton, an agent cannot enlarge the actual authority by his own action, so the question for you to determine by all the facts and circumstances there present, so as to lead Mr. Azer to believe that Mr. Melton had the apparent authority to give this purchase order — that is a question under the law for you to determine."

Obviously, the second reference to "Mr. Melton" in the third quoted paragraph is an error in a transcript or "a mere *lapsus linguae*." It has no relation to the ground of decision.

Absent the testimony as to what transpired between Azer and *Melton*, the instructions given are in substantial accord with our decisions. However, we find nothing in these instructions or elsewhere in the charge that deals directly with a major, if not the crucial factual question, namely, whether Melton told Azer he could leave the cabinets with defendant only on a consignment basis.

Azer was the only person purporting to act for plaintiff in contacts with Bartel and Melton. There was evidence (1) that Azer knew Melton was Bartel's superior, and (2) that Melton notified Azer he could not leave the cabinets with defendant except on a consignment basis. If the jury should so find, such statement by Melton to Azer would negative whatever apparent authority Bartel may have otherwise possessed. "Any apparent authority that might otherwise exist vanishes in the presence of the third person's knowledge, actual or constructive, of what the agent is, and what he is not, empowered to do for his principal." 2 C.J.S., Agency § 92, p. 1189; *Commercial Solvents v. Johnson*, 235 N.C. 237, 242, 69 S.E. 2d 716; 3 Am. Jur. 2d, Agency, § 77. On account of said evidence, defendant was entitled, even in the absence of a request therefor, to an instruction on this substantial feature of the case. *Westmoreland v. Gregory*, 255 N.C. 172, 120 S.E. 2d 523; *Correll v. Gaskins*, 263 N.C. 212, 139 S.E. 2d 202. The failure to so charge was prejudicial error for which a new trial must be awarded.

Other assignments of error present questions that may not arise at the next trial.

New trial.

MARY P. FOWLE v. DR. WILLIS H. FOWLE, III.

(Filed 24 February, 1965.)

1. Malicious Prosecution § 1; False Imprisonment § 1; Process § 16—

Allegations to the effect that defendant instituted proceedings for the commitment of plaintiff to a mental hospital, maliciously for the purpose of ridding himself of plaintiff, his wife, when defendant well knew that plaintiff was not mentally disordered, that plaintiff was committed pursuant to the writ and later discharged as sane, does not state a cause of action for false imprisonment, since plaintiff was committed pursuant to a duly issued order, nor for abuse of process, since the result accomplished was warranted by the writ, but the allegations state a cause of action for malicious prosecution.

2. Malicious Prosecution § 2—

Proceedings under the statute for the commitment of a person to a mental hospital are judicial in nature, and the institution of such proceedings maliciously and without probable cause will support an action for malicious prosecution. G.S. 122-46.

3. Malicious Prosecution § 6—

Where a person committed to a mental hospital is discharged on a writ of *habeas corpus* less than a month thereafter upon findings by the court that such person was improperly restrained of her liberty and was not psychotic, and there is no evidence of any material change in her mental condition between said dates, there is a sufficient termination of the judicial proceedings for the purpose of an action for malicious prosecution.

4. Malicious Prosecution § 4—

In an action for malicious prosecution plaintiff must show, in addition to malice, want of probable cause, which is not established merely by proof of the termination of the judicial proceeding in plaintiff's favor, but must be established by showing that a reasonable man would not have believed and acted under the circumstances as defendant did.

5. Malicious Prosecution § 11—

Evidence tending to show that defendant had his wife committed to a mental hospital, that about a month later she was discharged upon *habeas corpus* on the court's finding that she was improperly restrained of her liberty and was not psychotic, with testimony of psychiatrists that she did not need treatment for any mental disease at the time she was committed, together with testimony of the wife that they had had marital difficulties over a period of years, that he had repeatedly threatened to have her committed, and that he remarried the day after a divorce decree was entered, *is held* sufficient to be submitted to the jury on the element of want of probable cause.

PARKER AND BOBBITT, JJ., dissent.

APPEAL by plaintiff from *Crissman, J.*, 5 April 1964 Session of RANDOLPH. This case was docketed in the Supreme Court as No. 524 and argued at the Fall Term 1964.

This is a civil action instituted by plaintiff on 23 January 1961, to recover damages against the defendant for allegedly having her unlawfully committed to a state hospital for mentally disordered persons.

Plaintiff and defendant were married at Chapel Hill, North Carolina, in 1948, while the defendant was a student at the University of North Carolina Medical School. After completing his medical education and his internship, the defendant and plaintiff moved to Asheboro, North Carolina, in 1954, where the defendant has been engaged in the practice of medicine since that time.

The plaintiff alleges in her complaint, among other things, the following:

That on 28 January 1960, the defendant, her husband, maliciously and wrongfully instituted insanity proceedings against the plaintiff for her commitment to a state hospital for the mentally disordered by executing and filing an affidavit with the Clerk of the Superior Court of Randolph County to the effect that, in his opinion, the plaintiff was suffering from some mental disorder and was a fit subject for admission into a hospital for the mentally disordered.

That the defendant well knew that the plaintiff was not insane, was not mentally disordered, was not in need of mental treatment, and was not a fit subject for admission into a hospital for the mentally disordered.

That the defendant acted solely through ill will and malice growing out of the marriage relationship between the plaintiff and himself and through his desire to rid himself of the plaintiff.

That the Clerk of the Superior Court of Randolph County ordered an examination of the plaintiff and that thereafter a hearing was held with respect to the commitment of plaintiff. That plaintiff was committed to Umstead State Hospital on 28 January 1960 and remained there for 24 days, until she was released pursuant to an order of the Honorable Hamilton H. Hobgood, entered in a *habeas corpus* proceeding, inquiring into plaintiff's detention. That plaintiff suffered serious damage by virtue of her wrongful detention.

Plaintiff's evidence tends to show these facts:

The plaintiff started receiving psychiatric treatments in May 1957, at which time she was confined to Duke Hospital for about one month. She thereafter received out-patient treatments from two psychiatrists for a period of approximately one year, going for out-patient treatment approximately three times per week and receiving ninety some treatments over a period of one year. She received treatment on

an out-patient basis up to and including 30 January 1959. On 28 January 1960, the defendant filed with the Clerk of the Superior Court of Randolph County an affidavit stating that the plaintiff was, in his opinion, a fit subject for admission into a hospital for the mentally disordered. Affidavits were filed by Dr. E. D. Shackelford and Dr. T. R. Cleek, stating that they had carefully examined the plaintiff and that in the opinion of each of them Mary Elizabeth Fowle (plaintiff) was suffering from a mental disease and was a fit subject for admission into a hospital for the mentally disordered. These affidavits were filed pursuant to an order of the Clerk of the Superior Court of Randolph County and pursuant to the provisions of North Carolina General Statutes, Chapter 122, Article 3.

According to the record, the Clerk of the Superior Court of Randolph County held a hearing in the matter. Other than the Clerk and the plaintiff, those present at the hearing which was held in the home of the plaintiff, were Richard Clark, an attorney whom the plaintiff had called, Dr. Shackelford, Dr. Cleek, and a Deputy Sheriff. The plaintiff expressed a willingness to go to Duke Medical Center for psychiatric treatment but protested being committed to Umstead State Hospital for treatment.

Plaintiff's evidence tends to show that during several years prior to 28 January 1960, the plaintiff and the defendant had serious marital difficulties; that the defendant would get mad and threaten about twice a month to have her committed to Butner (Umstead State Hospital); that he assaulted her many times, and in one of his tantrums he broke her arm; that the day after she was discharged from Umstead State Hospital the defendant filed an action for divorce and has since been granted a divorce; that he married a second spouse the day after his divorce was granted.

After alleging in her complaint that a hearing was held before the Clerk of the Superior Court of Randolph County, the plaintiff testified that no hearing was held before said Clerk and denied that Drs. Shackelford and Cleek had examined her as stated in their affidavits. The plaintiff also testified that her husband thought she used alcohol to excess. According to plaintiff's evidence, the plaintiff and the defendant were social drinkers.

The plaintiff offered in evidence the affidavit of the defendant as well as those of Drs. Shackleford and Cleek, tending to show the need for the plaintiff to be committed to a hospital for the mentally disordered, and the order of the Clerk of the Superior Court of Randolph County committing the plaintiff to Umstead State Hospital for "a period of observation, not exceeding sixty days."

Plaintiff further offered evidence of several psychiatrists tending to show that she was not in need of treatment for any mental disease at the time she was committed to Umstead State Hospital; that she had anxiety neurosis. One of the psychiatrists testified that he recommended that Mrs. Fowle would benefit from psychiatric out-patient treatment.

At the close of plaintiff's evidence, on motion of the defendant, the court below entered a judgment as of nonsuit.

The plaintiff appeals, assigning error.

Ottway Burton for plaintiff appellant.

L. T. Hammond, Sr., L. T. Hammond, Jr., Ferree, Anderson & Ogburn for defendant appellee.

DENNY, C.J. This action was originally brought against Dr. Willis H. Fowle, III, Dr. E. D. Shackelford and Dr. T. R. Cleek, to recover damages for the detention of plaintiff in a state hospital for mentally disordered persons, arising out of a judicial proceeding under Article 3, Chapter 122, General Statutes of North Carolina. A joint written demurrer filed by defendants Drs. Shackelford and Cleek was sustained and the plaintiff appealed. This Court, at the Fall Term 1961, in an opinion reported in 255 N.C. 720, 122 S.E. 2d 722, sustained the demurrer on authority of *Bailey v. McGill*, 247 N.C. 286, 100 S.E. 2d 860 and *Jarman v. Offutt*, 239 N.C. 468, 80 S.E. 2d 248.

An examination of the complaint herein leaves one in doubt as to whether the plaintiff is seeking recovery of an action for false imprisonment, malicious prosecution, or abuse of process.

In the case of *Melton v. Rickman*, 225 N.C. 700, 36 S.E. 2d 276, 162 A.L.R. 793, this Court said: "At common law there were a number of related causes of action devised to afford a remedy against the wrongful invasion of the liberty of an individual through the processes of the courts.

"A cause of action for false arrest or false imprisonment is based upon the deprivation of one's liberty *without* legal process. It may arise when the arrest or detention is without warrant * * *.

"To sustain an action for malicious prosecution the plaintiff must show malice, *want of probable cause,* and the favorable termination of the former proceeding.

"One who uses *legal process* to compel a person to do some collateral act not within the scope of the process or for the purpose of oppression or annoyance is liable in damages in a common law action for abuse of process.

"So then, while false imprisonment is the arrest and imprisonment without legal process and malicious prosecution is the prosecution with

malice and without probable cause, abuse of process is the misuse of legal process for an ulterior purpose. It consists in the malicious misuse or misapplication of that process *after issuance* to accomplish some purpose not warranted or commanded by the writ. It is the malicious perversion of a legally issued process whereby a result not lawfully or properly obtainable under it is attended to be secured." (Citations omitted. Emphasis added, with the exception of that in last paragraph.)

There is no evidence of false imprisonment. The plaintiff was committed pursuant to a duly issued order of the Clerk of the Superior Court of Randolph County as authorized by statute. Moreover, the plaintiff's evidence clearly establishes the fact that the proceeding which she alleges was maliciously instituted, was used only for the purpose for which it was intended, and the result accomplished was warranted and commanded by the writ. Therefore, the evidence is insufficient to support an action based on abuse of process. *Ledford v. Smith,* 212 N.C. 447, 193 S.E. 722; *Carpenter v. Hanes,* 167 N.C. 551, 83 S.E. 577; *Hauser v. Bartow,* 273 N.Y. 370, 7 N.E. 2d 268.

Consequently, in our opinion, the complaint only states a cause of action for malicious prosecution. *Barnette v. Woody,* 242 N.C. 424, 88 S.E. 2d 223, and cited cases.

Article 3, Chapter 1232 of the 1957 Session Laws of North Carolina, codified as G.S. 122-35.1 through G.S. 122-65, was in effect until 1 July 1963, the effective date of Chapter 1184 of the 1963 Session Laws of North Carolina. Therefore, the law in effect on 28 January 1960 is applicable in this case.

G.S. 122-46 was in effect on 28 January 1960 and, among other things, provided: "Neither the institution of a proceeding to have any alleged mentally disordered person committed for observation as provided in this section nor the order of commitment by the clerk as provided in this section shall have the effect of creating any presumption that such person is legally incompetent for any purpose. Provided, however, that if a guardian or trustee has been appointed for any alleged mentally disordered person under G.S. 35-2 or 35-3 the procedure for restoration to sanity shall be as is now provided in G.S. 35-4 and 35-4.1."

In view of the fact that neither the institution of the proceeding complained of, nor the order of the clerk entered therein, "shall have the effect of creating any presumption that such person is legally incompetent for any purpose"; and the further fact that the plaintiff is entitled upon a motion for nonsuit to have her evidence considered in the light most favorable to her, we hold that the evidence is sufficient to carry the case to the jury on the questions of malice, lack of probable cause, and favorable termination of the commitment proceeding.

It is stated in 34 Am. Jur., Malicious Prosecution, § 7, page 706, as follows: "One of the elements necessary to authorize an action for malicious prosecution is the commencement and prosecution of a judicial proceeding against the plaintiff." *Ibid.*, § 33, page 723, it is said: "If, upon a discharge of a writ of *habeas corpus,* the proceeding against the accused can go no further, there is a sufficient termination to sustain an action for malicious prosecution."

We have heretofore held that a proceeding pursuant to G.S. 122-46 is a judicial proceeding. *Bailey v. McGill, supra,* and *Jarman v. Offutt, supra.*

There was evidence in the trial below tending to show that the plaintiff on 28 January 1960 was not psychotic nor in need of observation in an institution for the observation and treatment of the mentally disordered. Furthermore there was no evidence in the trial below tending to show that the mental condition of the plaintiff was any different on 28 January 1960 than it was on 22 February 1960, the date of her discharge upon a writ of *habeas corpus,* in which hearing the court found as a fact that the plaintiff was not psychotic, that she was being improperly restrained of her liberty, and thereupon ordered her release.

In an action for malicious prosecution the plaintiff must not only prove malice but the want of probable cause and termination of prosecution or proceeding in plaintiff's favor. *Barnette v. Woody, supra.* Malice alone is not sufficient to support an action for malicious prosecution. Moreover, in an action for malicious prosecution, the acquittal of defendant by a court of competent jurisdiction does not make out a *prima facie* case of want of probable cause. *Morgan v. Stewart,* 144 N.C. 424, 57 S.E. 149; *Bell v. Pearcy,* 33 N.C. 233.

In 34 Am. Jur., Malicious Prosecution, § 47, page 732, it is said: "* * * A definition sufficiently exact to meet satisfactorily every possible test would be difficult, if not impossible, to furnish, for the complete legal idea expressed by the term 'probable cause' is not to be gathered from a mere definition. However, * * * the standard of conduct for beginning or continuing any proceeding, whether civil or criminal, is that of a reasonable or ordinarily prudent man placed in the same situation as the defendant. That is, if a reasonable man would have believed and acted under the circumstances as the defendant did, there would be probable cause; otherwise not. It is to be noted that the conduct of the defendant is to be weighed in view of what appeared to him at the time of instituting the prior proceeding, not in the light of subsequently appearing facts."

Upon this record, in our opinion the judgment of nonsuit entered below should be

Reversed.

PARKER AND BOBBITT, JJ., dissent.

STATE OF NORTH CAROLINA v. HERBERT P. COOK.

(Filed 24 February, 1965.)

1. Criminal Law §§ 7, 106—

The burden is on defendant to prove his defense of entrapment to the satisfaction of the jury, and an instruction placing the burden upon the State to disprove the defense beyond a reasonable doubt is favorable to defendant.

2. Criminal Law § 106—

A charge that if after considering all the evidence the jury was not satisfied beyond a reasonable doubt of defendant's guilt to acquit him, *held* not error for failure to inform the jury that it could consider the lack of evidence relating to some of the elements of the offense in determining whether the State had carried the requisite degree of proof. The distinction in a charge that reasonable doubt is a "rational doubt growing out of the evidence" is pointed out.

3. Criminal Law § 161—

A charge to the jury will be construed as a whole and error cannot be predicated upon detached portions which are not prejudicial when so construed.

4. Larceny § 8—

Where a contract between an oil company and a filling station operator constitutes gasoline in the storage tanks of the filling station the property of the oil company by construction of the contract as a matter of law, the court is not required to submit to the jury the question of whether the oil company or the filling station operator owned the gasoline.

5. Same; Larceny § 3—

The value of property within the purview of the larceny statute is its fair market value, and where all the evidence of such value is that it exceeded $200, the court is not required to submit the question of the larceny of goods of a value less than $200.

6. Criminal Law § 165.1—

Defendant may not complain of a charge which he himself has requested.

STATE *v.* COOK.

APPEAL by defendant from *Copeland, S.J.*, July 13, 1964 Criminal Session of MECKLENBURG, docketed and argued as No. 222 Fall Term 1964.

Defendant was charged and convicted of stealing 1208 gallons of gasoline, the property of Gulf Oil Corporation, which had a value in excess of $200.00. The court imposed a prison sentence. Defendant excepted and appealed.

Attorney General Bruton and Deputy Attorney General McGalliard for the State.

Warren C. Stack and James L. Cole for defendant appellant.

RODMAN, J. The evidence would permit a jury to find these facts: James Atkinson was, in January 1964, operating a service station on Independence Boulevard in Charlotte. The service station was owned by Gulf Oil Corporation (Gulf). On May 31, 1962, Gulf and Atkinson, as part of a single transaction, executed three documents. One was captioned "SERVICE STATION LEASE," another "CONTRACT OF SALE," the other "AUTOMOTIVE GASOLINE AGREEMENT (DELIVERY AND STORAGE)." The lease required Atkinson to conduct his business in such manner that the value of the property as a service station would not be depreciated. He specifically agreed to "furnish such services and accomodations to retail gasoline customers at such times as are customarily provided by gasoline service stations in Dealer's area * * *."

The contract of sale obligated Atkinson to purchase from Gulf the petroleum products sold at the service station. One of the conditions enumerated in the contract of purchase provided: "When transportation is furnished by SELLER, SELLER'S liability ceases and title passes to PURCHASER when bulk product passes connection between SELLER'S delivery hose and PURCHASER'S receiving connection."

The delivery and storage agreement recites: "WHEREAS, the parties hereto desire to provide for Dealer a readily available and adequate supply of automotive gasolines and to relieve Dealer of the necessity of investing capital which is and otherwise would be represented by automotive gasoline inventories." Based on this recital, the parties agreed:

> "1. Dealer authorizes Gulf at any time while this Agreement is in effect to deliver such grades of automotive gasoline into the storage tanks now located or later installed by Gulf at said premises in such quantities and at such times as Gulf sees fit * * *.

"2. Dealer agrees to hold and care for all gasoline delivered hereunder without compensation as the property of Gulf, it being understood and agreed that until said gasoline is purchased by Dealer as herein provided, title to all said gasolines shall be vested in and remain the property of Gulf * * *.

"4. * * * Dealer is authorized to sell the gasoline to his customers in the ordinary course of his business at such prices and on such terms as Dealer shall determine, and it is agreed that title to said gasoline shall pass to Dealer at the meters on the pumps. Dealer shall pay Gulf for all gasoline so purchased and withdrawn by dealer * * *.

"6. The pumps, meters and computers located upon the premises have been jointly checked by Gulf and Dealer * * *."

About midnight on January 31, 1964, a red tractor with tank trailer was driven to Atkinson's Gulf Station on Independence Boulevard, and "approximately 1,208 gallons of gasoline were pumped into one of the two storage compartments located in said red tanker from the underground storage tanks located and situated upon the property known as Atkinson's Gulf Station." The station was not open for business at that time.

Police officers of Charlotte discovered the tractor-trailer as it was pumping gasoline from the storage tank. Defendant Cook was present and in charge of the tractor-trailer. When accosted by the police officers, he said that he was pumping gas into the underground tank. Then asked if he had to use the pump to deliver the gas, he said he had purchased the gasoline. The market value of the 1208 gallons of gasoline pumped from the storage tank to the tractor-trailer was, according to defendant Cook, $253.68. Witnesses for the State fixed the market value in excess of $300.00.

At no time between May 31, 1962 and January 31, 1964, had Atkinson asserted any claim to, or ownership of, the gasoline in the underground storage tanks. He had always asserted it belonged to Gulf; it had not at any time asserted Atkinson's ownership of the gasoline in the underground storage tanks. It regularly invoiced him with the gasoline pumped from the underground tanks. The amount taken from the storage tanks was measured by meters on the pumps making retail deliveries.

Defendant contends: The evidence would justify a jury in finding that there had been an epidemic of thefts of gasoline from service stations in Charlotte. The Charlotte police, acting through Atkinson, induced Cook to take Gulf's gasoline from the underground tank. He relied on his purchase from Atkinson when he pumped the gas from the

tank. He was beguiled and led to commit a crime by Atkinson, who was acting for and on behalf of the Police Department.

The court treated the evidence as sufficient to raise the defense of entrapment. Conceding, without deciding, that the evidence was sufficient to warrant submission of the question of entrapment to the jury, the first question for determination is: Did the court err in its charge relating to the burden of proof on the defense of entrapment?

The court told the jury defendant could not be convicted if he had been entrapped. The court defined entrapment in apt language, to which no exception was taken. It then stated the ingredients of the crime of grand larceny, explaining that the essential facts must be found beyond a reasonable doubt before the jury could return a verdict of guilty, and if the State had failed to establish these facts beyond a reasonable doubt, the jury should return a verdict of not guilty. It then said:

> "(And further, you will add to that instruction the matter of entrapment, which the Court has previously instructed you, and it will be your duty, in addition, to find beyond a reasonable doubt in this case that the defendant has not been entrapped, as the Court has defined that term to mean to you). And it will be your duty to bring in a verdict of not guilty as to this defendant if there is a reasonable doubt in your minds as to the matter of entrapment. You will give him the benefit of that doubt and you will acquit him in such event."

Thereupon the court inquired: "Are there any further contentions in this regard?" Counsel for defendant answered: "No, sir, your Honor."

Defendant assigns as error that portion of the charge included in parentheses, contending the court placed the burden on the defendant of establishing his defense of entrapment by proof beyond a reasonable doubt. The construction now placed on the charge is not only at variance with what defendant seemingly understood the court to mean when the charge was given, but is a misconstruction of what the court said.

Actually, the burden of establishing entrapment rests on the defendant to establish it to the satisfaction of the jury, but the court, instead of placing the burden where it properly belonged, put the burden on the State to disprove the defense of entrapment; and not only put the burden on the State to disprove that defense, but to disprove it beyond a reasonable doubt. The charge was more favorable to the defendant that he was entitled. *State v. Brown,* 250 N.C. 209, 108 S.E. 2d 233; *State v. Caldwell,* 249 N.C. 56, 105 S.E. 2d 189; *State v. Holbrook,* 228 N.C. 582, 46 S.E. 2d 842; *State v. Harris,* 223 N.C. 697, 28 S.E. 2d 232; *State v. Davis,* 214 N.C. 787, 1 S.E. 2d 104, 22A C.J.S. 319.

Defendant assigns as error these portions of the charge:

> "(If, after considering, comparing and weighing the evidence, the minds of the jurors are left in such a condition that they cannot say that they have an abiding faith to a moral certainty in the defendant's guilt, then they have a reasonable doubt; otherwise, not) * * * (Now, in this case the burden of proof remains with the State of North Carolina from the beginning to the end of this trial. The burden of proof as such never shifts)."

Defendant contends these excerpts from the charge are prejudicially erroneous because: (A) The jury was limited in determining guilt or innocence to the evidence offered, whereas the court ought to have also informed the jury that it could consider the failure of the State to offer evidence relating to some ingredient of the crime charged; and (B) the court did not include in the last quoted paragraph the *quantum* of proof required, and thereby permitted the jury to return a verdict of guilty without finding defendant guilty beyond a reasonable doubt.

To support his contention that the charge is erroneous because it limits the jury's consideration to the evidence offered, defendant cites and relies on *State v. Braxton,* 230 N.C. 312, 52 S.E. 2d 895, and *State v. Tyndall,* 230 N.C. 174, 52 S.E. 2d 272. In each of the cited cases the vice in the charge given was the phrase used in defining reasonable doubt as "a rational doubt *growing out of the evidence in the case.*" The court in those cases pointed out that a doubt might arise because of the absence of evidence, and that the phrase *growing out of the evidence* unduly restricted the jury in determining whether there was a reasonable doubt. The objectionable language referred to in those cases was not used in this instance. The charge here given is substantially in accord with *State v. Schoolfield,* 184 N.C. 721, 114 S.E. 466.

The court, just before defining "reasonable doubt," had told the jury that defendant's plea of not guilty created a presumption of innocence, which surrounded him and continued throughout the trial "unless and until the State of North Carolina by competent evidence has satisfied you, and each of you, of his guilt beyond a reasonable doubt." When the charge is construed as a whole, as we must, we think it inconceivable that the jury could have misunderstood that, to return a verdict of guilty, they must find from the evidence and beyond a reasonable doubt that the defendant had committed the crime charged. Error cannot be predicated on detached sentences or portions of a charge. *State v. Davis,* 259 N.C. 138, 129 S.E. 2d 894; *State v. Peeden,* 253 N.C. 562, 117 S.E. 2d 398; *State v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133.

Defendant assigns as error the following portion of the court's charge:

"[I]f you find from the evidence and beyond a reasonable doubt that the defendant feloniously took and carried away the property and goods of the Gulf Oil Corporation of the value of more than $200.00, without its consent and against its will, and that such property was taken and carried away by defendant with the felonious intent to deprive the owner of its property permanently and to convert the same to his own use or to the use of some person other than the rightful owner, if you find these to be the facts beyond a reasonable doubt, it will be your duty to render a verdict of guilty against the defendant. If you fail to so find, it will be your duty to render a verdict of not guilty; or if upon a fair and impartial consideration of all the facts and circumstances in the case, you have a reasonable doubt as to the defendant's guilt, it will be your duty to give the defendant the benefit of such doubt and acquit him."

It is defendant's contention that the quoted instruction is a peremptory instruction. He contends the jury was afforded no opportunity to determine either ownership of the gasoline taken or its value.

The court, after summarizing the evidence, had instructed the jury in unmistakable language that defendant could not be convicted unless at the time he pumped the gasoline from the tank, he had a felonious intent; that if he acted *bona fide,* believing that Atkinson was the owner, and that he was purchasing the gas from Atkinson, there would be no felonious intent; nor could he be convicted unless the gasoline in the storage tank was in fact the property of Gulf Oil Corporation; and further that defendant could not be convicted of the offense with which he was charged "unless the State of North Carolina has proved to you beyond a reasonable doubt that the value of the alleged stolen property; to wit: the gasoline, had a value in excess of $200." The charge was not peremptory; to the contrary, it was in substance the language which defendant incorporated in his request for instructions to the jury. He cannot now complain that the language which he selected was either inept or inadequate.

Defendant, in this Court, takes the position that the contract between Gulf and Atkinson vested title in Atkinson the moment the gasoline was placed in the storage tanks; or if not the owner as a matter of law at that moment, the jury should have been instructed to ascertain the "connection between Seller's delivery hose and Purchaser's receiving connection." It is, we think, apparent that the quoted language of the contract has no application to the facts of this case. The three writings executed contemporaneously constituted a single agreement composed of different parts or chapters. When the contract is read as a

whole, it is apparent that "Purchaser's receiving connection" is not the underground storage tank, but the meter on the pump which pumps the gasoline from the storage tank to Atkinson's customers. All openings to the tanks, except through the retail pumps, were sealed with Gulf's seal. For a period of nearly two years, the parties had interpreted the contract as vesting title in Atkinson only when the gasoline was pumped from the tank through the meter measuring the sale to the retail customer. The contract must be interpreted to effectuate the intention of the parties. That intent may be shown by an interpretation given to the contract by the parties over a long period of time. *Preyer v. Parker,* 257 N.C. 440, 125 S.E. 2d 916; *Construction Co. v. Crain and Denbo, Inc.,* 256 N.C. 110, 123 S.E. 2d 590; *Power Co. v. Membership Corp.,* 253 N.C. 596, 117 S.E. 2d 812; *Cole v. Fibre Co.,* 200 N.C. 484, 157 S.E. 857.

Defendant requested the court to charge the jury that he could not be convicted of the offense charged unless the jury found beyond a reasonable doubt that the value of the property stolen exceeded $200. The court acted on defendant's request and so charged the jury. It is now contended that the charge was erroneous. This contention would have merit if there was any basis to support a finding that the gasoline did not have a value in excess of $200.

Defendant seemingly misinterprets the meaning of the word "value." He argues his motion for nonsuit should have been allowed because Atkinson, when he acquired title to the gasoline, had the right to fix its value; Atkinson was not asked to put a value on the 1208 gallons of gasoline pumped by defendant into his vehicle, and since he did not put a value on the property, the State failed to establish any value for the gasoline taken. The word "value," as used in the statute, does not mean the price at which the owner would sell, but means, as the court charged, fair market value. *Hager v. Whitener,* 204 N.C. 747, 169 S.E. 645; 52 C.J.S. 851. The court properly overruled the motion to nonsuit. The reason assigned in support of the motion was not sufficient.

We have examined each of appellant's assignments of error. We find no others warranting discussion.

No error.

PILOT FREIGHT CARRIERS, INC. v. EDWARD SCHEIDT, COMMISSIONER OF MOTOR VEHICLES FOR THE STATE OF NORTH CAROLINA (CASE NO. T. D. 9144).

AND

PILOT FREIGHT CARRIERS, INC. v. EDWARD SCHEIDT, COMMISSIONER OF MOTOR VEHICLES FOR THE STATE OF NORTH CAROLINA (CASE NO. T. D. 12098).

(Filed 24 February, 1965.)

1. Taxation § 26—

The contract between a carrier and the labor unions representing its employees, differentiating for the purpose of computing the drivers' rate of pay between a "peddle run" and a "pickup and delivery" shipment, is not binding upon the State in ascertaining the tax due by the carrier to the State for the use of the State highways. G.S. 20-88(e).

2. Same—

In ascertaining that portion of an interstate carrier's revenue derived from the transportation of goods on the highways of this State, the total mileage within the State must be computed on the basis of the place where the carrier takes possession of the goods for shipment and the place where the carrier surrenders possession to the consignee, regardless of whether such points are at terminals or on "peddle runs" or "pickup and delivery" points.

APPEAL by defendant from *McConnell, J.*, May 25, 1964 Civil Session of FORSYTH, docketed and argued as No. 393 at Fall Term 1964.

Plaintiff, a common carrier of property by motor vehicle, computed and paid, based on its computation, the taxes chargeable to it by G.S. 20-88(e) for the years 1959 and 1960. After an audit of plaintiff's returns, the State assessed additional taxes for each year. The taxes so assessed were paid under protest. Demand for refund was refused. Plaintiff then instituted these actions, as permitted by G.S. 20-91.1, to recover the taxes alleged by plaintiff to have been illegally assessed.

The cases were consolidated for trial. Jury Trials were waived. The court found facts. On the facts found, judgment was rendered in favor of plaintiff for the sums claimed. Defendant excepted and appealed.

Attorney General Bruton, Assistant Attorney General Brady, Allen, Steed & Pullen for defendant appellant.

Womble, Carlyle, Sandridge & Rice by Leon L. Rice, Jr. and Wade M. Gallant, Jr., for plaintiff appellee.

RODMAN, J. The construction and maintenance of our highways is financed, in part, by a tax based on the use of the highways by motor vehicles, G.S. 20-97. The amount of the tax varies with the type of vehicle, its weight and intended use. Compare G.S. 20-87 and G.S. 20-88.

All motor vehicles using the highways of the State are required to register and pay an annual license fee, G.S. 20-50. The fee payable by motor carriers, except common carriers, is based on a variable rate per hundred pounds of gross weight, G.S. 20-88(b). Common carriers pay a fixed rate per hundred pounds of weight, irrespective of the size of the vehicle engaged in commerce. The sums paid by common carriers for licenses are only a prepayment on the amount owing for the use of our highways. They are charged six per cent of the revenues earned in the use of our highways, G.S. 20-88(e).

Where a carrier is engaged exclusively in intrastate commerce, the rule for measuring the tax is simple. The amount owing is six per cent of revenues. Plaintiff does both an intrastate and an interstate business. It operates in twelve states. North Carolina cannot take six per cent of the revenues derived from the movement of goods in interstate commerce; but it can require plaintiff and other interstate carriers to pay their fair portion of the cost of maintaining our highway system. *Transportation Co. v. Currie, Comr. of Revenue,* 248 N.C. 560, 104 S.E. 2d 403; *Crowder v. Commonwealth,* 87 S.E. 2d 745. What is the measuring rod which fixes the portion of interstate revenues subject to the six per cent tax? Our statutes, properly interpreted, furnish the answer.

The Legislature of 1937 fixed the basic rule to ascertain the amount carriers should pay for the use of our highways in moving goods in interstate commerce. The rule then adopted, with amendments applicable to these cases, is now codified as G.S. 20-88(e). So far as here pertinent, it provides:

> "* * * Common carriers of property operating between a point or points within this State and a point or points without this State shall be liable for a six per cent tax only on that proportion of the gross revenue earned between terminals in this State and terminals outside this State that the mileage in North Carolina bears to the total mileage between the respective terminals. Common carriers of property operating through this State from a point or points outside this State to a point or points outside this State shall be liable for a six per cent tax on that proportion of the gross revenue earned between such terminals as the mileage in North Carolina bears to the total mileage between the respective terminals. * * * Common carriers of property operating from a point in this State to a point in another state over two or more routes, shall compute their mileage from the point of origin to the point of destination on the basis of the average mileage of all routes used by them from the point in this State to the point outside of this State and this figure shall be used as the mileage between said points in

determining the percentage of miles operated in North Carolina between said points."

The reference to "terminals" was inserted in 1943 (c. 648 S.L. 1943). Similar language was, at the same session, inserted in G.S. 20-87(a) relating to common carriers of passengers. The last sentence in the quoted portion of the statute was added in 1951 (c. 583 S.L. 1951).

When an interstate carrier receives property for transportation, it is required to issue a receipt or bill of lading, 49 U.S.C.A. § 20(11). The bill of lading must show the name of the consignor, point of origin (the place where the goods begin their journey), the kind and quantity of goods to be moved, the destination or journey's end and the name of the consignee, Title 49, Code of Federal Regulations, Part 172.1.

Many factors enter into the cost of transporting goods from one point to another. Some of the factors which must be considered are: What kind of goods are to be shipped; what quantity is to be shipped at one time; where do the goods start on their journey; to what point are they to be carried; what is the most feasible method of moving a shipment from point of origin to point of destination; what is a fair charge for moving the shipment from one point to another.

Carrier experience has demonstrated: A single shipment large enough to require the entire cargo space of a vehicle (truck load) can be moved from one point to another point at less expense than several small shipments moving from several points in the same general area to the same destination or to several destinations in the same general area. For this reason, truck load shipments normally carry a lower rate than LTC (less truck load).

Orderly and economical transportation of many relatively small shipments necessitates the establishment of a warehouse, at some convenient point or points, where different shipments destined for the same terminal point can be assembled and loaded in one vehicle. These assembly points are in carrier terminology known as "terminals." Plaintiff's terminals in this State are located at Winston-Salem, Durham, Wilmington, Laurinburg, Charlotte, Hickory and Asheville.

In the earlier days of our transportation system when goods moved principally by water or rail, the shipper normally made delivery to the carrier at its place of business, and consignee picked up the goods at the end of carrier's line.

The introduction of the motor vehicle as a common carrier, with its increased mobility, brought additional service. Now it is customary for motor carriers to go to consignor's place of business for the goods to be shipped, and to deliver the shipment to the consignee's place of business. This service appropriately became known as "pickup and de-

livery." Originally it was confined to the city in which the shipment originated or terminated. Increasing popularity led to its extension to the metropolitan area served by the assembly warehouse. The area covered by pickup and delivery service, according to the testimony in this case, varies materially from locality to locality. Plaintiff's evidence indicates that ten miles, or thereabouts, is the maximum limit of pickup and delivery service for North Carolina assembly warehouses. On the other hand, pickup and delivery service for New York includes all of the State of New Jersey, and a large part of the State of New York.

The relatively small pickup and delivery area served by North Carolina warehouses, or terminals, is too small to fit the needs of motor carriers in assembling goods to make up truck load shipments. For that reason, the carriers have expanded the areas around their warehouses beyond the areas technically described as "pickup and delivery." Carriers call for and deliver shipments in this outer area, without additional charge, just as they do in "pickup and delivery." These outer areas are called "peddle runs." "Line haul," "pickup and delivery," and "peddle run" are trade terms. Each has a clearly defined meaning recognized by common carriers, the Interstate Commerce Commission and our Utilities Commission.

Whether a particular shipment is a "peddle run" or a "pickup and delivery" is determined by contracts which motor carriers make with labor unions representing their employees. The name given a movement determines the driver's rate of pay. The State does not participate in nor is it bound by such contracts.

The amount which plaintiff has been required to pay has been computed by excluding the miles traveled in "pickup and delivery," but including miles traveled in "peddle runs." Plaintiff takes the position that neither "pickup and delivery" nor "peddle run" mileage should be used in determining North Carolina's proportion of the mileage "between the respective terminals." Plaintiff argues it has, because of economic pressure exerted by the labor union, been forced into a disadvantageous position, and that the Legislature, recognizing plaintiff's inability to negotiate an economically sound contract with the union, permitted plaintiff to compute mileage between "terminals."

We do not agree with the reasoning on which plaintiff seeks to recover. In our opinion, the word "terminal," as used in the statute, G.S. 20-88(e), means the point of origin or place where the carrier took possession of the shipment, or the point to which the transportation company makes delivery, the final destination of the shipment. *Great Northern Ry. Co. v. Commodity Credit Corp.*, 77 Fed. Supp. 780(787). The last sentence of the quoted portion of the statute reads: "Common

carriers of property operating from a point in this State to a point in another state over two or more routes, shall compute their mileage *from the point of origin to the point of destination* on the basis of the average mileage of all routes used by them from the point in this State to the point outside of this State and this figure shall be used as the mileage between said points in determining the percentage of miles operated in North Carolina between said points." This language, inserted by c. 583, S.L. 1951, is too clear to require interpretation.

For several years, "mileage" was ascertained by reference to the truck's manifest, a summary of the information provided by reference to all of the bills of lading issued for goods moving by that vehicle. This method of computing mileage was, because too complicated, abandoned by plaintiff pursuant to an agreement with an auditor representing the State. Legislative enactments prescribing the method of computing a tax cannot so easily be set aside. If the statutory language is cumbersome and produces inequitable results, carriers are not forbidden relief. Their remedy is an appeal to the Legislature to enact more equitable formulae.

Until the Legislature prescribes some other rule for measurement, the tax must be computed by ascertaining the miles actually traveled by outbound shipments from the place where the carrier takes possession of the shipment, the point of origin, to the State line; and for inbound shipments, the miles actually traveled from the State line to the place where the carrier surrenders possession of the shipment to the consignee, the point of destination. The miles the shipment actually moves in this State is the numerator. The total miles actually traveled by the shipment from the point of origin to the point of destination is the denominator. That fraction determines the portion of the revenue derived from each shipment which is subject to North Carolina's six per cent tax.

The conclusion here reached necessitates a new trial. Plaintiff is entitled to recover the amount over-assessed, if any, under the interpretation here placed on the statute.

New trial.

LIZZIE HERRING MILLS, WIDOW v. BESSIE INGRAM DUNK AND HUSBAND, WILLIAM H. DUNK.

(Filed 24 February, 1965.)

1. Cancellation and Rescission of Instruments § 2— Deed may be rescinded for misrepresentation that it contained material provision for support of grantor.

Where the grantee agrees to support and maintain grantor for life as consideration for the conveyance of the remainder in property after the reservation of a life estate, and grantor, an illiterate, is induced to sign an unconditional deed conveying the remainder in the belief that the deed set forth the agreement of the parties, the grantor is entitled to rescission of the deed for fraud in the treaty, and such right of action may not be defeated by the contention that the action was to declare a sealed deed void for failure of consideration or for failure of grantor to allege that grantee, at the time of making the promise to maintain and support grantor, did not then presently intend to fulfill such promise.

2. Appeal and Error § 1— Defendant may not acquiesce in theory of trial and then object thereto on appeal.

Where plaintiff alleges a cause of action for rescission of a deed for fraud in the treaty in that she was induced to sign the instrument by false representations that the deed contained a material provision which it did not, but the court submits the case to the jury on the theory that defendant fraudulently induced plaintiff to sign the deed by promising to support and maintain plaintiff for life when defendant had no present intent of fulfilling the promise, but defendant does not except to the issues or to the charge or make any objection that the case was not submitted to the jury upon the facet of fraud alleged in the complaint, defendant may not complain, since a litigant may not acquiesce in the trial of the case upon one theory and assert on appeal that it should have been tried on another.

APPEAL by defendants from *Morris, J.*, September 1964 Civil Term of PITT.

This action to set aside a deed was instituted April 2, 1962. In brief summary, plaintiff alleges: Plaintiff, illiterate, is the mother of *feme* defendant (Bessie). On June 25, 1957, in consideration of defendants' promise to support and maintain her, in accordance with her station in life, so long as she might live, plaintiff agreed to convey to Bessie, subject to a life estate in plaintiff, a certain tract of land containing 28 acres. Defendants promised to have a deed prepared in accordance with their agreement. On June 25, 1957, relying upon defendants' representations "that the deed had been drawn exactly in accordance with their agreement," plaintiff signed it. She acknowledged it on July 11, 1957, and the instrument was recorded July 18, 1957. Defendants, agreeing to pay plaintiff as rent one-third of all crops raised on it, immediately went into possession of the land. Defendants not only have failed and

refused to provide any support whatever for plaintiff but also have never paid her any rent. "Recently" plaintiff discovered that the deed contained no mention of the agreement which was the consideration for the conveyance but that it merely recited a consideration of love and affection plus one dollar. She immediately demanded a reconveyance of the property to her, but defendants refuse to reconvey. Plaintiff is entitled to have the deed set aside "(1) For total failure of consideration. (2) For the false and fraudulent representations of the defendants to the plaintiff made and declared by the defendants at the time of the execution of the deed." Answering, defendants denied all the material allegations of the complaint.

Plaintiff's evidence, taken in the light most favorable to her, is sufficient to establish these facts: Plaintiff acquired the land in question by inheritance from her sister sometime prior to August 2, 1955. Thereafter her son-in-law, defendant Henry Dunk (Henry), "run (her) down to let him be boss of that land." He told her that if she would convey the land to him he would take care of her and her husband, who has since died, as long as they lived. Subsequently Bessie took her to a notary's office, where plaintiff and her husband signed a paper which, she was told, was a "will deed" to keep her husband's boys from bothering Henry. She did not see the deed thereafter. Plaintiff has only a third-grade education. On October 20, 1961, plaintiff asked Bessie for $25.00 to pay some bills. At first Bessie refused to give her the money and said, "You ain't nothing; and never been nothing; and nothing you ever done is nothing." Later she gave plaintiff the money, but said it would be the last thing she would ever get off the farm, and it was. It was on the day Bessie "blew her out" that plaintiff discovered the agreement to support her had been left out of the deed. When she asked Henry about it, he "cussed her out"; and, if she said anything to him about the property, he would say that he was the "boss over it."

Defendants' evidence tended to show that plaintiff went alone to the office of her attorney and told him that, because Bessie had been good to her and her husband, she wanted to give the land to Bessie. At her direction, the attorney prepared a deed of gift from plaintiff to Bessie, in which deed plaintiff reserved a life estate in the property. Plaintiff paid him for preparing the deed, and he had no dealings in that transaction with either of defendants. After the deed had been recorded, plaintiff delivered it to Bessie and later gave her a fireproof lockbox in which to keep it. Prior to the delivery of the deed neither defendant had ever discussed the land with plaintiff, and they knew nothing of her intention to make a deed to Bessie until she delivered the deed to her. Defendants made plaintiff no promises in return for the deed.

Defendants' motions for nonsuit, timely made, were overruled. Without objection or exception, the judge submitted the case to the jury on the following issues:

"1. Did the defendants promise and agree with the plaintiff Lizzie Mills that if she would convey to the defendant Bessie Dunk, subject to her life estate, Lot No. 7 of the Georgana Herring Williams land, they would support and maintain her in accordance with her station in life so long as she might live, as alleged in the complaint?

"2. Was said promise and agreement upon the part of the defendants the true consideration for the conveyance of said land, as alleged in the complaint?

"3. Did the defendants fail and refuse to carry out their agreement, as alleged in the complaint?

"4. Did the plaintiff Lizzie Mills execute said deed, dated June 25, 1957, and recorded in Book U-29, page 58, in the Office of the Register of Deeds, by reason of the aforesaid representation by the defendants and were said representations false and fraudulent and made for the fraudulent purpose of deceiving the plaintiff and to fraudulently obtain from her said deed for Lot No. 7, as alleged in the complaint?"

The court instructed the jury, *inter alia,* that, if they answered the first three issues Yes, they would then consider the fourth issue. With reference to this issue, he told the jury, in effect, that they would answer it Yes if they should find (1) that defendants, in order to induce plaintiff to execute the deed in question, represented to her that, if she would convey the property to them, they would support her as long as she should live; (2) that this promissory representation was false, in that at the time it was made defendants never intended to support plaintiff; (3) that plaintiff was deceived by it; and (4) that, relying upon it, she executed and delivered the deed to Bessie Dunk. Defendants assign no errors in the charge.

The jury answered each of the issues Yes, and the court entered judgment directing the cancellation of the deed. Defendants appeal.

Albion Dunn for plaintiff.

Fred W. Harrison and H. E. Beech for defendants.

SHARP, J. Defendants' assignments of error, properly made, present one question only, the sufficiency of the evidence to withstand their motions for judgment as of nonsuit. In this Court, however, they demur

ore tenus to the complaint on the ground that it contains no allegation that at the time defendants made their promise to support plaintiff for life, and thereby secured from her a deed to the property described in the complaint, they did not intend to perform the agreement.

If we construe the complaint liberally in plaintiff's favor, it sufficiently alleges fraud in the treaty, *i.e.*, that, in order to secure her signature on the deed in question, defendants knowingly and intentionally represented to her that it contained their agreement to support her when, in fact, it did not; that plaintiff, who could not read, relied upon defendants' fraudulent misrepresentation that the deed had been drawn in accordance with their agreement, and executed the deed when, but for the fraudulent misrepresentation, she would not have done so.

Although a deed in proper form will convey the land described therein without any consideration, except as against creditors or innocent purchasers for value, *Smith v. Smith,* 249 N.C. 669, 676, 107 S.E. 2d 530, 535, its consideration is a most material part of the transaction, unless the deed is actually a deed of gift. If a grantee who has secured a conveyance in consideration of his promise to support the grantor, falsely and fraudulently represents that the deed contains the agreement when it does not, from the grantor's point of view the misrepresentation relates to the most material part of the transaction. In such a case, for rescission the grantor relies on the fraud and not merely on the failure of consideration. North Carolina is aligned with a minority of jurisdictions holding that, if there is no fraud or mistake and unless performance is made a condition precedent or subsequent, failure of consideration alone does not authorize cancellation of a deed made in consideration of an agreement to support. *Murray v. King,* 42 N.C. 19, followed in *Minor v. Minor,* 232 N.C. 669, 62 S.E. 2d 60, and in *Cherry v. Walker,* 232 N.C. 725, 62 S.E. 2d 329; Annot., Remedy of rescission for grantee's breach of agreement to support grantor, 112 A.L.R. 670; 50 Am. Jur., *Support of Persons* § 28 (1944). See McCall, *Estates on Condition and on Special Limitation in North Carolina,* 19 N.C.L. Rev. 334, 358-360.

Notwithstanding, an agreement to support and maintain a grantor during his remaining lifetime creates a peculiarly personal relationship and obligation. It calls for services and supervision over a long time, and mutual trust and respect are essential for satisfactory performance, on the one side, and acceptance, on the other. The grantor who discovers that the person to whom he has conveyed his land in consideration of such an agreement has secured the deed by false representations clearly indicating his bad faith, should not be relegated to successive actions for damages, even though in such actions the true consideration may be shown by parol. Such a remedy is as unrealistic as it is unjust.

The principle of law applicable to such a situation is quoted with reference to a release in *Cowart v. Honeycutt,* 257 N.C. 136, 142, 125 S.E. 2d 382, 386:

> " 'If a misrepresentation amounting to fraud is made as to any matter embraced in the release the instrument is vitiated as a whole, and not merely as to the matter to which the misrepresentation relates; every portion and clause of a release voidable for fraud in its inception is unenforceable and not binding.' 76 C.J.S., Release, p. 651."

A misrepresentation such as plaintiff has here alleged would taint the entire transaction with fraud entitling plaintiff to rescind her deed without any specific allegation that defendants did not intend to comply with their promise at the time they made it. Compare *Gadsden v. Johnson,* 261 N.C. 743, 136 S.E. 2d 74, wherein the complaint was demurrable for failure to allege *any* fraud. Actually, however, from the allegations that defendants fraudulently omitted the agreement from the deed and thereafter failed to support plaintiff, an inference arises that defendants never intended to fulfill their promise to support her. The complaint states a cause of action for rescission for fraud, and the demurrer *ore tenus* is overruled.

Plaintiff's evidence was sufficient to establish the case she has alleged. Defendants' motions for nonsuit were, therefore, properly overruled.

Had this case been submitted to the jury on the theory alleged, *i.e.,* fraud in the treaty, this appeal would present no problem. The difficulty comes about because the judge submitted the case to the jury on the theory of a promissory misrepresentation which, although implicit both in the allegations of the complaint and in plaintiff's evidence, is not specifically alleged. In so doing, however, the judge did not change the nature of the action; he merely substituted another brand of fraud. Upon the trial, had defendants wished to object to this deviation from the strict letter of the pleadings, they should have excepted to the issues and tendered those which they considered more appropriate. Upon appeal they should have excepted to the charge as it relates to the fourth issue and made assignments of error, in the manner prescribed by the rules of this Court, based on each of these exceptions. This they did not do. The record contains no exceptions and no assignments of error presenting for review the protest they now make, *i.e.,* that the case was not submitted to the jury upon the facet of fraud alleged in the complaint. A litigant, however, may not acquiesce in the trial of his case in the Superior Court upon one theory and here complain that it should have been tried upon another. *In re Drainage,* 257 N.C. 337, 125 S.E. 2d 908; *Edgerton v. Perkins,* 200 N.C. 650, 158 S.E. 197.

Perhaps it is not amiss to say that on this same evidence it is not improbable that the final judgment would have been the same had the judge submitted the case to the jury as defendants now contend he should have done. Jurors — no less than courts — "will guard with jealous care the rights of the aged and infirm who have conveyed their land in the belief that they were making provision for support and maintenance in their declining years." Denny, J. (now C.J.) in *Higgins v. Higgins,* 223 N.C. 453, 456, 27 S.E. 2d 128, 130.

No error.

STATE v. WILLIAM H. MIDAY.

(Filed 24 February, 1965.)

1. Evidence § 26—

The rule that the writing itself is the best evidence of its contents can have no application when there is no evidence that the matter in question had ever been reduced to writing.

2. Evidence § 27—

The rule that parol evidence is not admissible to contradict or vary a written instrument does not apply when the writing is collateral to the issue involved in the action.

3. Health § 3—

Where defendant defends a prosecution for failure to have his child vaccinated for smallpox and immunized for poliomyelitis on the ground that he was exempt by G.S. 130-93.1(h), the introduction of unverified letters stating opinions as to the doctrine of the religious sect to which defendant belongs does not warrant the exclusion of testimony by *bona fide* ministers and members of the organization as to its teachings, neither the best evidence rule nor the parol evidence rule being applicable.

4. Same— Whether teachings of defendant's religious sect justified defendant in refusing to have his child vaccinated held for jury.

The fact that a religious organization does not forbid vaccination does not preclude members of the sect from asserting that they come under the exemptions set forth in G.S. 130-93.1(h), and when defendant introduces evidence to the effect that the religious doctrine of his sect, while not forbidding vaccination, taught that it was better to rely upon faith in God, it is for the jury to say whether defendant was justified in his refusal to have his children vaccinated and immunized against smallpox and poliomyelitis, and it is error for the court to charge the jury peremptorily to the effect that defendant was not entitled to defend on the ground of his religious convictions.

5. Schools § 14—

Where school authorities send a child home for failure of the child's parents to have the child vaccinated and immunized as required by statute, and the parent does everything in his power to keep the child in school except to waive what he believed to be his right not to have the child vaccinated and immunized, such parent cannot be convicted under G.S. 115-166.

6. Same—

A jail sentence may be imposed on a parent under G.S. 115-169 only after a fine has been imposed upon the parent for failure to send his child to school and the parent has refused to pay such fine, and a jail sentence entered immediately upon conviction of violating G.S. 115-116 is not warranted.

APPEAL by defendant from *Carr, J.*, Regular May Session 1964 of ROBESON. This case was docketed in the Supreme Court as No. 733 and argued at the Fall Term 1964.

The defendant, William H. Miday, was charged in bills of indictment with violating G.S. 130-87, 130-88, 130-89, 130-93.1, 130-203, 115-166 and 115-169.

The defendant is the father of Paul E. Miday, a minor, who was born 26 March 1956. Defendant, a minister of the Miracle Revival Fellowship, presented his son, Paul E. Miday, for enrollment in the Robeson County Schools for the 1962-1963 school year, without having said child vaccinated or immunized from certain diseases as required by law. Defendant claims, however, that he qualified for the exclusion or exemption set forth in G.S. 130-93.1(h).

The Robeson County Board of Education allowed the child to be enrolled and to remain in school until 5 November 1962, when the child was sent home from school pursuant to a ruling of the Robeson County Board of Education based on the ground that the defendant, the father of the child, had not met the legal requirements with respect to vaccination and immunization shots for said child.

The defendant introduced in evidence the following letter, dated 3 October 1963, addressed to Dr. E. R. Hardin, Health Director of Robeson County:

> "This is with reference to your letter of September 26, concerning William H. Miday. Mr. Miday is a minister of Miracle Revival Fellowship. However, this Fellowship does not forbid vaccination against any and all diseases.
>
> "It is our belief that the God who formed us is also able to keep us in perfect health, as we walk uprightly before Him. We know that God shall never forsake his children when they place their trust in Him, and we are fully persuaded in our own hearts that

this action is to declare the keeping power of God rather than to expose precious children to illness. In a question of this nature, each of the members of the Fellowship is permitted to make his own decisions in accordance with his own individual conscience, provided that said member shall support the policy that this Fellowship requires that the government is ordained of God and that its members shall be subject to the Higher power, according to Romans 13, 1 and 77. Yet, as the word of God admonishes us to follow peace with all men, and to love our enemies and to do good to them who hate us, in Matthew 5:44.

"We trust this will in some way clarify the situation for you.

"May the God of Love and Peace be near you."

It is apparent that this letter was received from someone connected with the Miracle Revival Fellowship in response to an inquiry from Dr. Hardin. However, the record does not disclose who wrote the letter.

Likewise, a letter dated 23 September 1963, addressed to the Superintendent, County Board of Education, Robeson County, North Carolina, from Miracle Revival Fellowship, International Pentecostal Miracle Valley, Arizona, was introduced in evidence by the defendant, which letter reads as follows:

"In the case of William H. Miday, Minister, Shannon, North Carolina.

"Gentlemen: Rev. Miday of Shannon, N. C. has written to us, expressing his convictions, that since his trust is in God, for the health of his family, it is not necessary for his children to take vaccination shots for their protection. He contends that forcing him to submit his child to vaccination is to force him to go against his religious convictions. Further, he states that his convictions are in accord with the doctrines and teachings of Miracle Revival Fellowship, a *bona fide* religious organization, of which he is a member.

"It is the decision of the officers of this Fellowship that Reverend Miday is within his rights in contending that his beliefs are in accord with the doctrines and teachings of Miracle Revival Fellowship. We do not specifically teach against vaccination nor condemn doctors or those who use the medical profession; nevertheless, the word of God teaches us that the better way is a complete right of faith. Though we teach that it is christian *(sic)* and right to obey the laws of the land, Romans 13:1-7, when the laws of the land contradict the religious convictions of the individual on what God's word teaches, we do take the position that it is better for him to obey God rather than man. Acts 5-58:29.

"Therefore, we feel that this man is within his rights according to our teachings and his own convictions in taking the stand he takes."

The record does not disclose the author of this letter, but it is apparent that it expresses the view of certain officers of the Miracle Revival Fellowship.

In September 1963 the Robeson County Board of Education caused to be served upon the defendant notice of filing a complaint against him for failure to enroll his son in the public schools, the child then being seven years of age and within the ages of compulsory school attendance, as provided by G.S. 115-166. Pursuant to this notice the child was again, in September 1963, presented for enrollment in the Robeson County Schools, but his admission was refused for that he had not complied with the immunization requirements.

Immediately prior to the submission of this case to the jury, the defendant produced and delivered to the State a purported immunization record of Paul E. Miday, bearing the name of Dr. George F. Cain of Canton, Ohio, indicating that Paul E. Miday, on 18 August 1956, 21 September 1956, and 19 October 1956, was inoculated against the diseases of diphtheria, tetanus and whooping cough. The mother of Paul E. Miday testified that these inoculations were administered prior to the time she and her husband became members of the Miracle Revival Fellowship. Upon receipt of the purported immunization record, the State agreed not to ask for conviction except on the counts charging failure of the defendant to have his child immunized against smallpox, as required by G.S. 130-87 and as charged in count No. 1 of bill of indictment No. 17984; immunized against poliomyelitis, as required by G.S. 130-93.1(a) and as set out in count No. 2 of bill of indictment No. 17984; and for failure to send the child to school, as required by G.S. 115-166 and as set out in a separate bill of indictment, No. 17985.

The jury returned a verdict of guilty on all three counts. The court imposed a judgment of 30 days in jail on each count, the sentences to run consecutively. The defendant appeals and assigns error.

Attorney General Bruton, Deputy Attorney General Harry W. McGalliard, Asst. Attorney General Richard T. Sanders, Staff Attorney Theodore C. Brown, Jr., for the State.

Barrington & Britt for defendant.

DENNY, C.J. The defendant excepts to and assigns as error the ruling of the court below to the effect that only written evidence of the teachings of a religious organization is admissible and that parol evi-

dence by a member of such organization with respect to its teachings is inadmissible.

We concur in the view that when a religious organization has duly adopted and promulgated certain official documents in which the doctrines, teachings, articles of faith, *et cetera*, are set forth, parol evidence is inadmissible, under the best evidence rule, to prove the contents of such documents. *Mahoney v. Osborne*, 189 N.C. 445, 127 S.E. 533. The best evidence rule requires the production of the documents or properly certified copies thereof in order to prove their contents. There is no evidence on the record in this case to the effect that the Miracle Revival Fellowship has officially adopted and promulgated such documents.

Moreover, while parol evidence is not admissible to vary, explain, or contradict a written instrument when the enforcement of the terms of such instrument is the basis of the cause of action or the substantial issue between the parties, *Winkler v. Amusement Co.*, 238 N.C. 589, 79 S.E. 2d 185, the rule that parol evidence is not admissible does not apply when the writing is collateral to the issue involved in the action. *Peek v. Trust Co.*, 242 N.C. 1, 86 S.E. 2d 745; *Deaton v. Coble*, 245 N.C. 190, 95 S.E. 2d 569.

We do not consider the letters introduced below, which do not purport to represent anything more than the unverified expression as to what the Miracle Revival Fellowship teaches, to be of such character as to warrant the exclusion of oral testimony with respect to such teachings by *bona fide* ministers and members of this religious organization. We hold that the exclusion of such evidence constituted prejudicial error.

G.S. 130-93.1(h) provides as follows: "This article shall not apply to children whose parent, parents, or guardian are *bona fide* members of a recognized religious organization whose teachings are contrary to the practices herein required, and no certificate for admission to any private, public or parochial school shall be required as to them."

In our opinion, it is not necessary for a religious organization to forbid vaccination in order for its teachings to come within the meaning of the statute and to authorize the exclusion sought; that it is for the jury under proper instructions to determine whether or not the evidence concerning the teachings of the Miracle Revival Fellowship is such that the defendant was justified in his position against vaccination and immunization of his child.

Religious organizations generally do not prohibit their members from consuming alcoholic beverages; however, no one would seriously contend that they do not teach against the consumption of alcoholic beverages by their members. In our opinion, the letter introduced in

evidence below, dated 23 September 1963, is susceptible of the inference that the Miracle Revival Fellowship does teach that the better way is to rely on one's faith rather than on inoculations and immunization to prevent diseases. The letter says: "* * * (W)hen the laws of the land contradict the religious convictions of the individual on what God's word teaches, we do take the position that it is better for him to obey God rather than man. * * *

"Therefore, we feel that this man is *within his rights according to our teachings* and his own convictions in taking the stand he takes." (Emphasis added.)

The defendant assigns as error, among others, the following excerpts of the court's charge to the jury:

> "The interpretation of a writing, when the writing is exhibited to the court, is not for the jury or for the defendant, or for the State. It becomes the duty of the court to interpret the writing, that is what the meaning of the writing is. The jury, when there is a conflict in evidence, it not being in writing has to determine the facts. But, if the writing is offered in evidence and if there be some statements in the writing that may produce an argument and may give rise to contention as to what was the meaning of the writing or the letters, then it becomes the duty of the court to interpret as a matter of law what the writing means. And it has been contended that there are sufficient statements in these letters to justify the court in concluding that this Miracle Revival Fellowship teaches a doctrine contrary to the statute. However, the court has examined the letters carefully and the court is of the opinion and so rules and instructs the jury that these letters do not indicate that the Miracle Revival Fellowship teaches a doctrine that is contrary to the practices required under the statute. (Exception No. 10.)
>
> "* * * (I)f the State has satisfied you from the evidence and beyond a reasonable doubt that the defendant did fail to immunize this child, Paul Edward Miday, against the disease of smallpox, and you believe all of the evidence and find all of the facts to be true in respect to the defendant's contention that he comes within the exemption that requires or permits one to send a child to school, rather permits one not to have a child immunized for smallpox, it would be your duty under the instructions of the court and under the interpretation the court has given that statement and to these letters, to return a verdict of guilty on the charge of failure to immunize his child from the disease of smallpox, as charged in the bill of indictment." (Exception No. 11.)

The instruction on the second count, the failure of the defendant to have his child immunized against poliomyelitis, was substantially in accord with that given on the first count with respect to the defendant's failure to have his child vaccinated against smallpox.

We think the above instruction was erroneous, that the jury should have been given the opportunity to consider and determine what weight should be given to the contents of the letters introduced in the trial below. Moreover, the further instruction was tantamount to a peremptory instruction, and the defendant is entitled to a new trial on the counts charging him with failure to have his child immunized against smallpox and poliomyelitis.

With respect to the defendant's conviction for failing to send his child to school as required by G.S. 115-166, it appears that the defendant did everything within his power to keep his child in school except to waive what he believed to be his rights under G.S. 130-93.1(h). So long as the defendant, in good faith, was asserting his rights as he conceived them under the statute, in our opinion he was not subject to conviction under G.S. 115-166. Moreover, 115-169 reads as follows:

> "Any parent, guardian or other person violating the provisions of this article shall be guilty of a misdemeanor, and upon conviction shall be liable to a fine of not less than five dollars ($5.00) nor more than twenty-five dollars ($25.00), and upon failure to pay such fine, the said parent, guardian or other person shall be imprisoned not exceeding thirty days in the county jail."

There is nothing in this record tending to show that the court below has heretofore imposed a fine on this defendant for failure to send his child to school, and by reason of his failure to pay such fine the prison sentence was imposed. The sentence imposed, purportedly pursuant to G.S. 115-169, was without sanction of law.

The defendant is entitled to a new trial on counts Nos. 1 and 2 in bill of indictment No. 17984, and to have the judgment reversed upon his conviction for failure to send his child to school as charged in bill of indictment No. 17985.

On counts Nos. 1 and 2 in bill of indictment No. 17984 — New trial.

The conviction upon bill of indictment No. 17985 — Reversed.

BEATRICE E. JOHNSON v. DOROTHY J. OWENS.

(Filed 24 February, 1965.)

1. Fraud § 1—

The elements of fraud are a definite, material misrepresentation which is made with knowledge of its falsity or in culpable ignorance of its truth, and with the intent to deceive, and which is reasonably relied upon to the deception and damage of the other party.

2. Same; Sales § 15—

The remedy for fraud applies to contracts and sales of both real and personal property.

3. Fraud § 5—

Whether the party asserting fraud was entitled to rely upon the misrepresentation constituting the basis of his remedy must be determined upon the facts of each case under the general guidelines that a person who has made a bad bargain should not be allowed to disown the bargain by asserting a false representation upon which he did not in fact rely, while a person who knowingly makes a false representation in regard to a material matter, with intent that it should be relied upon, should not be allowed to escape liability on the ground that his deceit inspired confidence in a credulous person.

4. Sales § 15—

The maxim *caveat emptor* does not apply in cases of fraud.

5. Fraud §§ 5, 11— Whether plaintiff reasonably relied upon misrepresentation held for jury under the evidence.

Plaintiff's evidence was to the effect that as a prospective purchaser she inspected the house owned by defendant on three occasions, the first two in the absence of defendant, that the house was cold on all three occasions but that on the occasion when defendant was present there was a fire in the fireplace and defendant explained she did not heat the house in the daytime because of her absence at work, and that on that occasion when the thermostat was turned up the furnace fan responded. The evidence further tended to show that the fan worked because it was set on summer control, that defendant, in reply to a direct inquiry, stated that the heating system was in excellent working condition, while, as a matter of fact, the furnace and the oil tank had holes in them, were worn out, and were not worth repairing, and that soot around the registers was concealed by heavy furniture, and that after buying the house plaintiff had to have a new furnace installed. *Held:* Defendant's motion for nonsuit should have been denied, and the contention that the evidence disclosed as a matter of law that plaintiff's reliance upon the misrepresentation was not justified is untenable.

PARKER, J., concurs in result.

JOHNSON *v.* OWENS.

APPEAL by plaintiff from *Campbell, J.*, May 18, 1964 Schedule B Civil Session of MECKLENBURG. This appeal was docketed in the Supreme Court as Case No. 237 and argued at the Fall Term 1964.

Action to recover damages for fraud. At the close of plaintiff's evidence the trial judge entered a judgment of involuntary nonsuit. The evidence, taken in the light most favorable to plaintiff, is sufficient to establish these facts:

In February 1963 defendant's residence was for sale. About the middle of the month, and again a few days later, plaintiff, a registered nurse, in company with defendant's realtor, inspected the house in defendant's absence. On each of these occasions the house was cold. Plaintiff made an appointment with defendant to see her at the house on Sunday night, February 17, 1963. To help her decide whether she should buy defendant's house, plaintiff took Mr. R. L. Hogan with her. It was a cold night. When they arrived at the house, defendant and several guests were seated in the den, by the fireplace, in which there was a fire. Because the rest of the house was cold, plaintiff asked defendant very specifically about the heating system. Defendant told her that "the heating system was in excellent condition and in working order" and that "the heating unit was adequate and satisfactory to keep the house warm." Defendant explained that since she worked all day she did not turn up the heat until she came home in the afternoon. In response to an inquiry by Mr. Hogan as to whether the heating system was then working properly, defendant said that it was but that it was not turned on. He asked her permission to turn up the thermostat, and, when he did so, the fan came on. He felt air coming out of the duct by which he was standing. Defendant very soon, however, turned the thermostat down, and the fan went off. No warm air had come through. Mr. Hogan thought the thermostat was turned off before the air had had time to become warm. He later learned that the fan "was probably set on summer control; otherwise the fan would not have come on as soon as he turned the thermostat up."

Because of defendant's representations about it, plaintiff "did not get a furnace man to inspect the heating system." On February 28th plaintiff contracted to buy the house for $15,900.00. Defendant delivered the deed on March 20, 1963, and plaintiff went into possession on April 8, 1963. With all defendant's furniture out of the house, plaintiff was able to observe, for the first time, that the carpeting in the living room and the dining room was smoked and that the registers were filled with soot and dirt. Round each register was a 2-foot area black from soot. Previously there had been a large couch and a chair in front of the registers in the living room. This arrangement of furniture had concealed the blackened areas round the registers there, and

the register in the dining room was under a built-in bookcase. When, on April 8th, plaintiff attempted to turn on the furnace, "nothing happened." She then called in a heating expert, Mr. G. L. Rhodes, who discovered a hole in the body of the furnace itself and worn-out bearings in the fan. The flue passages were two-thirds clogged with soot, scale, and rust, "an accumulation of over two or three years at least." The furnace was "burned out," and "the life of it was gone." In Mr. Rhodes' opinion, the furnace could not have operated properly or satisfactorily during the winter either of 1962 or of 1963. Furthermore, he was certain that, even if the furnace had been in operating condition, it was too small to have heated the house. The oil tank had 50 or more holes in it. It contained 25-30 gallons of oil and 165-170 gallons of water. He discovered a copper tube running through the ventilator in the foundation of the house into the top of the oil tank. Such a tube is a "common emergency practice" to take oil from the top of a tank into which water is seeping. Neither the furnace nor the tank was worth repairing, and plaintiff was obliged to put in a new furnace. It cost plaintiff "approximately $1,000.00 to repair what was represented to be in good condition when (she) purchased the house." At the close of plaintiff's evidence Judge Campbell allowed defendant's motion to nonsuit her cause of action for fraud (first cause of action). The case went to the jury on a second cause of action, which is not involved here. From the judgment dismissing plaintiff's first cause of action, she appeals.

Dockery, Ruff, Perry, Bond & Cobb for plaintiff.
Bradley, Gebhardt, Delaney and Millette for defendant.

SHARP, J. The oft-stated essential elements of fraud, or deceit, are: " 'the representation, its falsity, *scienter,* deception, and injury. The representation must be definite and specific; it must be materially false; it must be made with knowledge of its falsity or in culpable ignorance of its truth; it must be made with fraudulent intent; it must be reasonably relied on by the other party; and he must be deceived and caused to suffer loss' . . . The principle applies to contracts and sales of both real and personal property. . . ." *Berwer v. Insurance Co.,* 214 N.C. 554, 557, 200 S.E. 1, 3; *accord, Keith v. Wilder,* 241 N.C. 672, 86 S.E. 2d 444; *Cofield v. Griffin,* 238 N.C. 377, 78 S.E. 2d 131; *Harding v. Insurance Co.,* 218 N.C. 129, 10 S.E. 2d 599.

When we attribute to plaintiff's evidence the verity required by defendant's motion for nonsuit, it plainly is sufficient to establish that defendant made the positive and specific representation that the heating system was in excellent condition and adequate to heat the house. It is sufficient to establish, also, that the representation was false and that

defendant knew it to be so. Patently, the representation affected the value of the property, and defendant specifically intended that it should induce plaintiff to purchase the house. Plaintiff's evidence raises the inference that she was actually deceived by the misrepresentation and that she relied upon it to her damage. The only real question in the case is whether, under all the circumstances, plaintiff "reasonably relied" upon the representation.

Defendant argues that, even if her statements about the furnace were false, plaintiff had ample opportunity to inspect the house on two occasions in defendant's absence and to test the furnace herself, as well as to have it inspected by an expert; that, had she moved the furniture, she would have discovered the soot damage from the furnace; and that she should have been put on her guard by the chill in the house in February each time she entered it. In other words, defendant contends that plaintiff's own evidence affirmatively discloses that plaintiff acted unreasonably in relying upon her representations.

"The right to rely on representations is inseparably connected with the correlative problem of the duty of a representee to use diligence in respect of representations made to him. The policy of the courts is, on the one hand, to suppress fraud and, on the other, not to encourage negligence and inattention to one's own interest," *Calloway v. Wyatt,* 246 N.C. 129, 134, 97 S.E. 2d 881, 886 (a case in which the complaint was fatally defective). "The question is whether it is better to encourage negligence in the foolish or fraud in the deceitful." Annot., Fraud predicated upon vendor's misrepresentation of psysical condition of real property, 174 A.L.R. 1010, 1025. In *Machine Co. v. Bullock,* 161 N.C. 1, 9, 76 S.E. 634, 637; and *Cofield v. Griffin, supra* at 381, 78 S.E. 2d at 134 (both cases in which the court rejected such contentions by the defendant), it is said: " 'We are not inclined to encourage falsehood and dishonesty by protecting one who is guilty of such fraud on the ground that his victim had faith in his word, and for that reason did not pursue inquiries which would have disclosed the falsehood.' " See Annot., Opportunity of buyer of personal property to ascertain facts as affecting claim of fraud on part of seller in misrepresenting property, 61 A.L.R. 492, 505-506 (doctrine of reasonable reliance in early North Carolina cases).

In *Cowart v. Honeycutt,* 257 N.C. 136, 142, 125 S.E. 2d 382, 387, a case in which the plaintiff contended that she was prevented from reading a release by the fraud of the defendant, Parker, J., speaking for this Court, said:

> "Defendant in his brief admits that there was evidence of a false representation of a material fact which was relied upon by

plaintiff, but contends plaintiff as a matter of law was not justified in relying upon such representation, and her reliance was not reasonable. Such a contention is without merit. Our reply to such contention is this: 'In *Gray v. Jenkins,* 151 N.C. 80, 65 S.E. 644, this Court said: "The law does not require a prudent man to deal with everyone as a rascal and demand covenants to guard against the falsehood of every representation which may be made as to facts which constitute material inducements to a contract; that there must be a reliance on the integrity of man or else trade and commerce could not prosper."' *Roberson v. Williams,* 240 N.C. 696, 83 S.E. 2d 811."

Just where reliance ceases to be reasonable and becomes such negligence and inattention that it will, as a matter of law, bar recovery for fraud is frequently very difficult to determine. This case presents that difficulty. In close cases, however, we think that a seller who has intentionally made a false representation about something material, in order to induce a sale of his property, should not be permitted to say in effect, "You ought not to have trusted me. If you had not been so gullible, ignorant, or negligent, I could not have deceived you." Courts should be very loath to deny an actually defrauded plaintiff relief on this ground. When the circumstances are such that a plaintiff seeking relief from alleged fraud must have known the truth, the doctrine of reasonable reliance will prevent him from recovering for a misrepresentation which, if in point of fact made, did not deceive him. In such a case the doctrine is the specific remedy for a complainant who is, so to speak, malingering. A plaintiff who, aware, has made a bad bargain should not be allowed to disown it; no more should a fraudulent defendant be permitted to wriggle out on the theory that his deceit inspired confidence in a credulous plaintiff.

Plaintiff in this case, having reason to suspect the capacity of the furnace, inquired specifically of defendant about it. Defendant's reply, according to plaintiff's testimony, was so specific that it reassured her completely. Unfortunately, the reply was false. Although the parties were dealing at arm's length, "the maxim *caveat emptor* does not apply in cases of fraud," *Brooks v. Construction Co.,* 253 N.C. 214, 217, 116 S.E. 2d 454, 457. Plaintiff contends that she was fraudulently induced to forego an investigation of the furnace by defendant's artifice in covering the soot damage from the furnace with heavy pieces of furniture and in setting the fan on summer control. Upon each of plaintiff's three visits to the house defendant made it a point to explain that the furnace was not "on." When Mr. Hogan turned up the thermostat, the furnace appeared to respond, but it was only the fan. Of course, de-

fendant cut the thermostat off again almost immediately. Presumably, however, this did not arouse plaintiff's suspicions because she had not intended to remain in the house long enough for the furnace to heat it. Defendant's strategy succeeded, and plaintiff made no further investigation of the furnace.

Under all the circumstances, we cannot say, as a matter of law, that plaintiff, a registered nurse with no mechanical or engineering experience, did not reasonably and justifiably rely upon defendant's positive assurances that the furnace was in excellent condition. The two women were not on equal terms. Although plaintiff was looking over defendant's house as a prospective purchaser, defendant had been living in the house, and the manner in which the furnace performed, was, therefore, within her personal knowledge. When specifically asked about the furnace's performance, defendant was under both a legal and a moral obligation to disclose the facts and to answer the questions truthfully. *Harrell v. Powell,* 249 N.C. 244, 106 S.E. 2d 160; *Gray v. Edmonds,* 232 N.C. 681, 62 S.E. 2d 77.

In fairness to defendant, we point out that her evidence has not been heard. Whether she perpetrated the fraud which plaintiff has alleged and offered evidence tending to show, and, if she was fraudulent, whether plaintiff reasonably relied upon her representations, are questions of fact for the jury.

Reversed.

PARKER, J., concurs in result.

STATE v. ROBERT M. HEWITT AND PAUL ROBERT RASH.

(Filed 24 February, 1965.)

1. Automobiles § 59—

In order to warrant overruling motion to nonsuit in a manslaughter prosecution, the State's evidence must show that defendant driver was guilty of an intentional, wilful or wanton violation of a safety statute or an inadvertent violation of such statute accompanied by recklessness of probable consequences of a dangerous nature amounting to a thoughtless or heedless indifference to the safety and rights of others, and that such conduct proximately caused the injury and death.

2. Automobiles § 39—

The fact that a heavy passenger car travelled 360 feet after the collision before it stopped in a ditch on its left side of the road is not evidence that

it was being driven at excessive speed at the time of the impact when there is evidence tending to show that the driver was rendered unconscious by the collision and that the vehicle was travelling downhill.

3. Automobiles § 72—

Evidence that the driver had been drinking, without evidence that he was under the influence of intoxicating beverages and without any evidence of faulty driving on his part, such as following an irregular course on the highway, is insufficient to show a violation of G.S. 20-138.

4. Automobiles § 59— Evidence held insufficient to be submitted to the jury on the issue of culpable negligence.

The evidence tended to show that a vehicle driven by defendant collided head-on with another vehicle on the highway and that the driver of the other car died as a result of injuries received in the collision. There was no evidence that defendant was driving at an unlawful speed or any sufficient evidence that he was under the influence of intoxicants. The debris, tire marks and physical facts at the scene left in mere conjecture which vehicle was over the center line of the highway. *Held:* Defendant-driver's motion to nonsuit should have been allowed, and the evidence being insufficient to be submitted to the jury as to him, nonsuit should also have been entered as to the owner-occupant sought to be held as an aider and abetter.

APPEAL by defendants from *Froneberger, J.,* November 1964 Session of RUTHERFORD.

This is a criminal action in which defendants are indicted for the felony of manslaughter.

Plea: Not guilty. Verdict: Guilty. Judgment: Imprisonment, as to each defendant.

Attorney General Bruton, Assistant Attorney General Brady, and Staff Attorney Hornthal for the State.

Jones & Jones for defendants.

MOORE, J. The sole assignment of error is the refusal of the court to grant defendants' motions for nonsuit.

Ernest Patterson died as a result of injuries suffered in a collision between an Oldsmobile, which he was driving, and a Cadillac driven by defendant Hewitt. Defendant Rash owned, and was riding in, the Cadillac at the time. The collision occurred shortly after midnight on 14 March 1964 in Rutherford County on U. S. Highway 221 about 1½ miles north of the State line and 400 to 500 feet south of Broad River Bridge. The highway is 20 feet wide and runs generally north and south. The Cadillac was going south, the Oldsmobile north; they collided at or near the center of the highway at a point where the highway curves slightly to the right for southbound traffic. The highway is straight for ½ mile north of the point of collision, and is downhill in

approaching the river bridge from the north. The maximum speed limit is 55 miles per hour.

State Highway Patrolman Joe Wilson arrived at the scene about 15 minutes after the collision. He observed the cars, the condition of the highway, and talked to defendants at the scene and later. The Oldsmobile was on the east shoulder of the highway, and the Cadillac was off the embankment to the east of the highway 360 feet south of the Oldsmobile. Both cars were inoperable, both were damaged on the left front and left side. The left front wheel of the Cadillac was bent back and so wedged that it could not turn. There was, at the point of impact, debris, including glass and dirt, all over the road. There was glass all over the road but most of the dirt was on the east side. There was a tire or skid mark, which started about 2 feet west of the center line of the highway and extended from the point of impact southwardly across the center line to the east edge of the hardsurface; there were marks from the edge of the hardsurface to the place where the Cadillac came to rest. There was a groove in the asphalt which started to the east of the center line at or near the point of impact and ran southwardly, parallel to the skid mark, 232 feet to the east edge of the hardsurface — this groove was apparently made by some metallic part of the Cadillac. It was impossible to tell which wheel made the skid mark. After the impact the Cadillac went straight ahead, did not follow the curve of the road to its right.

At the scene the patrolman observed that both defendants had the odor of beer on their breath, but he could not say whether they were under the influence of intoxicants. There was no odor of intoxicants in the Cadillac, but there was in the Oldsmobile. Patterson was dead. Defendant Hewitt was unconscious and was removed to a hospital, and the patrolman talked to him the next day; the patrolman talked to defendant Rash at the scene. Defendants told the patrolman that Rash took a drink of whiskey at his home at 6:30 P.M., went to Hewitt's home where they both had a drink of whiskey about 7:30, they left Forest City about 8:30 and between that hour and midnight visited 3 or 4 taverns south of the State line and had a beer at each place, about one beer each hour, they went to Womack's place at the State line about midnight but did not go in because they were told that the "South Carolina law" was there, they left but after they had travelled north for some distance they decided to turn around and go back, the collision occurred on the way back to the State line.

Defendants testified in their own behalf; their testimony corresponded generally with what they had told the patrolman. They testified to additional details as follows: They left Forest City to go to the race track (location not disclosed), but when they got there they found

that the races had been "called off." They decided to go to the State line. They drank three beers, one at each of three taverns. They were not under the influence of intoxicants. When they went to Womack's a fight was going on and they were told that officers had been called. They left, but later decided to go back and see how the fight came out. They saw two lights coming down the road meeting them, the lights were "criss-crossing." Rash interrupted a conversation to say, "Whitey (Hewitt), that car is going to hit us." The Cadillac was on its right side of the road when the collision took place. Hewitt was knocked unconscious and lost control. Rash asked persons who soon arrived at the scene to call an ambulance and a patrolman.

The only direct evidence as to speed is from defendant Hewitt who testified: "We were going at 55 or 60 miles per hour. When I saw the car, I applied my brakes, but I do not have an opinion as to how fast we were going at the time of the collision. We had slowed down some."

The inquiry is whether there is *prima facie* evidence (1) that defendant Hewitt was guilty of an intentional, wilful or wanton violation of a statute designed for the protection of human life and limb, or guilty of an inadvertent violation of such statute accompanied by recklessness or probable consequences of a dangerous nature amounting altogether to a thoughtless disregard of consequences or heedless indifference to the safety and rights of others, and (2) that such violation and conduct was the proximate cause of the injury and resulting death of deceased. *State v. Cope,* 204 N.C. 28, 167 S.E. 456. And if so, we inquire further whether there is sufficient evidence of aiding and abetting on the part of defendant Rash to take the case to the jury as against him. *State v. Kelly,* 243 N.C. 177, 90 S.E. 2d 241.

The only direct evidence as to the speed of the Cadillac is the testimony of defendant Hewitt that he was driving 55 to 60 miles per hour as he neared the point of the accident, he applied brakes when he saw the Oldsmobile approaching and "slowed down some" but did not know his exact speed at the time of the impact. The Cadillac came to rest 360 feet south of the point where the Oldsmobile stopped; apparently the Oldsmobile went only a short distance after the impact. These are circumstances to be considered on the question of speed. *State v. Ward,* 258 N.C. 330, 128 S.E. 2d 673. However, it is undisputed that defendant Hewitt was rendered unconscious by the collision and had no control of the movements of the Cadillac after the impact. There is no testimony on the part of the State as to whether the Cadillac was going uphill, downhill or on the level. Defendants' Exhibit 2, a photograph identified as a true representation of the scene, clearly indicates that it was on a definite downgrade. How far a heavy uncontrolled automobile, which is travelling approximately 55 miles per hour at the

time it collides with another vehicle, will go down a decline before running off an embankment and coming to a stop is pure speculation. Furthermore, there is no evidence of recklessness or wanton conduct on the part of defendant Hewitt at any time prior to the collision. On a charge of culpable negligence in the operation of a motor vehicle, resulting in death, conduct is not to be measured with precision instruments or weighed on golden scales. There must be definite evidence of reckless and wanton conduct.

It appears that the State relies principally on its contention that the Cadillac, at the time of the collision, was across the center of the highway in the Oldsmobile's lane of travel. The contention is based on pure conjecture. There was glass "all over the road" — on both sides of the center line. There was dirt and debris on both sides, but there was more dirt on the east side. There was a wide tire mark which commenced two feet west of the center line and veered gradually to the east and continued for more than 230 feet to the east edge of the hardsurface where the Cadillac went onto the shoulder. The patrolman could not say which wheel made the tire track. There were no brake marks left by either car leading to or going beyond the point of impact. If the brakes of the Cadillac were being applied after the impact, it is reasonable to suppose there would have been tire marks from the wheels on both sides of the vehicle; but this was not the case. The left front wheel of the Cadillac was bent back by the force of the impact and imbedded in the wrecked fender; it could not roll or turn. State's exhibit 2 is a photograph, identified as a true representation of the damaged Cadillac as it was at the scene before it had been moved. It indicates that the tire was still on the left front wheel. The most reasonable supposition is that this immobilized tire made the mark seen and described by the patrolman. The indications are that the other wheels were in alignment and would turn. If the supposition be true, the impact occurred on the west, the Cadillac's, side of the highway. On the other hand, there was a grove or scrape mark in the highway running parallel to the tire mark (the evidence does not disclose which side of the tire mark the groove was on or how close it was to the tire mark). This groove commenced on the east side of the center line (the distance from the center line does not appear, the photograph of the scene does not show the groove at all). It is possible that the impact occurred at the point of beginning of the groove. It is also possible that some metallic portion of the Cadillac made contact with the surface of the highway after the Cadillac became disengaged from the Oldsmobile and had veered to the left. All this discussion of possibilities shows only that the respective positions of the cars at the time of the impact is, on the record evidence, simply conjecture, speculation and guesswork. A ver-

dict based on conjecture cannot in justice and good conscience be permitted to stand.

Defendant Hewitt had a drink of whisky at 7:30 P.M. From 7:30 to midnight he had four beers, about one each hour. He testified that he was not under the influence of these beverages. There is no evidence on the part of the State that he was. The fact that a motorist has been drinking, when considered in connection with faulty driving such as following an irregular course on the highway or other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show a violation of G.S. 20-138. *State v. Gurley,* 257 N.C. 270, 125 S.E. 2d 445. But the requisite additional circumstances do not appear in the case at bar.

We are of the opinion, and so hold, that defendants' motions for nonsuit should have been allowed. There being no case for the jury against defendant Hewitt, it follows that defendant Rash could not be guilty on the theory of aiding and abetting.

Compare *State v. Roop,* 255 N.C. 607, 122 S.E. 2d 363.

Reversed.

VERNON POWELL v. MRS. THOMAS CROSS, JR., MR. THOMAS CROSS, JR., AND STEPHEN M. GINELEWICZ.

(Filed 24 February, 1965.)

1. Evidence § 54—

When a party calls a witness he represents that the witness is worthy of belief, and while he may show the facts to be otherwise than as testified to by the witness, in the absence of evidence sufficient to show the contrary as a logical conclusion, and not merely raising a conjecture with respect thereto, the party is bound by the facts stated by the witness.

2. Automobiles § 41f—

In this action to recover for a rear end collision, plaintiff called as a witness a passenger in the following car who testified that the following car came to a complete stop without hitting plaintiff's vehicle, and that it was then hit by a third following vehicle and knocked into plaintiff's car. *Held:* In the absence of evidence in contradiction of the witness, the driver of the first following car is entitled to nonsuit, and testimony of plaintiff to the effect that his car received two jolts is insufficient to contradict the witness' statement, since there are many possibilities which would explain the successive jolts.

3. Trial § 22—

Plaintiff must make out his case by proving the facts essential to his cause of action or by proving facts permitting an inference of the material facts as a fair and logical conclusion, but an inference must be based on direct evidence and cannot be based on a presumption or some other inference or surmise, and evidence which presents a mere choice of possibilities is insufficient to be submitted to the jury.

4. Trial § 48—

The failure of the court to order a mistrial as to the second defendant upon the granting of nonsuit as to the first defendant will not be held for error, since the matter rests in the court's discretion and plaintiff could have stopped the trial at any time by taking a voluntary nonsuit.

5. Trial § 21—

The entering of nonsuit as to one defendant at the close of all of plaintiff's evidence will not be held for error on the ground that nonsuit should not have been entered until all of the evidence was in and that testimony of another defendant was sufficient to complete the case against the first, since plaintiff is not entitled to rely upon the evidence of the codefendant to prove his case against the first defendant, but has the burden of proving his own case, with the right to call defendants as witnesses, to contradict their testimony or cross-examine them, if he so desires. G.S. 1-183.

APPEAL by plaintiff from *Cowper, J.*, November 1964 Civil Session of MARTIN.

Plaintiff seeks to recover damages for injury to his person and to his automobile allegedly caused by the negligence of defendants.

At the close of plaintiff's evidence the court allowed the motion of defendants Cross for judgment of involuntary nonsuit. The jury absolved defendant Ginelewicz of blame. Judgment was entered dismissing the action.

Edgar J. Gurganus for plaintiff.

Griffin and Martin for defendants Cross.

James and Speight and William C. Brewer, Jr., for defendant Ginelewicz.

MOORE, J. Plaintiff contends, first, that the court erred in allowing the motion of defendants Cross for nonsuit.

The injuries of which plaintiff complains were suffered in a collision involving three automobiles. The collision occurred about 6:45 P.M. on 7 August 1961 on U. S. Highway 13 and 17 about 5 miles north of Williamston, N. C., where paved rural road 1521 (Cedar Landing Road) makes a "T" intersection with said highway. Plaintiff was driving his automobile northwardly on the highway at a speed of 50 to 55

miles per hour (according to his testimony) approaching said intersection and intending to make a right turn into the Cedar Landing Road. Defendant Mrs. Cross, operating her husband's automobile, was following plaintiff. Defendant Ginelewicz was following Mrs. Cross. The highway is 23 feet wide and has a 6 to 7-foot shoulder on each side. It had been raining. As plaintiff was making his turn to the right at the intersection, his car was struck in the rear by the Cross automobile.

Plaintiff testified: "As I approached this (Cedar Landing) road, I tapped my brake and began to slow up and give a signal with my hand out and up. I say I gave the signal as much as 200 feet before I arrived at the Cedar Landing Road intersection. I started to slow down my automobile just about where they started with the yellow line . . . the yellow line, coming to the intersection. At the time I gave a signal and before I got to the Cedar Landing Road, I saw two automobiles behind me. It looked like these automobiles were about 35 feet behind me at that time, one behind the other. . . . I was going about 15 miles per hour at the time I started my turn . . . As I got the right wheel started to turn into the Cedar Landing Road, I heard a brake squeal behind me. I turned to look and see what was happening and there were two cars right close together and about that time I got a lick and sent my head back. It flopped forward and before I could get straightened out I got another jolt and it flew back and forwards again. My automobile rolled down the road I reckon 15 or 20 feet. These two jolts I just described were what you might say close enough together before I could get my head straightened out from one, the other hit. . . . I said I heard brakes squeal and I turned to look back and I saw two cars. It looked like one was about 35 feet behind me and it looked like the other one was right near the other car. It did not look like the other car was over about 35 foot behind the Cross car." After the collision there were two dents in the rear of the car. "The dent in the center in the rear was dented in about 6 to 12 inches. . . . there was another dent where the left fender joins the body. It was dented in there all out to the edge. Between the dent in the center of the automobile and the dent to the left fender out to the edge was just a scratch, a rubbed scratch, looked like where something rubbed it."

Mrs. Scott Harrell, a passenger in the Cross car, was called as a witness for plaintiff and testified as follows: "I was riding on the front seat with Mrs. Cross. . . . We were gaining on the car driven by Mr. Powell (plaintiff). I don't have any idea what Mr. Powell's speed was the first time I saw him. It must have been a mighty slow rate of speed. We saw Mr. Powell's brake lights come on. Mrs. Cross applied her brakes . . . She applied hers immediately and she had

come to a complete stop. . . . just short of hitting the car and almost instantly we were hit from the back and turned around in the road so that we were facing back toward Williamston. We hit the car of Mr. Vernon Powell. Mr. Ginelewicz hit us from the back. . . . the Ginelewicz car went to the left . . . After Mr. Ginelewicz's car struck Mrs. Cross' car, Mrs. Cross' car struck Mr. Powell's car. . . . The car driven by Mrs. Cross, I said, had come to a complete stop and had not hit the Powell car before it was hit by Mr. Ginelewicz. . . . his (plaintiff's) car was struck only one time. . . . he was just barely moving."

Plaintiff instituted this action against Mrs. Cross, Mr. Cross (under the doctrine of *respondeat superior,* as owner of family purpose car driven by his wife), and Mr. Genelewicz. He alleges that Mrs. Cross was negligent in that she drove recklessly (G.S. 20-140) and at a speed greater than was reasonable and prudent (G.S. 20-141), failed to keep a proper lookout, failed to maintain reasonable control, and followed too closely (G.S. 20-153).

Plaintiff called Mrs. Harrell and caused her to give testimony. In doing so he made her his witness and represented that she was worthy of belief. *State v. Tilley,* 239 N.C. 245, 79 S.E. 2d 473. She testified that the Cross car came to a complete stop just before reaching the plaintiff's car and was forced into the rear of plaintiff's car by the Ginelewicz automobile. Defendants Cross contend that her testimony absolves them of each of the specifications of negligence set out in the complaint, and that plaintiff is bound by her testimony. On the other hand, plaintiff contends that he is not foreclosed by Mrs. Harrell's testimony with respect to the conduct of Mrs. Cross, that he is not precluded from proving the facts to be different from those to which Mrs. Harrell testified (*Matheny v. Motor Lines,* 233 N.C. 673, 65 S.E. 2d 361), that he has shown the facts to be otherwise, and that the contradictions in the evidence affect only its credibility and does not justify nonsuit (*Rhyne v. Bailey,* 254 N.C. 467, 119 S.E. 2d 385). Plaintiff does not claim that Mrs. Harrell's testimony is contradicted by direct eyewitness testimony. He relies on his own testimony that his car received "two jolts." It comes to this: Is the testimony of "two jolts" sufficient, in the light of all of plaintiff's evidence, to support the inference that the Cross car first struck plaintiff's car of its own force, and a second time by reason of being knocked forward by the Ginelewicz car, and is such testimony sufficient predicate for verdict and judgment? The evidence of "two jolts" is an effect which could have been caused by the state of facts plaintiff contends for, and suggests the possibility of the existence of such facts. The testimony also suggests other possibilities — that the Cross car stopped but, being sandwiched between the other two

cars, was bounced back and forth between them; that the Cross car in turning around (Mrs. Harrell testified that it turned around and faced south toward Williamston, and the investigating patrolman who testified for plaintiff found it in that position) struck plaintiff's car twice; and that the interplay of the inertial force of plaintiff's slow moving car opposing the momentum of the Cross car (propelled by the force of the Ginelewicz car) resulted in repeated contact. Other possibilities can be imagined. Had plaintiff not introduced the testimony of Mrs. Harrell he might have gone to the jury on the principle that the mere fact of a collision with a vehicle ahead furnishes some evidence that the following motorist was negligent as to speed, was following too closely, or failed to keep a proper lookout. *Dunlap v. Lee,* 257 N.C. 447, 126 S.E. 2d 62; *Clark v. Scheld,* 253 N.C. 732, 117 S.E. 2d 838; *Clontz v. Krimminger,* 253 N.C. 252, 116 S.E. 2d 804. This principle is not absolute; the negligence, if any, depends upon the circumstances. *Dunlap v. Lee, supra.* When plaintiff introduced the testimony of Mrs. Harrell he dispelled and explained away the possibility on which he relies and rejected the benefit of the principle set out in the cases cited next above. An inference must be based on some clear and direct evidence, it cannot be based on presumption, some other inference or surmise. A resort to a choice of possibilities is guesswork. *Johnson v. Fox,* 254 N.C. 454, 119 S.E. 2d 185; *Lane v. Bryan,* 246 N.C. 108, 97 S.E. 2d 411. "The sufficiency of the evidence in law to go to the jury does not depend upon the doctrine of chances. However confidently one in his own affairs may base his judgment on mere probability as to a proposition of fact and as a basis for the judgment of the court, he must adduce evidence of other than a majority of chances that the fact to be proved does exist. It must be more than sufficient for mere guess and must be such as tends to actual proof." *State v. Prince,* 182 N.C. 788, 108 S.E. 330; *Warren v. Insurance Co.,* 217 N.C. 705, 9 S.E. 2d 479. The motion of defendants Cross for nonsuit was properly allowed.

Plaintiff further contends that the court erred in proceeding to judgment on his cause of action against defendant Ginelewicz after having nonsuited his action against defendants Cross, and contends also that the court should not have granted either defendant an involuntary nonsuit until the evidence had been heard from all defendants.

The trial court has the discretionary power to discharge a juror and order a mistrial when necessary to attain the ends of justice. 4 Strong: N. C. Index, Trial, § 48, p. 356. The record does not show that plaintiff requested the court to exercise discretion in this respect in the instant case, nor that the court abused its discretion in failing to declare a mistrial. Such failure is not, therefore, reviewable on this appeal. Plaintiff might have stopped the trial at any time before verdict

by taking a voluntary nonsuit. *Sink v. Hire,* 210 N.C. 402, 186 S.E. 494.

Defendant Ginelewicz testified to a state of facts which would have made out a *prima facie* case against defendants Cross had their motion not been allowed at the close of plaintiff's evidence. Plaintiff contends that nonsuit should not have been considered until all of the evidence was in. The statute provides otherwise. G.S. 1-183. When an action is instituted and a cause of action alleged, plaintiff assumes the burden of supporting his allegations by introducing competent evidence bearing on each material issue raised. Defendants are not required to offer evidence. Plaintiff could have called all defendants and compelled them to testify and could have cross-examined them, and could also have contradicted their testimony. G.S. 8-50.

Affirmed.

BRENDA McGAHA v. SMOKY MOUNTAIN STAGES, INC., AND GORDON CLARK.

(Filed 24 February, 1965.)

1. Automobiles §§ 41a, 41c—

Findings to the effect that plaintiff was a passenger in an automobile being driven on a curving mountain road covered with several inches of ice and snow, that the driver of the car saw a bus approaching from the opposite direction on the bus' wrong side of the highway, became excited, and applied his brakes, causing the car to skid and collide with rock on its right side of the highway, without a finding that the bus and the car ever came into actual contact, *is held* insufficient to support recovery by plaintiff against the bus company.

2. Negligence § 1—

Negligence is not actionable unless a proximate cause of injury.

APPEAL by defendants from *Froneberger, J.,* October, 1964 Session, HENDERSON Superior Court.

This civil action to recover damages for personal injury originated in the General County Court of Henderson County. The plaintiff alleged in substance the following: On February 25, 1964, at 11:15 in the morning, she was riding eastwardly in an Oldsmobile being operated by her husband on Highway No. 19, "a curvy mountain highway in Cherokee County, North Carolina." At the same time a passenger bus owned by the defendant Smoky Mountain Stages, Inc., and driven by

its agent, Gordon Clark, was traveling westwardly on the highway. Further allegations are here quoted:

> "11. That the road on which the plaintiff was riding consisted of many curves and as the plaintiff came in view of the bus, said bus was being operated on the left of the center of the highway in the direction it was traveling and on the wrong side.
>
> "12. That the plaintiff's husband applied brakes to avoid colliding with the bus. That at said time the road was slick due to some snow falling and said car slid into an embankment on the right shoulder of the highway striking a rock which protruded.
>
> "13. That said car came to an immediate stop at an angle on the right side of the highway in the direction it was traveling.
>
> "14. That the plaintiff remained in said car for a few seconds and was in the act of getting out of same when it was struck with great force and violence by the defendant's bus causing the injuries and damages as herein alleged."

The defendants filed answer in which they admitted the road was curvy and covered with about three inches of snow and ice. They admitted the driver of the automobile in which plaintiff was riding lost control, skidded off the road, and after striking a rock in the embankment came to a stop in the highway, blocking both lanes of traffic. The defendant denied there was any contact between the bus and the Oldsmobile, or that plaintiff or the vehicle was damaged in any way by the bus. The defendants pleaded as a further defense the accident and injury resulted solely from the negligence of plaintiff's husband in crashing into the rock, and not from any contact with the bus.

The parties waived a jury trial and stipulated that the Judge of the General County Court should hear and decide the case. According to all the evidence before Judge Sheppard of the General County Court, the plaintiff's husband, on seeing the approaching bus, applied his brakes, causing his vehicle to skid into the righthand embankment. The vehicle bounced backward, stopping at an angle across the road. The plaintiff's witnesses stated the Oldsmobile stopped in its traffic lane. The plaintiff and her husband, Marvin McGaha, testified they were not injured by the collision with the rock but that after the car came to rest and as the plaintiff attempted to get out, it was hit violently by the bus; that all her injuries were caused thereby. The bus driver and its two passengers testified the bus did not come in contact with the automobile.

Mr. Amos, a highway employee, testified for the plaintiff that he was operating a motor grader removing snow and ice from the high-

way; that he was traveling behind the bus; that he saw the bus and the automobile in the road, as best he could tell in the plaintiff's proper lane of travel; that the bus and the Oldsmobile were stopped about six inches apart and that he saw no damage to the rear of the car, only damage to the front which had been caused by the collision with the rock.

The court entered these findings:

"That there was on said road two and a half to three inches of snow and ice; that driving conditions were hazardous and dangerous;

"That Marvin McGaha, driver of the car in which Brenda McGaha was a passenger, on seeing bus on his side of the road coming towards him became excited, pressed on his brakes, causing his car to collide with rocks to his right getting his car out of control, damaging portions of his car, and the spinning around in the road came to a stop, with the rear of his car in the direction in which he was traveling, the front of his car pointing towards Andrews;

"That the rear of the defendant Gordon Clark did collide with the car in the left rear portion of said car; (W R S)

"That the plaintiff Brenda McGaha in said collision was hit on the head by the door frame of her car next to the windshield and where the hinges of the door attach";

The court entered the following:

"The Court finds that the negligent operation of the Smoky Mountain Stages, Inc., bus by Gordon Clark is the proximate cause of the plaintiff's injuries, and the Court finds that the plaintiff has suffered permanent injury in the amount of $3,-500.00."

The defendant filed exceptions to the findings of fact, conclusions, and judgment and appealed to the Superior Court. On the hearing, Judge Froneberger affirmed the judgment below, from which the defendants appealed.

Redden, Redden & Redden by Arthur J. Redden, M. F. Toms for plaintiff appellee.

Whitmire & Whitmire for defendant appellants.

Higgins, J. The defendant by exceptive assignment challenges the sufficiency of the findings of fact to support a recovery. The plaintiff

alleged and both she and her husband testified that her injuries as well as his resulted from the collision between the moving bus and their stationary automobile. The plaintiff's pleadings were cast, her evidence was presented and the case was tried on that theory. Judge Sheppard entered, and then removed by crossing out, a finding that the bus and the automobile had collided. The Court found the automobile collided with the rock. But the plaintiff and her husband testified they suffered no injury as a result of the Oldsmobile's having hit the rock. There is no finding whatever left in the record that the bus at any time struck the Oldsmobile. Hence the finding of liability and damages against the defendant is without a factual basis to support it. Negligence, unless a proximate cause of injury is not actionable. *Reason v. Sewing Machine Co.*, 259 N.C. 264, 130 S.E. 2d 397.

In this condition of the record the order of the Superior Court affirming the judgment of the General County Court was improvidently entered and is set aside. The Superior Court will remand the cause to the General County Court of Henderson County for a new trial.

Reversed.

MARVIN McGAHA v. SMOKY MOUNTAIN STAGES, INC., AND GORDON CLARK.

(Filed 24 February, 1965.)

APPEAL by defendants from *Froneberger, J.*, October, 1964 Session, HENDERSON Superior Court.

The plaintiff in this case is the husband of the plaintiff in the companion case, No. 27 — Brenda McGaha against the same defendants. The two cases were tried together before the General County Court of Henderson County and resulted in a verdict and judgment for the plaintiff awarding him $1,500.00 for his personal injury and $350.00 for the damage to his Oldsmobile. The Superior Court on appeal affirmed the judgment. The defendants appealed to the Supreme Court.

Redden, Redden & Redden by Arthur J. Redden, M. F. Toms for plaintiff appellee.

Whitmire & Whitmire for defendant appellants.

PER CURIAM. The pleadings, the evidence, the findings of the General County Court of Henderson County, and the confirming order of the Superior Court are the same in this as in the companion case,

Brenda McGaha against the same defendants, decided this day. That decision is controlling on this appeal. On its authority the order of the Superior Court affirming the judgment of the General County Court is reversed. The cause will be remanded to the General County Court of Henderson County for a new trial.

Reversed.

STATE v. VERNON GARRETT.

(Filed 24 February, 1965.)

1. Burglary and Unlawful Breakings § 8—

G.S. 14-55 defines three separate offenses.

2. Statutes § 5—

The doctrine of *ejusdem generis*, requiring that general words of a statute following particular words should embrace only articles of similar kind as those described by specific appellation, applies in apposite upon the theory that if the legislative body had intended the general words to be used in their unrestricted sense the specific words would have been omitted.

3. Same—

A statute creating a criminal offense must be strictly construed.

4. Burglary and Unlawful Breakings § 8—

A tire tool is not an instrument of housebreaking within the contemplation of G.S. 14-55, and a defendant cannot be convicted under that statute upon evidence that he was found in possession of a tire tool, even though there is evidence of a tire tool mark in the jamb of a door of a nearby building and that when pressure was put on the door it opened.

5. Burglary and Unlawful Breakings § 4—

Where the evidence shows that the glass in the door of one shop had been broken, that the screen door in another had been cut, and that tire tool marks were found in the jamb of a third, without any evidence that anything had been stolen from any of the establishments, and defendant testifies to the effect that he was intoxicated and angry and inflicted the damage solely to annoy officers of the law, the court must charge the jury that if it accepted defendant's version he would not be guilty of housebreaking.

6. Same—

The charge of housebreaking for the purpose of committing a felony does not include as a lesser offense malicious or intentional injury to property.

CERTIORARI to review convictions and sentences of imprisonment entered in four criminal prosecutions against Vernon Garrett, heard by *Johnston, J.*, at the March 11, 1964 Special Criminal Session, GUILFORD Superior Court, Greensboro Division.

The defendant was tried on three indictments, Nos. 14078, 14080, and 14081 for the felonious breaking into three separate business establishments for the purpose of committing larceny: (1) Swain's Charcoal Steak House, Inc., (2) Howard Johnson's Restaurant, Inc., and (3) Byerly's Antique Shop, all in Guilford County. In Case No. 14079 he was tried "for having in possession, without lawful excuse, a certain implement of house breaking, to-wit: a tire tool." The four charges were consolidated and tried together.

Three officers, O. E. Cherry, detective, J. W. Deaton, a uniformed police officer, and Thurmond Jones, a Guilford County Deputy Sheriff, testified for the State. Cherry testified that on September 18, 1962, at about 2:45 in the morning, he saw the defendant walking away from Swain's Charcoal Steak House with a tire tool in his hand. At the time he was 10 or 12 feet from the door. Examination of the door disclosed a tire tool mark in the jamb. When the officer pressed the door, it opened, although the lock was unbroken.

Deaton testified the defendant admitted he broke the glass in the door of Byerly's Antique Shop, went in, but there was no money in the cash register. Afterwards he went to the Howard Johnson Restaurant, cut the screen door, entered through the area where the garbage cans were kept, tried to get money but failed. The testimony of Jones was in substance the same as Deaton's with respect to the physical evidence of entry into Byerly's Antique Shop and the Howard Johnson Restaurant. Nothing was missing from any of the buildings.

The defendant testified that he had been hounded and falsely accused of breaking and entering by the Police Department of Graham where he lived. On the night of September 18, 1962, he was on his way to his father-in-law's home in High Point. He stopped at Byerly's, made no attempt to enter, but did throw a small rock through the glass in the door. He stopped at the Howard Johnson restaurant, cut the screen with his knife, but did not open the door and did not enter. His intention was to worry the officers in retaliation for the worry they had caused him. He was angry and intoxicated. He stopped at Swain's Steak House to tighten a lug on his truck wheel which had been wobbling. For that purpose he had the tire tool. He denied telling Officer Cherry or anyone else that he intended to steal money or anything of value or to enter any of the places he "visited."

Motions for directed verdicts were made and denied.

Exceptions were duly noted. The jury returned these verdicts: In Nos. 14078 and 14081, guilty of attempting to break and enter; in No. 14080, guilty of breaking and entering Howard Johnson's Restaurant with intent to commit larceny; in No. 14079, guilty of possession, without lawful excuse, an implement of house breaking or store breaking, "to-wit: a tire tool." In each of the four cases the court entered judgment that the defendant be imprisoned not less than five nor more than eight years — the sentences to run concurrently.

The defendant gave notice of, but did not perfect, his appeals. This Court, upon application of a court-appointed counsel, granted the writ of *certiorari* in order that the trials may be here for review.

T. W. Bruton, Attorney General, Harry W. McGalliard, Deputy Attorney General for the State.

James G. Exum, Jr., for defendant appellant.

HIGGINS, J. This Court is of the opinion the charge and the evidence were insufficient to support the conviction for having in possession, without lawful excuse, an implement of house breaking as contemplated in G.S. 14-55. The statute makes it unlawful (1) to be found armed with a dangerous or offensive weapon with intent to break and enter a dwelling house and to commit a felony or other infamous crime therein; or (2) to be found having in his possession, without lawful excuse, any pick lock, key, bit, or other implement of house breaking; or (3) shall be found in such building with intent to commit a felony or other infamous crime therein, etc. Each is a separate offense. For definitions and analyses, see *State v. Davis,* 245 N.C. 146, 95 S.E. 2d 564; *State v. Baldwin,* 226 N.C. 295, 37 S.E. 2d 898; *State v. Boyd,* 223 N.C. 79, 25 S.E. 2d 456; *State v. Vick,* 213 N.C. 235, 195 S.E. 779.

The indictment in No. 14079 attempts to charge a felony as defined in (2) of the statute, that is, possessing, without lawful excuse, an implement of house breaking, "to-wit: a tire tool." We have some doubt whether a tire tool under the *ejusdem generis* rule is of the same classification as a pick lock, key, or bit, and hence, condemned by the statute. "The maxim *ejusdam generis* applies especially to the construction of legislative enactments. It is founded upon the obvious reason that if the legislative body had intended the general words to be used in their unrestricted sense the specific words would have been omitted." *Turner v. Board of Education,* 250 N.C. 456, 109 S.E. 2d 211.

A tire tool is a part of the repair kit which the manufacturer delivers with each motor vehicle designed to run on pneumatic tires. Not only is there lawful excuse for its possession, but there is little or no

excuse for a motorist to be on the road without one. A statute creating a criminal offense must be strictly construed. Strong's N. C. Index, Statutes, Vol. 4, p. 179.

In the charge to the jury, the court summarized at great length the evidence and the contentions of the State with respect to the four charges. Likewise, the court fairly summarized the defendant's testimony that his purpose was to provoke the officers and cause them worry in retaliation for the trouble the Graham officers had caused him. However, the court failed to charge that if the jury should accept his version, and find that he did not break and enter, or attempt to break and enter, any of the buildings, but merely damaged them for the purpose of requiring the officers to spend time and effort to determine whether a felonious breaking had been committed, in that event he would not be guilty of house breaking and it would be the jury's duty to return verdicts of not guilty.

The defendant's conduct, according to his own story, was not to his credit. However, according to all the evidence nothing whatever was stolen from any of the establishments. Under the circumstances the defendant was entitled to the instruction that if the jury should find that all he did was to worry the officers as he claimed, he could not be guilty of either of the house breaking charges. The charges of house breaking for the purpose of committing a felony do not include malicious or intentional injury to the buildings as lesser offenses. The defendant was entitled to, but did not receive, a charge to that effect. For this error, new trials are required in the house breaking charges.

In No. 14079 — Reversed.

In Nos. 14078, 14080, and 14081 — New trials.

TOWN OF HERTFORD v. JESSE L. HARRIS AND WIFE, ELIZABETH CLARK HARRIS.

(Filed 24 February, 1965.)

1. Appeal and Error § 49—

Where there are no exceptions to the findings of fact, an appeal presents the question only whether the facts found support the judgment.

2. Eminent Domain § 7a—

Where a municipality must acquire land for a governmental purpose, the statute requires that it first negotiate with the owners for the purchase of the land before initiating condemnation proceedings, G.S. 160-204, G.S. 160-205, but unsuccessful negotiation with one owner is sufficient to meet the

requirement, and therefore where it is admitted that husband and wife owned the land, vain negotiation with the husband alone suffices, and the municipality is not required to ascertain the exact interests of the respective defendants in the *locus*.

3. Same—

While condemnor may not condemn an interest which it itself owns in realty, the allegation of the petition in this case that condemnor owned a perpetual lease in part of the property was immaterial, it appearing that condemnor did not intend to reduce the value of the fee simple estate it sought to acquire, and the proceeding being tried on the theory that the damages awarded should be ascertained on the basis that defendants were the owners in fee of the full title to the lands in question.

APPEAL by defendants from *Mallard, J.*, November 1964 Session of PERQUIMANS.

This is an appeal from an order directing the Clerk to appoint commissioners to value a tract of land containing 4.75 acres so that the Town of Hertford may acquire title for use as a sewerage disposal plant, and for other governmental purposes.

In April 1964, the Town Council adopted a resolution reciting the proposed construction of a sewerage disposal plant, the need of land for this purpose and for use by its Fire Department. The resolution directed the Town Attorney to offer defendants, owners of the land, $500 per acre for the area needed. The resolution directed the attorney to acquire title by condemnation, if the offer was not accepted.

In July 1964, Hertford filed its petition, praying that it be adjudged the owner of the described area, upon payment of the ascertained value. The petition alleged: Defendants owned the area, which was described by metes and bounds; the town needed it for the enumerated governmental purposes and "the parties cannot agree upon the purchase price; that the petitioner has made *bona fide*, but ineffectual efforts to acquire the said land from the owners."

Defendants answered. They alleged: The land which Hertford sought to condemn was part of a larger tract owned by them; the land was not needed for the purposes stated in the petition; nor had the petitioner made a *bona fide* effort to purchase.

The Clerk, on petitioner's motion for the appointment of commissioners, found that petitioner had failed, prior to the institution of the condemnation proceeding, to negotiate for the purchase. He dismissed the action. Petitioner appealed. Judge Mallard, hearing petitioner's appeal, found as a fact that petitioner did "prior to the institution of this proceeding for the condemnation of the lands described in this petition, through its duly authorized agent, negotiate in good faith with the respondent, Jesse L. Harris, for the purchase of the land belonging

to the respondents Jesse L. Harris and Elizabeth Clark Harris, as mentioned and described in the pleadings, and that said negotiation was in good faith and that said petitioner made a *bona fide* offer and that the respondent Jesse L. Harris stated that he would not sell, and the Court finds as a fact that the petitioner did not attempt to purchase from the respondent, Elizabeth Clark Harris, but that such would have been a vain thing." Based on this finding, the court remanded the cause to the Clerk with directions to appoint commissioners, as provided by law. Defendants excepted and appealed.

Lake, Boyce & Lake for respondent appellants.
Charles E. Johnson and John H. Hall for petitioner appellee.

RODMAN, J. The Legislature has authorized municipalities to acquire property for the purposes enumerated in the petition, G.S. 160-204. If unable to agree with the owner on the amount to be paid, the municipality may condemn, G.S. 160-205.

Here, the court has found as a fact that Hertford sought in good faith to acquire title by private negotiation. Defendants have not, by exceptions, challenged the findings. The findings are conclusive. The only question then is: Do the facts found warrant the order which the court made? *Schloss v. Jamison,* 258 N.C. 271, 128 S.E. 2d 590; *Goldsboro v. R. R.,* 246 N.C. 101, 97 S.E. 2d 486.

The evidence and the findings are that all of the negotiations had by the town were with the male defendant; none were had with the wife, *feme* defendant. The petition alleges, and the answer admits, defendants are the owners of the land. The character of ownership is not disclosed by the pleadings. Are they tenants by the entirety, as the brief of defendant suggests; are they co-tenants; or does the wife own some other right in the property, such as a contingent right of dower? The evidence does not show, and the court has made no finding. Our statute requires one vested with the power to take by eminent domain to first attempt to acquire from the owner by private negotiation. Such an allegation is jurisdictional. Brown J. said in *Durham v. Rigsbee,* 141 N.C. 128, 53 S.E. 531:

> "It is not essential that the particular language of the statute should be used. If the facts alleged plainly show that the petitioner has been unable to acquire title, and the reason why, that is a compliance with the statute. While this is a necessary allegation of this petition, it is not an *issuable* fact for the jury to determine. The judge was right in refusing to submit it to the jury. The statute requires such a statement, so that the court may see

whether the condemnor has made a reasonable effort to acquire title without resorting to the expense of condemnation proceedings and bringing a citizen into court."

Condemnor is not required, when several are asserting title to the lands to be acquired, to unravel the divergent interests and negotiate with each claimant. Any other rule would needlessly delay a governmental agency in work proposed for the protection of society. As said by Adams, J. in *Power Co. v. Moses,* 191 N.C. 744 (747), 133 S.E. 5: "Inability to acquire title of some of the owners makes it unnecessary to negotiate with the others."

The court correctly concluded that it was not necessary to go through the vain performance of making an offer to Mrs. Harris before instituting condemnation proceedings.

The assignments of error do not challenge the power of the court to appoint commissioners for the purpose of fixing the value of the property in an eminent domain proceeding when controversy exists between condemnor and condemnee as to which has title. The question is, however, raised in the brief. The challenge now directed to Judge Mallard's order arises because of an allegation in the petition that "there is .57 of an acre of land included in said description, that the Town of Hertford already has and owns, a permanent lease thereon." Defendants, in their answer, denied "that the petitioner now owns a permanent lease or any other interest in and to any part of the tract of land * * *."

If the question had to be decided merely upon the pleadings, it would present a serious problem. A governmental agency has no need or right to condemn property which it owns. *Power Co. v. King,* 259 N.C. 219, 130 S.E. 2d 318; *Wescott v. Highway Commission,* 262 N.C. 522, 138 S.E. 2d 133. Where controversy exists between condemnor and condemnee as to which has title, logic would seem to dictate that value should be ascertained only after these rights have been determined. When the dispute relating to title is between defendants, there is no reason to delay the appointment of commissioners. There, when value has been determined, the condemnor may pay the ascertained value into court and the disputed claims will then be transferred from the property to the fund.

Our examination of the record, and of the proceedings had, convinces us that petitioner, notwithstanding its allegations of a perpetual lease, did not intend thereby to reduce the value of the fee simple estate it sought to acquire. The fifth allegation of the petition reads: "That the title to said lands sought to be acquired by the petitioner is the complete, fee simple title thereto, subject nevertheless to the existing easement or right of way in favor of the Norfolk Southern

Railway Company and the existing easement of the Virginia Electric & Power Company, if any." This allegation seemingly negatives the contention that petitioner sought to acquire, or pay for, less than an unencumbered fee. This conclusion is fortified by recitals in Judge Mallard's order. He said petitioner and respondent agreed that the only question he was called upon to determine was whether there had been such negotiations between the parties as warranted the appointment of commissioners.

When the town sought to have the property valued, free of any claims which it could assert, the town could not, after the value had been fixed, claim any part of the award. *Power Co. v. King, supra.*

Our interpretation of petitioner's position was said, in the oral argument, to be correct.

The town has filed in this Court a written stipulation stating that "damages are to be awarded on the basis of the defendants being the owners in fee of the full title of the lands sought to be condemned and of the entire tract of which they are a part." That stipulation is now a part of the record on appeal.

Since there is no controversy between the town and the defendants with respect to title, the order remanding the cause to the Clerk for the appointment of commissioners is

Affirmed.

DEWEY KEITH MAYBERRY, PLAINTIFF v. ALICE THOMPSON ALLRED, DEFENDANT.

(Filed 24 February, 1965.)

1. Automobiles § 41g—

Plaintiff's evidence tending to show that he turned on his left turn signal and attempted to make a left turn at an intersection after ascertaining that no vehicle was approaching from the opposite direction within the line of his vision of 150 feet, and that defendant's vehicle, approaching the intersection from the opposite direction, struck his vehicle when all but four feet of his vehicle had cleared the intersection, *held* sufficient to be submitted to the jury on the issue of defendant's negligence upon the hypothesis that defendant failed to delay her entry into the intersection when plaintiff's vehicle was already in the intersection. G.S. 20-155(b).

2. Automobiles §§ 37, 39—

This action involved a collision between plaintiff's lightweight compact and defendant's car weighing approximately twice as much. Physical facts

at the accident disclosed that defendant's car stopped at the point of impact with no skid marks behind it, while the compact, which was hit broadside, was turned around and knocked some 4 to 5 feet. *Held:* The physical facts belie plaintiff's testimony that the speed of defendant's vehicle was some 50 mph, and makes such testimony without probative force.

3. Automobiles § 42h—

Evidence permitting the inference that plaintiff turned left at an intersection across defendant's approaching automobile at a time when it was unsafe to turn *held* to raise the issue of contributory negligence for the jury, G.S. 20-154, but the testimony in this case *held* not to show contributory negligence on that aspect as a matter of law.

4. Negligence § 26—

Nonsuit for contributory negligence is proper only when the evidence, taken in the light most favorable to plaintiff, establishes that defense so clearly that no other reasonable inference is possible.

APPEAL by plaintiff from *Gambill, J.,* June 1964 Regular Civil Session of SURRY. This appeal was docketed in the Supreme Court as Case No. 666 and argued at the Fall Term 1964.

Plaintiff brought this action to recover for personal injuries and property damage which he sustained when his Volkswagen Karmann Ghia collided with defendant's 1962 Pontiac about 11:00 a.m. on October 17, 1963, in the intersection of North Elm Street and Bessemer Avenue in Greensboro.

Plaintiff alleges that the collision was proximately caused by defendant's negligence in that she was traveling at an unlawful rate of speed without having her car under control and without keeping a proper lookout, and in that she failed to yield to plaintiff the right of way to which he was entitled. Defendant denies the material allegations of the complaint and alleges that plaintiff's negligence was the sole cause of the collision in that he made a left turn across her lane of travel without giving a signal and at a time when the turn could not be made in safety. She pleads plaintiff's contributory negligence in bar of his right to recover and also counterclaims for the damage to her automobile.

Plaintiff's evidence tends to show these facts: Plaintiff was traveling north on North Elm Street approaching its intersection with Bessemer Avenue, into which he intended to make a left turn to the west. For 150 feet immediately north and south of the intersection, North Elm Street is 41 feet wide and divided into three lanes. On the south side of the intersection, the westernmost lane is for southbound traffic; the center and easternmost lanes, from which turns may be made from the appropriate lane either to the right or to the left into Bessemer Avenue, are for northbound traffic. On the north side of the intersection the

easternmost lane is for northbound traffic; the other two, for southbound traffic, permit similar right and left turns into Bessemer Avenue. West of the intersection Bessemer Avenue is 25 feet wide. From the intersection looking north, the view is unobstructed for 150-200 feet. The area is a 35 mph speed zone. Before plaintiff reached the intersection, he switched on his left turn signal. Seeing no traffic approaching, he proceeded into the intersection and began his left turn at a speed not in excess of 12 mph. Another vehicle, traveling south on Elm Street, made a left turn immediately in front of plaintiff into East Bessemer Avenue. As plaintiff entered the lane for southbound traffic, he observed defendant's car 150-200 feet away approaching in that lane, according to his testimony, at a speed in excess of 50 mph. He testified:

> "When I realized she was coming so fast I couldn't get completely out of the way, *I put on my brake . . . and she hit me* . . . All of my car was in Bessemer Avenue, all but four feet . . . When I saw her coming, I let it go as fast as I could and I couldn't get out of the way. When she hit me, I grabbed for my boy. I got to the point where she passed me and I knew she was going to hit me. I could feel it. I stopped after that and the back of my car at that point was sticking four feet in the intersection and I had my car in gear and my foot on the accelerator." (Italics ours.)

On cross-examination plaintiff said that he "continued on across that lane of traffic and before he could get four feet of the rear of (his) . . . automobile out of that lane, this lady hit (him) . . . from 150-200 feet back there and she was going 50 mph." The right fender of the Pontiac, hitting the right side of the Karmann Ghia, damaged it "from the door on back to the motor." The Karmann Ghia was knocked round 4-5 feet and came to rest near the southwest corner of the intersection, facing north, in the pedestrian cross-walk and parallel to the Pontiac, which stopped at the point of impact. There were no skid marks behind the Pontiac, which weighed approximately twice as much as the Karmann Ghia. The cars were 4-5 feet apart after the impact, with the debris approximately in front of the Pontiac. The weather was clear, and a motorist traveling north in the lane to plaintiff's right and behind him the length of one or two cars saw defendant's automobile as it came over the knoll about 150 feet away. He also saw plaintiff make a left turn at the time defendant, going south, was coming down the knoll. This witness gave no estimate of defendant's speed, nor was he asked for one. Defendant told plaintiff that "it was probably her fault; that as she approached the intersection she increased her speed to make the green light."

Defendant's motion for nonsuit at the close of plaintiff's evidence was allowed, whereupon defendant took a voluntary nonsuit on her counterclaim. Plaintiff appeals, assigning as error the dismissal of his action as of nonsuit.

Daniel J. Park for plaintiff.

Hudson, Ferrell, Petree, Stockton, Stockton & Robinson by W. F. Maready and J. Robert Elster for defendant.

SHARP, J. Plaintiff's evidence, taken in the light most favorable to him, is sufficient to establish these facts: After having ascertained that no vehicle was approaching from the north within the limits of his visibility of 150 feet, with his signal light blinking, plaintiff attempted to make a left turn from the center lane of a 41-foot wide street into an intersecting 25-foot wide street in a 35 mph speed zone. When all but 4 feet of his automobile had cleared the intersection, it was struck on the right rear by defendant's automobile, which stopped at the point of impact.

If the jury should find these to be the facts, plaintiff was already in the intersection, giving the statutory left-turn signal, at a time when defendant was 150 feet away. If so, it was defendant's duty to have delayed her entrance into the intersection until plaintiff had cleared it entirely. G.S. 20-155(b).

The physical evidence belies plaintiff's estimate that defendant approached the intersection at a speed of 50 mph, and makes it without probative value. *Burgess v. Mattox,* 260 N.C. 305, 132 S.E. 2d 577; *Jones v. Schaffer,* 252 N.C. 368, 114 S.E. 2d 105; *Hudson v. Transit Co.,* 250 N.C. 435, 108 S.E. 2d 900. The Pontiac stopped at the point of impact with no skid marks behind it. Although its weight was approximately twice that of the Karmann Ghia, which it hit broadside, it merely turned the lighter car round and knocked it 4-5 feet. These are physical facts which speak louder than plaintiff's testimony. *Carr v. Lee,* 249 N.C. 712, 716, 107 S.E. 2d 544, 547, and show that defendant's speed was less than 50 mph. These same facts, however, give rise, also, to the inference that plaintiff, by the exercise of a proper lookout, could have avoided colliding with any part of the Karmann Ghia, only 4 feet of which remained in the intersection at the time of the impact. "Fractions of a second and a few feet of space may determine the difference between safety and danger in crossing intersecting streets and highways." Higgins, J. in *Wright v. Pegram,* 244 N.C. 45, 47, 92 S.E. 2d 416, 418.

The testimony of the motorist who was traveling in the lane to plaintiff's right tends to show that plaintiff turned left in the intersection in

front of defendant's approaching automobile at a time when it was unsafe to turn. G.S. 20-154; *Wiggins v. Ponder*, 259 N.C. 277, 130 S.E. 2d 402. A portion of plaintiff's own testimony is susceptible to the inference that when he saw defendant approaching, he applied his brakes and attempted to stop in her lane of travel, instead of accelerating in a maximum effort to clear the intersection. Discrepancies and contradictions, even in plaintiff's testimony, are for the jury, not the court. A motion for nonsuit on the ground of contributory negligence may be sustained only when the evidence, taken in the light most favorable to plaintiff, establishes it so clearly that no other reasonable inference is possible. *Fowler v. Atlantic Co.*, 234 N.C. 542, 67 S.E. 2d 496. Issues of defendant's negligence and plaintiff's contributory negligence alike arise upon this evidence. *Lemons v. Vaughn*, 255 N.C. 186, 120 S.E. 2d 527. The case, therefore, should have been submitted to the jury.

Reversed.

STATE v. SYLVESTER BANKS.

(Filed 24 February, 1965.)

1. Criminal Law § 139—

The warrant is part of the record proper, and the Supreme Court will take notice *ex mero motu* if it is insufficient to charge a criminal offense, this being a jurisdictional matter.

2. Indictment and Warrant § 9—

The offense must be charged in a warrant or indictment with such certainty as will identify the offense, protect defendant from being again put in jeopardy therefor, to enable him to prepare for trial, and enable the court, upon conviction, to pronounce sentence.

3. Obscenity—

A warrant charging defendant with peeping into the room of a female must set forth the identity of the female person whose privacy defendant is charged with having invaded.

4. Indictment and Warrant § 13—

A bill of particulars cannot supply an averment essential in charging the offense. G.S. 15-143.

APPEAL by defendant from *Morris, J.*, September, 1964 Session, CRAVEN Superior Court.

This criminal prosecution originated in the Craven County Recorder's Court upon a warrant charging that on June 14, 1964, "Sylvester Banks

did unlawfully and wilfully peep secretly into a room occupied by a female person contrary to the form of the statute . . ." From a conviction in the Recorder's Court, the defendant appealed to the Superior Court of Craven County where the case was tried *de novo*. From a jury verdict of guilty and the court's judgment thereon, the defendant appealed, assigning errors.

T. W. Bruton, Attorney General, Richard T. Sanders, Assistant Attorney General for the State.

Reginald L. Frazier, Samuel S. Mitchell, Earl Whitted, Jr., J. LeVonne Chambers for defendant appellant.

HIGGINS, J. The warrant upon which the prosecution is based is before us as a part of the record proper. We are charged with notice of its contents. If the warrant is insufficient on its face to state a criminal charge and support a conviction, the Court, *ex mero motu*, should so declare, and arrest the judgment. "It is an essential of jurisdiction that a criminal offense shall be sufficiently charged in a warrant or an indictment." ". . . 'The authorities are in unison that an indictment, . . . to be good must allege lucidly and accurately all the essential elements of the offense endeavored to be charged. The purpose of such constitutional provisions is: (1) such certainty in the statement of the accusation as will identify the offense . . .; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction . . . to pronounce sentence . . .' " *State v. Barnes*, 253 N.C. 711, 117 S.E. 2d 849.

The warrant fails to give sufficient information to enable the defendant to prepare for his trial. He is entitled to know the identity of the female person whose privacy he is charged with having invaded. In *State v. Peterson*, 232 N.C. 332, 59 S.E. 2d 635, the name of the woman (changed to female person by Ch. 338, Session Laws of 1957) was stated in the warrant. Likewise, in *State v. Bass*, 253 N.C. 318, 116 S.E. 2d 772, the warrant gave the name of the female person. In *State v. Bivins*, 262 N.C. 93, 136 S.E. 2d 250, the warrant gave the name of the female person and the street address of the room she occupied at the time the offense was committed. While the warrant was not challenged in either of these previous decisions, the form of the warrant in the *Bivins* case is free from objection.

The warrant before us is defective in that it fails to name the victim of the peeping misdemeanant. The defect may not be cured by a bill of particulars supplying the name. "A 'defect in a warrant . . . is not cured by . . . a bill of particulars, G.S. 15-143. . . . Request for a

bill of particulars is addressed to the discretion of the court. Such a bill, therefore does not supply any matter which the indictment must contain.' " *State v. Thornton,* 251 N.C. 658, 111 S.E. 2d 901.

For the reasons assigned, the warrant in this case is held insufficient to charge a criminal offense. The Court, *ex mero motu,* takes notice thereof and arrests the judgment. The State is not estopped to proceed on a proper warrant. This disposition makes unnecessary any discussion of the other questions arising on the record.

Judgment arrested.

STATE v. JOSEPH T. BROWN, ALIAS JOE THOMAS FINCH.

(Filed 24 February, 1965.)

Criminal Law §§ 100, 139; Larceny § 7—

The Supreme Court, in the exercise of its supervisory jurisdiction, may in a prosecution for breaking and entering and larceny take notice of a variance between the indictment and proof as to the ownership of the property, even though no motion to nonsuit appears in the record and the matter is not pressed on the appeal. Constitution of North Carolina, Art. IV, § 10(1).

APPEAL by defendant from *Froneberger, J.,* January 1964 Session of BUNCOMBE.

Criminal prosecution tried on a bill of indictment (No. 63-1016) charging defendant in three separate counts: *First,* with feloniously breaking and entering a certain building occupied by "Stroup Sheet Metal Works, H. B. Stroup, Jr., owner," with intent to steal; *second,* with the larceny of 2,000 blank checks of the value of $30.00, the property of "Stroup Sheet Metal Works, H. B. Stroupe, Jr., owner"; and *third,* with receiving said articles with knowledge they had been stolen, with felonious intent. The bill charges the alleged offenses were committed on November 20, 1963.

The jury found defendant guilty of breaking and entering as charged in the first count and of larceny as charged in the second count. Judgments imposing prison sentences were pronounced.

Defendant excepted and gave notice of appeal.

Attorney General Bruton and Deputy Attorney General McGalliard for the State.

G. Edison Hill for defendant appellant.

BOBBITT, J. The record indicates defendant was tried and convicted at December 1963 Session on a bill of indictment (No. 63-1015) charging other criminal offenses and that judgment imposing a prison sentence was then pronounced.

The record contains an affidavit of defendant in which he states: "That he is the defendant in the above numbered (Nos. 63-1015 and 63-1016) cases; that he was found guilty in all counts and from the imposition of the sentence in each count he gave notice of appeal to the Supreme Court in open court; that he was represented by Carl Loftin in Case No. 63-1015 but does not desire his services in connection with his appeal; that he was represented by Robert E. Riddle in Case No. 63-1016 but does not desire his services in connection with his appeal; that he wishes to appeal in *Forma Pauperis* and handle his own appeal in each case."

In No. 63-1015, this Court, allowing the Attorney General's motion therefor, dismissed the appeal for failure to comply with Rule 17, Rules of Practice in the Supreme Court, 254 N.C. 783, 793.

In No. 63-1016, this Court, treating a communication from defendant as a petition for *certiorari*, ordered, *inter alia*, that the case be "remanded to Buncombe County to the end that counsel be appointed to bring up defendant's appeal." Thereafter, G. Edison Hill, Esquire, was appointed counsel to perfect defendant's appeal.

As indicated, the first and second counts in the bill of indictment relate to a building occupied by and to property of "Stroup Sheet Metal Works, H. B. Stroup, Jr., owner." The only evidence purporting to identify the occupant of the place of business and the ownership of the property is the testimony of Jack Arden. Mr. Arden testified: "I am Secretary-Treasurer of the Stroup Sheet Metal Works, Inc." It appears from this testimony that the occupant and owner is a corporation. The evidence contains no reference to "H. B. Stroup, Jr.," referred to in the indictment as owner of Stroup Sheet Metal Works. Thus, the record discloses a fatal variance between the indictment and the proof. *S. v. Stinson*, 263 N.C. 283, 139 S.E. 2d 558, and cases cited.

The record before us does not show defendant's trial counsel moved to dismiss as in case of nonsuit. Nor does defendant's appellate counsel call attention thereto. Indeed, the record before us does not comply with Rules 19(3) and 21, and the brief for appellant does not comply with Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783, *et seq.* Even so, defendant's conviction herein is not a bar to a subsequent prosecution based on like charges relating to a building occupied by and property of Stroup Sheet Metal Works, Inc. *S. v. Stinson, supra.*

Under the circumstances, we deem it appropriate, in the exercise of our general supervisory jurisdiction, N. C. Constitution, Article IV, § 10(1), to take notice of said fatal variance *ex mero motu.* Hence, the verdict and judgment in No. 63-1016 are vacated; and it is ordered that the action be and it is dismissed "as in case of nonsuit" for fatal variance between the indictment and proof.

Reversed.

STATE v. DELLA TAYLOR SMITH.

(Filed 24 February, 1965.)

1. Trespass § 13—

In a prosecution under G.S. 14-134 for refusing to leave private premises after being directed to do so by the person in lawful possession, the warrant or indictment must charge, in substance at least, that defendant's acts were "without a license therefor."

2. Criminal Law § 121—

Arrest of judgment for fatal defect in the warrant does not preclude the State from thereafter proceeding upon a sufficient warrant or indictment.

APPEAL by defendant from *Morris, J.,* June Session 1964 of MARTIN, docketed and argued as No. 5 at Fall Term 1964.

In *S. v. Smith,* 262 N.C. 472, 137 S.E. 2d 819, *q.v.,* this Court arrested the judgments on the verdicts based on counts in Indictment No. 3011. *Certiorari* was allowed with reference to Indictment No. 3091, permitting defendant to file a case on appeal and *complete* record showing, *inter alia,* the proceedings, if any, in the Recorder's Court of Martin County. Present consideration is upon such case on appeal and record.

The warrant of arrest charged that defendant, on April 6, 1964, "did unlawfully, wilfully, and intentionally refuse to leave the premises of Everett Oil Company after being ordered to do so by Roscoe Everett," etc. It *now* appears that defendant, when called to trial on said warrant in the Recorder's Court of Martin County, demanded a trial by jury. Thereupon, as provided by Session Laws of 1945, Chapter 113, Section 2, the case was transferred to the Superior Court of Martin County. Hence, the criminal prosecution could proceed in the superior court only on bill of indictment. *S. v. Peede,* 256 N.C. 460, 124 S.E. 2d 134.

Indictment No. 3091, on which the criminal prosecution now under consideration was based, was returned. It charges that defendant on April 6, 1964, "unlawfully and wilfully and intentionally did fail and

refuse to leave the premises of Everett Oil Company after having been ordered to do so by Roscoe Everett, partner," etc.

At the conclusion of the trial on said Indictment No. 3091, the jury returned a verdict of guilty. Judgment was pronounced. Defendant excepted and appealed.

Attorney General Bruton and Deputy Attorney General McGalliard for the State.

Albion Dunn and M. E. Cavendish for defendant appellant.

BOBBITT, J. When the appeal was first before us (262 N.C. 472), the record proper did not disclose the proceedings, if any, in the Recorder's Court of Martin County. The record now before us dispels any doubt as to the jurisdiction of the Superior Court of Martin County to proceed by bill of indictment.

In the trial below, defendant was not represented by counsel. On appeal, defendant, through counsel, contends Indictment No. 3091 is fatally defective and, in substance if not in words, moves in this Court for arrest of judgment. The contention has merit.

G.S. 14-134, in pertinent part, provides: "If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor . . ." It seems clear it was intended that Indictment No. 3091 charge a violation of this statutory offense.

The words, "without a license therefor," do not appear in Indictment No. 3091. It was held in *S. v. Bullard,* 72 N.C. 445, that an indictment is fatally defective if it does not charge this constituent element of said statutory offense.

It appears that the evidence, when considered in the light most favorable to the State, was sufficient, upon legal principles stated in *S. v. Clyburn,* 247 N.C. 455, 101 S.E. 2d 295, to support a conviction of violation of G.S. 14-134. Even so, a valid bill of indictment is an essential of jurisdiction. *S. v. Helms,* 247 N.C. 740, 745, 102 S.E. 2d 241. While *S. v. Clyburn, supra,* and *S. v. Cooke,* 246 N.C. 518, 98 S.E. 2d 885, were decided on other grounds, it is noteworthy that the warrants on which these criminal prosecutions were based charged in substance that the defendant's alleged entry or refusal to leave was without a license therefor.

For the reasons indicated, the judgment is arrested. In legal effect, this vacates the verdict and judgment. However, the State, if so advised, may proceed against defendant upon a sufficient bill of indictment. *S. v. Strickland,* 243 N.C. 100, 89 S.E. 2d 781.

Judgment arrested.

MORRIS L. KIGHT v. DENNIS JOSEPH SEYMOUR AND DENNIS JOSEPH SEYMOUR, JR., BY HIS GUARDIAN AD LITEM DENNIS JOSEPH SEYMOUR.

(Filed 24 February, 1965.)

1. Automobiles §§ 41a, 41c— Negligence of one motorist may be proximate cause of collision between two other motorists.

Evidence tending to show that defendant driver was traveling some 75 miles per hour and attempted to pass another vehicle proceeding in the same direction when plaintiff was approaching from the opposite direction, that defendant driver did not slacken speed and struck the car he was attempting to pass, causing the driver of that car to lose control and swerve across the highway and crash into plaintiff's automobile, *held* sufficient to be submitted to the jury on the issue of negligence, whether defendant's negligence was the proximate cause of the accident being for the jury under the evidence, notwithstanding defendant's car did not collide with plaintiff's vehicle.

2. Automobiles § 55—

Evidence that the son was driving the car owned by the father for use of the family and was driving with the father's knowledge and permission is sufficient to be submitted to the jury on the question of agency under the family purpose doctrine.

3. Damages § 12—

Where plaintiff introduces some competent evidence that his injuries were permanent, the introduction of the Mortuary Tables in evidence is not error. G.S. 8-46.

4. Trial § 52—

Motion to set aside the verdict on the ground that the damages were excessive is addressed to the discretion of the trial court and is not reviewable in the absence of abuse of discretion.

APPEAL by defendants from *Fountain, J.*, September 1964 Session of CAMDEN.

Action in tort to recover for personal injuries and damages to an automobile allegedly caused by the actionable negligence of Dennis Joseph Seymour, Jr., an infant who is defended here by a guardian *ad litem*, in the operation of a family purpose automobile, owned by his father Dennis Joseph Seymour, with his father's consent, knowledge and as his agent.

Plaintiff and defendants offered evidence. The jury found by its verdict that plaintiff was injured and his automobile was damaged by defendants' negligence, as alleged in the complaint, that plaintiff did not by his negligence contribute to his injuries and damages to his automobile as alleged in the answer, and awarded $15,000 damages for personal injuries and $535 for damages to plaintiff's automobile.

From a judgment in accord with the verdict, defendants appeal.

LeRoy, Wells & Shaw by Charles C. Shaw, Jr., for defendant appellants.

John T. Chaffin for plaintiff appellee.

PER CURIAM. Defendants assign as error the denial of their motion for judgment of compulsory nonsuit made at the close of all the evidence.

Plaintiff's evidence would permit a jury to find the following facts: State Highway No. 343 is a two-lane highway, and runs between Camden and Shiloh in Camden County in a general east-west direction. A few minutes after 11 p.m. on 9 August 1961, plaintiff, a man 30 years old, was driving his automobile eastwardly on this highway toward Shiloh at a speed of 50 to 55 miles an hour in his right lane of traffic. The highway was straight and level. It was a clear night, without fog or rain or drizzle. About 350 to 400 feet ahead, he saw approaching him on the highway two automobiles, one behind the other, traveling, in his opinion, at a speed of 75 to 80 miles an hour. The front automobile approaching him was driven by Richard Mansfield, Jr.: the automobile behind the Mansfield automobile was driven by Dennis Joseph Seymour, Jr. When these approaching automobiles were 350 to 400 feet from him, Seymour pulled his automobile into his left lane of traffic to pass the Mansfield automobile. When he saw the Seymour automobile turn into the left lane of traffic to pass the Mansfield automobile, he put his foot on his brake. He just eased it, because he thought Seymour would see him coming head-on and drop back behind the Mansfield automobile. Seymour did not slacken the speed of his automobile, but came straight on. Whereupon, he applied his brakes hard and began pulling to the shoulder of the road on his right. He slowed his automobile to less than 10 miles an hour, and had two wheels of it on the highway and two on the shoulder. The Seymour automobile and the Mansfield automobile continued to come on without slackening speed. The Seymour car came in between his automobile and the Mansfield car, striking the Mansfield car. Then the Mansfield car crossed over into its left lane of traffic and crashed into his automobile. His automobile was not struck by the Seymour automobile. In the collision he sustained personal injuries and his automobile was practically demolished. From these facts the jury could draw these reasonable inferences and conclusions: Dennis Joseph Seymour, Jr., was operating the automobile, as alleged in the complaint, in violation of G.S. 20-140, the reckless driving statute; at a rate of speed greater than was reasonable and prudent under existing conditions and at a rate of 75 miles an hour in violation of G.S. 20-141(a) and (b)4; in driving to the left side of the center of the highway and attempting

to overtake and to pass another automobile proceeding in the same direction when the highway ahead was not free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be made in safety, in violation of G.S. 20-150(a); and in failing to keep a proper lookout in the direction he was traveling; and that by reason of such negligence on his part in the operation of the automobile he struck the automobile of Mansfield and caused the Mansfield automobile to swerve across the highway and crash into plaintiff's automobile; and that the resulting collision of the Mansfield automobile with plaintiff's automobile followed so quickly and is so connected with the negligence of Seymour that Seymour's negligence constituted a direct and continuous chain of events that made it a proximate cause of plaintiff's injuries and damage to his automobile, and that any person of ordinary prudence could have reasonably foreseen that such a result was probable under the facts as they existed. Plaintiff's evidence is amply sufficient to carry the case to the jury as against Seymour, Jr. Plaintiff's evidence, and defendants' evidence, shows that Seymour, Jr., was operating the family purpose automobile owned by his father, with his father's knowledge and permission and as his agent, so as to impose liability on Seymour, Sr., for the negligent operation of his family purpose automobile by his son. Strong's N. C. Index, Vol. 1, Automobiles, § 55. There is no evidence in the record to show that plaintiff was guilty of contributory negligence as a matter of law. The court properly denied plaintiff's motion for a judgment of compulsory nonsuit.

Defendants assign as error the admission in evidence, over their objection, of the Mortuary Tables, G.S. 8-46, on the ground plaintiff has no evidence his injuries were of a permanent nature, and rely on *Hunt v. Wooten*, 238 N.C. 42, 76 S.E. 2d 326. This assignment of error is overruled. Dr. George A. Duncan is a specialist in orthopedic surgery practicing in Norfolk, Virginia. Defendants stipulated he is an expert in the field of orthopedics. He examined plaintiff. He testified: "My opinion is the collision could have caused the back sprain. When I saw him I thought he had some permanent disability."

Defendants' assignments of error to the charge have been examined and are overruled. The judge's charge fairly and accurately declared and explained the law arising on the evidence given in the case. The jury under application of well-settled principles of law resolved the issues of fact against the defendants.

There is no merit to defendants' assignment of error that the judge abused his discretion in refusing to set the verdict aside because it was excessive. The trial judge's decision on this motion will not be disturbed on appeal unless it is obvious that he abused his discretion, and no such

abuse of discretion appears. *Hinton v. Cline,* 238 N.C. 136, 76 S.E. 2d 162.

In the trial below we find

No error.

IN RE: DISCHARGE OF ROBERT C. BURRIS BY THE CITY MANAGER, THE CIVIL SERVICE COMMISSION AND THE CITY COUNCIL OF THE CITY OF ASHEVILLE.

(Filed 24 February, 1965.)

1. Appeal and Error § 49—

Where there is no exception to the findings of fact, an appeal presents only whether the facts found support the conclusions of law.

2. Master and Servant § 10; Municipal Corporations § 9—

Findings to the effect that a municipal employee, with knowledge that the city would have to acquire certain realty, purchased an interest in such realty, *held* ground for the discharge of the employee, since the facts disclose that the employee knowingly and deliberately brought about a conflict of interest between himself and his employer.

APPEAL by petitioner Robert C. Burris from *Clarkson, J.,* 23 November 1964 Session of BUNCOMBE.

This case was here at the Spring Term 1964 and its disposition then is reported as *In re Burris,* 261 N.C. 450, 135 S.E. 2d 27. Petitioner, a Civil Service employee in the Tax Department of the City of Asheville, was discharged by the City Manager when petitioner acquired an interest in real property which the City was attempting to buy for use in connection with the Municipal Airport. The Civil Service Commission, after giving petitioner a full hearing as provided by N. C. Sess. Laws 1953, ch. 757, recommended his discharge upon findings here summarized:

Sometime prior to 1963, petitioner procured from approximately 40 persons 8 deeds to himself and to his wife. These deeds purported to convey to them a one-third reversionary interest in the land on which the Boiling Springs Baptist Church is located. For these deeds petitioner paid approximately $1,000.00 and made an agreement with the grantors that *when the property was sold* the proceeds of the sale would be divided one-third to the Board of Education of Henderson County, one-third to the trustees of the church, and one-third to petitioner and his wife. The City of Asheville needs the property described in the deeds

to eliminate a hazard at the entrance of the Municipal Airport, and the City intends to acquire the property. At the time petitioner procured the 8 deeds to himself and to his wife, he knew that the City needed the property and intended to acquire it. Because of the doubtful title to the church property and the purchase by petitioner and his wife of a purported interest in it, the City's negotiations for the purchase of the property have been impeded.

Upon petitioner's request the City Council reviewed the action of the Commission and unanimously approved it. Petitioner then sought judicial review by a writ of *certiorari* issued by the resident judge of the district. When the matter came on for hearing, however, the judge was of the opinion that the Superior Court was without authority to review the findings of fact and conclusions of either the Commission or the City Council. He dismissed the proceeding, and petitioner appealed. We held that, since petitioner's removal had been effected in a *quasi*-judicial proceeding, he was "entitled to have the court pass upon the question whether or not the facts found are sufficient under the law and the regulations of the Civil Service Board to constitute a valid cause of the petitioner's discharge," *In re Burris, supra* at 454, 135 S.E. 2d at 30, and we remanded the cause to the Superior Court to pass upon that question.

Pursuant to this direction, on November 23, 1964, Judge Clarkson, after considering the entire record, and specifically the findings of fact made by the Commission and the Council, concluded as a matter of law that the facts found show that petitioner was in violation of the regulations of the Civil Service Commission in that he had caused to arise a conflict of interest between himself and his employer, the City of Asheville. He held that such conduct constituted a valid cause for petitioner's discharge and dismissed the proceedings. Petitioner excepted to the signing of the judgment and appealed. He assigns as error only the conclusions of law in the judgment.

W. M. Styles for petitioner-appellant.

O. E. Starnes, Jr., for the City of Asheville, respondent-appellee.

William J. Cocke for Civil Service Board of the City of Asheville, respondent-appellee.

PER CURIAM. Petitioner's assignments of error do not call into question the findings of fact made by the Civil Service Commission or the evidence on which they are based. This appeal presents only the question whether the facts found support Judge Clarkson's conclusions of law. *Merrell v. Jenkins,* 242 N.C. 636, 89 S.E. 2d 242.

The findings of fact unequivocally disclose that petitioner knowingly and deliberately — and at an expenditure of considerable time and effort — brought about a conflict of interest between himself and his employer.

> "Manifestly, when a servant becomes engaged in a business which necessarily renders him a competitor and rival of his master, no matter how much or how little time and attention he devotes to it, he has an interest against his duty. It would be monstrous to hold that the master is bound to retain the servant in his employment after he has thus voluntarily put himself in an attitude hostile to his master's interests." *Dieringer v. Meyer,* 42 Wis. 311, 313, 24 Am. Rep. 415, 416.

Where an employee deliberately acquires an interest adverse to his employer, he is disloyal, and his discharge is justified. 3 Am. Jur. 2d, *Agency* § 48 (1962).

The judgment of the court below is

Affirmed.

MILLARD NIX, ADMINISTRATOR OF THE ESTATE OF LONNIE NIX, DECEASED v. EVERETT DARWIN EARLEY.

(Filed 24 February, 1965.)

1. Automobiles § 33—

A "Y" formed by the intersection at a 45 degree angle of a rural paved road with a State highway some 117 feet outside the city limits of a municipality, the central area of the highway being marked with yellow lines indicating a "no travel" zone, *held* not to constitute the intersection an unmarked crosswalk. G.S. 20-173, G.S. 20-174, G.S. 20-38(1).

2. Automobiles § 42k—

Evidence *held* to show contributory negligence as a matter of law on the part of a pedestrian walking into the path of defendant's approaching automobile at a place not constituting a marked or unmarked crosswalk.

APPEAL by plaintiff from *Pless, J.,* October 1964 Civil Session of McDOWELL.

Administrator's action to recover damages for the alleged wrongful death of his intestate. The pleadings raise issues of negligence and contributory negligence.

Evidence was offered by plaintiff and by defendant.

The basic factual situation may be summarized as follows:

On Friday, April 3, 1964, about 5:40 p.m., Lonnie Nix, 52, a pedestrian, while attempting to cross from the south to the north side of U. S. Highway #70, was struck by a westbound Ford car owned and operated by defendant, thereby sustaining injuries resulting in his death later that day.

Highway #70 runs generally east and west. The paved portion thereof, at the place where Lonnie Nix attempted to cross, is 37.2 feet wide. It is outside (117.5 feet west of) the corporate limits of Marion, N. C.

A motorist, traveling west on Highway #70 within the corporate limits, reaches the intersection of said highway and Logan Street where traffic is controlled by an electric signal device. Continuing west, a street or road referred to as Fern Avenue extends north (right) from Highway #70. Continuing west, beyond the corporate limits, there extend north (right) from Highway #70 two entrances to a grocery store known as Food Town. The eastern and western entrances are separated by a grass-covered area or island. Extending south from Highway #70, there is a paved road referred to as Hammertown Road or Rural Paved Road #1208.

It was stipulated that Hammertown Road or Rural Paved Road #1208 comes into or intersects Highway #70 on its south side; that it does not cross to the opposite side of the highway; that it intersects with Highway #70 at an angle of approximately 45 degrees; and that said intersection is immediately east of and directly across from the front of the property occupied by Food Town.

West of its intersection with Hammertown Road or Rural Paved Road #1208, the central area of Highway #70 is marked with yellow lines as a "no travel" zone.

Two brothers, Lonnie Nix, the deceased, and Alvin Nix, attempted to cross from the south to the north side of Highway #70. Alvin, in front of Lonnie, escaped injury. Lonnie's attempt was unsuccessful.

Defendant had proceeded west from said Logan Street intersection. Plaintiff's witness (Richey), who was standing on the grass-covered island between the entrances to Food Town, saw defendant's car "back up as far as the traffic signal lights" and "as it came on down the road toward Lonnie." Richey had been to Food Town, was going to cross from the north to the south side of Highway #70 and "was waiting on traffic to pass so (he) could get across." The investigating State Highway Patrolman testified there was "no indicated pedestrian crosswalk there anywhere near the area where this accident occurred."

At the conclusion of all the evidence, the court, allowing defendant's motion therefor, entered judgment of involuntary nonsuit. Plaintiff excepted and appealed.

Wm. D. Lonon for plaintiff appellant.
E. P. Dameron for defendant appellee.

PER CURIAM. After careful and full consideration of the evidence, we are of opinion, and so decide, that there is no evidence sufficient to support plaintiff's allegation that Lonnie Nix was crossing Highway #70 within an unmarked crosswalk at an intersection. G.S. 20-173; G.S. 20-174; G.S. 20-38(l).

If it be conceded that the evidence was sufficient to require submission of an issue as to defendant's actionable negligence, it is manifest that the negligence of Lonnie Nix was at least one of the proximate causes of his fatal injuries. The only reasonable conclusion to be drawn from the evidence is that Lonnie Nix, notwithstanding he could and should have observed the approach of defendant's car, walked or ran directly into the path thereof. The applicable legal principles are stated in *Blake v. Mallard*, 262 N.C. 62, 136 S.E. 2d 214, and cases cited.

On the grounds stated, the judgment of involuntary nonsuit is affirmed.

Affirmed.

HENRY A. MONK v. TRAVIS H. FLANAGAN, T/A GREENVILLE TOBACCO CURING COMPANY, AND CHARLIE BARNES.

(Filed 24 February, 1965.)

Negligence § 24a—

Evidence that plaintiff was injured when he turned the knob on the door of a tobacco curing "pot burner" and as a result the door flew open and a blast of hot steam, scalding oil, hot ashes and soot erupted onto his right arm, *held* insufficient to overrule nonsuit, since an inference of negligence cannot rest on conjecture or surmise, but only upon a premise established by proof.

APPEAL by plaintiff from *Morris, J.*, 21 September 1964 Civil Session of PITT.

Action of tort to recover damages for personal injuries sustained when plaintiff, who was engaged in curing tobacco in a barn, turned

the knob on the door of a tobacco curing burner, commonly referred to as a "pot burner," and as a result the door flew open and a blast of hot steam, scalding oil and hot ashes and soot erupted from the "pot burner" onto his right hand and arm. That such explosion was allegedly caused by the negligence of Flanagan, t/a Greenville Tobacco Curing Company, acting through and by his agent Barnes, in installing, adjusting, repairing, and changing this "pot burner" and the smokestack incident to its operation.

From a judgment of involuntary nonsuit entered at the close of plaintiff's evidence, he appeals.

Willis A. Talton for plaintiff appellant.

James and Speight by William C. Brewer, Jr. and W. W. Speight for defendant appellees.

PER CURIAM. A critical study of plaintiff's evidence, considered in the light most favorable to him, leads us to the conclusion that plaintiff has failed to show any actionable negligence on the part of the defendants, or either of them, resulting in his unfortunate injuries. Plaintiff has no evidence that would reasonably warrant an inference of fact that the flying open of the door of the "pot burner" when he turned its knob, and the eruption therefrom of a blast of hot steam, scalding oil and hot ashes and soot was caused by any act of defendants. "An inference of negligence cannot rest on conjecture or surmise. [Citing authority.] This is necessarily so because an inference is a permissible conclusion drawn by reason from a premise established by proof." *Sowers v. Marley,* 235 N.C. 607, 70 S.E. 2d 670. His evidence leaves it all in the realm of mere conjecture, surmise, and speculation, and one surmise may be as good as another. Nobody knows. "A cause of action must be something more than a guess." *Lane v. Bryan,* 246 N.C. 108, 97 S.E. 2d 411. "Any other interpretation of the law would unloose a jury to wander aimlessly in the fields of speculation." *Poovey v. Sugar Co.,* 191 N.C. 722, 133 S.E. 12. "Cases cannot be submitted to a jury on speculations, guesses or conjectures." *Hopkins v. Comer,* 240 N.C. 143, 81 S.E. 2d 368. A resort to a choice of possibilities is guesswork, not decision. *Hanrahan v. Walgreen Co.,* 243 N.C. 268, 90 S.E. 2d 392.

The judgment of involuntary nonsuit is

Affirmed.

STATE v. RAYMOND HARDING.

(Filed 24 February, 1965.)

Criminal Law § 92—

The trial court has discretionary power, after the commencement of argument, to permit the State to reopen the case for testimony of a witness who had been tardily located, defendant having and exercising the right of cross-examination.

APPEAL by defendant from *Clarkson, J.*, October 30, 1964, Session of BUNCOMBE.

Defendant is charged with criminal offenses in two indictments: (1) Case No. 64-581, assault upon a female, Donna Massey, with intent to commit rape; (2) Case No. 64-582, crime against nature with and upon Donna Massey. It is alleged that the offenses were committed in Buncombe County on 18 July 1964. The cases were consolidated for trial.

Plea: Not guilty. Verdict: Guilty as charged.

Judgment: Imprisonment for a term of 12 years on each count, the terms to run concurrently.

Attorney General Bruton and Deputy Attorney General McGalliard for the State.

W. M. Styles for defendant.

PER CURIAM. Defendant's motions for nonsuit were properly overruled. Evidence of the *corpus delicti* is full and direct. Defendant is identified as the perpetrator of the felonies. The testimony of the prosecutrix is corroborated in every detail. No purpose can be served here in recounting the evidence.

After the solicitor had commenced his argument to the jury, the judge, over the objection of defendant, permitted the State to reopen the evidence and take the testimony of a witness, William McElrath, who had been tardily located and brought into the courtroom, and whose name had been frequently mentioned by other witnesses. He was cross-examined by defendant's counsel, and defendant was permitted to introduce evidence in rebuttal. The judge committed no error in permitting McElrath to testify. "The trial court has discretionary power to permit the introduction of additional evidence after both parties have rested, even after the argument has begun. But the opposing party should be given opportunity to introduce evidence in rebuttal." 1 Strong: N. C. Index, Criminal Law, § 92, p. 760, and cases cited.

No error.

STATE v. ROBERT WILLIAMS.

(Filed 3 March, 1965.)

1. Criminal Law § 31—

Where it is common knowledge that a defendant in a case on appeal has fled this Country and gone to a communist country and there engaged in propaganda inimical to this Country, our courts will take judicial notice of such activity.

2. Criminal Law § 139—

Where it is a matter of common knowledge and admitted by defendant's counsel that defendant fled the Country between the time of judgment of the State court finding no error in his trial and receipt of mandate from the U. S. Supreme Court on *certiorari* remanding the cause for consideration in the light of applicable Federal decisions, the North Carolina Supreme Court, in its discretion, may order the case left off the docket until further direction to the contrary by the Court.

ON mandate from the Supreme Court of the United States, 378 U.S. 548, 12 L. Ed. 2d 1032 (22 June 1964). This mandate from the Supreme Court of the United States was docketed in the Supreme Court of North Carolina as Case No. 443, Fall Term 1964, and as Case No. 495, Spring Term 1965.

This was a criminal action tried at 10 May 1960 Regular Criminal Term of Union County *de novo* on appeal from the recorder's court of Union County on a warrant charging that defendant on 11 March 1960 in Union County "unlawfully and willfully, did enter and trespass upon the land and premises of Jones Drug Company, Inc., after having been forbidden to enter said premises and not having a license to enter said premises and did unlawfully refuse to leave upon request contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

Defendant entered a plea of Not Guilty. Verdict: Guilty of trespass as charged in the warrant. Judge Frank M. Armstrong presiding, in accord with the verdict, sentenced the defendant to a term of imprisonment for 30 days, which prison sentence by consent of the defendant in open court was suspended for a period of one year on the following conditions: (1) That he pay a fine of $10 and the costs of the action, and (2) that he remain of good behavior, not violate any laws of this State, and that in the event defendant violates the terms of this judgment, capias and commitment shall issue. From this judgment defendant appealed to the Supreme Court.

This Court found No Error in the trial. 253 N.C. 804, 117 S.E. 2d 824. This opinion was filed 20 January 1961.

Defendant applied to the Supreme Court of the United States for a writ of *certiorari*, which was allowed 22 June 1964, 378 U.S. 548, 12 L. Ed. 2d 1032. The *per curiam* opinion, which appears in 378 U.S. 548, 12 L. Ed. 2d 1032, reads as follows:

> "PER CURIAM. The petition for writ of *certiorari* is granted, the judgment vacated and the case remanded to the Supreme Court of North Carolina for consideration in light of *Robinson v. Florida*, ... U.S. ....., 12 L. Ed. 2d 771, 84 S. Ct. ....., decided this date. Mr. Justice Douglas would reverse outright on the basis of the views expressed in his opinion in *Bell v. Maryland*, ... U.S. ....., 12 L. Ed. 2d 867, 84 S. Ct. ....., decided this date.
>
> "Mr. Justice Black, Mr. Justice Harlan and Mr. Justice White dissent."

T. W. Bruton, Attorney General, and Ralph Moody, Deputy Attorney General, for the State.

T. H. Wyche, W. B. Nivens, Conrad J. Lynn, and Leonard B. Boudin for defendant.

PARKER, J. The Attorney General of North Carolina on 3 February 1965 filed in this Court a motion and supporting petition requesting the Court, as stated in the motion, to dismiss defendant's appeal for the reason that the said defendant, Robert Williams, "has fled the jurisdiction of the Courts of North Carolina and has sought refuge and asylum in Communist Cuba and has become a Communist propaganda agent for the Castro Government of Communist Cuba; that the said defendant Robert Williams, as set forth in the petition hereto annexed, is not entitled to any appeal or consideration by any of the Courts of North Carolina, including this Court," and requested that this motion be heard on 16 February 1965 by this Court. The Attorney General of North Carolina sent a copy of this motion and supporting petition to defendant's two North Carolina attorneys, T. H. Wyche and W. B. Nivens, who were defendant's attorneys of record when the case was heard on appeal by this Court at the Fall Term 1960, but did not send copies of these papers to Conrad J. Lynn of New York, N. Y., who was associated with Wyche and Nivens in the defense of defendant, and to Leonard B. Boudin of New York, N. Y., who was an attorney of record for defendant in the United States Supreme Court. Wyche and Nivens forwarded to Lynn the papers forwarded to them by the Attorney General, and he in turn notified Boudin of these papers.

The petition attached to the motion was verified by Ralph Moody, Deputy Attorney General of North Carolina. The pertinent parts of this verified petition are as follows:

"(3) On information and belief: That the defendant Robert Williams on or about Sunday, August 27, 1961, became involved in an incident at Monroe, North Carolina, whereby the said defendant Robert Williams, and his fellow confederates and conspirators, May Mallory, Richard Crowder, Harold Reep, John Cyril Lowry, and many others, kidnaped and held prisoners and as hostages G. Bruce Stegall and his wife Mabel W. Stegall; all of which is shown in a record on file in the Office of the Clerk of the Supreme Court of North Carolina, the same being No. 438, Fall Term, 1964 and entitled STATE OF NORTH CAROLINA v. MAY MALLORY, RICHARD CROWDER, ET ALS; that as shown in the deposition of Robert Williams on page 317 of the above cited record the said Robert Williams fled the jurisdiction of this Court on August 27, 1961, after holding the Stegalls as hostages, and after attempting over the telephone to secure the release of certain colored persons in the Union County jail through the instrumentality of hostages.

"(4) On information and belief: That the said defendant Robert Williams fled to the Nation or Country which is now known as 'Communist Cuba,' which is a nation now governed by a dictator by the name of 'Castro,' who is a mere agent and puppet of the Soviet Government and who granted asylum to the defendant Robert Williams; that the said defendant Robert Williams is now a fugitive from justice and has fled the jurisdiction of the Courts of North Carolina, as well as this Court, and is now a propaganda agent for the Communist dictator Castro; that the said defendant Robert Williams has been monitored in the State of Florida in giving propaganda broadcasts for Communist Cuba, both over radio and television; that the said defendant Robert Williams has also caused propaganda tracts or pamphlets to be circulated in the United States, urging the colored people to engage in guerilla warfare against white persons, and also giving directions for the manufacture of Molotov Cocktails, bombs and other explosives commonly used by guerillas; that the petitioners request this Court to take judicial notice of any information in the files of the State Bureau of Investigation, as well as the files of the Federal Bureau of Investigation, relating to the defendant Robert Williams; that this Court has the power and authority to dismiss said appeal as shown by previous decisions of this Court (STATE v. JACOBS, 107 N.C. 772; STATE v. DEVANE, 166 N.C. 281;

STATE v. DALTON, 185 N.C. 606; SAVAGE v. STATE, 174 P. 2d 272 — Okla.); that it is not a denial of any federal constitutional rights for a state court to dismiss appellate process because the accused has become a fugitive from justice (ALLEN v. GEORGIA, 166 U.S. 138, 41 L. Ed. 949, 17 S. Ct. 525; SMITH v. UNITED STATES, 94 U.S. 97, 24 L. Ed. 32)."

On 9 February 1965 Conrad J. Lynn, counsel for defendant, filed a verified answer to the Attorney General's petition, in which he does not deny that defendant Robert Williams has fled to Cuba, and is now a propaganda agent for the Communist dictator Castro, and is engaged in the activities in Cuba set forth in the Attorney General's verified petition to dismiss. Lynn's verified answer to the petition states: Defendant, "an angry, black man, fled to Cuba and proclaims to all and sundry his hatred of the system of segregation prevalent in the southern states, including North Carolina." Leonard B. Boudin filed a verified answer to the Attorney General's petition to dismiss, but he does not deny that defendant Williams is a fugitive from justice in Cuba and is engaged in the activities there set forth in the verified petition of the Attorney General.

As we understand the majority *per curiam* opinion of the United States Supreme Court, it vacates the judgment of this Court finding No Error in defendant's trial at the 10 May 1960 Regular Criminal Term of Union County, and remands the case to us for consideration in the light of *Robinson v. Florida,* ..... U.S. ....., 12 L. Ed. 2d 771.

In the verified answer of Conrad J. Lynn, attorney of record for defendant, in reply to the Attorney General's motion to dismiss defendant's appeal, it is stated defendant "has fled to Cuba," and consequently he is beyond the jurisdiction of the courts of North Carolina. A deposition of defendant Williams read in evidence for defendant in the trial of *S. v. Lowry* and *S. v. Mallory,* 263 N.C. 536, 139 S.E. 870, states in part, "* * * I left the country * * *."

The verified answers of defendant's counsel Conrad J. Lynn and of Leonard B. Boudin do not controvert the allegations in the Attorney General's verified petition that, on information and belief, defendant is in Cuba and is engaged in certain activities there, which are not conducive to the peace, tranquility and welfare of the people of this State and Nation.

It is a fact generally known from the radio, television, and the press that defendant Williams is in Cuba and is engaged in spreading propaganda there to the United States by radio, television and public statements that, to say the least, is not to the best interests of this State and Nation. We take judicial notice of such activity by him "for justice

does not require that courts profess to be more ignorant than the rest of mankind." *S. v. Vick,* 213 N.C. 235, 195 S.E. 779.

In *S. v. Jacobs,* 107 N.C. 772, 11 S.E. 962, the Court stated: "In appellate courts, where questions of law only can be reviewed, and in the absence of any statute specifically regulating the procedure, if there be satisfactory evidence that a defendant, whose appeal is founded upon exceptions entered on the trial below and has been regularly called for hearing, has escaped and is not in actual or constructive custody, it is clearly within the sound discretion of the Court to determine whether the exceptions shall be argued and passed upon, the appeal dismissed, or the hearing postponed to await the recapture of the alleged defendant. [Citing numerous authorities.] In the exercise of this power, the courts of the different States have not adopted uniform rules of practice, even where there are no statutory or constitutional provisions regulating the mode of procedure. But while the general, if not universal, rule has been to refuse a motion of a defendant who had absconded and put himself in contempt of court, to dispose of his appeal or make any order affecting it *at his instance or for his benefit,* the courts of the different States have as a general rule where there was no express statutory requirement in reference to it, and where the prosecuting officer was a moving party, continued, dismissed or heard the appeal according to the circumstances of the case or the early precedents of the particular court."

In *S. v. Anderson,* 111 N.C. 689, 16 S.E. 316, which was a conviction for murder, the Court again affirmed the doctrine that the prisoner having made his escape pending his appeal to the Supreme Court, this Court, in the exercise of its sound discretion, may either dismiss the appeal or hear and determine the assignments of error or continue to await the recapture of the fugitive, and, upon motion of the Attorney General, this Court in its discretion dismissed the appeal.

In *S. v. Cody,* 119 N.C. 908, 26 S.E. 252, the defendants were convicted of burglary, sentenced, and appealed to the Supreme Court. Before the appeal was called for argument, they had escaped from custody and were at large. The case was continued from term to term, and they were still at large. The Court, after quoting the rule set forth in *S. v. Anderson, supra,* said: "In the present instance we have heretofore pursued the latter of the three courses indicated, having continued the cause till this the fifth term. The prisoners not yet having returned after the lapse of more than two years indulgence, we now adopt the first course and dismiss the appeal. Besides, upon looking into the record, we find there were only two assignments of error, neither of which is a valid objection."

In *S. v. Dixon,* 131 N.C. 808, 42 S.E. 944, which was a conviction for murder in the first degree, this Court reaffirmed the law stated in the *Jacobs, Cody,* and *Anderson* cases, and affirmed the judgment, saying: "One who thus dismisses himself abandons his appeal and has no ground to invoke a review of the trial by the appellate court."

In *S. v. Keebler,* 145 N.C. 560, 59 S.E. 872, when the case was called for argument in the Supreme Court, counsel of record for the defendants states that his clients, who had been convicted of larceny, had broken jail and were beyond the process of the Court. The Court, upon motion of the Attorney General, dismissed the appeal, saying: "We will not deal with a defendant who is in the woods." In *S. v. Moses,* 149 N.C. 581, 63 S.E. 68, the Court said: "It appearing that defendant has broken jail and is still at large, the appeal is dismissed."

In *S. v. DeVane,* 166 N.C. 281, 81 S.E. 293 the Court held that when an appellant escapes pending his appeal to the Supreme Court, the Court in its discretion will either dismiss the appeal or affirm the judgment or continue the case. In this case, pending the appeal, the defendant fled the jurisdiction of the Court. The Court affirmed the trial below after stating it had carefully reviewed the exceptions on the trial below and found no error that was prejudicial to the prisoner.

In *S. v. Dalton,* 185 N.C. 606, 115 S.E. 881, the Court reaffirmed the law stated in the above cited cases that when a prisoner escapes pending his appeal, this Court, in the exercise of its discretion, can either affirm the judgment or dismiss the appeal or continue the case. In this case the defendant had not docketed his appeal from a judgment upon his conviction of a capital felony in apt time, and had fled the jurisdiction of the State and remained absent until arrested and brought back. His appeal was dismissed.

In *Smith v. United States,* 94 U.S. 97, 24 L. Ed. 32, Chief Justice Waite said for a unanimous Court:

> "It is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render. In this case it is admitted that the plaintiff in error has escaped, and is not within the control of the court below, either actually, by being in custody, or constructively, by being out on bail. If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest. Under such circumstances, we are not inclined to hear and decide what may prove to be only a moot case."

In *Bonahan v. Nebraska,* 125 U.S. 692, 31 L. Ed. 854 (in the L. Ed. the name of plaintiff in error is erroneously given as Bohanan), the plaintiff in error was convicted of murder in a State court, which conviction was affirmed by the Supreme Court of Nebraska, and by a writ of error the cause was removed to the Supreme Court of the United States. During the pendency of the writ, plaintiff in error escaped and was not within the control of the court below. The Court states: "* * * it is ordered that the submission of the case be set aside; and that, unless the plaintiff in error is brought or comes within the jurisdiction and under the control of the court below, on or before the last day of this term, the cause be thereafter left off the docket until directions to the contrary."

In *Eisler v. United States,* 338 U.S. 189, 93 L. Ed. 1897, petitioner was convicted for contempt of Congress, fled the United States after the Supreme Court had granted his petition for writ of *certiorari,* and after his cause had been submitted on the merits. A majority of the Court in a *per curiam* opinion held that the case should be removed from the docket until a direction to the contrary shall issue. The *per curiam* opinion cites in support of its decision the *Smith* and *Bonahan* cases. Mr. Justice Frankfurter, with the concurrence of Chief Justice Vinson, dissented, taking the view that the case should be dismissed, since the Court could entertain and decide a case only if there is a litigant before it against whom its decision may be enforced. In the dissenting opinion of Mr. Justice Frankfurter, it is stated in substance that the Attorney General requested the Secretary of State to make application through the usual diplomatic channels for the return of Eisler to the United States. That application was made and resisted by Eisler, and the English Court with final authority in such matters dismissed the application. Since then Eisler has formally repudiated the jurisdiction of this country and has been elected to a political office in a foreign country. The Attorney General has abandoned all attempts to secure his return. Mr. Justice Murphy and Mr. Justice Jackson, in separate dissenting opinions, stated that in their opinion the decision of the Court should be announced, notwithstanding the escape of the prisoner.

For further discussion of the effect of a defendant's fleeing the jurisdiction of the court pending his appeal, see Wharton's Criminal Procedure, Anderson Ed., Vol. 5, § 2249; 24A C.J.S., Criminal Law, § 1825(4); 4 Am. Jur. 2d, Appeal and Error, § 275; Bishop's New Criminal Procedure, 2d Ed., Vol. 1, p. 236.

Defendant Williams has no right to flee to Cuba, and at the same time demand such relief and deliverances as the law may afford, while he persists in his flight and engages in activities in Cuba inimical to

the peace, tranquility and best interest of the people of his State and Nation. The law does not seek or tolerate revenge, but a proper administration of justice requires of every one due submission to the authority of its courts, before it will grant relief.

In *Allen v. Georgia,* 166 U.S. 138, 41 L. Ed. 949, the Court held that the dismissal by a state court of a writ of error taken by the accused from a conviction, because he has escaped and is a fugitive from justice, is not a denial of due process of law within the meaning of the Federal Constitution.

Under all the attendant facts here, we, absent a governing statute, in the exercise of our discretion, are of opinion that the Attorney General's motion to dismiss should not be allowed, but it is ordered, in the exercise of our discretion, that this case be left off the docket until a direction to the contrary shall issue. Such procedure is authorized by our decisions cited above and by the decisions of the Supreme Court of the United States cited above.

Motion to Dismiss Denied, but case ordered to be left off the docket until further order.

NATIONAL SPINNING COMPANY, INC. v. McLEAN TRUCKING COMPANY.

(Filed 3 March, 1965.)

1. Trial § 21—

On motion to nonsuit, plaintiff's evidence is to be considered in the light most favorable to it.

2. Negligence § 26—

The sufficiency of the evidence to overrule nonsuit must be determined in the light of the facts of each particular case, and nonsuit cannot be granted when the relevant facts are in dispute or opposing inferences are permissible from plaintiff's proof.

3. Carriers § 7— Evidence held for jury on issue of carrier's negligence in failing to provide trailer reasonably safe for unloading.

Evidence favorable to plaintiff tending to show that defendant's driver detached its trailer at plaintiff's dock for unloading by plaintiff's agents when the shipping documents should be received by plaintiff, that the driver set the air brakes but did not chock the wheels, and that when plaintiff's agents were unloading the trailer several days later the trailer rolled down the incline from the dock, causing the loading ramp which was spanning the distance between the trailer and the dock to fall with plaintiff's fork lift thereon, *held* sufficient to be submitted to the jury on the

issue of defendant's negligence in failing to exercise reasonable care to supply a trailer in a reasonably safe condition for unloading, and not to disclose contributory negligence as a matter of law.

APPEAL by plaintiff from *Cowper, J.*, October 1964 Session of BEAUFORT.

This is an action to recover for damage to plaintiff's fork lift or tow motor in the sum of $2,342.52, allegedly caused by the negligence of the defendant.

On 16 August 1961, the defendant delivered a trailer load of nylon yarn to the premises of the plaintiff. Upon opening the trailer it was discovered that the shipper had failed to include the packing slip or shipping documents. The defendant's driver was informed by plaintiff's agent, Mr. Nelson, the receiving clerk, that he could not unload the trailer without the shipping documents. The defendant's driver then obtained permission from his superior in Rocky Mount, North Carolina, to detach the trailer and leave it on the plaintiff's premises, pending the arrival of the shipping documents. The trailer was to be unloaded by the plaintiff upon receipt of the shipping documents, under the supervision of Mr. Nelson.

Pursuant to the plaintiff's instructions, the defendant's driver backed the trailer to plaintiff's dock, parked it, locked the air brakes, cranked down the little wheels in front of the trailer, detached the tractor from the trailer and drove away. Plaintiff's agent, Mr. Nelson, observed the manner in which the trailer was detached and inquired of the driver as to whether or not he was going to chock it. The driver said, "Oh, hell, it will hold." This statement was purportedly made immediately before the defendant's driver drove the detached tractor away without chocking the wheels of the trailer.

Five days later, on 21 August, the plaintiff undertook to unload the trailer under the supervision of its agent, Mr. Nelson.

The trailer had been loaded four cases across and four to five cases high. Each case weighed approximately 110 pounds. According to the evidence, the trailer had been backed up against the plaintiff's unloading dock. The dock is about 4½ feet from the ground. The driveway adjacent to the unloading dock slopes downhill away from the dock so as to facilitate drainage, to prevent water from standing in the dock area. A ramp, consisting of "a big steel piece of iron" and weighing approximately 300 pounds, was used as a gangplank over which the motorized fork lift or tow motor could travel in and out of the trailer in order to lift the pallets of yarn.

The motorized fork lift weighed approximately 2,000 to 2,500 pounds and was being operated at the time by Scott Ross (no longer employed

by plaintiff and who was living in New York at the time of the trial) under the supervision of Mr. Nelson. The first few cases were removed by hand. Thereafter, the fork lift or tow motor was driven into the trailer. Inside the trailer, sixteen to twenty cases were loaded on a wooden pallet, then picked up with the fork lift and driven from the trailer. Using this method, some 300 cases of yarn were removed on some eleven or twelve trips into and out of the trailer.

When the fork lift was backing out of the trailer with the last loaded pallet, the trailer suddenly rolled forward about six feet, causing the unloading ramp and the fork lift to fall to the ground between the trailer and the platform or dock, severely damaging the fork lift.

According to the plaintiff's evidence, it is a custom in the trucking industry to set the brakes on a trailer when it is disconnected from the tractor and to also chock the wheels. The length of time the air brakes will hold on a disconnected trailer depends on the condition of the equipment. There was evidence tending to show that such brakes would hold for a few days to a month or so, depending on whether there was a leak in the air brakes. Plaintiff also offered evidence to the effect that it did not move the trailer between the time defendant's driver placed it on plaintiff's premises and the day it was unloaded.

Defendant offered evidence to the effect that it was not a custom in the trucking industry to chock the wheels of a trailer when it was detached from the tractor. On the other hand, its driver, who parked the trailer involved, testified that he did chock the trailer when he parked it, "that is a standard custom in the trucking industry." This witness also testified that the trailer had been moved approximately twelve feet down the dock from where he had left it, before it was unloaded. It was established that there were materials adequate for chocking in the dock area.

At the close of all the evidence the defendant renewed its motion for nonsuit, and the trial court sustained the motion. The plaintiff appeals, assigning error.

Rodman & Rodman for plaintiff appellant.
Spry, Hamrick & Doughton for defendant appellee.

DENNY, C.J. The plaintiff's sole assignment of error is to the allowance of defendant's motion for judgment as of nonsuit at the close of all the evidence.

In our opinion, when the plaintiff's evidence is considered in the light most favorable to it, as it must be on a motion for nonsuit, it is sufficient to carry the case to the jury. *Thomas v. Morgan*, 262 N.C. 292, 136 S.E. 2d 700; *Smith v. Corsat*, 260 N.C. 92, 131 S.E. 2d 894; *Scott*

v. Darden, 259 N.C. 167, 130 S.E. 2d 42; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307.

The defendant argues and contends that plaintiff's evidence adduced in the trial below established contributory negligence as a matter of law.

The evidence of the plaintiff and that of the defendant bearing on the pertinent issues with respect to negligence and contributory negligence, is in sharp conflict.

Whether a nonsuit should be granted on the ground of contributory negligence must be determined in light of the facts in each particular case. *Tew v. Runnels,* 249 N.C. 1, 105 S.E. 2d 108.

"Nonsuit on the issue of contributory negligence should be denied when the relevant facts are in dispute or opposing inferences are permissible from plaintiff's proof. Contradictions in plaintiff's evidence do not justify nonsuit on the issue." Strong's North Carolina Index, Vol. 3, Negligence, § 26, page 475; *Wilson v. Camp,* 249 N.C. 754, 107 S.E. 2d 743; *Murray v. Wyatt,* 245 N.C. 123, 95 S.E. 2d 541; *Gilreath v. Silverman,* 245 N.C. 51, 95 S.E. 2d 107.

In the case of *Yandell v. Fireproofing Corp.,* 239 N.C. 1, 79 S.E. 2d 223, Ervin, J., speaking for the Court, said: "An initial carrier by rail, which furnishes a car for moving freight, owes to the employees of the consignee, who are required to unload the car, the legal duty to exercise reasonable care to supply a car in reasonably safe condition, so that the employees of the consignee can unload the same with reasonable safety. (Numerous cases cited.) A delivering carrier by rail, which delivers to the consignee for unloading a car received by it from a connecting carrier, owes to the employees of the consignee, who are required to unload the car, the legal duty to make a reasonable inspection of the car to ascertain whether it is reasonably safe for unloading, and to repair or give warning of any dangerous condition in the case discoverable by such an inspection. (Numerous cases cited.)"

In *Honeycutt v. Bryan,* 240 N.C. 238, 81 S.E. 2d 653, the defendant transported a load of structural steel from Charlotte to the site of a building then being erected in Morganton by Herman Sipe Company. When the defendant arrived at the site of the building under construction, he placed his truck as directed by Sipe's foreman. This put the tractor on a slight decline to the left rear. In unloading I-beams, 20 feet long and 21 inches wide, weighing approximately 1,237 pounds each, the unloading proceeded without mishap until the front end of the fourth beam hooked to some part of the trailer. Plaintiff asked defendant if it would be safe to walk up the beams to the front "to get that one loose," and defendant told him it was safe. Plaintiff got on the truck and started to walk up the beams to the front, when the rear standard of the truck bent and the beams began sliding off the truck

and plaintiff was injured. Barnhill, J., in speaking for the Court, after quoting the above portion of the opinion in *Yandell v. Fireproofing Corp., supra,* said: "Since the defendant was both the initial and delivering carrier, he owed to Sipe's employees the duty (1) to exercise reasonable care to furnish a vehicle in reasonably safe condition so that the employees of Sipe could unload the trailer with reasonable safety, and (2) to make a reasonable and timely inspection of the vehicle to ascertain whether it was reasonably safe for unloading, and to repair or give warning of any dangerous condition in the trailer discoverable by such inspection." The verdict rendered in favor of the plaintiff was affirmed.

In our opinion, the instant case is one for the jury on the issues of negligence and contributory negligence, and we so hold.

Reversed.

DUKE POWER COMPANY, PETITIONER v. CHARLES C. BLACK, AND WIFE, ALTA MAE BLACK; W. O. McGIBONY, TRUSTEE FOR FEDERAL LAND BANK OF COLUMBIA; FEDERAL LAND BANK OF COLUMBIA; W. J. ALLRAN, TRUSTEE FOR CHERRYVILLE PRODUCTION CREDIT ASSOCIATION; AND CHERRYVILLE PRODUCTION CREDIT ASSOCIATION, RESPONDENTS.

(Filed 3 March, 1965.)

Trial § 35—

In proceedings to assess compensation for land taken by condemnation, an instruction of the court to the effect that the owner's contention was correct that the land remaining after the taking was damaged by the use to which condemnor intended to put the land taken, *held* prejudicial, since the expression of opinion related directly to a material and controverted question for the jury's determination.

HIGGINS, J., dissenting.

APPEAL by petitioner from *Campbell, J.,* September 1964 Civil Session of LINCOLN.

Condemnation proceeding in accordance with procedure prescribed in G.S. 40-11 *et seq.* in which Duke Power Company, petitioner, seeks to acquire for its use in the transmission of electric power an easement and defined rights with reference thereto over 7.2 acres, being a triangular area along the east portion of a tract of 55⅜ acres in Catawba Springs Township, Lincoln County, N. C., owned by respondents Black.

Other respondents are parties to deeds of trust constituting liens on said 55⅜-acre tract.

Commissioners appointed by the clerk assessed respondents' damages at $8,500.00. The clerk confirmed this award of the commissioners and entered judgment in accordance therewith. Petitioner excepted and appealed.

Upon trial in the superior court, one issue was submitted, *viz.*: "What amount are the respondents entitled to recover by reason of the taking of the easement across their property by the petitioner?" The jury answered, "$12,500." Judgment in accordance with said verdict was entered. Petitioner excepted and appealed.

Wm. I. Ward, Jr. and C. E. Leatherman for petitioner appellant.
Clayton & London for respondent appellees Black.

BOBBITT, J. In charging the jury, the court, after defining the easement over said 7.2 acres and all rights with reference thereto to be acquired by petitioner, gave instructions as to the rules applicable in determining the amount respondents were entitled to recover as compensation therefor. No exception was taken to these instructions.

The court then instructed the jury as follows:

"(A) So the items going to make up the difference embraces compensation for the part that has been taken, compensation to his remaining land. He says, *and the Court instructs you that that is correct,* that while he has some 48 acres of land left, it is not as good as it was before because he is going to have right alongside of it, this power line and the power line is unsightly; it's not a pretty thing to look at and the trees that were growing there before could have been pretty to look at and it's not going to be as pretty any more. (B) So he says what he has left has been hurt by having these rights taken along that strip and the Court instructs you that your duty is to give him full and adequate and complete compensation and take into account everything that affects the value of what he has left as well as what was taken. So that is the duty of the jury." (Our italics.)

Immediately thereafter, the court gave full instructions as to what is meant by "fair market value." Later, the court reviewed various contentions of petitioner and of respondents.

Petitioner excepted to and assigns as error the portion of the quoted excerpt from the charge between (A) and (B).

Assuming, as we must, the verity of the agreed case on appeal, the reasonable interpretation of the challenged instruction is that the court endorsed as correct what respondents said (contended) with reference to the adverse effect the petitioner's power line on the 7.2 acres had

upon the fair market value of the remaining 48 acres, more or less, of said 55⅜-acre tract. The statement, "and the Court instructs you that that is correct," while an inadvertence, violates the portion of G.S. 1-180 providing that "(n)o judge, in giving a charge to the petit jury, . . . shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury . . ." Reference is made to *S. v. Canipe,* 240 N.C. 60, 81 S.E. 2d 173, for a full discussion and citation of authority. A presiding judge is not permitted "to invade the prerogative of the jury in its right to find the facts." *In re Will of Holcomb,* 244 N.C. 391, 93 S.E. 2d 454.

Of course, we cannot determine with certainty the adverse effect, if any, the indicated error in the charge had or may have had on the verdict. However, the sole question for jury determination was *the amount* of compensation respondents were entitled to recover; and the indicated error in the charge related directly to one of the most material and controverted questions to be resolved in making such determination. In the circumstances, we are of opinion, and so hold, that the indicated error in the charge must be considered prejudicial to petitioner. On account thereof, petitioner is entitled to a new trial.

In view of the conclusion reached, discussion of questions raised by petitioner's other assignments of error is unnecessary.

New trial.

HIGGINS, J., dissenting: I am unable to agree that prejudicial error appears in the record before us. Judge Campbell's instruction which this Court underscores as error is a statement of the landowner's contention that a power line over his land is not as sightly as the growing trees which were removed for its erection, and that the Court agrees with the contention. Then follows the instruction that the jury will award compensation by taking into account everything which affects the value of that which was left as well as the value of that which was taken, and base the award thereon.

Assuming the jury got the impression that Judge Campbell agreed with the landowner that a growing tree is more pleasing in appearance than a power pole, I doubt that this microscopic error was enough to cost either party the amount of postage required to bring the record here for review.

To be prejudicial, an error must amount to a denial of some substantial right, and a probability that another trial would produce a result more favorable to the appellant. *Rubber Co. v. Distributors,* 256 N.C. 561, 124 S.E. 2d 508; *Price v. Gray,* 246 N.C. 162, 97 S.E. 2d 844;

Waddell v. Carson, 245 N.C. 669, 97 S.E. 2d 222. The appellant's showing, I think, is insufficient to warrant the return of this case to the Superior Court for another trial.

ALTON B. BELL v. MARY LOU SMITH.

(Filed 3 March, 1965.)

1. Insane Persons § 10—

Where the Superior Court on appeal affirms the clerk's order appointing a guardian *ad litem* for defendant, the order of appointment rests upon the statutory authority of the clerk and the inherent authority of the court, and such appointment will not be set aside for the want of a finding that defendant was *non compos mentis* (G.S. 1-65.1).

2. Appeal and Error § 3—

The appointment of a guardian *ad litem* for a defendant is an interlocutory order, and when it appears that the guardian filed answer containing a general denial of plaintiff's allegations, the appointment does not affect a substantial right, and an appeal from the order will be dismissed as premature.

APPEAL by plaintiff from *Campbell, J.,* December 14, 1964 Session of GASTON.

Plaintiff instituted this action November 30, 1963 to recover for damages, actual and punitive, allegedly caused by false, slanderous and malicious statements of defendant.

The order affirmed by this Court on former appeal, *Bell v. Smith,* 262 N.C. 540, 138 S.E. 2d 34, overruled a motion by defendant's counsel to quash the service of summons and complaint made on defendant while confined in the State Hospital for the insane.

In the superior court, all on December 14, 1964, the following occurred: On motion of defendant's counsel, the clerk of the superior court appointed Robert E. Gaines as guardian *ad litem* for defendant "to act for and defend this action in her behalf." Gaines accepted said appointment and as such guardian *ad litem* verified and filed an answer in defendant's behalf. Plaintiff moved before Judge Campbell, then presiding over the December 14, 1964 Session, that the clerk's order appointing said guardian *ad litem* be vacated. Judge Campbell found "as a fact" that "said Order of Appointment was proper" and entered an order approving and confirming the clerk's order. Plaintiff appealed.

W. N. Puett for plaintiff appellant.

Hollowell & Stott, Frank Patton Cooke and Joseph B. Roberts, III, for defendant appellee.

BOBBITT, J. The only question is whether Judge Campbell erred in approving and confirming the clerk's order.

On former appeal, this Court said: "If a defendant in a civil action is *non compos mentis*, he must defend by general or testamentary guardian if he has one within the State, otherwise by guardian *ad litem* to be appointed by the court. *Hood v. Holding*, 205 N.C. 451, 171 S.E. 633 . . . Either party, or the court upon its own motion, may initiate proceedings for the appointment of a guardian *ad litem* before any hearing on the merits." In this connection, see *Moore v. Lewis*, 250 N.C. 77, 80, 108 S.E. 2d 26, and cases cited.

Plaintiff contends the clerk's order is based on the unverified motion of defendant's counsel; that the motion contains no statement and the clerk's order contains no finding that defendant was *non compos mentis;* and that, absent an evidence-supported finding that defendant was *non compos mentis*, the clerk had no authority under G.S. 1-65.1 to appoint a guardian *ad litem* for defendant. In this connection, it is noted that Judge Campbell, whose authority was inherent and not statutory, approved and confirmed the clerk's order. Hence, the appointment of the guardian *ad litem* on December 14, 1964, rests on the authority of both clerk and judge. In this connection, see *Carraway v. Lassiter*, 139 N.C. 145, 152, 51 S.E. 968.

The clerk and Judge Campbell acted on the basis of undisputed facts disclosed by the records of the Superior Court of Gaston County, to wit:

Defendant Mary Lou Smith, indicted for murder, was arraigned at October 7, 1963 Criminal Session. Upon arraignment, pursuant to suggestion by her counsel, a jury was selected and impaneled and evidence was presented by defendant and by the State on the following issue: "Does the defendant have sufficient mental capacity to understand the nature and quality of the charges against her, and to plead to the Bill of Indictment, and to assist her counsel in her defense?" The jury, after hearing the evidence and argument of counsel, answered this issue, "No," and thereupon the presiding judge committed defendant to the Dorothea Dix State Hospital in Raleigh, N. C., as provided in G.S. 122-84. She was confined in said hospital when served with summons and complaint herein. Too, she was confined in said hospital on December 14, 1964. Counsel who represented defendant at said October 7, 1963 Criminal Session have represented and now represent defendant in this action.

The foregoing facts constituted ample basis for the orders of December 14, 1964 relating to the appointment of Gaines as guardian *ad litem* for defendant. The validity of these orders is unaffected by the circumstance that the clerk had received a letter "from the Superintendent of the hospital which states that she's now able to plead to the Bill of Indictment and to stand trial."

The orders of December 14, 1964 (1) are interlocutory, and (2) do not affect any substantial right of plaintiff. The said orders are not relevant to the issues for determination in plaintiff's action. Incidentally, it is noted that the answer filed by the guardian *ad litem* consists of a general denial of plaintiff's allegations. Hence, notwithstanding no reason appears to disturb said orders of December 14, 1964, dismissal of plaintiff's appeal is considered the appropriate disposition thereof. G.S. 1-271; G.S. 1-277; *Buick Co. v. General Motors Corp.*, 251 N.C. 201, 205, 110 S.E. 2d 870, and cases cited.

Appeal dismissed.

STATE OF NORTH CAROLINA v. JAMES S. HANEY.

(Filed 3 March, 1965.)

1. Robbery § 4—

Evidence that appealing defendant, if not the owner, was the operator and controller of the automobile in which his confederates perpetrated one robbery and attempted another, is sufficient to be submitted to the jury on the question of the appealing defendant's guilt as an aider and abetter.

2. Criminal Law § 50—

The use of the expression "I believe" or other like phrases by a witness does not render the witness' testimony incompetent when the subject of the testimony relates to a personal observation by the witness and the uncertainty refers only to the witness' indistinctness of perception or memory in regard thereto.

3. Criminal Law § 79; Searches and Seizures § 1—

When the officers within twenty minutes of a lawful arrest searched the car in which defendant was at the time, the search of the automobile without a warrant is not unlawful, since it is incident to arrest.

APPEAL by defendant James S. Haney from *Campbell, J.*, October 12, 1964 Criminal Term of GASTON.

Three defendants, S. L. Tomberlin, B. M. Cantrell, and appellant James S. Haney, were jointly tried upon a bill of indictment charging

them with the armed robbery of $1.00 from C. F. Sims, a violation of G.S. 14-87. Defendants offered no evidence. The evidence for the State tends to show these facts:

On September 9, 1964, about 10:00 p.m., Sims encountered defendants at a rest stop on Interstate 85 just across the Catawba River in Mecklenburg County. He had a conversation with defendant Haney, who said he was broke and needed a job. While the men were talking, the Mecklenburg County police came by and required them to show their driver's licenses. About an hour later, after he had driven his 1964 Volkswagen to Textile Bowling Lanes at Belmont in Gaston County, Sims again encountered defendants. In about ten minutes he accepted their invitation to go for a ride with them in a 1951 green Pontiac automobile. Sims and Tomberlin sat in the rear seat and Cantrell in the right front seat. They drove down a paved road behind the bowling alley, and the car stopped. Without any warning, Tomberlin dazed Sims with a blow on the left side of his head. He then opened a knife and held it at Sims' left side under his arm. One of the men, whom Sims "believed" to be Haney, demanded his money. With Tomberlin holding the knife on him, "he gave them a dollar which he had in his pocket." Tomberlin demanded to know where his wallet was, and Sims divulged that it was in his automobile, which was locked and parked at the bowling alley. Tomberlin then took Sims' car keys from his pocket, and the men returned to the bowling alley, where one or more of them searched the Volkswagen, Tomberlin continuing to hold the knife on Sims. The wallet was found, but it contained no money. Defendants then inquired how much money Sims had in the bank. Sims stated the erroneous figure of $78.00 "and was told that was how much was wanted." Someone inquired whether he could cash a check. Sims said that he could in Charlotte. With Tomberlin continuing to hold the knife on Sims, the group proceeded by Highway 29 to Charlotte in the Pontiac. En route, Sims was threatened with his life if he tried to escape. About 1:00 a.m. the men arrived in Charlotte. Sims told them that he had a credit card for the Sheraton Hotel. There, they returned to him his wallet so that he might identify himself with its contents, and they told him that if he failed to come back out of the hotel they would wreck his Volkswagen and he would never see it again. They told him, also, that if he went to the police they would accuse him of being a sexual deviate who had attempted "to pick them up and . . . the police would arrest him." Nevertheless, in the hotel he had the clerk call the Charlotte police. The officers arrived in about four minutes, but the Pontiac was gone when they came. That same night, however, Haney was apprehended in the Pontiac at the Sheraton parking lot. Tomberlin and Cantrell were apprehended on foot in

the vicinity. Haney told the officers that in Belmont, Sims had offered him $3.00 to drive him to Charlotte. Having only the one dollar bill, he paid him that and promised to get two more dollars at the Barringer Hotel later. Haney had the dollar bill in his wallet when he was arrested. Twenty minutes after the arrest, "on a search of the Haney car," the officers found the keys to Sims' car under the dashboard "as you reach under the steering wheel."

At the close of the State's evidence, defendant Haney's motion for judgment as of nonsuit was overruled. The jury returned a verdict of guilty as to him. The record does not disclose the outcome as to Tomberlin and Cantrell. From a judgment of imprisonment, Haney appeals, assigning as error the overruling of his motion for nonsuit and the admission of certain evidence.

T. W. Bruton, Attorney General, Richard T. Sanders, Assistant Attorney General for the State.

Dolley & Harris for defendant.

PER CURIAM. Taking the evidence in the light most favorable to the State, as we must in considering a motion for nonsuit, it was amply sufficient to establish that defendant Haney, if not the owner, was the operator and controller of the Pontiac, the automobile in which one robbery was perpetrated and another attempted. Defendant Haney stopped the Pontiac while Tomberlin took the dollar bill from Sims at knifepoint. Haney drove the car back to the bowling alley where the Volkswagen was parked and stopped the Pontiac while the Sims automobile was searched. The record does not reveal whether it was Haney or Cantrell, or both, who made the search. Haney then transported Sims to Charlotte while Tomberlin held the knife on Sims and threatened his life if he tried to escape. Furthermore, defendant Haney admitted receiving the dollar which Sims said had been taken from him with the threatened use of a knife, and the keys to the Volkswagen were found in the "Haney car" immediately after his arrest. Clearly, Haney was not a disinterested bystander; he was an active participant in a conspiracy to rob Sims and in the consequent robbery. The motion for nonsuit was properly overruled. *State v. Holland,* 234 N.C. 354, 67 S.E. 2d 272.

When Sims was asked which of the men demanded his money when Tomberlin hit him, his reply was, "I believe Haney said that." Defendant contends that this evidence was merely the expression of an opinion or a guess and was therefore incompetent. This contention cannot be sustained. The witness was speaking of his first-hand observation. His expression, "I believe," merely connoted "an indistinctness of per-

ception or memory." Stansbury, North Carolina Evidence § 122 (2d Ed. 1963).

> "(W)hen a witness uses such expressions as 'I think,' 'My impression is,' or 'In my opinion,' this will be no ground of objection if it appears that he merely speaks from an inattentive observation, or an unsure memory, though it will if the expressions are found to mean that he speaks from conjecture or from hearsay." McCormick, Evidence § 10 (1954 Ed.).

The evidence was competent; its weight was for the jury.

Defendant next contends that the search which revealed the Volkswagen keys in the Pontiac was illegal because conducted without a search warrant some twenty minutes after Haney's arrest. Defendant was under lawful arrest. G.S. 15-41. The police had the privilege to search his person. *State v. Grant,* 248 N.C. 341, 103 S.E. 2d 339. Under the circumstances of this case they had the privilege, also, to search his automobile without a warrant.

> "As incident to a lawful arrest, the conveyance of the person arrested may be searched without a warrant. Accordingly a search warrant is not necessary to authorize a search of an automobile in which a person was riding or beside which he was standing when arrested, and an officer, after arresting and incarcerating accused, may return and make a search of his automobile." 79 C.J.S., Searches and Seizures § 67e (1952); *Cf. State v. Giles,* 254 N.C. 499, 119 S.E. 2d 394.

In *Allgaier v. State,* 200 Ind. 583, 164 N.E. 315, "after the arrest was made, appellant was taken to the jail, where the automobile was searched. This search was made soon after the arrest and was incident to same." The search revealed two bottles of whiskey, which, the court held, were properly introduced in evidence. *accord, People v. Garrett,* 232 Mich. 366, 205 N.W. 95; *State v. Williams,* 328 Mo. 627, 14 S.W. 2d 434; *State v. Cyr,* 40 Wash. 2d 840, 246 P. 2d 480; *Gray v. State,* 243 Wis. 57, 9 N.W. 2d 68. In *Commonwealth v. Cockfield,* 411 Pa. 71, 190 A. 2d 898, defendant's automobile was searched without a warrant 57 hours after he had been arrested for arson. In the trunk were found gasoline and a charred roll of toilet paper. In holding the evidence competent, the court said:

> "'Incidental,' in its pertinent meaning, refers to that which follows as an 'incident,' *i.e.,* 'an event of accessory or subordinate character' (The Oxford English Dictionary, Vol. 5, p. 152). In our view, the search and seizure of the contents of Cockfield's auto-

mobile were clearly 'incidental' to the arrest and the one logically followed the other. The time which elapsed between the time of the arrest and the time of the search does not destroy the character of the search as incidental to the arrest. The search and seizure flowed naturally from and were part and parcel of the normal and logical consequences of the arrest. Had the police officers not searched this automobile and seized this gasoline can and tissue, they would have been derelict in their duties. . . ." *Id.* at 77, 190 A. 2d at 901.

Defendant's other assignments of error have been considered. They are without merit. In the trial below, we find

No error.

JUNIUS R. PAGE, AND ALL OTHER HEIRS AT LAW OF MRS. MYRTLE PAGE, DECEASED, WHO CARE TO MAKE THEMSELVES PARTIES PLAINTIFF TO THIS ACTION *v.* THE TOWN OF ABERDEEN, A MUNICIPAL CORPORATION, CREATED UNDER AND BY VIRTUE OF THE GENERAL STATUTES OF NORTH CAROLINA.

(Filed 3 March, 1965.)

1. Pleadings § 15—

Deeds attached to the complaint and made a part thereof can be considered on demurrer.

2. Deeds § 15—

Where a deed conveys land to a municipality for a community house and public park with provision that it was understood the premises should always be used for the benefit of the municipality and public in general and should not be conveyed for private industry, and that a breach of the condition should create a reversion, allegations merely that the municipality had permitted the property to run down and be used as a place for people to congregate and drink are insufficient to show a breach of the condition, and allegations that the municipality had abandoned the lots for the purpose for which conveyed is a mere conclusion.

3. Actions § 3—

Where, in an action to invoke the reverter clause in a deed for breach of the estate upon special limitation, the allegations are insufficient to allege a breach of condition, the court should dismiss the action as moot, since the court is not called upon to determine the estates conveyed by the deed unless facts sufficient to show a breach of condition are alleged.

PAGE *v.* ABERDEEN.

APPEAL by plaintiff from *Armstrong, J.*, May Session 1964 of MOORE. Docketed and argued as Case No. 460, Fall Term 1964.

Civil action for land, heard upon a demurrer to the complaint.

From a judgment sustaining the demurrer and dismissing the action, plaintiff appeals.

H. F. Seawell, Jr., for plaintiff appellant.
Johnson & Johnson by John M. Harney for defendant appellee.

PER CURIAM. The complaint alleges in substance: Plaintiff is one of the children and an heir at law of Mrs. Myrtle Page, deceased, and is entitled to inherit her real estate under the laws of the State of North Carolina. He brings this action in behalf of himself and all other heirs of Mrs. Myrtle Page, who care to make themselves plaintiffs.

In 1939 Mrs. Myrtle Page, a widow, conveyed by two deeds to the Town of Aberdeen, a municipal corporation, certain lots or parcels of land in a subdivision known as "The Highlands" in Sandhills Township, Moore County, North Carolina. These two deeds are identical in language except as to the description of the lots of land conveyed, and are attached to the complaint and made a part thereof.

The following identical provisions in the two deeds are relevant to determine the appeal:

(1) Naming clause: "THIS DEED * * * by MRS. MYRTLE A. PAGE, Widow, of Moore County and State of North Carolina, of the first part, and Town of Aberdeen, a Municipal Corporation, of Moore County and State of North Carolina, of the second part."

(2) Granting clause: "* * * said Town of Aberdeen and its successors and assigns * * *."

(3) After a description of the lots of realty conveyed, there follow these words:

> "This conveyance is executed and delivered at the nominal consideration of $10.00 but the real consideration and moving clause therefor is to cooperate, encourage and assist said Town of Aberdeen in obtaining a suitable site and location for a Community House and public park and especially to encourage the younger generation in possessing a wholesome recreational area. It is distinctly understood that said premises shall always be used for the use and benefit of the Municipality and the Public in general, and shall not be conveyed for private industry, a breach of this condition shall create a reversion of title."

(4) *Habendum* clause: "* * * to said party of the second part, its successors and assigns, to its only use and behoof forever."

(5) Warranty clause: "* * * will warrant and defend the said title to the same against the lawful claims of all persons whomsoever."

These two deeds are duly recorded in the Public Registry of Moore County. The town of Aberdeen has abandoned these lots or parcels of land for the purpose for which they were conveyed. The building on it has been permitted to get into a bad state of repair. There are liquor bottles, beer cans, and debris scattered in and around the premises. The premises have become a hide-away and place for people to congregate and drink, and are not being used for a wholesome recreational area. The building on the premises, as plaintiff is informed, is rented to Alcoholics Anonymous.

That by reason of these conditions the reverter clauses in the two deeds have become operative, and plaintiff and the other heirs at law of Mrs. Myrtle Page are now the owners of these lots or parcels of land conveyed, and are entitled to the possession of the same.

The town of Aberdeen has refused the demand of plaintiff to convey the lots or parcels of land to him and the other heirs at law of Mrs. Myrtle Page.

Wherefore, plaintiff prays that he and the other heirs at law of Mrs. Myrtle Page be declared the owners of the lots or parcels of land conveyed in the two deeds, and that a writ of possession issue in their behalf.

Defendant demurred to the complaint on the ground that it does not state sufficient facts to constitute a cause of action, "in that it appears from the face of the complaint the breach of the condition necessary to work a reversion of title has not happened and that the allegations set forth in paragraph 5 of the complaint merely show an express motive and not a condition, and that the allegations contained in paragraph 6 of the complaint do not show sufficient facts to create a reversion of title as contained in the deeds as set out in said complaint."

The trial judge recited in his judgment that it appeared from the face of the complaint and from the two deeds of Mrs. Myrtle Page attached thereto, which are duly recorded in the Public Registry of Moore County, that the two deeds convey a fee simple title to the Town of Aberdeen, in that the granting clause, the *habendum* clause and the warranty convey a fee simple title, and that the conditions as appear in the respective deeds between the description and the *habendum* clause are surplusage and do not limit the estate conveyed, citing *Oxendine v. Lewis*, 252 N.C. 669, 114 S.E. 2d 706. Whereupon, he decreed that the demurrer be sustained and the action dismissed.

The two deeds of Mrs. Myrtle A. Page attached to the complaint and made a part thereof can be considered on the demurrer. *Sale v.*

Johnson, Comr. of Revenue, 258 N.C. 749, 129 S.E. 2d 465; *Talman v. Dixon,* 253 N.C. 193, 116 S.E. 2d 338; *Moore v. W.O.O.W., Inc.,* 253 N.C. 1, 116 S.E. 2d 186; *Yeager v. Dobbins,* 252 N.C. 824, 114 S.E. 2d 820; 71 C.J.S., Pleading, § 257; 41 Am. Jur., Pleading, § 246.

After a description of the lots of realty conveyed in each deed appears this language:

> "It is distinctly understood that said premises shall always be used for the use and benefit of the Municipality and the Public in general, and shall not be conveyed for private industry, a breach of this condition shall create a reversion of title."

There is no allegation in the complaint that the lots of realty conveyed in the two deeds have been conveyed by the Town of Aberdeen to private industry, and no allegation of fact in the complaint tending to show these lots are not being used for the use and benefit of the municipality and the public in general, although according to the allegations of fact in the complaint the town of Aberdeen is permitting a use of these lots that is not wholesome for the people of the town. The allegation in the complaint that the town of Aberdeen has abandoned these lots for the purpose for which they were conveyed is a conclusion. In our opinion, and we so hold, the complaint does not allege facts sufficient to show a breach of the condition that the language in the deeds state shall create a reversion of title, and the demurrer to the complaint should have been sustained on that ground. Consequently, the question of a construction of the two deeds to determine the estates conveyed by them was not presented to the trial court for decision. In deciding such a question, the trial judge rendered a decision on a moot question, and a court will not hear and decide a moot question. Strong's N. C. Index, Vol. 1, Appeal and Error, § 6.

Judge Armstrong correctly sustained the demurrer to the complaint, but he based his judgment on the wrong ground. The basis for his judgment is a decision on a moot question, and therefore we are not called upon to determine the correctness or incorrectness of his determination of the estates conveyed by the two deeds.

The judgment sustaining the demurrer to the complaint and dismissing the action is affirmed, but it is modified by striking out the reason for the judge's sustaining the demurrer, and by inserting in lieu thereof that the demurrer is sustained because the complaint fails to state facts sufficient to show a breach of the condition of a reverter of title as stated in the two deeds, so as to call for a construction of the two deeds to determine the estates conveyed. It is so ordered.

Modified and affirmed.

STATE v. PERRY WHALEY.

(Filed 3 March, 1965.)

Criminal Law § 131; Constitutional Law § 36—

Sentence within the statutory maximum cannot be considered cruel or unusual in the constitutional sense.

APPEAL by defendant from *Campbell, J.*, November, 1964 Session, CLEVELAND Superior Court.

This appeal challenges the resentences imposed on the defendant pursuant to the order of this Court entered on a former appeal reported in 262 N.C. 536, 138 S.E. 2d 138. Judge Campbell imposed these prison sentences: In No. 5632A, Count 1, ten years; and on Count 2, five years, to run concurrently. In No. 5632B, Count 1, ten years, to begin at the expiration of the ten years sentence imposed in 5632A; and on Count 2, five years, to run concurrently.

At the conclusion of the trial the court permitted defendant's counsel to resign; thereupon appointed his present attorney of record to prosecute this appeal.

T. W. Bruton, Attorney General, Harry W. McGalliard, Deputy Attorney General for the State.

Joseph M. Wright for defendant appellant.

PER CURIAM. The record discloses the following as the defendant's sole assignment of error:

> "1. The Court's action in pronouncing judgment against the defendant in #5632A (Count One) and #5632B (Count One) for the reason that said sentences are cruel and unusual, excessive, harsh, and unreasonable punishment and in violation of defendant's rights under the law of North Carolina."

The sentence of five years imposed by Judge Campbell on the second count in each bill runs concurrently with the sentence on the first count. Hence the total term of imprisonment is 20 years. The statute permits a maximum of ten years on each of the four counts. The Court had discretionary power to make the sentences run concurrently or consecutively. The punishment imposed is within the limits authorized by statute. When punishment does not exceed the limits fixed by the statute, it cannot be considered cruel or unusual in a constitutional sense. *State v. Welch*, 232 N.C. 77, 59 S.E. 2d 199; *State v. Stansbury*, 230 N.C. 589, 55 S.E. 2d 185.

Affirmed.

STATE v. WILLIAM JESS REID.

(Filed 3 March, 1965.)

Criminal Law § 142—

The right of the State to appeal in criminal prosecutions is solely statutory, G.S. 15-179, and the State has no right to appeal from a judgment allowing a plea of former jeopardy or acquittal.

APPEAL by the State from *Campbell, J.*, October 1964 Criminal Session of GASTON.

A bill of indictment returned at September 3, 1963 Criminal Session charged that defendant, on August 14, 1963, "did unlawfully, willfully, feloniously and of malice aforethought kill and murder Clarence P. Armstrong," etc. The trial of defendant on said bill of indictment before Judge Froneberger and a jury at November 4, 1963 Criminal Session resulted in a verdict of not guilty.

A bill of indictment returned at March 31, 1964 Criminal Session charged defendant with the robbery of Clarence P. Armstrong by means of firearms on August 14, 1963, the felony defined in G.S. 14-87. At October 1964 Criminal Session, when called to trial on said robbery indictment, defendant pleaded former jeopardy (acquittal) as a bar to prosecution thereon. Thereupon, before selection of a jury, defendant offered in support of said plea of former jeopardy (acquittal) the Minutes of the court and a complete transcript of the proceedings and trial at said November 4, 1963 Criminal Session on said murder indictment.

Judge Campbell, being of the opinion "the charge of armed robbery is in fact but one transaction within the charge of murder in the first degree," for which defendant was tried and acquitted at said November 4, 1963 Criminal Session, sustained "defendant's plea in bar of former jeopardy" and directed the entry of a verdict of not guilty as to said robbery indictment. Thereupon, the State, through the Solicitor of the Fourteenth Solicitorial District, gave notice of appeal to the Supreme Court.

Attorney General Bruton and Assistant Attorney General Bullock for the State.

Frank Patton Cooke and Joseph B. Roberts, III, for defendant appellee.

PER CURIAM. Our statute provides that an appeal to the Supreme Court or superior court may be taken by the State in the cases specified therein, and no other. G.S. 15-179. And this Court, upon consideration

of this statute, held directly in *S. v. Wilson*, 234 N.C. 552, 67 S.E. 2d 748, and in *S. v. Ferguson*, 243 N.C. 766, 92 S.E. 2d 197, that the State has no right to appeal from a judgment allowing a plea of former jeopardy or acquittal. It is noted that the Attorney General states, with commendable frankness, that he is unable to distinguish the present case from those cited above. Hence, the State's (purported) appeal must be and is dismissed.

Appeal dismissed.

CLARENCE CRAWFORD, EMPLOYEE v. CENTRAL BONDED WAREHOUSE, DIVISION OF BAYSIDE WAREHOUSE COMPANY, EMPLOYER AND PHOENIX ASSURANCE OF NEW YORK, CARRIER.

(Filed 3 March, 1965.)

1. Master and Servant § 93—

Findings of fact of the Industrial Commission, when supported by competent evidence, are conclusive on appeal even though there may be evidence *contra*.

2. Master and Servant § 54—

Compensation may not be awarded for an injury resulting solely from an idiopathic condition of the employee.

APPEAL by plaintiff from *Froneberger, J.*, October 12, 1964, Non-jury Session of GASTON.

Pursuant to the provisions of the Workmen's Compensation Act, plaintiff filed with the Industrial Commission a claim for compensation because of injuries suffered by him while performing his duties as employee of defendant, Central Bonded Warehouse.

Deputy Commissioner Smith heard evidence and found these facts. On 28 February 1963 plaintiff was trucking cotton with a hand truck from a freight car to a warehouse; he had worked about 7 hours that day. About 4:30 P.M. he "was taken with a seizure while trucking a cotton bale, fell on the concrete floor and as a result thereof fractured and dislocated his left shoulder." He had been doing this kind of work for 28 years. He had a history of grand mal seizures.

The Deputy Commissioner concluded that plaintiff sustained an injury by accident arising out of and in the course of his employment, and awarded compensation.

The Full Commission, upon review, found these additional facts. The accident was a result of the blackout or seizure suffered by plaintiff and was not a result of plaintiff's employment. His employment did not place him in a place of danger and the employment did not contribute to the injuries sustained by plaintiff.

The Full Commission concluded that plaintiff's injury by accident did not arise out of his employment, but arose as a result of an idiopathic condition suffered by him. Plaintiff's claim for compensation was denied. On appeal, the Superior Court affirmed the decision of the Full Commission.

O. A. Warren and Whitener & Mitchem for plaintiff.

Grier, Parker, Poe & Thompson and Gaston H. Gage for defendants.

PER CURIAM. The facts found by the Commission are supported by competent evidence. G.S. 97-86. These findings of fact are conclusive on appeal even though there may be evidence *contra. Taylor v. Twin City Club,* 260 N.C. 435, 132 S.E. 2d 865. The findings of fact support the conclusions and the Opinion and Award of the Full Commission. Where an idiopathic condition of a workman is the sole cause of the injury, compensation may not be awarded. *Cole v. Guilford County,* 259 N.C. 724, 131 S.E. 2d 308.

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ANALYTICAL INDEX

ABATEMENT AND REVIVAL.

§ 3. Abatement for Pendency of Prior Action.

In order to be a proper basis for abatement, a prior action must be pending in a court of competent jurisdiction in this State, and when it appears that the prior action was pending in another state and also that it was pending in an inferior court without jurisdiction of the action, the court properly refuses defendant's plea in abatement on both grounds. *Cushing v. Cushing*, 181.

Supreme Court may dismiss *habeas corpus* proceeding instituted after action for alimony without divorce and custody of children. *In re Custody of Ponder*, 530.

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§ 5. Where Plaintiff's Wrongful Act Is Basis of Action.

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§ 2. Exclusiveness of Statutory Remedy.

Administrative procedure should be exhausted before resort to the courts. *Garner v. Weston*, 487.

§ 4. Appeal, Certiorari and Review.

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AGRICULTURE.

§ 8. Regulations of Fertilizers, Seeds and Feed.

Under the contract in question defendant provided baby chicks, feed, medication, and feed bins to certain farmers in the area, and such farmers furnished water, fuel, electricity, and labor and were paid a specified amount of each chicken raised. Defendant's employees had actual supervision of the flocks during the "grow-out operation." Defendant mixed the feed used from separate ingredients purchased by it. *Held:* The farmers raising the chicks were employees and not independent contractors, and defendant is exempt by the provisions of G.S. 106-95.1 from the inspection fee imposed by G.S. 106-99. *Graham v. Farms, Inc.*, 66.

ANIMALS.

§ 7. Criminal Responsibility for Killing or Mutilating Animals.

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APPEAL AND ERROR.

§ 1. Nature and Grounds of Appellate Jurisdiction in General.

Where judgment of nonsuit is reversed, the Supreme Court will refrain from discussing the evidence except to the extent necessary to explain the conclusion reached. *Byrd v. Motor Lines*, 369.

Defendant may not acquiesce in theory of trial and then object thereto on appeal. *Mills v. Dunk*, 742.

§ 2. Supervisory Jurisdiction and Matters Cognizable Ex Mero Motu.

The Supreme Court will take notice *ex mero motu* that upon the face of the record plaintiff had no capacity to maintain the action. *Revels v. Oxendine*, 510.

Supreme Court, in the exercise of its supervisory jurisdiction, will dismiss *habeas corpus* for custody of child instituted two days after institution of action for alimony without divorce and custody of children. *In re Custody of Ponder*, 530.

§ 3. Judgments Appealable.

Allowance of motion to strike a defense in its entirety is immediately appealable. *Galloway v. Lawrence*, 433.

The appointment of a guardian *ad litem* for a defendant is an interlocutory order, and when it appears that the guardian filed answer containing a general denial of plaintiff's allegations, the appointment does not affect a substantial right, and an appeal from the order will be dismissed as premature. *Bell v. Smith*, 814.

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§ 7. Motions and Demurrers in the Supreme Court.

A party may demur *ore tenus* in the Supreme Court. *Equipment Co. v. Equipment Co.*, 549.

Motion in the Supreme Court to amend will be denied when amendment sets up wholly new cause of action or substantially changes the original action. *Hormel & Co. v. Winston-Salem*, 666.

§ 19. Form and Requisites of Exceptions and Assignments of Error in General.

An assignment of error must be based on an exception duly noted in the record. *Heating Co. v. Realty Co.*, 642.

Assignments of error must be based on exceptions duly noted, and may not present a question not embraced in the exceptions. *Wilson v. Wilson*, 88.

APPEAL AND ERROR—*Continued.*

An assignment of error should point out the particular matter relied upon so as to avoid the necessity of going beyond the assignment itself to ascertain the question sought to be presented. *S. v. Wilson*, 533.

§ 20. Parties Entitled to Object and Take Exception.

Appellant may not assert an error in the charge relating to an issue answered in his own favor. *Brown v. Griffin*, 61.

§ 21. Exceptions and Assignments of Error to Judgment or to Signing of Judgment.

An appeal is itself an exception to the judgment or order and presents the questions whether error appears on the face of the record proper and whether the conclusions of law are supported by findings of fact. *Sizemore v. Maroney*, 14; *Karros v. Triantis*, 79; *Heating Co. v. Realty Co.*, 642.

An exception to the judgment presents the correctness of the judgment and whether it is supported by the verdict, properly interpreted, but it cannot affect the verdict. *Wilson v. Wilson*, 88.

§ 22. Exceptions and Assignments of Error to Findings of Fact.

An appeal from a judgment of nonsuit, entered without specific findings of fact in a trial by the court under agreement of the parties, presents the question whether the evidence, taken in the light most favorable to plaintiff, will support findings of fact upon which plaintiff could recover. *Oldham & Worth v. Bratton*, 307.

An assignment of error that the evidence is insufficient to support the findings of fact, with a sole exception to the judgment and without any exception to any of the findings, does not present for review the findings of fact or the sufficiency of the evidence to support them. *Heating Co. v. Realty Co.*, 642.

§ 24. Exceptions and Assignments of Error to Instructions.

An assignment of error to the charge should quote the portion of the charge to which appellant objects. *S. v. Wilson*, 533.

An assignment of error based on the failure of the court to charge should set out defendant's contention as to what the court should have charged. *Ibid.*

§ 38. Exceptions not Brought Forward in the Brief.

Assignments of error not brought forward and discussed in the brief are deemed abandoned. *Equipment Co. v. Equipment Co.*, 549.

§ 40. Harmless and Prejudicial Error in General.

New trials are not awarded for nonprejudicial errors. *Brown v. Griffin*, 61.

§ 41. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Where decision as to nonsuit is not based in whole or in part on evidence admitted over plaintiff's objection, the admission of such evidence cannot be prejudicial to plaintiff. *Oldham & Worth v. Bratton*, 307.

§ 42. Harmless and Prejudicial Error in Instructions.

An instruction to the effect that defendant would be negligent if at the time and place defendant shot his pistol he knew or had reasonable ground to know that plaintiff was on the premises will not be held for error as confining the rule to the presence of plaintiff himself when in context the instruction charges that

defendant's conduct should be judged in the light of the presence of any human being at the scene. *Belk v. Boyce*, 24.

An erroneous instruction upon a material aspect of the case is not cured by correct instructions on such aspect in other parts of the charge. *Crow v. Ballard*, 475.

§ 44. Invited Error.

Where plaintiff does not allege damages from loss of wages, and, after specific inquiry by the court, states that he requests no further instruction upon the point in addition to the court's instruction that plaintiff was entitled to recover by way of compensation a fair and reasonable sum considering, *inter alia*, the amount of plaintiff's salary, *held*, plaintiff is not in a position to complain that the court failed to charge that he was entitled to recover the amount of his wages for the time lost from work. *Brown v. Griffin*, 61.

§ 46. Review of Discretionary Matters.

Even though a matter rest in the discretion of the trial court, if the court's order is beyond the limits of judicial discretion if certain facts are true, the cause will be remanded for a determination of the facts. *Martin v. Martin*, 86.

Where the order appealed from exceeds sound judicial discretion, the order will be set aside and the cause remanded for a hearing *de novo*. *Edwards v. Edwards*, 522.

§ 49. Review of Findings or Judgments on Findings.

Legal conclusions of the trial court, even though denominated findings of fact, are not conclusive, and upon appeal the Supreme Court will examine all the findings of fact to ascertain if they support the judgment. *Warner v. W & O, Inc.*, 37.

Findings of fact by the lower court are conclusive on appeal when supported by competent evidence. *Gaster v. Goodwin*, 441; *Equipment Co. v. Equipment Co.*, 549.

Where there are no exceptions to the findings of fact the Supreme Court is bound by the findings. *Garner v. Weston*, 487; *Heating Co. v. Realty Co.*, 642.

Where there are no exceptions to the findings of fact, an appeal presents the questions whether the facts support the judgment and whether error of law appears on the face of the record. *Lowe v. Jackson*, 634; *Hertford v. Harriss*, 776; *In re Burris*, 793.

§ 50. Review of Injunctive Proceedings.

In the absence of specific findings of fact or a request therefor it will be presumed that the court found facts supporting its order continuing a temporary order to the hearing, and the order will not be disturbed when the allegations of the verified complaint, treated as an affidavit, are sufficient to warrant the relief. *Hooks v. Speedways*, 686.

§ 55. Remand.

This cause remanded for findings sufficient to support judgment as to validity of service of process by service on the Secretary of State. *Sizemore v. Maroney*, 14.

Where a proceeding before the Industrial Commission and an appeal therefrom is heard upon a misapprehension of the applicable law, the proceeding will be remanded. *Hall v. Chevrolet Co.*, 569.

ARREST AND BAIL.

§ 3. Right of Officer to Arrest Without Warrant.

A peace officer may arrest without a warrant when the person to be arrested has committed a misdemeanor in the presence of the officer or when the officer has reasonable grounds to believe that the person to be arrested has committed a misdemeanor in his presence. *S. v. Fenner*, 695.

Where the evidence shows that defendant was drunk and disorderly at a public place, it raises for the jury the question of whether an officer present at the time had reasonable ground to believe that defendant had committed a misdemeanor in his presence. *Ibid.*

§ 6. Resisting Arrest.

A warrant for resisting arrest must allege the identity of the officer alleged to have been resisted and describe his official character with sufficient certainty to show that he is a public officer, and indicate the official duties the officer was discharging or attempting to discharge, and state in a general way the manner in which defendant resisted, delayed or obstructed the officer. The warrant in this case *is held* to meet these requirements. *S. v. Fenner*, 695.

Where a warrant charging resisting arrest is amended by asserting the offense defendant was committing in the presence of the officer, the amendment does not alter in any way the charge, since irrespective the amendment the State would have the burden of showing the offense defendant was committing in the presence of the officer so as to establish that the arrest was lawful. *Ibid.*

§ 7. Rights of Persons Arrested.

A person arrested without a warrant has the right to be taken, as soon as may be, before a magistrate having jurisdiction to issue a warrant in the case in order to protect him from being held in violation of his rights. *S. v. Chamberlain*, 406.

ATTORNEY AND CLIENT.

§ 3. Scope of Authority of Attorney.

An attorney has no authority to enter a plea of *nolo contendere* against the wishes of his client. *S. v. Ward*, 93.

AUTOMOBILES.

§ 2. Suspension and Revocation of Drivers' Licenses.

The fact of conviction of reckless driving during the period of revocation of license for drunken driving, G.S. 20-17(2), without conviction of driving during period of revocation, does not warrant the Commissioner of Motor Vehicles in suspending the driver's license for an additional period of a year. G.S. 20-16 (a)(1). *In re Bratton*, 70.

§ 3. Driving During Suspension of License.

Certificate of revocation without admission of identity is not conclusive. *S. v. Blackwelder*, 96.

§ 6. Safety Statutes and Ordinances.

A municipal ordinance in conflict with a statute is void, but a municipal ordinance requiring ambulances to observe traffic control signals is not in con-

AUTOMOBILES—*Continued.*

flict with statute and is within the delegated authority of the municipality to enact. *Upchurch v. Funeral Home*, 560.

§ 7. Attention to Road, Look-Out and Due Care in General.

Negligence involves more than being at a particular place at a particular time. *Capps v. Smith*, 120.

§ 9. Stopping or Parking.

It is negligence or contributory negligence *per se* to stop a motor vehicle even partly on the hard surface at nighttime without lights, since the statute, G.S. 20-134, prescribes the standard of care, and the failure to exercise the prescribed care is actionable if the proximate cause of injury. *Correll v. Gaskins*, 212.

The stopping of a police car on a highway solely to enable police officers to determine whether the driver of another car had a driver's license does not constitute a parking of the police car in violation of G.S. 20-161(a). *Kinsey v. Kenly*, 376.

§ 10. Negligence or Contributory Negligence in Hitting Vehicle Stopped or Parked.

The question of liability for a rear collision between a standing and a moving vehicle must be determined upon the facts of each particular case. *Brown v. Hale*, 176.

§ 17. Intersections.

Evidence held to raise conflicting inferences of negligence on part of each party causing intersection accident. *Pressley v. Godfrey*, 82.

A municipal ordinance requiring ambulances to observe traffic control signals is valid. *Upchurch v. Funeral Home*, 560.

§ 33. Pedestrians.

A "Y" formed by the intersection at a 45 degree angle of a rural paved road with a State highway some 117 feet outside the city limits of a municipality, the central area of the highway being marked with yellow lines indicating a "no travel" zone, *held* not to constitute the intersection an unmarked crosswalk. *Nix v. Early*, 795.

§ 35. Pleadings in Automobile Accident Cases.

In an action for negligence the complaint must allege facts supporting the legal conclusions of negligence and proximate cause. *Green v. Tile Co.*, 503.

Allegation that a driver violated an ordinance intended to promote safety in the use of the streets of a municipality charges negligence. *Ibid.*

Complaint held not demurrable as compelling conclusion of insulating negligence or contributory negligence. *Ibid.*

Allegations that defendant operated his automobile carelessly and heedlessly and with wanton and wilful disregard for the rights and safety of others merely state conclusions of law. *Starnes v. McManus*, 638.

§ 39. Physical Facts at Scene.

Where there is testimony of witnesses that immediately before the accident they heard tires "squealing" and evidence further tending to relate skid marks on the road to plaintiff's motorcycle, testimony of an officer as to where

AUTOMOBILES—*Continued.*

the skid marks began and stopped is competent, it being for the jury to determine whether the marks were made by defendant's vehicle. *Howard v. Wood*, 241.

The fact that a heavy passenger car traveled 360 feet after the collision before it stopped in a ditch on its left side of the road is not evidence that it was being driven at excessive speed at the time of the impact when there is evidence tending to show that the driver was rendered unconscious by the collision and that the vehicle was traveling downhill. *S. v. Hewitt*, 759.

This action involved a collision between plaintiff's lightweight compact and defendant's car weighing approximately twice as much. Physical facts at the accident disclosed that defendant's car stopped at the point of impact with no skid marks behind it, while the compact, which was hit broadside, was turned around and knocked some 4 to 5 feet. *Held:* The physical facts belie plaintiff's testimony that the speed of defendant's vehicle was some 50 mph, and makes such testimony without probative force. *Mayberry v. Allred*, 780.

§ 41a. Sufficiency of Evidence of Negligence and Nonsuit in General.

Circumstantial evidence of negligence in driving at excessive speed and failing to maintain control held for jury. *Yates v. Chappell*, 461.

Bus approaching from opposite direction on wrong side of mountain road *held* not proximate cause of car driver applying his brakes so as to slide on snow covered highway into rocks on right side of highway. *McGaha v. Smoky Mountain Stages*, 769.

Negligence of one motorist may be proximate cause of collision between two other motorists. *Knight v. Seymour*, 790.

§ 41b. Sufficiency of Evidence of Negligence in Failing to Use Due Care in General.

Evidence held not to show negligence in failing to avoid collision with vehicle suddenly turning across defendant's lane. *Capps v. Smith*, 120.

§ 41c. Sufficiency of Evidence of Negligence in Failing to Stay on Right Side of Highway in Passing Vehicles Traveling in Opposite Direction.

Evidence that defendant's tractor-trailer, traveling east on a street between warehouses at a port, struck the "counter weight" of a fork lift which was unloading a tractor-trailer on the north side of the street, resulting in the injury in suit, *held* sufficient to be submitted to the jury on the issue of negligence. *Byrd v. Motor Lines*, 369.

Findings to the effect that plaintiff was a passenger in an automobile being driven on a curving mountain road covered with several inches of ice and snow, that the driver of the car saw a bus approaching from the opposite direction on the bus' wrong side of the highway, became excited, and applied his brakes, causing the car to skid and collide with rock on its right side of the highway, without a finding that the bus and the car ever came into actual contact, *is held* insufficient to support recovery by plaintiff against the bus company. *McGaha v. Smoky Mountain Stages*, 769.

Evidence tending to show that defendant driver was traveling some 75 miles per hour and attempted to pass another vehicle proceeding in the same direction when plaintiff was approaching from the opposite direction, that defendant driver did not slacken speed and struck the car he was attempting to pass, causing the driver of that car to lose control and swerve across the highway

and crash into plaintiff's automobile, *held* sufficient to be submitted to the jury on the issue of negligence, whether defendant's negligence was the proximate cause of the accident being for the jury under the evidence, notwithstanding defendant's car did not collide with plaintiff's vehicle. *Knight v. Seymour*, 790.

§ 41e. Sufficiency of Evidence of Negligence in Stopping or Parking.

The evidence tended to show that defendant employees were driving the defendant employer's vehicles back to his garage, that one of the vehicles became disabled and the other vehicle was used to push it along the outer lane of a four-lane highway, and that when the pushing vehicle overheated and also became disabled both vehicles were permitted to stand in the outer lane without lights, notwithstanding an eleven foot paved shoulder on the right. *Held:* The evidence is sufficient to be submitted to the jury on the issue of defendants' actionable negligence. *Brown v. Hale*, 176.

Evidence that police car was stopped so as to block two lanes of three-lane traffic, and left standing without lights held to take issue of negligence to jury. *Kinsey v. Kenly*, 376.

§ 41f. Sufficiency of Evidence of Negligence in Following too Closely or in Hitting Preceding Vehicle.

In this action to recover for a rear end collision, plaintiff called as a witness a passenger in the following car who testified that the following car came to a complete stop without hitting plaintiff's vehicle, and that it was then hit by a third following vehicle and knocked into plaintiff's car. *Held:* In the absence of evidence in contradiction of the witness, the driver of the first following car is entitled to nonsuit, and testimony of plaintiff to the effect that his car received two jolts is insufficient to contradict the witness' statement, since there are many possibilities which would explain the successive jolts. *Powell v. Cross*, 764.

§ 41g. Sufficiency of Evidence of Negligence in Failing to Yield Right of Way at Intersection.

Plaintiff's evidence tending to show that he turned on his left turn signal and attempted to make a left turn at an intersection after ascertaining that no vehicle was approaching from the opposite direction within the line of his vision of 150 feet, and that defendant's vehicle, approaching the intersection from the opposite direction, struck his vehicle when all but four feet of his vehicle had cleared the intersection, *held* sufficient to be submitted to the jury on the issue of defendant's negligence upon the hypothesis that defendant failed to delay her entry entrance into the intersection when plaintiff's vehicle was already in the intersection. *Mayberry v. Allred*, 780.

§ 41l. Sufficiency of Evidence of Negligence in Striking Pedestrian on Highway.

Evidence of negligence in striking pedestrian stepping into defendant's lane of traffic from behind parked cars on rainy night *held* insufficient for jury. *Senter v. Core*, 243.

§ 41n. Sufficiency of Evidence of Negligence in Striking Animal on Highway.

Plaintiff passengers were injured when defendant driver struck a mule on the highway at nighttime while driving 50 to 55 miles per hour. The evidence

AUTOMOBILES—*Continued.*

tended to show that the driver avoided striking one mule by swerving to the left, then drove back on his right side of the highway without slackening speed and did not see the second mule until too late to avoid the collision. *Held:* The evidence was sufficient to be submitted to the jury on the issue of negligence. *Moore v. Brooks*, 236.

§ 41p. Sufficiency of Evidence of Identity of Driver.

Circumstantial evidence that defendant was driving held for jury. *Yates v. Chappell*, 461.

§ 41q. Sufficiency of Evidence of Negligence in Leaving Car Unattended Without Proper Precautions.

Evidence to the effect that five children got into the rear seat of defendant's car, which had been parked in the yard by defendant, and that when the fifth child, the six-year old intestate, got in and closed the door something clicked in the front and the car started rolling, without any evidence that defendant failed to set the hand brake, or failed to engage the transmission, or neglected to maintain adequate brakes, *held* insufficient to overrule nonsuit, the doctrine of *res ipsa loquitur* not being applicable. *Warren v. Jeffries*, 531.

Evidence of negligence in leaving small boy in car with key in switch held for jury. *Pinyon v. Settle*, 578.

Evidence that defendant left a two and one-half year old child alone in a vehicle is sufficient to support an allegation that he left the vehicle unattended, since unattended means leaving it without anyone present who is competent to prevent any of the probable dangers to the public. *Ibid.*

§ 42d. Nonsuit for Contributory Negligence in Hitting Stopped or Parked Vehicle.

Evidence tending to show that plaintiff was traveling within the speed limit of 60 miles per hour on a four-lane highway, following a tractor-trailer, both traveling in the righthand lane for traffic moving in their direction, that the tractor-trailer suddenly swerved to its left, revealing for the first time to plaintiff the presence of defendant's vehicles standing without lights in the middle of the righthand lane, and that defendant immediately applied his brakes, but did not turn left, and crashed into the rear of the standing vehicle, *held* not to show contributory negligence as a matter of law. *Brown v. Hale*, 176.

§ 42g. Nonsuit for Contributory Negligence in Failing to Yield Right of Way at Intersection.

Evidence favorable to plaintiff tending to show that she stopped before entering an intersection with a dominant highway, looked both ways and did not see any approaching traffic, and then drove into the intersection and was struck by defendant's car, which was traveling on the dominant highway in a direction from which it could not have been seen by plaintiff until it was some 145 to 150 feet from the intersection, with evidence of physical facts tending to show defendant was traveling at excessive speed, *held* not to disclose contributory negligence as a matter of law. *Smith v. Jones*, 245.

§ 42h. Nonsuit for Contributory Negligence in Turning.

Evidence permitting the inference that plaintiff turned left at an intersection across defendant's approaching automobile at a time when it was unsafe to turn *held* to raise the issue of contributory negligence for the jury, G.S. 20-154,

but the testimony in this case *held* not to show contributory negligence on that aspect as a matter of law. *Mayberry v. Allred*, 780.

§ 42k. Contributory Negligence of Pedestrian.

Evidence held to support nonsuit for contributory negligence of pedestrian stepping into defendant's lane of traffic from behind parked cars on rainy night. *Senter v. Core*, 243.

Evidence tending to show that intestate, knowing that her husband was drunk, planted herself on the highway in his lane of travel to flag him down, and remained there after bystanders warned her that he might run over her, *held* to disclose contributory negligence as a matter of law barring recovery for her wrongful death resulting when he struck her without turning or slackening speed. *Starnes v. McManus*, 638.

Evidence *held* to show contributory negligence as a matter of law on the part of a pedestrian walking into the path of defendant's approaching automobile at a place not constituting a marked or unmarked crosswalk. *Nix v. Earley*, 795.

§ 45. Sufficiency of Evidence to Require Submission of Issue of Last Clear Chance.

Nonsuit *held* proper upon evidence tending to show that intestate had poor eyesight and walked into the highway in the path of defendant's car, and that defendant did not have time or opportunity to avoid the accident after he discovered or should have discovered that intestate was insensible to the danger. *Wise v. Tarte*, 237.

Evidence *held* not to raise issue of last clear chance. *Senter v. Core*, 243.

§ 46. Instructions in Automobile Accident Cases.

The evidence of one driver was to the effect that she stopped before entering an intersection with a dominant highway, gave a left turn signal, turned left, and had traveled a distance of 100 to 130 feet before the front of a car traveling along the dominant highway struck her. She did not admit that the collision occurred at the intersection. The evidence of the other driver tended to show debris from the collision only 40 feet from the intersection. *Held:* An instruction that it was admitted that the collision occurred at the intersection must be held for prejudicial error, this being a crucial and controverted fact. *Keith v. King*, 118.

Where defendant's evidence is to the effect that plaintiff's vehicle was standing partly on the hard surface at nighttime without lights when defendant's vehicle ran into its rear, defendant is entitled to an instruction to the effect that if the jury should find by the greater weight of the evidence that defendant violated the statute and such violation was a proximate cause of the collision to answer the issue of contributory negligence in the affirmative, and an instruction which leaves the issue of contributory negligence to be determined on the basis of the common law principle of due care must be held for prejudicial error. *Correll v. Gaskins*, 212.

Where, under the circumstances, negligence must be predicated on the concurrent acts of defendant driver in stopping the car he was driving on the highway at an angle so as to block two traffic lanes and in leaving the car standing in this position without light sufficient to disclose its presence, an instruction which permits the jury to answer the issue of negligence in the affirmative solely upon the jury's finding that the car was stopped at an angle in the manner

AUTOMOBILES—*Continued.*

indicated by plaintiff must be held for prejudicial error as being incomplete. *Kinsey v. Kenly*, 376.

§ 47. Liability of Driver to Guests and Passengers in General.

Evidence that a passenger was standing beside a car with the door open and that the driver permitted her foot to slip from the clutch while the automobile was in gear with the engine running, so that the car lurched forward, swinging the door back against the passenger to her injury, is sufficient evidence, in the absence of explanation, of lack of proper care under the circumstances. *Gillikin v. Burbage*, 317.

An action by a passenger to recover against the driver for a collision occurring in the State of Virginia is governed by the laws of that State which require a showing of gross negligence or a willful and wanton disregard for the safety of his passengers by the driver in order to support recovery against him *Crow v. Ballard*, 475.

Instruction that gross negligence and wanton and wilful disregard for safety of passengers was synonymous must be held for error. *Ibid.*

§ 48. Parties Liable to Guest or Passenger.

The fact that the driver is negligent does not preclude recovery by his passenger against the driver of the other car involved in the collision, since, if both are negligent, plaintiff is entitled to recover from either or both. *Green v. Tile Co.*, 503.

§ 49. Contributory Negligence of Guest or Passenger.

When a gratuitious passenger becomes aware that the automobile in which he is riding is being persistently driven in a reckless and dangerous manner, the duty devolves upon him in the exercise of due care for his own safety to caution the driver, and, if his warning is disregarded, to request that the automobile be stopped and he be permitted to leave the car, and he may not acquiesce in a continued course of negligent conduct on the part of the driver and then collect damages from the driver for injury proximately resulting therefrom. *Beam v. Parham*, 417.

A guest who feels endangered by the manner in which a car is operated is not ordinarily expected to leap therefrom while it is in motion, nor is it his duty to ask to be allowed to leave the vehicle under all circumstances of negligent operation, but he is required to use that care for his own safety which a reasonably prudent person would employ under the same or similar circumstances, which is ordinarily a question for the jury. *Ibid.*

§ 50. Negligence of Driver Imputed to Passenger.

The negligence of the driver will be imputed to the owner-passenger having the right to control and direct the operation of the vehicle by the driver. *Cox v. Shaw*, 361.

§ 52. Liability of Owner for Driver's Negligence in General.

In an action by an owner-passenger against the driver of the other car involved in the collision, demurrer should not be sustained even if the facts alleged disclose negligence on the part of the driver of plaintiff's car, since plaintiff's allegation that she was a passenger would permit her to show that she had relinquished the right of control. *Green v. Tile Co.*, 503.

AUTOMOBILES—*Continued.*

§ 54a. Employees or Agents Within Scope of Respondeat Superior.

A carrier will be held liable in damages for injuries to third persons caused by the negligent operation of a vehicle transporting goods under authority of its intrastate franchise by application of the same public policy which imposes liability on an interstate carrier for injuries resulting from the operation of a vehicle under its interstate franchise, notwithstanding the vehicle may be driven by the owner-lessor at the time of the accident. *Byrd v. Motor Lines*, 369.

The evidence tended to show that the owner of a tractor was operating the tractor and a trailer in transporting tobacco from a municipality in this State to a port in the State for shipment in foreign commerce, that defendant carrier had leased the equipment, and that the trailer had painted on its side the name of defendant carrier and the identifying number assigned to the trailer by the Utilities Commission. *Held:* If no interstate franchise was required because the freight consisted of agricultural products, then the shipment was not exempt from State regulation, and the transportation was under authority of the intrastate franchise rights, and defendant carrier is liable for injuries to third persons resulting from the negligent operation of the vehicle. *Ibid.*

The accident in suit occurred after the cargo had been unloaded at a warehouse and after the tractor-trailer had been turned around and was in the process of leaving the port terminal. *Held:* The liability of the carrier under his franchise continued at least during the time the vehicle was on the port terminal premises. *Ibid.*

§ 54f. Sufficiency of Evidence and Nonsuit on Issue of Respondeat Superior.

Evidence in this case *held* sufficient to be submitted to the jury on the issue of whether the owner-operator of the tractor-trailer in the shipment in intrastate commerce was the agent of the carrier under whose franchise authority the shipment was transported. *Byrd v. Motor Lines*, 369.

Stipulations that the car involved in the accident was owned by a designated person is sufficient to take the case to the jury on the issue of the agency of the driver. *Yates v. Chappell*, 461.

Where there is no evidence that the father of the driver was the registered owner of the car and no evidence tending to establish agency under the family purpose doctrine or otherwise, nonsuit of the father, sought to be held liable under the doctrine of *respondeat superior*, is correctly entered. *Crow v. Ballard*, 475.

§ 55. Family Car Doctrine.

Under the family purpose doctrine the negligent operation of a car by a minor member of the family is imputed to the father furnishing the vehicle, regardless of whether the father is present in the car at the time of the accident. *Cox v. Shaw*, 361.

Evidence that the son was driving the car owned by the father for use of the family and was driving with the father's knowledge and permission is sufficient to be submitted to the jury on the question of agency under the family purpose doctrine. *Knight v. Seymour*, 790.

§ 59. Sufficiency of Evidence and Nonsuit in Homicide Prosecutions.

In order to warrant overruling motion to nonsuit in a manslaughter prosecution, the State's evidence must show that defendant driver was guilty of an intentional, wilful or wanton violation of a safety statute or an inadvertent vio-

AUTOMOBILES—*Continued.*

lation of such statute accompanied by recklessness of probable consequences of a dangerous nature amounting to a thoughtless or heedless indifference to the safety and rights of others, and that such conduct proximately caused the injury and death. *S. v. Hewitt*, 759.

Evidence in this case *held* insufficient for jury on issue of culpable negligence. *Ibid.*

§ 72. Sufficiency of Evidence and Nonsuit in Prosecutions for Drunken Driving.

Evidence that the driver had been drinking, without evidence that he was under the influence of intoxicating beverages and without any evidence of faulty driving on his part, such as following an irregular course on the highway, is insufficient to show a violation of G.S. 20-138. *S. v. Hewitt*, 759.

§ 76. Failing to Stop After Accident.

Evidence held sufficient for jury on question of whether defendant knowingly and wilfully failed to render aid to injured passenger but insufficient to show defendant failed to give name, address and operator's license to injured party. *S. v. Coggin*, 457. Court should instruct jury that burden is on State to establish that defendant failed to render reasonable assistance to injured passenger. *Ibid.*

AVIATION.

§ 2. Operations.

G.S. Chapter 63 contemplates full cooperation and compliance with Federal statutes and rules and regulations of appropriate Federal agencies in the operation of aircraft. *Charlotte v. Spratt*, 656.

BAILMENT.

§ 1. Nature and Requisites of the Relationship.

Evidence and allegation to the effect that plaintiff turned over possession of his airplane to defendant for repairs is sufficient to establish the relationship of bailor and bailee in regard to the airplane while in defendant's control or possession. *Electric Corp. v. Aero Co.*, 437.

§ 3. Liabilities of Bailee to Bailor.

The bailee is not an insurer, but is required to exercise ordinary care to protect bailor's property against loss, damage or destruction, and to return the property to bailor in as good condition as when he received it. *Electric Corp. v. Aero Co.*, 437.

Plaintiff's evidence to the effect that when he turned over his airplane to defendant for repairs of the radio the airplane was in good condition and that while the plane was in defendant's possession and control it became damaged, makes out a *prima facie* case of actionable negligence against the defendant in the absence of some fatal admission or confession. *Ibid.*

BURGLARY AND UNLAWFUL BREAKINGS.

§ 4. Sufficiency of Evidence and Nonsuit.

Circumstantial evidence of guilt of felonious breaking held for jury. *S. v. Mullinax*, 512.

BURGLARY AND UNLAWFUL BREAKING—*Continued.*

§ 5. Instructions.

Where the evidence shows that the glass in the door of one shop had been broken, that the screen door in another had been cut, and that tire tool marks were found in the jamb of a third, without any evidence that anything had been stolen from any of the establishments, and defendant testifies to the effect that he was intoxicated and angry and inflicted the damage solely to annoy officers of the law, the court must charge the jury that if it accepted defendant's version he would not be guilty of housebreaking. *S. v. Garrett,* 773.

§ 6. Submission of Guilt of Less Degrees of Crime.

The charge of housebreaking for the purpose of committing a felony does not include as a lesser offense malicious or intentional injury to property. *S. v. Garrett,* 773.

§ 8. Possession of Implements of Breaking.

G.S. 14-55 defines three separate offenses. *S. v. Garrett,* 773.

A tire tool is not an instrument of housebreaking within the contemplation of G.S. 14-55, and a defendant cannot be convicted under that statute upon evidence that he was found in possession of a tire tool, even though there is evidence of a tire tool mark in the jamb of a door of a nearby building and that when pressure was put on the door it opened. *Ibid.*

CANCELLATION AND RESCISSION OF INSTRUMENTS.

§ 2. Cancellation for Duress or Fraud.

Deed may be rescinded for misrepresentation that it contained material provision for support of grantor. *Mills v. Dunk,* 742.

CARRIERS.

§ 7. Loading and Unloading Facilities.

Evidence held for jury on issue of carriers' negligence in failing to chock wheels of trailer so that it would be reasonably safe for unloading. *Spinning Co. v. Trucking Co.,* 807.

CHATTEL MORTGAGES AND CONDITIONAL SALES.

§ 8. Necessity for Registration and Rights of Parties Under Unregistered Instruments.

Unregistered chattel mortgage has priority over later recorded Federal tax lien. *Trust Co. v. Ins. Co.,* 32.

§ 14. Substitution and Cancellation.

Where, upon the mortgagor's claim of breach of the contract by the mortgagee, in failing to service the chattel purchased, the mortgagee, with consent of the mortgagor, takes possession of the chattel and has the mortgagor execute a relinquishment of the equity of the redemption, and thereafter treats the property as if it were the absolute owner, the equitable and legal title will merge in the mortgagee, and the mortgagee may not thereafter sell the property and seek to recover from the mortgagor deficiency on the purchase money notes. *Cooperative Exchange v. Holder,* 494.

CLAIM AND DELIVERY.

§ 5. Judgment for Defendant and Liabilities on Plaintiff's Undertaking.

Where judgment is entered that plaintiff is entitled to the chattel, judgment against the surety on plaintiff's bond may not be allowed, even though defendant recovers judgment against plaintiff for purchase money payments made on the chose. *Wilson v. Wilson*, 88.

COMMON LAW.

Principles of the common law which have not been abrogated or modified by statute are in full force and effect in this jurisdiction. *Layton v. Layton*, 453; *S. v. Lowry*, 536.

CONSTITUTIONAL LAW.

§ 4. Persons Entitled to Raise Constitutional Questions.

A party has no standing to enjoin the enforcement of a statute or ordinance when he fails to show that his rights have been impinged or are imminently threatened by the operation of the statute or ordinance. *Surplus Co. v. Pleasants*, 587; *Charles Stores v. Tucker*, 710.

§ 14. Police Power — Morals and Public Welfare.

Municipal ordinance prescribing observance of Sunday held to have relationship to public health and welfare. *Charles Stores v. Tucker*, 710.

§ 20. Equal Protection, Application and Enforcement of Laws and Discrimination.

In accordance with mandate of the Supreme Court of the United States, conviction of defendant of trespass in wilfully refusing to leave a restaurant after being requested to do so by the management, is reversed on the ground that the inspection form of the State Board of Health providing for toilet facilities separate for each race constitutes State action depriving the operator of the restaurant of freedom of choice as to patrons he could serve. *S. v. Fox*, 233.

The Constitution does not preclude classifications provided they are not arbitrary and unreasonable and all members within a classification are treated alike. *Galloway v. Lawrence*, 433.

G.S. 1-540.1, providing that a release from liability should not bar a subsequent action for malpractice in treating injuries which were the subject of the release unless the parties specifically so intended, *held* not to place physicians and surgeons in an arbitrary or unreasonable classification with respect to tortious liabilities, but merely to remove them from favorable protection, since all other persons responsible for a subsequent or independent tortious injury are held responsible therefor. *Ibid.*

Classifications of business permitted Sunday operations held reasonable and uniform within the classifications. *Charles Stores v. Tucker*, 710.

§ 24. What Constitutes Due Process.

Notice and an opportunity to be heard are requisites of due process. *Browning v. Highway Comm.*, 130.

§ 29. Right to Jury Trial.

Upon *prima facie* showing of racial discrimination in selection of grand jury burden is upon State to go forward with evidence and upon its failure to do so finding of nondiscrimination is not supported by evidence. *S. v. Lowry*, 536.

CONSTITUTIONAL LAW—*Continued.*

§ 30. Due Process in Criminal Prosecutions in General.

A defendant in a state criminal trial has a right to be tried according to the substantive and procedural due process requirements of the Fourteenth Amendment to the United States Constitution. *S. v. Chamberlain*, 406.

Defendant is entitled to speedy trial, but whether it is afforded must be determined in light of circumstances, and under facts of this case there was no denial of constitutional right. *S. v. Lowry*, 536.

§ 32. Right to Counsel.

Defendant's waiver of counsel must be intelligently and understandingly made in order to be effective, but the court is not justified in forcing counsel upon an accused who wants none. *S. v. Bines*, 48; *S. v. McNeil*, 260.

Where the record shows that the trial court was careful to advise defendant of the charges against him and the permissible punishment in case of conviction, and that defendant, experienced by a number of prior prosecutions, with full understanding waived appointment of counsel, it is not error for the trial court to permit the defendant to begin trial without counsel. *S. v. Bines*, 48.

Where one defendant, at the time of arraignment, waives counsel, the fact that his codefendants during the trial change their pleas from not guilty to guilty does not require the court of its own motion to reiterate the seriousness of the charge and caution defendant to reconsider his waiver of counsel. *Ibid.*

A defendant in a criminal prosecution is entitled to counsel and, if an indigent, to have court appoint counsel for him unless he intelligently and understandingly waives counsel, and the fact that defendant enters pleas of guilty does not constitute such a waiver. *S. v. Johnson*, 479.

A defendant in a criminal action may intelligently and understandingly waive his right to appeal, but such waiver is not knowingly made if defendant, at the time of waiver, is without knowledge of his rights, and the courts will indulge every reasonable presumption against waiver. *S. v. Roux*, 149.

Findings held to disclose that defendant did not knowingly waive his right to appeal. *Ibid.*

An indigent defendant has no right to select his own counsel and must accept experienced and competent counsel appointed by the court in the absence of any substantial reason for replacement, and when a defendant states he does not want court appointed counsel after the court has made clear that the court would not appoint other counsel, he waives counsel. The mere fact that court appointed counsel had not prosecuted appeals from prior convictions of the defendant when defendant thought he should have done so is not ground for replacement. *S. v. McNeil*, 260.

It is not required that waiver of counsel be in writing. *Ibid.*

Speculation as to whether defendant would have been better off had he not discharged his court appointed counsel and represented himself is irrelevant to the question of whether he had voluntarily waived counsel by discharging his court appointed counsel. *Ibid.*

The statute prescribing the right of an indigent defendant charged with a felony to representation by counsel does not apply to preliminary examination prior to arrest and prior to indictment. *S. v. Elam*, 273.

The Federal decision that defendant in a criminal prosecution is entitled to counsel must be given retroactive effect. *S. v. Goff*, 515.

A defendant is entitled to counsel at his post-conviction hearing attacking the constitutionality of his trial. *Ibid.*

CONSTITUTIONAL LAW—*Continued.*

Where the assistance of counsel is a constitutional requisite, the right to have counsel does not depend upon a request. *Ibid.*

§ 33. Right of Accused not to Incriminate Self.

Where a defendant does not object to an examination by a physician, testimony by the physician as to defendant's condition in respect to being drunk or under the influence of intoxicating liquor does not violate defendant's constitutional right not to be compelled to give evidence against himself. *S. v. Hollingsworth*, 158.

§ 36. Cruel and Unusual Punishment.

Sentence within the statutory maximum cannot be considered cruel or unusual in the constitutional sense. *S. v. Whaley*, 824.

CONTRACTS.

§ 1. Nature and Essentials in General.

A stipulation in a contract giving each party the election to continue to perform or to pay a specified sum for terminating the contract, is valid and enforceable. *Bell v. Concrete Products*, 389.

§ 4. Consideration.

Consideration necessary to support a simple contract may consist of some benefit or advantage to the promisor or some detriment to the promisee. *Helicopter Corp. v. Realty Co.*, 139.

§ 12. Construction and Operation of Contracts in General.

Where the language of a contract is plain and unambiguous it is for the court and not the jury to declare its meaning and effect. *Lowe v. Jackson*, 634.

§ 14. Parties to Contract.

Where a contractor for the construction of a house is an independent contractor, the person furnishing materials solely on the basis of the contractor's credit may not hold the owner liable on the theory that the contractor was an agent for the owner in purchasing the materials. *Oldham & Worth v. Bratton*, 307.

§ 19. Novation.

Mere assumption of debt by purchaser of equity of redemption does not constitute novation. *Lowe v. Jackson*, 634.

§ 21. Performance and Breach.

Where there are mutually dependent stipulations in a contract constituting mutual considerations, if defendant's conduct is such as to prevent full performance on the part of the plaintiff, the latter may hold the contract as abandoned by defendant and sue to recover damages for what he has done and his losses occasioned by the default of defendant. *Helicopter Corp. v. Realty Co.*, 139.

§ 25. Pleadings, Issues and Burden of Proof.

Plaintiff may allege a special contract and recover on *quantum meruit* upon a proper showing. *Helicopter Corp. v. Realty Co.*, 139.

CONTRACTS—*Continued.*

§ 26. Competency and Relevancy of Evidence.

Evidence of prior negotiations of the parties to a written agreement may be competent for the purpose of throwing light on the intent of the parties. *Bell v. Concrete Products*, 389.

§ 31. Interference With Contract by Third Person.

An action will lie against a third person who wrongfully and maliciously prevents the making of a contract between the negotiating parties, and plaintiff need not show actual malice in order to support recovery, it being sufficient if the interference flows from a design to injure plaintiff or to gain some advantage at his expense. *Johnson v. Gray*, 507.

But where party has statutory duty to make report the fact that the report induces the employer not to renew contract of employment is not ground for action in absence of malice. *Ibid.*

As a general rule, a third person who, by intermeddling, induces one of the negotiating parties not to enter into a contract which he would have executed except for such intermeddling, is liable for the resulting damages provided such interference is not done in the exercise of legitimate rights, but is in furtherance of malicious design to injure one of the contracting parties or to gain some advantage at this expense. *Equipment Co. v. Equipment Co.*, 549.

Plaintiff alleged that it was a distributor of defendant and that defendant induced one of plaintiff's prospects to purchase equipment from another distributor instead of plaintiff. *Held:* In the absence of allegation that the prospect would have consumated an agreement with plaintiff except for the malicious interference and in the absence of allegation of facts supporting the conclusion of malice on the part of defendant, defendant's demurrer must be allowed. *Ibid.*

CORPORATIONS.

§ 8. Authority and Duties of General Manager and Power to Bind Corp.

The position of manager of a corporation implies that the person holding that corporate office is in charge of the affairs of the company with respect to the property and business with which he is associated, with the power to do those things necessary for the discharge of such duties. *Research Corporation v. Hardware Co.*, 718.

Where plaintiff's evidence is sufficient for the jury on the question of the apparent authority of defendant's agent to order the appliances in question, but defendant introduces evidence that the agent's superior told plaintiff's salesman that the appliances might be delivered only upon consignment, it is error for the court to fail to instruct the jury that on defendant's evidence the agent had no authority to purchase the goods. *Ibid.*

§ 19. Dividends.

Causes to compel declaration of dividends and to compel liquidation of corporation for mismanagement may be joined in action against corporation and its directors. *Dowd v. Foundry Co.*, 101.

§ 26. Liability of Corporation for Torts.

Evidence held sufficient to show that person accosting plaintiff and asking to see her pocketbook in search for shoplifted goods was employee of defendant and acting in scope of his employment. *Black v. Clark's*, 226.

CORPORATIONS—*Continued.*

§ 27. Dissolution.

Causes to compel declaration of dividends and for dissolution may be joined in action against corporation and its directors. *Dowd v. Foundry Co.*, 101.

§ 29. Claims and Priorities.

Funds collected on accounts receivable due a corporation may not be used to pay the individual debts of the principle incorporator, which debts were incurred by the incorporator in connection with other personal businesses operated by him. *Couture, Inc. v. Rowe*, 234.

COUNTIES.

§ 3.1. Ordinances.

Plaintiff failing to allege imminent threat to constitutional rights has no standing to attack county Sunday ordinance. *Surplus Co. v. Pleasants*, 587.

COURTS.

§ 2. Jurisdiction in General.

Where personal service of process has not been had a judgment *in personam* is a nullity, notice and an opportunity to be heard being prerequisites of jurisdiction. *Finance Co. v. Leonard*, 167.

A challenge to jurisdiction may be made at any time, and if the court finds at any stage of the proceeding that it is without jurisdiction it should dismiss the proceeding. *Richards v. Nationwide Homes*, 295.

At any time a court finds it has no jurisdiction of the proceedings it should stay, quash or dismiss the suit. *Revels v. Oxendine*, 510.

§ 9. Jurisdiction After Orders or Judgment of Another Superior Court Judge.

The sustaining of a demurrer with leave to amend cannot preclude another Superior Court judge from thereafter overruling demurrer to the amended pleading when the amendment adds allegations of fact essential or relevant to the causes of action alleged. *Helicopter Corp. v. Realty Co.*, 139.

§ 20. What Law Governs — Laws of This and Other States.

Libel is transitory, and courts of the State of the posting or of the receipt of libelous matter sent through the mail have jurisdiction. *Sizemore v. Maroney*, 14.

When accident occurs in Virginia, its laws govern the right of a passenger to recover from the driver. *Crow v. Ballard*, 475.

CRIME AGAINST NATURE.

§ 1. Nature and Elements of the Offense.

In this jurisdiction crime against nature embraces sodomy, buggery, and bestiality as those offenses were known and defined at common law. *S. v. O'Keefe*, 53.

§ 2. Prosecutions.

Evidence of defendant's guilt of committing the crime against nature with another male person *held* sufficient to be submitted to the jury. *S. v. O'Keefe*, 53.

CRIME AGAINST NATURE—*Continued.*

A bill of indictment charging a male defendant with committing "the abominable and detestable crime against nature with" a named male person on a specified date in a named county is sufficient, it not being required that the manner in which the offense was committed be set forth. *Ibid.*

An indictment charging defendant with committing the crime against nature with a named pathic on a specified date permits the introduction of evidence that defendant committed two acts of unnatural intercourse, one *per os* and the other *per anum*, during the single visit of the pathic to defendant's room, since the two acts were essentially parts of a single transaction, and the court correctly instructs the jury that proof of either act would be sufficient for conviction of the crime charged. *Ibid.*

CRIMINAL LAW.

§ 1. Nature and Elements of Crime.

A criminal statute must be sufficiently definite to give unmistakable notice of the act proscribed, but if the statute uses a well-known common law appellation which conotes a definite offense the statute is definite and certain. *S. v. Lowry*, 536.

The municipal Sunday observance ordinance in question *held* sufficiently definite to enable a citizen of reasonable intelligence to determine what goods could or could not be legally sold within the city on Sunday, and therefore the ordinance is not void as being unconstitutionally vague. Difficulty as to classification of a few inconsequential items does not warrent declaring the ordinance invalid. *Charles Stores v. Tucker*, 710.

§ 7. Entrapment.

The burden is on defendant to prove his defense of entrapment to satisfaction of jury. *S. v. Cook*, 730.

§ 19. Transfer of Cause to Superior Court Upon Demand for Jury Trial.

Upon transfer of a cause from a recorder's court to the Superior Court upon defendant's demand for a jury trial, defendant is properly tried in the Superior Court on an indictment. *S. v. Hollingsworth*, 158.

§ 25. Plea of Nolo Centendere.

Since a plea of *nolo contendere* will support the same punishment as a plea of guilty, it comes within the purview of G.S. 15-4.1 requiring the court to warn and advise an accused who is without counsel of the consequences of the plea. *S. v. Payne*, 77.

Counsel may not enter plea of *nolo contendere* over defendant's objection. *S. v. Ward*, 93.

§ 26. Former Jeopardy.

No person may be twice put in jeopardy for the same offense, but the burden is upon defendant to prove his plea of former jeopardy and show that the prior prosecution was for the same offense, both in law and in fact. *S. v. Stinson*, 283.

In a prosecution for the larceny of certain property from a named individual, plea of former jeopardy based upon a nonsuit for variance entered in a prior prosecution on an indictment charging larceny of the same property but laying the ownership of the property in a nonexistent corporation, is properly

CRIMINAL LAW—*Continued.*

denied by the court upon an examination of the two indictments without introduction of evidence by defendant of sumbission of issues to the jury. *Ibid.*

§ 31. Judicial Notice.

Where it is common knowledge that a defendant in a case on appeal has fled this Country and gone to a communist country and there engaged in propaganda inimical to this Country, our courts will take judicial notice of such activity. *S. v. Williams*, 800.

§ 32. Burden of Proof and Presumptions.

Proof to satisfaction of jury is not necessarily greater burden than proof by greater weight of evidence. *S. v. Matthews*, 95.

§ 34. Evidence of Defendant's Guilt of Other Offenses.

Where the State's evidence tends to show larceny of property and flight of the participants by automobile immediately after the larceny, evidence of the prior larceny of the automobile in another state is competent as tending to show the existence of a plan or design to commit the larceny charged. *S. v. Stinson*, 283.

§ 44. Bloodhounds.

Where a dog is identified as a "bloodhound" and a "thoroughbred," and it is shown that the dog actually followed a single human scent, differentiating it from others, objection that it had not been shown that the dog was of pure blood is untenable. *S. v. Rowland*, 353.

Where the evidence discloses that a bloodhound followed tracks from the scene of the crime to a room of a house some distance away in which the defendant and another were sitting, with evidence tending to show that defendant had on his person bills of the same denomination as those taken from the unconscious body of the victim of a robbery, objection to the evidence of the actions of the dog because the dog did not sufficiently identify defendant at the end of the trail is untenable. *Ibid.*

§ 48. Silence of Defendant as Implied Admission.

Officers of the law obtained a confession from one of the parties perpetrating the offense charged, read the confession to defendant and took defendant to the hospital room where the party who had made the confession made statements implicating defendant. *Held:* Defendant's silence in the face of the accusation is not competent as an implied admission of guilt since such implied confession was not voluntary, and therefore testimony as to the accusations is incompetent as hearsay. *S. v. Virgil*, 73.

Where defendant promptly denies an accusation of guilt the principle of an implied admission by silence does not come into play, and evidence of the circumstances of the accusation is incompetent. *S. v. McNeil*, 260.

Where defendant tells his confederate to go ahead and tell the truth and that he would stop him if he lied, and the confederate recounts the circumstances of the commission of the offense, including statements directly implicating defendant, defendant's failure to deny the accusation of guilt is competent. *S. v. Stinson*, 283.

§ 50. Opinion Evidence in General.

The use of the expression "I believe" or other like phrases by a witness does not render the witness' tstimony incompetent when the subject of the testimony

CRIMINAL LAW—*Continued.*

relates to a personal observation by the witness and the uncertainty refers only to the witness' indistinctness of perception or memory in regard thereto. *S. v. Haney*, 816.

§ 61. Evidence of Tire Tracks.

It is competent to show in evidence that a track of a mud grip tire on the right and the track of a tire of a regular tread on opposite side were found at the scene of the crime and that defendant's car had a mud grip tire on the right rear and a regular tire on the opposite side. *S. v. Brown*, 327.

§ 65.1. Evidence of Identity by Name.

Certificate of Department of Motor Vehicles of revocation of license of a named person is not conclusive that defendant of same name was same person in absence of admission. *S. v. Blackwelder*, 96.

§ 71. Confessions.

The fact that a defendant who had voluntarily given himself up at police headquarters made a confession after he had been truthfully told by a police officer that defendant had been implicated by others in the commission of the crime under investigation does not render the confession involuntary. *S. v. McNeil*, 260.

Where, upon objection by defendant's counsel to the introduction in evidence of defendant's extrajudicial confession, defendant's counsel in the absence of the jury cross-examines the officer in regard to the voluntariness of defendant's statement and counsel makes no indication that defendant desired to offer any evidence in rebuttal, objection to the admission of the confession on the ground that defendant had not offered any evidence is untenable. *S. v. Elam*, 273.

The trial court's finding that defendant's extrajudicial confession was freely and voluntarily made will not be disturbed on appeal when the court's finding is supported by plenary competent evidence. *Ibid.*

Evidence held to support findings in this case that confession was voluntary, and fact that defendant was without counsel is immaterial, defendant having knowingly waived right to counsel. *Ibid.*

Evidence to the effect that defendant, while in jail, requested to see a specified police officer and made a confession to such officer when the officer went to the jail in response to defendant's request, and that the officer made no promises or threats of any kind, supports the court's finding that the confession was freely and voluntarily made. *S. v. Stinson*, 283.

Where a defendant charged with a crime makes an extrajudicial confession to a police officer while defendant is confined in jail, it is not required that defendant be warned that anything he said might be used against him. *Ibid.*

The competency of an extrajudicial confession is a preliminary question for the trial court, but its finding that the confession was voluntarily made cannot stand if there is no competent evidence to support it. *S. v. Chamberlain*, 406.

The Fourteenth Amendment to the United States Constitution prohibits the use of a confession which is coerced, either by physical or mental means. *Ibid.*

Uncontradicted evidence in this case *held* to show that confession was involuntary, and finding by trial court to the contrary is vacated. *Ibid.*

§ 77. Privileged Communications.

The relationship of physician and patient does not exist between a physician called by defendant's brother to examine defendant at the jail to determine

CRIMINAL LAW—*Continued.*

whether defendant was under the influence of an intoxicant, it being clear that defendant's brother was acting in his own behalf and not as agent, and the testimony of the physician as to defendant's condition at that time is not precluded by G.S. 8-53. *S. v. Hollingsworth,* 158.

§ 79. Evidence Obtained Without Search Warrant.

When the officers within twenty minutes of a lawful arrest searched the car in which defendant was at the time, the search of the automobile without a warrant is not unlawful, since it is incident to arrest. *S. v. Haney,* 816.

§ 86. Time of Trial and Continuance.

A defendant is entitled to a speedy trial, but what is a speedy trial must be determined on the facts of each particular case, and defendant was not denied a speedy trial under the facts of this case. *S. v. Lowry,* 536.

§ 92. Introduction of Additional Evidence.

The trial court has discretionary power, after the commencement of argument, to permit the State to reopen the case for testimony of a witness who had been tardily located, defendant having and exercising the right of cross-examination. *S. v. Harding,* 799.

§ 96.1. Acts or Incidents Relating to Codefendants.

One defendant has no ground to complain that his codefendants, before the conclusion of the State's evidence, withdraw their pleas of not guilty and enter pleas of guilty, when neither of them testifies against defendant and there is no indication of any deal by the State in return for the change in pleas, each being given a prison sentence. *S. v. Bines,* 48.

§ 99. Consideration of Evidence on Motion to Nonsuit.

On motion to nonsuit, the evidence must be considered in the light most faforable to the State, giving it the benefit of every reasonable inference deducible therefrom. *S. v. Mullinax,* 512.

§ 100. Necessity for Motion to Nonsuit and Renewal.

Supreme Court may take notice of fatal variance between indictment and proof notwithstanding absence of motion to nonsuit. *S. v. Brown,* 786.

§ 101. Sufficiency of Evidence to Overrule Nonsuit.

Defendant's motion to nonsuit is properly overruled if there is evidence to support a conviction of the crime charged or an included crime. *S. v. Virgil,* 73; *S. v. Rowland,* 353.

Defendant's confession of guilt of the crime charged, together with evidence *aliunde* of the *corpus delicti* is sufficient to overrule defendant's motion to nonsuit. *S. v. Elam,* 273; *S. v. Stinson,* 283.

Where the State relies upon circumstantial evidence, defendant's motion to nonsuit presents only the question of whether a reasonable inference of defendant's guilt may be drawn from the circumstances adduced by the evidence, it being for the jury to determine whether the facts, taken singly or in combination, satisfy the jury beyond reasonable doubt that defendant is actually guilty. *S. v. Rowland,* 353.

§ 106. Instructions on Presumptions and Burden of Proof.

An instruction that the burden was on defendant to prove self-defense to the satisfaction of the jury and that such degree of proof exceeds proof by the

greater weight of the evidence is prejudicial error, since proof by greater weight of the evidence may be sufficient to satisfy the jury. *S. v. Matthews*, 95.

A charge that if after considering all the evidence the jury was not satisfied beyond a reasonable doubt of defendant's guilt to acquit him, *held* not error for failure to inform the jury that it could consider the lack of evidence relating to some of the elements of the offense in determining whether the State had carried the requisite degree of proof. The distinction in a charge that reasonable doubt is a "rational doubt growing out of the evidence" is pointed out. *S. v. Cook*, 730.

§ 107. Instructions — Statement of Evidence and Application of Law Thereto.

The court properly refrains from charging the jury as to the law upon a state of facts not presented by a reasonable view of the evidence in the case. *S. v. Hollingsworth*, 159.

Where defendant introduces evidence of an alibi, it is prejudicial error for the court to fail to charge the law applicable thereto. *S. v. Leach*, 242.

It is insufficient for the court merely to read the applicable statutory law, and give a summary of the evidence and the contentions of the parties, since G.S. 1-180 requires that the court apply the law to the facts in evidence. *S. v. Coggin*, 457.

§ 108. Expression of Opinion by Court on Evidence in Charge.

In a prosecution for driving a vehicle on a public highway while under the influence of intoxicating liquor, an instruction to the effect that the State contended the statute was enacted to protect life and property and if the jury should fail to "convict on this evidence, then the law or statute commonly referred to as 'the drunken driving' statute, would have no purpose and no effect" *held* prejudicial as an expression of opinion by the court on the evidence. *S. v. Anderson*, 124.

§ 109. Instructions on Less Degree of Crime.

The court is not required to submit question of guilt of a less degree of the crime when there is no evidence of guilt of such less degree. *S. v. Summers*, 517.

§ 111. Charge on Credibility of Witnesses.

Charge on duty of jury to scrutinize testimony of witness in view of bias held without error. *S. v. Morgan*, 400; *S. v. Britt*, 535.

§ 120. Unanimity of Verdict, Acceptance and Impeachment.

After the verdict has been accepted and the jury discharged, the jurors should not be heard to impeach their verdict on the ground that they had not heard the judge's charge to them, since to permit jurors to impeach the verdict would be replete with dangerous consequences. *S. v. Hollingsworth*, 158.

Where it is apparent from the record that the jury had agreed upon the verdict, subject to clarification as to its form, the court, upon clarifying the question for the jury, may accept the verdict then tendered without requiring further deliberation. *S. v. Summers*, 517.

§ 121. Arrest of Judgment.

Arrest of judgment for fatal defect in the warrant does not preclude the State from thereafter proceeding upon a sufficient warrant or indictment. *S. v. Smith*, 788.

CRIMINAL LAW—*Continued.*

§ 128.1. Judgment of Nonsuit.

A judgment of nonsuit has the force and effect of a verdict of not guilty of the charge contained in the indictment. *S. v. Stinson*, 283.

§ 131. Severity of Sentence.

A sentence within the limits allowed for a first offense will not be disturbed on the contention that the warrant failed to charge the requisites of a prior conviction and that the court might nevertheless have taken the previous conviction into consideration in fixing punishment. *S. v. Morgan*, 400.

Sentence within the statutory maximum does not violate constitutional rights. *S. v. Whaley*, 824.

§ 133. Concurrent and Cumulative Sentences.

Where defendant is serving a sentence at the time of commitment under a subsequent sentence specifying that time of service thereunder should begin at the expiration of the first, and the prior sentence is set aside, defendant should be recommited under the second sentence with provision that the term should begin on the first day of the term of court at which the judgment and sentence was imposed, and not the date of recommitment. *Potter v. State*, 114.

§ 136. Revocation of Suspension of Sentence.

The revocation of suspension of sentence based upon a criminal conviction must be set aside when the conviction is vacated. *S. v. Blackwelder*, 96.

§ 139. Nature and Grounds of Appellate Jurisdiction.

The warrant is part of the record proper, and the Supreme Court will take notice *ex mero motu* if it is insufficient to charge a criminal offense, this being a jurisdictional matter. *S. v. Banks*, 784.

Supreme Court, in the exercise of its supervisory jurisdiction, may take notice of fatal variance between indictment and proof, notwithstanding absence of motion to nonsuit and failure to press question by exception, assignment of error, or in the brief. *S. v. Brown*, 786.

Where it is a matter of common knowledge and admitted by defendant's counsel that defendant fled the Country between the time of judgment of the State court finding no error in his trial and receipt of mandate from the U. S. Supreme Court on *certiorari* remanding the cause for consideration in the light of applicable Federal decisions, the North Carolina Supreme Court, in its discretion, may order the case left off the docket until further direction to the contrary by the Court. *S. v. Williams*, 800.

§ 142. Right of State to Appeal.

The right of the State to appeal in criminal prosecutions is solely statutory, G.S. 15-179, and the State has no right to appeal from a judgment allowing a plea of former jeopardy or acquittal. *S. v. Reid*, 825.

§ 143. Right of Defendant to Appeal.

A defendant has a right to appeal from a conviction in the Superior Court for any criminal offense. *S. v. Roux*, 149.

§ 148. Making Up and Transmitting Record.

It is the duty of appellant to see that the record is properly made up and transmitted, but an indigent defendant is entitled to appointment of counsel and

CRIMINAL LAW—*Continued.*

to have the county make available to him the transcript and all records required for an adequate and effective appellate review. *S. v. Roux*, 149.

§ 149. Certiorari.

The Supreme Court may issue the extraordinary writ of *certiorari* to review judgment in a post conviction hearing to ascertain the validity of the judgment and correct any errors therein. *S. v. Roux*, 149.

§ 154. Form and Requisites of Exceptions and Assignments of Error in General.

An assignment of error should point out the particular matter relied upon so as to avoid the necessity of going beyond the assignment itself to ascertain the question sought to be presented. *S. v. Wilson*, 533.

§ 156. Exceptions and Assignments of Error to Charge.

An assignment of error to the charge should quote the portion of the charge to which appellant objects. *S. v. Wilson*, 533.

An assignment of error based on the failure of the court to charge should set out defendant's contention as to what the court should have charged. *Ibid.*

§ 157. Exceptions and Assignments of Error to Refusals of Motions to Nonsuit.

Where defendant introduces evidence, only the correctness of the motion to nonsuit made at the close of all the evidence will be considered on appeal. *S. v. Stinson*, 283.

§ 159. The Brief.

An exception not brought forward and discussed in the brief is deemed abandoned. *S. v. Anderson*, 124; *S. v. McNeil*, 260; *S. v. Brown*, 327; *S. v. Fenner*, 694.

§ 161. Harmless and Prejudicial Error in Instructions.

An instruction placing the burden of proof on the State to disprove an affirmative defense cannot be prejudicial to defendant. *S. v. Cook*, 730.

A charge to the jury will be construed as a whole and error cannot be predicated upon detached portions which are not prejudicial when so construed. *Ibid.*

§ 162. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Where there is sufficient competent evidence to overrule defendant's motion to nonsuit, the introduction of other evidence, even if incompetent, is not prejudicial when such evidence does not in itself tend to link defendant with the *corpus delicti* and it is apparent from the whole record that its admission did not affect the result adversely to defendant. *S. v. Rowland*, 353.

§ 164. Whether Error Relating to One Count Alone Is Prejudicial.

Where concurrent sentences are imposed on each of two counts, error relating to one count alone cannot be prejudicial. *S. v. Hollingsworth*, 158.

§ 165.1. Invited Error.

Defendant may not complain of a charge which he himself has requested. *S. v. Cook*, 730.

CRIMINAL LAW—*Continued.*

§ 168. Review of Judgment on Motion to Nonsuit.

In passing upon defendant's exception to the refusal of his motion to nonsuit, all of the evidence admitted at the trial, whether competent or incompetent, must be considered. *S. v. Virgil*, 73.

§ 173. Post Conviction Hearing.

Where defendant's counsel enters a plea of *nolo contendere* and defendant maintains throughout that he was not guilty, the judgment may not be allowed to stand, and when there is no specific finding as to whether defendant did consent to the plea entered for him, the cause must be remanded. *S. v. Ward*, 93.

Upon the hearing of a petition attacking the constitutionality of defendant's trial on the ground that he had been denied counsel, petitioner's uncontradicted evidence that he filed his petition within a year after his parole to this State after serving some eleven years as a Federal prisoner and that the petition was filed within several months of the rendition of the Federal decision declaring the right of a defendant to counsel, discloses that defendant's delay in filing the petition for more than five years from the rendition of the judgment attacked was not due to laches or negligence, and the trial court's holding to the contrary cannot stand. *S. v. Johnson*, 479.

DAMAGES.

§ 3. Compensatory Damages for Injury to Person.

Plaintiff has the burden of showing that defendant's negligence was the proximate cause of the particular injuries for which plaintiff seeks recovery, and when a layman can have no well formed knowledge as to whether a particular injury resulted from the accident there can be no recovery of damages therefor without expert medical testimony of causation. *Gillikin v. Burbage*, 317.

Testimony of plaintiff that when the door of defendant's car hit her the blow twisted her body and knocked her against the side of the car, together with testimony of a physician that when he examined plaintiff some time after the accident she had a ruptured disc and that a ruptured disc usually occurs as a result of some acute movement which produces a marked flexion, *held* to leave in speculation whether the accident caused the ruptured disc, and the testimony in regard to the ruptured disc should have been stricken on motion. *Ibid.*

Where the only evidence that plaintiff's injury was permanent and would continue to cause her pain and suffering is testimony of a physician that a condition such as plaintiff's usually improves but could recur, *held* insufficient to be submitted to the jury on the question of the permanency of the injury, and it was error for the court to admit in evidence the mortuary table and instruct the jury thereon in regard to the award of the present cash value of future damages. *Ibid.*

An instruction that counsel had introduced the mortuary tables and that the jury had the right to consider the tables but that they were not conclusive, without reading to the jury provisions of the statute, or stating its provisions in substance, must be held incomplete and erroneous. *Kinsey v. Kenly*, 376.

§ 9. Credit on Damages for Sums Paid by Other Persons Liable or in Other Proceedings.

An admission by plaintiff that he received medical payments in a certain sum under an insurance policy issued to him is not an admission that defendant is entitled to a credit on the damages for such payment, and if there is nothing

DAMAGES—*Continued.*

in the record to show that defendant paid plaintiff anything for medical expenses or that such payment was made under a liability policy, it is error for the court to deduct the amount of the insurance payment from the award of the jury. *Brown v. Griffin*, 61.

§ 11. Necessity for and Sufficiency of Pleading of Damages.

Where the complaint describes an injury which necessarily causes physical pain the law will presume some mental anguish, and such natural consequences need not be pleaded in detail, but plaintiff must set forth in his complaint allegations as to consequences which are not the natural or normal result of the injury, since the defendant is entitled to know from the complaint the nature of the injury to which he must answer in order to make his defense and not be taken by surprise at the trial. *Thacker v. Ward*, 594.

Allegations of physical pain and mental anguish and shock to nervous system held insufficient predicate for recovery for traumatic neurosis. *Ibid.*

§ 12. Competency and Relevancy of Evidence on Issue of Compensatory Damages.

A self-employed plaintiff hiring extra help as needed in his work, and being remitted by his injuries largely to supervision of the work, may testify as to his income from his business before and after the injury, there being no unusual circumstances other than his condition and increased labor costs affecting his income and plaintiff having testified as to the amount of the increase of labor costs. *Upchurch v. Funeral Home*, 560.

Where plaintiff introduces some competent evidence that his injuries were permanent, the introduction of the Mortuary Tables in evidence is not error. *Knight v. Seymour*, 790.

§ 14. Burden of Proof and Sufficiency of Evidence of Damages.

In an action for breach of contract to lease land for grazing cattle, plaintiff's evidence that he purchased 80 head of cattle intending to graze them on the land, but that he did not know what he paid for the cattle and did not know what he sold them for, but that he had lost money, is insufficient predicate for an award of more than nominal damages, the burden being upon plaintiff to establish the amount of damages with reasonable certainty. *Lawrence v. Stroupe*, 618.

DEATH.

§ 3. Nature and Grounds of Action for Wrongful Death.

In an action for wrongful death in a suit by the administrator of the mother to recover against the estate of her son and against her husband for wrongful death resulting from the negligent operation of a family car by the son, any recovery will be diminished by the share in such recovery which would go to the son's estate or to the husband under the doctrine that those culpably responsible for a person's death may not share in any recovery for the wrongful death. *Cox v. Shaw*, 361.

DECLARATORY JUDGMENT ACT.

§ 1. Nature and Grounds of Remedy.

The right of the alleged widow to dissent, upon which depends the share to be taken by the beneficiaries of testators' will, is a proper controversy for

DECLARATORY JUDGMENT ACT—*Continued.*

determination under the Declaratory Judgment Act. *Cunningham v. Brigman*, 208.

DEDICATION.

§ 2. Acceptance of Dedication.

The sale of lots in a subdivision with reference to a map showing streets gives the purchaser of each lot the right to have the streets kept open insofar as necessary to afford him reasonable ingress or egress to his lot, but as to the public the selling of the lots with reference to a map is only an offer to dedicate, and neither burdens nor benefits may be imposed on the public unless in some proper way it accepts the dedication. *Wofford v. Highway Comm.*, 677.

DEEDS.

§ 11. Construction and Operation in General.

A deed must be construed to effectuate the intent of the parties as gathered from the entire instrument, and any ambiguity must be resolved in favor of justice and common sense, and no part of the instrument should be rejected unless it is in irreconcilable conflict with the granting, holding, and warranty clauses. *Reynolds v. Land Co.*, 609.

§ 12. Estates Conveyed by Construction of the Instrument in General.

The granting, habendum and warranty clauses in the deed were sufficient in form to convey the fee simple. Following the description and preceding the habendum the instrument expressed the intent to convey a life estate to the grantor and at his death a fee simple to "the heirs of his body if any, and in the event he has no heirs of his body" to others. *Held:* If the provisions following the description be interpreted as a limitation on the fee simple they must be treated as surplusage and without effect as being repugnant to the conveyance of the fee simple estate. *Tremblay v. Aycock*, 626.

§ 13. Rule in Shelley's Case, Life Estates and Remainders.

A conveyance to a named person and the heirs of his body creates an estate tail, converted into a fee simple by statute. *Tremblay v. Aycock*, 626.

Where the granting and habendum clauses are sufficient in form to convey the fee simple, provision warranting the title to the said grantee and the heirs of his body, "if any," does not affect the character of the estate when there is no limitation over. *Ibid.*

Where the grantee has no children at the time of the conveyance, a deed to him and his children creates a fee tail, converted into a fee simple by the statute. *Ibid.*

§ 14. Reservations and Exceptions.

While there is a distinction between an exception and a reservation in a deed, the legal effect of the language and not the nomenclature used by the parties is determinative. *Reynolds v. Sand Co.*, 609.

The granting and holding clauses of this deed for 71 acres were in fee simple form, but following the description was a statement that the grantor reserved the mineral rights under some 18 acres of the tract, particularly described therein, with right of access for mining purposes. The warranty was that the title to the land conveyed was free and clear "except as hereinbefore set out."

DEEDS—*Continued.*

Thereafter the purchaser by *mesne* conveyances negotiated with the grantor for the conveyance of the mineral rights. *Held:* The grantor's claim to the mineral rights is valid, this being in accord with the intent of the parties as gathered from the entire instrument, corroborated by the interpretation the parties themselves placed upon the instrument. *Ibid.*

§ 15. Estates Upon Special Limitation and Defeasible Fees.

Where a deed conveys land to a municipality for a community house and public park with provision that it was understood the premises should always be used for the benefit of the municipality and public in general and should not be conveyed for private industry, and that a breach of the condition should create a reversion, allegations merely that the municipality had permitted the property to run down and be used as a place for people to congregate and drink are insufficient to show a breach of the condition, and allegations that the municipality had abandoned the lots for the purpose for which conveyed is a mere conclusion. *Page v. Aberdeen*, 820.

DESCENT AND DISTRIBUTION.

§ 1. Nature of Titles by Descent in General.

Title to the personal estate of an intestate, except for such portion as may be allotted as allowance for a year's support, vests in the administrator. *Kearns v. Primm*, 423.

Title to the realty of an estate of an intestate vests in his heirs and not his personal representative. *Ibid.*

DISORDERLY CONDUCT AND PUBLIC DRUNKENNESS.

The doctrine of *ejusdem generis* does not apply to G.S. 14-335, and the statute applies to drunkenness at any public place and is not limited to a public highway or meeting. *S. v. Fenner*, 694.

"Public place" within the purview of G.S. 14-335 is not limited to places devoted solely to uses of the public but includes any place visited by many persons and to which the neighboring public may have resort, and a mercantile establishment during business hours is such a public place. *Ibid.*

The charge in this prosecution for violation of G.S. 14-334 *is held* to define correctly the words "drunk," "intoxicated" and "intoxication," and to define a public place within the purview of the statute. *Ibid.*

DIVORCE AND ALIMONY.

§ 1. Jurisdiction.

While divorce decree may be entered on substituted service, decree for support and maintenance of children may not be rendered except upon personal service in this State. *Surratt v. Surratt*, 466.

§ 3. Condonation.

Cruelty and indignities, like other matrimonial offenses, may be condoned, and while violation of the conditions of condonation revive the original offenses, the acts constituting and surrounding the breach of the conditions of forgiveness must be alleged with the same particularity required in stating the original matrimonial offenses. *Cushing v. Cushing*, 181.

DIVORCE AND ALIMONY—*Continued.*

While condonation is an affirmative offense and ordinarily must be alleged and proved by defendant, it is ground for demurrer when the complaint itself alleges cohabitation subsequent to the indignities relied on as the basis of the cause of action. *Ibid.*

§ 16. Alimony Without Divorce.

The complaint in an action for alimony without divorce on the ground that defendant offered such indignities to the person of plaintiff as to render her condition intolerable and her life burdensome, is demurrable when it appears upon the face of the complaint that plaintiff resumed cohabitation after a prior separation occasioned by the misconduct of defendant and fails to allege with sufficient particularity either the acts constituting the breach of condition of condonation or the acts of the husband occurring thereafter constituting the basis of the cause of action. *Cushing v. Cushing*, 181.

§ 18. Alimony Pendente Lite.

While the amount of alimony *pendente lite* for the support of the wife and minor children rests in the sound discretion of the trial court, such discretion must be exercised with regard to the conditions and circumstances of the parties and the current earnings of the husband and his ability to pay, as well as the needs of the children. *Martin v. Martin*, 86.

Where the amounts allowed as alimony *pendente lite* are excessive and unrealistic if the facts set forth in the husband's affidavit as to his earnings and obligations are true, such allowance exceeds the limits of judicial discretion, and in the absence of specific findings with respect to the matters set out in the affidavit or indication that such matters were considered by the court, the cause must be remanded. *Ibid.*

§ 22. Jurisdiction to Award Custody and Support of Children.

The court has jurisdiction to enter orders relating to the support and custody of the children of the marriage in an action for alimony without divorce under G.S. 50-16, notwithstanding the complaint as to the cause of action for such alimony is demurrable. *Cushing v. Cushing*, 181.

Court may treat wife's action for alimony without divorce and for maintenance of children and husband's *habeas corpus* proceeding for custody of children as one action, and award custody of children in the divorce action. *Edwards v. Edwards*, 522.

§ 24. Award of Custody of Children.

An order awarding custody of the children to the wife upon condition that she live without any financial support from her husband, reside in the parsonage furnished her husband and devote her energies and attention to the rearing of the children, and abandon her professional career and cease all employment, exceeds sound judicial discretion and may not be allowed to stand. *Edwards v. Edwards*, 522.

ELECTRICITY.

§ 2. Service to Customers.

Evidence held for jury in action to enjoin power company from servicing customer in violation of contract with membership Corporation. *Membership Corp. v. Light Co.*, 428.

EMINENT DOMAIN.

§ 1. Nature and Extent of Power.

Where private property is taken for a public purpose by an agent having the power of eminent domain, the owner, in the exercise of his constitutional rights, may maintain an action at common law to obtain just compensation when there is no applicable or adequate statutory remedy. *Charlotte v. Spratt*, 656.

§ 2. Acts Constituting a "Taking."

On facts of this case construction of limited access road substantially reduced access from part of owner's land, and limitation of access constituted a "taking." *Highway Comm. v. Farmers Market*, 622.

Construction of limited access highway across city street so as to place property along street in *cul de sac* does not constitute a "taking" of easement. *Wofford v. Highway Comm.*, 677. This rule applies regardless of whether municipality acquires street by dedication or otherwise. *Ibid.*

§ 5. Amount of Compensation.

The measure of compensation for the taking of a part of a tract of land is the value of the land taken together with the diminution in value of the remaining land caused by the severance and the use to be made by the condemnor of the land taken. *Charlotte v. Spratt*, 656.

§ 6. Evidence of Value.

Where subdivision is best susceptibility of land, its value is properly computed on the basis of its worth for such purpose, but its value should not be computed by multiplying the maximum number of lots by value per lot. *Highway Comm. v. Conrad*, 394. Prices paid at voluntary sale of similar land competent in evidence. *Ibid.*

§ 7a. Proceedings to Take Land and Assess Compensation in General.

A property owner has a constitutional right to just compensation for the taking of his property for a public purpose, and every property owner is entitled to reasonable notice and opportunity to be heard on the question of damages for the taking. *Browning v. Highway Comm.*, 130.

Easement incident to widening of highway held not acquired by mere posting of map. *Ibid.*

By filing complaint and declaration of taking and the deposit of estimate of fair compensation, Commission acquires title. *Highway Comm. v. Industrial Center*, 230.

Controversy between the parties whether upon the facts of the particular case the limitation of access to a highway constituted a "taking" for which compensation must be paid presents a question of law and of fact for the court. *Highway Comm. v. Farmer's Market*, 622.

This action was instituted to assess compensation for the taking of a strip through the respondent's land to lengthen the runway of an adjacent airport. By amendment, respondents sought to recover damages resulting from the use of respondent's property as an approach way for air planes entering and leaving the airport. *Held:* Since the runway would be extended on a portion of the strip of land condemned, the necessity for a flight easement with respect to respondent's remaining property would them be obviated, and such flight easement was temporary and counterclaim to recover damages therefor, theretofore caused, G.S. 1-137, does not arise from the condemnation of the strip of land

EMINENT DOMAIN—*Continued.*

described in the petition, G.S. 40-12, and therefore allegations relating to such flight easement were properly stricken on motion. *Charlotte v. Spratt*, 656.

Where a municipality must acquire land for a governmental purpose, the statute requires that it first negotiate with the owners for the purchase of the land before initiating condemnation proceedings, G.S. 160-204, G.S. 160-205, but unsuccessful negotiation with one owner is sufficient to meet the requirement, and therefore where it is admitted that husband and wife owned the land, vain negotiation with the husband alone suffices, and the municipality is not required to ascertain the exact interests of the respective defendants in the *locus*. *Hertford v. Harriss*, 776.

While condemnor may not condemn an interest which it itself owns in realty, the allegation of the petition in this case that condemnor owned a perpetual lease in part of the property was immaterial, it appearing that condemnor did not intend to reduce the value of the fee simple estate it sought to acquire, and the proceeding being tried on the theory that the damages awarded should be ascertained on the basis that defendants were the owners in fee of the full title to the lands in question. *Ibid.*

§ 10. Abandonment of Proceedings.

Under the 1959 Amendment to G.S. 136, Art. 9, upon the filing of complaint by the Highway Commission and a declaration of a taking and the deposit with the court by the Commission of its estimate of fair compensation, the Commission acquires title, and may not thereafter take a voluntary nonsuit. Nor may the Commission assert the right to take a nonsuit on the ground that, contrary to the averment in its complaint and its declaration of a taking, it had not taken any property from the condemnee. *Highway Comm. v. Industrial Center*, 230.

ESTOPPEL.

§ 3. Estoppel by Record.

Plaintiff *held* estoppel by record from asserting that defendant was a resident of this State. *Surratt v. Surratt*, 466.

§ 4. Equitable Estoppel.

An estoppel always involves a prejudicial misleading. *Hospital v. Stancil*, 630.

§ 5. Parties Estopped.

Estoppel is for the protection of innocent persons and they only may claim its benefits. *Cunningham v. Brigman*, 208.

Heirs of the testator by a prior marriage may not be estopped to attack his second marriage on the ground that testator continued to live with the second wife after ascertaining there might be some question about the validity of the divorce obtained by his second wife, since the testator had no part in procuring the decree, and the second wife may not assert the estoppel. *Ibid.*

EVIDENCE.

§ 1. Judicial Notice of Statutes and Ordinances.

The courts will not take judicial knowledge of municipal and county ordinances, but such ordinances must be pleaded, at least to the extent stipulated by G.S. 160-272. *Surplus Co. v. Pleasants*, 587.

EVIDENCE—*Continued.*

§ 3. Matters Within Common Knowledge.

It is a matter of common knowledge that a boy of average size between two and three years old is filled with activity and is likely to experiment with the operation of any mechanism which he can set in motion, and must be constantly watched to prevent injury to himself or others. *Pinyan v. Little*, 578.

The court will take judicial notice that gasoline is a flammable commodity. *Moore v. Beard-Laney Co.*, 601.

§ 15. Relevancy and Competency of Evidence in General.

In an action to recover for injuries resulting to a boy injured by a shot fired by defendant at a dog on defendant's premises, testimony of a witness that he had been shot at by some "unknown person" on two occasions while at a pond on the premises, is not admissible for the purpose of fixing defendant with knowledge that boys frequented the pond, and further its exclusion is not prejudicial when defendant himself testifies that he knew boys had been coming to the pond. *Belk v. Boyce*, 24.

§ 26. Best and Secondary Evidence.

The rule that the writing itself is the best evidence of its contents can have no application when there is no evidence that the matter in question had ever been reduced to writing. *S. v. Miday*, 747.

§ 27. Parol or Extrinsic Evidence Affecting Writings.

The rule that parol evidence is not admissible to contradict or vary a written instrument does not apply when the writing is collateral to the issue involved in the action. *S. v. Miday*, 747.

§ 35. Opinion Evidence in General.

Nonexpert opinion is not competent when the jury is as well qualified as the witness to draw inferences and conclusions from the facts which the witness may relate, and therefore testimony of a witness that a tract would bring a better price if sold as a whole than if sold in smaller tracts is incompetent. *Brown v. Boger*, 248.

§ 41. Invasion of Province of Jury by Nonexpert Testimony.

In proceedings to have land sold for partition a witness may not testify that the property could not be divided without injury to some or all of the tenants in common, since this is the ultimate question for decision by the court after findings of fact by the court sufficient to support the conclusion. *Boger v. Brown*, 248.

§ 54. Rule That Party is Bound by Testimony of Own Witness.

When a party calls a witness he represents that the witness is worthy of belief, and while he may show the facts to be otherwise than as testified to by the witness, in the absence of evidence sufficient to show the contrary as a logical conclusion, and not merely raising a conjecture with respect thereto, the party is bound by the facts stated by the witness. *Powell v. Cross*, 764.

EXECUTION.

§ 16. Supplementary Proceedings.

All claimants to payment out of a particular fund should be given notice and an opportunity to be heard in proceedings under G.S. 1-353. *Couture, Inc. v. Rowe*, 234.

EXECUTORS AND ADMINISTRATORS.

§ 36. Actions Against Personal Representative.

Action to surcharge and falsify account may not be joined with action for conspiracy to purchase land for less than value at partition sale. *Kearns v. Primm*, 423.

FALSE IMPRISONMENT.

§ 1. Nature and Essentials of Right of Action.

False imprisonment is the illegal restraint of a person, and while actual force is not required, there must be an implied threat of force, at least, which compels a person to remain where he does not wish to remain or go where he does not wish to go, since if the person consents there can be no restraint. *Black v. Clark's*, 226.

Action against husband by wife to recover for wrongful commitment to mental hospital is for malicious prosecution and not false imprisonment, since wife was committed pursuant to duly issued order. *Fowle v. Fowle*, 724.

FOOD.

§ 1. Liability of Manufacturer to Consumer.

A consumer may hold the manufacturer liable for negligence in failing to guard against harmful or deleterious substances in food or drink prepared for human consumption, but he may not hold the manufacturer liable for breach of implied warranty of fitness for human consumption unless the food or drink is in sealed packages with labels bearing representations to the consumer. *Terry v. Bottling Co.*, 1.

FRAUD.

§ 1. Nature and Elements of Fraud in General.

The elements of fraud are a definite, material misrepresentation which is made with knowledge of its falsity or in culpable ignorance of its truth, and with the intent to deceive, and which is reasonably relied upon to the deception and damage of the other party. *Johnson v. Owens*, 754.

§ 5. Reliance on Misrepresentation and Deception.

Whether the party asserting fraud was entitled to rely upon the misrepresentation constituting the basis of his remedy must be determined upon the facts of each case under the general guidelines that a person who has made a bad bargain should not be allowed to disown the bargain by asserting a false representation upon which he did not in fact rely, while a person who knowingly makes a false representation in regard to a material matter, with intent that it should be relied upon, should not be allowed to escape liability on the ground that his deceit inspired confidence in a credulous person. *Johnson v. Owens*, 754.

§ 11. Sufficiency of Evidence and Nonsuit.

Whether plaintiff reasonably relied upon misrepresentation held for jury under the evidence. *Johnson v. Owens*, 754.

FRAUDS, STATUTE OF.

§ 2. Sufficiency of Writing.

The statute of frauds does not require that all the provisions of the agreement to be set out in a single instrument, but the memorandum is sufficient if

FRAUDS, STATUTE OF—*Continued.*

the contract provisions can be determined from separate but related writings. *Hines v. Tripp*, 470.

In this action to enforce a contract to reconvey land theretofore conveyed by plaintiffs to defendants for the purpose of securing a loan to pay off a prior mortgage executed by plaintiffs to other parties, a letter signed by plaintiffs' attorney requesting execution of the deed in accordance with the contract between the parties with a letter of defendants' attorney acknowledging the contract, and the attorney's draft of the contract for defendants' signatures, together with corroborative parol testimony, *held* competent for the purpose of showing signature of a sufficient memorandum by defendants' agent. *Ibid.*

§ 3. Pleading the Statute.

A denial of the alleged contract is equivalent to a plea of the applicable statute of frauds. *Hines v. Tripp*, 470.

Upon defendant's plea of the statute of frauds plaintiff has the burden of showing a written agreement or some memorandum or note thereof signed by the party to be charged or by some person by him thereto lawfully authorized. *Ibid.*

§ 6a. Contracts Affecting Realty in General.

A lease for one year need not be in writing. *Helicopter Corp. v. Realty Co.*, 139.

§ 6b. Contracts to Convey or Devise.

Parol acceptance by the optionee is not sufficient to repeal the statute of frauds so as to bind the optionee. *Warner v. W & O, Inc.*, 37.

GRAND JURY.

§ 1. Selection and Qualification.

Upon *prima facie* showing of racial discrimination in selection of grand jury burden is upon State to go forward with evidence and upon its failure to do so finding of nondiscrimination is not supported by evidence. *S. v. Lowry*, 536.

HABEAS CORPUS.

§ 2. For Custody of Minor Children.

Where it is made to appear upon diminution of the record that a proceeding for *habeas corpus* to obtain custody of the adopted child of the marriage was instituted by the husband in the Superior Court two days after the institution of the wife's action for alimony without divorce and custody of the child, the Supreme Court, in the exercise of its supervisory jurisdiction, will dismiss the *habeas corpus* proceeding. *In re Custody of Ponder*, 530.

HEALTH.

§ 3. Health Ordinances and Statutes.

Where defendant defends a prosecution for failure to have his child vaccinated for smallpox and immunized for poliomyelitis on the ground that he was exempt by G.S. 130-93.1(h), the introduction of unverified letters stating opinions as to the doctrine of the religious sect to which defendant belongs does not war-

HEALTH--*Continued.*

rant the exclusion of testimony by *bona fide* ministers and members of the organization as to its teachings, neither the best evidence rule nor the parol evidence rule being applicable. *S. v. Miday*, 747.

Whether teachings of defendant's religious sect justified defendant in refusing to have his child vaccinated held for jury. *Ibid.*

HIGHWAYS.

§ 5. Rights of Way and Access.

Highway has authority to construct limited access highways in both rural and urban areas, and right to access of abutting property owners is subject to exercise of such police power. *Wofford v. Highway Comm.*, 677.

§ 10. Obstructing Public Roads.

The operation of a lawful business may not be enjoined on the ground that its operation would create such additional traffic as would interfere with the customary use of the adjacent highway by Plaintiffs, since plaintiffs have no authority over, or right to control the use of a public highway, which must be open alike to all. *Hooks v. Speedways*, 686.

HOMICIDE.

§ 14. Relevancy and Competency of Evidence in General.

Evidence of tire tracks at scene *held* competent. *S. v. Brown*, 327.

§ 15. Dying Declarations.

In order for a declaration to be competent as a dying declaration the declarant must have been in actual danger of death at the time of making the declaration, the declarant must have been in full apprehension of impending death, and death must have ensued. *S. v. Brown*, 327.

That declarant at the time of making the declaration was then presently conscious of impending death need not be established by a statement of declarant to that effect but may be inferred from the surrounding circumstances. *Ibid.*

Consciousness of impending death as an essential element of admissibility of a declaration is satisfied if declarant believes he is going to die, but it is not required that he should have given up all hope of survival or should consider himself to be in the very act of dying. *Ibid.*

The admissibility of a declaration as a dying declaration is a question to be determined by the trial judge, and when the judge admits the declaration his ruling is reviewable only to determine whether there is evidence tending to show the facts essential to support it. *Ibid.*

Evidence held sufficient to support finding that declarant believed she was facing impending death. *Ibid.*

§ 20. Sufficiency of Evidence and Nonsuit.

Dying declaration together with evidence of the *corpus delicti* and of identity *held* sufficient to be submitted to the jury on charge of murder. *S. v. Brown*, 327.

HOMICIDE—*Continued.*

§ 23. Instructions on Burden of Proof.

It is error for court to charge that burden of proving self-defense to satisfaction of jury exceeded burden of proving matter by greater weight of evidence. *S. v. Matthews*, 95.

An instruction placing the burden on defendant to prove matters in mitigation or justification upon the State's evidence establishing an intentional killing with a deadly weapon, is not error. *S. v. McGirt*, 527.

§ 27. Instructions on Defenses.

The court's charge in respect to defendant's right to self-defense when assaulted in his own home *held* without error in this case. *S. v. McGirt*, 527.

HUSBAND AND WIFE.

§ 3. One Spouse as Agent for the Other.

Where the wife does not sign the contract for the construction of a residence and there is no evidence that the husband was her agent in signing the contract, or that she had any dealings in regard thereto, the wife is not a party to the agreement and she is not liable thereon. *Oldham & Worth v. Bratton*, 307.

§ 9. Right to Maintain Action in Tort Against Spouse.

One spouse may maintain an action against the other in tort, G.S. 52-10.1, and if a husband's negligence results in the death of his wife her personal representative may maintain an action against him for her wrongful death. *Cox v. Shaw*, 361.

Child's immunity to suit by mother will not be extended to prevent mother from recovering from child's father under family purpose doctrine. *Ibid.*

INDEMNITY.

§ 2. Construction and Operation of Indemnity Contracts.

Indemnity against loss from failure to register chattel mortgage does not cover loss from failure to assert lien of unregistered instrument against later recorded Federal tax lien. *Trust Co. v. Ins. Co.*, 32.

INDICTMENT AND WARRANT.

§ 1. Preliminary Proceedings.

A person arrested without a warrant has the right to be taken, as soon as may be, before a magistrate having jurisdiction to issue a warrant in the case in order to protect him from being held in violation of his rights. *S. v. Chamberlain*, 406.

§ 9. Charge of Crime.

Two acts constituting essentially parts of a single transaction may be charged together as a single offense, and defendant is not entitled to complain that only one offense was charged even though each act would have been ground for a separate charge. *S. v. O'Keefe*, 53.

The offense must be charged in a warrant or indictment with such certainty as will identify the offense, protect defendant from being again put in jeopardy therefor, to enable him to prepare for trial, and enable the court, upon conviction, to pronounce sentence. *S. v. Banks*, 784.

INDICTMENT AND WARRANT—*Continued.*

A warrant sufficiently charging defendant with an offense will not be quashed because it fails to sufficiently charge defendant's prior conviction of a like offense for the purpose of increased punishment. *S. v. Morgan*, 400.

§ 12. Amendment.

The Superior Court on appeal from an inferior court has the power to allow an amendment to the warrant provided the amendment does not change the offense with which defendant was originally charged, and this rule applies even though the inferior court has exclusive original jurisdiction of the offense, since the amendment in such instance relates only to procedural matters. *S. v. Fenner*, 694.

§ 13. Bill of Particulars.

A bill of particulars cannot supply an averment essential in charging the offense. *S. v. Banks*, 784.

§ 16. Effect of Quashal.

Quashal of the indictment for racial discrimination in the selection of the grand jury does not entitle defendants to their discharge or the dismissal of the charges, since the State may proceed on new bills returned by an unexceptionable grand jury. *S. v. Lowry*, 536.

INFANTS.

§ 6. Guardians ad Litem and Attack of Judgments Against Infants.

Before funds belonging to infants or incompetents may be taken from them, the law requires that they be represented by a guardian, a guardian *ad litem*, or a next friend, as the situation may require. *Parker v. Moore*, 89.

On an *ex parte* petition filed by the minor's mother and father, the court approved the payment by the infant out of the proceeds of a life policy a sum as a credit on the funeral expenses of the insured. *Held:* The infant not being represented by a guardian *ad litem*, the court was without authority to authorize the payment, and the infant, upon attaining her majority, is entitled to recover the fund against the insured's estate. *Ibid.*

INJUNCTIONS.

§ 3. Inadequacy of Legal Remedy and Irreparable Injury in General.

Irreparable injury as a basis for injunctive relief is not an injury which is beyond the possibility of repair or possible monetary compensation, but is such a continuous and recurring injury that no reasonable redress is afforded at law and one to which the complainant in equity and good conscience should not be required to submit. *Hooks v. Speedways*, 686.

§ 5. Injunctions to Restrain Enforcement of Statute or Ordinance.

Ordinarily injunction will not lie to restrain enforcement of an ordinance creating a criminal offense, since a defendant prosecuted thereunder may raise the question of the constitutionality of the ordinance as a defense, and thus has an adequate remedy at law. *Ice Cream Co. v. Hord*, 43.

A party has no standing to enjoin the enforcement of a statute or ordinance when he fails to show that his rights have been impinged or are imminently

INJUNCTIONS—*Continued.*

threatened by the operation of the statute or ordinance. *Surplus Co. v. Pleasants*, 587.

§ 7. Injunction to Restrain Occupancy or Use of Land.

Temporary order restraining construction of race track in vicinity of rural church held properly continued to the hearing. *Hooks v. Speedways*, 686.

That business would result in traffic congestion is no ground for injunctive relief. *Ibid.*

§ 13. Continuance of Temporary Orders to Hearing.

Order continuing temporary order to hearing will not be disturbed when allegations of verified complaint are sufficient to support the order. *Hooks v. Speedways*, 686.

INSANE PERSONS.

§ 10. Appointment of Guardian Ad Litem.

Where the Superior Court on appeal affirms the clerk's order appointing a guardian *ad litem* for defendant, the order of appointment rests upon the statutory authority of the clerk and the inherent authority of the court, and such appointment will not be set aside for the want of a finding that defendant was *non compos mentis*. *Bell v. Smith*, 814.

INSURANCE.

§ 3. Construction and Operation of Policies in General.

Statutory requirements become as much a part of a policy of insurance as though expressly written therein. *Lofquist v. Ins. Co.*, 615.

§ 53.2. Construction and Operation of Liability Policies in General.

By statutory requirement, an operator's policy of liability insurance protects against liability resulting from the insured's operation of any motor vehicle, G.S. 20-379.21(c), while an owner's policy protects the insured and other persons using the insured vehicle with the owner's permission from liability arising out of the use of the vehicle or vehicles designated in the policy only, and whether a policy is an operator's or an owner's liability policy depends upon the intent of the parties as gathered from the language used in the written contract. *Lofquist v. Ins. Co.*, 615.

§ 54. Vehicles Insured Under Liability Policy.

The policy in suit covered liability of the named insured arising out of the ownership, maintenance and use of "the automobile." The policy prescribed the coverage of the word "automobile" and excluded a motorcycle from coverage. At the time of the issuance of the policy insured owned a motor scooter covered by the policy, but thereafter purchased, in addition to the scooter, a motorcycle which was involved in the collision in question. *Held:* The policy was an owner's and not an operator's liability policy, and the exclusion of the motorcycle from coverage of the policy is valid. *Lofquist v. Ins. Co.*, 615.

§ 64. Rights of Injured Party Against Insurer.

Pursuant to its liability policy obligating it to pay medical expenses to or for the person injured, insurer issued its check for hospital expenses payable

INSURANCE—*Continued.*

jointly to the injured party and the hospital. The drawee bank cashed the check upon endorsement of the injured party alone and the injured party failed to pay the hospital. *Held:* There was no contractual relation between insurer and the hospital, and under the terms of the policy insurer's liability was discharged by the payment to the injured party. *Hospital v. Stancil*, 630.

§ 66.1. Adjustment of Loss Between Insurers Liable.

Where insurer pays entire loss, action against third person tort-feasor cannot be maintained in name of insured. *Parnell v. Ins. Co.*, 445. Consent judgment that plaintiff's action be dismissed as of nonsuit without prejudice to defendant's counterclaim precludes plaintiff from setting up his claim or going forward with his evidence, and entitles defendant to prosecute counterclaim. *Moore v. Young*, 483.

INTOXICATING LIQUOR.

§ 2. Beer and Wine Licenses.

The 1959 Amendment to G.S. 18-78.1 does not have the effect of requiring actual knowledge of the sale of beer to a minor by a licensee before his license may be revoked or suspended, since the word "knowingly" as used in the amendment refers only to permitting the consumption on the premises of a forbidden beverage and does not apply to the provisions relating to the selling, offering for sale, or possession of the beverages. *Campbell v. Board of Alcoholic Control*, 224.

JUDGMENTS.

§ 1. Nature and Requisites of Judgments in General.

Jurisdiction is prerequisite of a judgment, and a judgment *in personam* may not be rendered on service of process on a nonresident defendant outside the State. *Surratt v. Surratt*, 466.

§ 7. Tender of Judgment.

A tender of judgment which is not made until after nonsuit has been entered and plaintiff has appealed therefrom and the session of court has expired, does not comply with G.S. 1-541. *Oldham & Worth v. Bratton*, 307.

§ 10. Consent Judgments.

A consent judgment is the contract of the parties entered on the records with the sanction of the court, and is to be interpreted as other contracts, and cannot be modified or set aside without the consent of both parties except for fraud or mistake. *Layton v. Layton*, 453.

§ 14. Jurisdiction to Enter Default Judgments.

G.S. 1-113, G.S. 1-114, G.S. 1-115 are applicable only when the obligations of defendants are joint and not when they are joint and several, and therefore in an action on a note against the makers thereof who are jointly and severally liable, a default judgment rendered against both makers is void as to the maker not served with process. *Finance Co. v. Leonard*, 167.

§ 19. Void Judgments.

If a court has not acquired jurisdiction of the parties by voluntary appearance or service of process, its judgment entered *in personam* is void and may be

JUDGMENTS—*Continued.*

disregarded and treated as a nullity anywhere, notice and an opportunity to be heard being prerequisites of jurisdiction. *Finance Co. v. Leonard*, 167.

A void marriage or divorce may be colaterally attacked at any time and no legal rights flow therefrom. *Cunningham v. Brigman*, 208.

§ 22. Attack of Judgments for Surprise and Excusable Neglect.

When a defendant employs reputable counsel and gives him the facts constituting his defense, and counsel prepares and files answer, a default judgment due to the negligent failure of the attorney to appear and defend the cause when called for trial may ordinarily be set aside for surprise and excusable neglect. *Gaster v. Goodwin*, 441.

A motion to set aside such judgment is apt if made within one year of actual or constructive notice of its rendition. *Ibid.*

§ 28. Conclusiveness of Judgment and Bar in General.

A judgment dismissing an action instituted to set aside a former judgment is *res judicata* and bars a subsequent action between the parties to set aside the judgment, the remedy if the judgment of dismissal was erroneous being solely by appeal. *Karros v. Triantis*, 79.

§ 30. Matters Concluded.

Where a municipal board of adjustment refuses to revoke a building permit on the ground that the contemplated structure was prohibited by existing ordinances, judgment upon *certiorari* sustaining the order does not adjudicate the right of the municipality to thereafter prohibit the proposed structure by amending its zoning ordinances. *Warner v. W & O, Inc.*, 37.

Judgment in a prior action between the parties attacking the validity of a deed of trust and the foreclosure thereof and adjudicating that the purchaser at the foreclosure obtained good title *held* to bar a subsequent action between the parties attacking the foreclosure on the ground that the signatures to the deed of trust were forgeries, even though the question of forgery was not raised in the prior action, since such question was within the scope of the pleadings in the prior action and one which the parties in the exercise of reasonable diligence could and should have brought forward. *Wilson v. Hoyle*, 194.

§ 34. Conclusiveness of Consent Judgment.

Consent judgment dismissing plaintiff's action as of nonsuit without prejudice to defendant's counterclaim *held* to preclude plaintiff from trereafter setting up his claim by going forward with his evidence and entitles defendant to prosecute his counterclaim. *Moore v. Young*, 483.

§ 38. Pleas in Bar, Hearings and Determination.

The court has discretionary power to determine a plea of *res judicata* prior to trial on the merits. *Wilson v. Hoyle*, 194.

Judgment of dismissal entered upon consideration of the pleadings in the action, the judgment roll in a prior action, and stipulations as to identity of the parties and of subject matter, is not a judgment on the pleadings but a determination of the plea of *res judicata*. *Ibid.*

§ 45. Right to Assignment of Judgment.

Where liability insurer has paid the entire judgment against insured, insured is no longer the real party in interest and may not maintain an action against his joint tort-feasor or the insurer of the joint tort-feasor, to recover

JUDGMENTS—*Continued.*

contribution notwithstanding the judgment against insured provided that upon payment by insured he should be entitled to recover one-half of the amount from the joint tort-feasor. *Parnell v. Ins. Co.*, 445.

KIDNAPPING.

§ 1. Elements of the Offense.

The failure of G.S. 14-39 to define kidnapping does not render the statute vague or uncertain, since the statute does not originate the offense but merely provides that kidnapping should be a felony and fixes the punishment, and the common law definition of the offense as the unlawful taking and carrying away of a person by force and against his will, is incorporated in the statute by construction. *S. v. Lowry*, 536.

LABORERS' AND MATERIALMEN'S LIENS.

§ 3. Liens of Subcontractor or Material Furnishers.

Where the owner receives no notice of amounts due a material furnisher but pays the contractor upon monthly applications for reimbursement for labor and materials, with the material furnisher's invoices attached, with nothing to indicate that the contractor had not paid the materialman for the items listed thereon, the owner is not liable to the material furnisher under the provisions of G.S. 44-8. *Oldham & Worth v. Bratton*, 307.

Where the contract is terminated solely for financial inability of the contractor to complete performance, provisions of the contract referring to the owner's right to terminate the contract and the rights and obligations of the owner in the event of such termination, are inapplicable. *Ibid.*

The owner may be held liable for material furnished after the owner had agreed with the material furnisher to pay for same. *Ibid.*

Lien of material furnisher, properly preserved, relates back to time performance was begun and takes precedence over later recorded deeds and deeds of trust. *Heating Co. v. Realty Co.*, 641; but does not create lien on realty owned by contractor when contractor has been placed under receivership. *Ibid.* General rule as to application of payment is ordinarily applicable to payment made by contractor to material furnished. *Ibid.*

LANDLORD AND TENANT.

§ 2. Form, Requisites and Validity of Leases in General.

A lease for a term of years is a contract by which one party agrees for a valuable consideration to let another have the occupation and profits of land for a definite time. *Helicopter Corp. v. Realty Co.*, 139.

A lease for one year need not be in writing. *Ibid.*

The requirement that the term of a lease have a definite commencement date and duration is subject to the rule that that is certain which is capable of being made certain, and the parties to a lease may provide that the specified term of a lease should commence upon the happening of a subsequent contingency, and such agreement creates a valid lease provided the contingency occurs within a reasonable time after the execution of the contract. *Ibid.*

An agreement to give lessee one year's use, rent free, of defendant's roof for a heliport upon condition that lessee secure necessary governmental approval for

the establishment and operation of the port and secure for use in the proposed helicopter taxi service a helicopter and other necessary equipment, the year's use to begin upon plaintiff's performing the acts stipulated, *held* not void for uncertainty as to the commencement of the term, lessee having performed the stipulated acts within one year of the execution of the agreement. *Ibid.*

The essentials of a lease are parties lessor and lessee, the real estate demised, the term of the lease and the consideration, and a complaint alleging these essentials is not subject to demurrer for its failure to allege agreement as to every element incidental to the occupancy and enjoyment of the premises. *Ibid.*

Lease agreement for use of roof as heliport held not void for indefiniteness. *Ibid.*

Plaintiff's evidence to the effect that his agreement with the owner of property to lease it at the expiration of the current yearly term was made subject to the condition that plaintiff could obtain an assignment from the lessee for the unexpired portion of that term, and that plaintiff did not notify the owner that he had been successful in obtaining the assignment until the owner was in the act of leasing it to a stranger, and that plaintiff did not tender any rent until some three months after plaintiff knew of the lease to the stranger, *held* insufficient to establish a lease contract. *Lawrence v. Stroupe*, 618.

§ 4. Right of Landlord to Convey and Rights of Parties upon Conveyance.

A conveyance of land which is subject to a valid and continuing lease gives the purchaser no right to rents then accrued, but does give the purchaser the right to collect the rents accruing after the time title passes unless the conveyance specifically reserves to the grantor the right to continue to collect the rents. Attornment by leasee is not necessary. G.S. 42-2. *Pearce v. Gay*, 449.

Stipulation in a deed that it was made subject to a rental contract theretofore executed by grantors merely recognizes the rights guaranteed by G.S. 42-8, and does not have the effect of reserving to grantors rents accruing subsequent to the transfer of title. *Ibid.*

§ 5. Enjoyment, Use and Possession.

A lease includes an implied covenant of quiet enjoyment, which extends to those easements and appurtenances whose use is necessary and essential to the enjoyment of the leased premises. *Helicopter Corp. v. Realty Co.*, 139.

Lessee is under no duty to the lessor to insure the demised premises and lessor is under no obligation to provide liability insurance covering the operation by lessee of its separate business on the leased premises. *Ibid.*

Municipal and governmental regulations applicable to the use and operation of lessee's business become a part of the lease contract. *Ibid.*

§ 8. Subletting.

Evidence that lessee subleased for the unexpired portion of the term of one year, for which lessee had paid the rent, and that sublessee paid the lessee therefor an amount equal to one-half of the yearly rental, with further evidence that lessor knew of the sublease prior to the time of renting to a third party, who took possession, *held* sufficient to make out a *prima facie* case in the sublessee's action against the lessor, but the sublessee is entitled to only nominal damages in the absence of evidence fixing the amount of damages with any degree of certainty. *Lawrence v. Stroupe*, 618.

LARCENY.

§ 1. Elements of the Crime.

Felonious intent as an essential element of the crime of larceny is the intent to permanently deprive an owner of his property, and a taking by trespass or by assault for the immediate temporary use of the taker and without any intent of depriving the owner permanently of his property does not constitute larceny. *S. v. McCrary*, 490.

§ 7. Sufficiency of Evidence and Nonsuit.

Absence of any evidence of ownership of the articles alleged to have been stolen precludes conviction of larceny. *S. v. Mullinax*, 512.

Nonsuit directed for variance between indictment and proof as to ownership of property. *S. v. Brown*, 786.

§ 8. Instructions.

Where the State's evidence tends to show that defendant took the property of another for the taker's immediate temporary use and without any intent to deprive the owner of his property permanently, an instruction which fails to charge the jury that the requisite felonious intent was to deprive the owner permanently of its property must be held for prejudicial error. *S. v. McCrary*, 490.

Where all the evidence is to the effect that the property stolen exceeded the value of $200.00, the court is not required to submit the question of guilt of a misdemeanor. *S. v. Summers*, 517.

Where a contract between an oil company and a filling station operator constitutes gasoline in the storage tanks of the filling station the property of the oil company by construction of the contract as a matter of law, the court is not required to submit to the jury the question of whether the oil company or the filling station operator owned the gasoline. *S. v. Cook*, 730.

The value of property within the purview of the larceny statute is its fair market value, and where all the evidence of such value is that it exceeded $200, the court is not required to submit the question of the larceny of goods of a value less than $200. *Ibid.*

LIBEL AND SLANDER.

§ 1. Nature and Essentials of Cause of Action.

Since libel actions are transitory, libelous matter sent through the mails is actionable at the the place of posting or at the place of receipt by the addressee, even in another state, unless otherwise provided by statute. *Sizemore v. Maroney*, 14.

In an action for libel based on letters posted in another state, it is error for the court to dismiss the action on the ground that it was for a tort arising in such other state in the absence of any finding that none of the letters was received by an addressee in this State and the absence of any finding that none of the alleged tortious acts was committed by defendant in this State. *Ibid.*

MALICIOUS PROSECUTION.

§ 1. Nature and Distinctions Between Other Causes.

An action against a husband by a wife for wrongful commitment to a mental hospital is for malicious prosecution and not for abuse of process or false imprisonment. *Fowle v. Fowle*, 724.

MALICIOUS PROSECUTION—*Continued.*

§ 2. "Prosecutions."

Proceedings under the statute for the commitment of a person to a mental hospital are judicial in nature and is a "prosecution" within the purview of the cause of action. *Fowle v. Fowle*, 724.

§ 4. Want of Probable Cause.

In an action for malicious prosecution plaintiff must show, in addition to malice, want of probable cause, which is not established merely by proof of the termination of the judicial proceeding in plaintiff's favor, but must be established by showing that a reasonable man would not have believed and acted under the circumstances as defendant did. *Fowle v. Fowle*, 724.

§ 6. Termination of Prosecution.

Where a person committed to a mental hospital is discharged on a writ of *habeas corpus* less than a month thereafter upon findings by the court that such person was improperly restrained of her liberty and was not psychotic, and there is no evidence of any material change in her mental condition between said dates, there is a sufficient termination of the judicial proceedings for the purpose of an action for malicious prosecution. *Fowle v. Fowle*, 724.

§ 11. Sufficiency of Evidence and Nonsuit.

Evidence held sufficient to be submitted to jury in action by wife against husband for wrongful commitment to mental hospital. *Fowle v. Fowle*, 724.

MARRIAGE.

§ 2. Validity and Attack.

If, at the time of the marriage, either party has a spouse living who has not been validly divorced, the marriage is void. *Cunningham v. Brigman*, 209.

A void marriage is a nullity, and no rights flow therefrom. *Ibid.*

MASTER AND SERVANT.

§ 3. Distinction Between Employee and Independent Contractor.

If a person performing labor under contract is under the supervision and control of the employer in the performance of the work he is not an independent contractor. *Graham v. Forms, Inc.*, 66.

An independent contractor is ordinarily one who undertakes to produce a given result at a stipulated price without the supervision or control of the person employing him except as to the result of the work. *Richards v. Nationwide Homes*, 295.

An agreement under which a contractor obligates himself to construct a residence on a cost plus basis in accordance with plans and specifications, leaving to the contractor decision as to where materials should be purchased, who should be employed as workmen, and to what extent, if any, the contractor would subcontract the work, the owner being concerned only with the final result, creates the relation of owner and independent contractor. *Oldham & Worth v. Bratton*, 307.

§ 10. Duration of Employment and Wrongful Discharge.

A contract of employment which provides that if the employee should quit he would forfeit all bonus rights, while if he should be discharged the employer

MASTER AND SERVANT—*Continued.*

would pay 10 per cent of his bonus, calculated to the date of his discharge, *is held* terminable at will, there being no definite term, notwithstanding the contention of the employee that his employment was to be permanent as long as his work was satisfactory, since ordinarily any contract of employment is based upon the services being satisfactory, and a contract for permanent employment implies only an indefinite general hiring, terminable at will. *Tuttle v. Lumber Co.*, 216.

Where an employee knowingly and deliberately brings about a conflict of interest between himself and his employer, the employer is entitled to discharge the employee. *In re Burris*, 793.

§ 22. Nature and Extent of Employer's Liability for Injury to Employee in General.

The employer is not an insurer of the safety of his employee. *Clark v. Roberts*, 336.

§ 24. Warning and Instructing Employee.

It is the duty of the employer to warn the employee of dangers known to the employer and not known to the employee or not discoverable in the exercise of due care, or dangers which the employee, by reason of youth, inexperience or incompetency, could not appreciate. *Clark v. Roberts*, 336.

§ 29. Contributory Negligence of Employee.

Evidence *held* to disclose contributory negligence as a matter of law on part of employee in sticking hand into silage cutter without ascertaining that machinery was still moving. *Clark v. Roberts*, 336.

§ 454. Construction of Compensation Act in General.

Benefits within the purport and intent of the Workmen's Compensation Act will not be denied by a narrow, technical and strict construction. *Hall v. Chevrolet Co.*, 569.

§ 48. Compensation Act—Independent Contractors.

A subcontractor may be an independent contractor as to certain parts of the work and merely an employee in regard to other parts, but in his character as an independent contractor he is not covered by the Compensation Act and the court has no jurisdiction to apply its provisions to him in such instance. *Richards v. Nationwide Homes*, 295.

The provisions of G.S. 97-19 do not impose liability on the employer for injuries received by an independent contractor or a subcontractor personally when the injuries arise in the performance of the independent employment. *Ibid.*

Whether an injured person is an independent contractor or a subcontractor who is an independent contractor or an employee within the meaning of the Compensation Act is to be determined by the common law test in the absence of pertinent statutory provisions. *Ibid.*

Person subcontracting erection of prefabricated houses *held* independent contractor. *Ibid.*

§ 54. Causal Relation Between Employment and Injury in General.

Injury to a Scout executive by accident while on a fishing trip on the high seas while attending an executive's conference arises out of and in the course of his employment when the executive is directed to attend the conference with all expenses paid by the Council, and the Council prepares an agenda of rec-

MASTER AND SERVANT—*Continued.*

reational projects, including deep sea fishing, and impliedly requires each executive to select one of the projects as an aid to his advancement and better qualifications to carry on his work in scouting. *Rice v. Boy Scouts*, 204.

Compensation may not be awarded for an injury resulting solely from an idiopathic condition of the employee. *Crawford v. Warehouse*, 826.

§ 67. Compensation in General.

Under the Workmen's Compensation Act disability refers not to physical infirmity but to a diminished capacity to earn money. *Hall v. Chevrolet Co.*, 569.

§ 72. Compensation for Disfigurement.

Under the 1963 amendment, the Industrial Commission may make an award for both partial incapacity under G.S. 97-30 and for disfigurement under G.S. 97-31(22), for injuries occurring subsequent to 1 July 1963. *Hall v. Chevrolet Co.*, 569.

§ 82. Nature and Extent of Jurisdiction of Industrial Commission in General.

The Industrial Commission has authority to grant a rehearing of a claim for newly discovered evidence. *Hall v. Chevrolet Co.*, 569.

§ 83. Jurisdiction of Commission — Employment in this State.

Where the contract of employment is made in this State, the employer's business is in this State, and the contract of employment does not specifically provide for services exclusively outside this State, *held*, the North Carolina Industrial Commission has jurisdiction of a claim for injury even though it occurs on the high seas provided it arises out of and in the course of employment, G.S. 97-36, since the Longshoremen's and Harbor Workers' Act is applicable only to injuries arising on navigable waters which may not validly be provided for by State Law. *Rice v. Boy Scouts*, 204.

§ 90. Prosecution of Claim and Proceedings Before the Commission.

A person seeking to recover benefits under the N. C. Workmen's Compensation Act has the burden of proving that he comes within the purview of the Act. *Richards v. Nationwide Homes*, 295.

A claim is still pending before the Industrial Commission for one year after the rendition of an award. *Hall v. Chevrolet Co.*, 569.

During that period the Commission may reopen the case for newly discovered evidence upon a proper showing even though claimant mistakes his remedy to be for additional compensation for change of condition. *Ibid.*

§ 93. Review in Superior Court.

Findings of fact of the Industrial Commission, when supported by competent evidence, are conclusive on appeal even though there may be evidence *contra*. *Crawford v. Warehouse*, 826.

Jurisdictional findings of the Industrial Commission are not conclusive on appeal to the Superior Court, and where the appeal is based upon exceptions to the findings of the Industrial Commission that plaintiff was an employee and not an independent contractor, it is the duty of the Superior court on appeal to review the evidence and make independent findings therefrom in respect to the controverted jurisdictional fact. *Richards v. Nationwide Homes*, 295.

MASTER AND SERVANT—*Continued.*

§ 94. Appeals to Supreme Court.

Where proceedings before Commission and on appeal to Superior Court are heard under a misapprehension of the applicable law, the proceeding will be remanded. *Hall v. Chevrolet Co.*, 569.

MORTGAGES AND DEEDS OF TRUST.

§ 13. Debt Assumption Agreements.

An instrument under which the purchaser of the equity of redemption agrees to pay the full amount of interest and principal due on notes theretofore executed by his grantor and secured by deeds of trust on the property, is not a novation, there being no element of a further consideration passing between the parties or a substitution of a new for an old debt. *Lowe v. Jackson*, 634.

§ 21. Limitation on Right to Foreclose.

Where no payment of principal or interest is made on notes secured by deeds of trust for a period of ten years after maturity, the right to exercise the power of sale contained in the deeds of trust is barred, and the fact that in the interim the purchaser of the equity of redemption assumes the debt, without any payment, does not extend the period of limitation. *Lowe v. Jackson*, 634.

§ 41. Title and Rights of Purchaser.

The trustee, pursuant to foreclosure, can convey only such title as the instrument authorizes, and the fact that the mortgagee bids in the property and assigns the bid does not enlarge the trustee's authorization, there being no merger of the estates in the mortgagee. *Reynolds v. Sand Co.*, 609.

MUNICIPAL CORPORATIONS.

§ 4. Powers of Municipalities in General.

A municipality is a creature of the Legislature and has only such authority as is conferred upon it, expressly or by necessary implication. *Upchurch v. Funeral Home*, 560.

§ 9. Discharge of Municipal Employees.

Findings to the effect that a municipal employee, with knowledge that the city would have to acquire certain realty, purchased an interest in such realty, *held* ground for the discharge of the employee. *In re Burris*, 793.

§ 15. Injuries to Lands from Water and Sewer Systems.

In this action to recover damages resulting from the overflow of waters from a culvert conveying surface waters under a building leased by plaintiff, recovery cannot be had against the city on the theory of its liability for negligence in the maintenance and repair of drains and culverts constructed by it when plaintiff's evidence is to the effect that plaintiff's lessor constructed the culvert which caved in and caused the damage. *Hormel & Co. v. Winston-Salem*, 666.

Mere evidence that defendant city bolted down a manhole in a private drainage line and sealed the holes therein and regularly sent an employee through the private drainage system to see that it was open for the drainage of surface waters from the streets, is insufficient to show that the city adopted

and controlled the drainage culvert complained of so as to render the municipality liable for damages resulting from its failure to keep it in repair. *Ibid.*

In an action to recover for damages resulting from the overflow of waters from a culvert conveying surface water under a building leased by plaintiff, plaintiff may not recover on the theory that defendant municipality gathered and concentrated surface waters into artificial drains and diverted them into the culvert when the theory of the complaint is that the city negligently failed to maintain and repair the drains and there is no allegation of divertion or concentration of surface waters into the culvert. *Ibid.*

§ 24. Nature and Extent of Municipal Police Power in General.

A municipal ordinance in conflict with statute is void, but the mere fact that there is a statute dealing with the subject does not necessarily render the ordinance void. *Upchurch v. Funeral Home*, 560.

§ 25. Zoning Ordinances and Building Permits.

If a property owner in good faith makes expenditures in reliance on a building permit issued to him, his right to construct the building will be protected as an existing use upon later amendment of the municipal zoning regulations, but the mere issuance of a building permit alone creates no property right in him, and he may not remain inactive and thereby deny the municipality the right to make needed changes in its ordinances. *Warner v. W & O, Inc.*, 37.

Expenditures for architect's drawings prior to the issuance of a building permit cannot be made in reliance on the permit so as to protect the permittee from later changes in the zoning ordinances. *Ibid.*

Where, at the time of the enactment of an amendment prohibiting a proposed structure, the optionee who had obtained a building permit could not have been compelled to purchase and pay for the property by reason of the statute of frauds, the optionee may not assert the later payment of the purchase price as an expenditure in good faith exempting him from the operation of the amendment. *Ibid.*

The law accords protection to nonconforming users who, relying on authorization then given, make substantial expenditures in the honest belief that proposed structures would not violate the zoning regulations, but the law does not protect one who waits until after the enactment of an ordinance forbidding a proposed use before making expenditures even though the expenditures are made prior to the effective date of the ordinance. *Ibid.*

Finding that defendant had not expended any substantial sum prior to effective date of zoning ordinance held supported by evidence. *Garner v. Weston*, 487.

§ 27. Regulations Relating to Public Morals and Welfare.

Plaintiff failing to allege that enforcement of Sunday regulation constituted imminent threat to his rights has no standing to challenge the ordinance. *Surplus Co. v. Pleasants*, 587.

Cities have been given authority to enact ordinances requiring the observance of Sunday, and ordinance in question held valid, the classifications being uniform and reasonable. *Charles Stores v. Tucker*, 710.

§ 28. Regulation of and Control Over Streets.

Municipal corporations are authorized by G.S. 20-169 to adopt ordinances requiring ambulances to observe traffic control lights. *Upchurch v. Funeral Home*, 560.

MUNICIPAL CORPORATIONS—*Continued.*

A municipal ordinance requiring ambulances to observe traffic control lights is not in conflict with G.S. 20-156(b), since the right of way privileges accorded to ambulances by statute is not absolute and G.S. 20-158(b) grants municipalities power to require ambulances to observe traffic lights by implication at least. *Ibid.*

Municipalities have been given authority to maintain limited access streets, and access rights of property owners is subject to the exercise of such police power. *Wofford v. Highway Comm.*, 677.

§ 34. Enforcement, Validity and Attack of Ordinances.

Companies engaged in the retail sale of ice cream from motor vehicles cruising the streets of a municipality are not entitled to restrain enforcement of a municipal ordinance prohibiting loud and unnecessary noises on the ground that they had been instructed by enforcement agencies to cease the use of any type of bell, musical instrument, or similar device necessary to attract customers to the mobile units, since they have an adequate remedy at law by attacking the constitutionality of the ordinance as applied to them as determined upon particular factual situations in which the bells or musical instruments are used. *Ice Cream Co. v. Hord*, 43.

A municipal ordinance, as well as a statute, may be valid in part and invalid in part, and its constitutionality may be more satisfactorily determined upon the basis of a particular factual situation rather than upon attack of its constitutionality generally. *Ibid.*

NEGLIGENCE.

§ 1. Acts or Omissions Constituting Negligence in General.

Ordinary care is such care as an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury. *Clark v. Roberts*, 336; *Pinyan v. Settle*, 578.

Negligence is not actionable unless a proximate cause of injury. *McGaha v. Smoky Mountain Stages*, 769.

§ 4. Dangerous Substances and Instrumentalities.

A person handling an inherently dangerous commodity, like gasoline, is under duty to use care commensurate with the known exceptional danger. *Moore v. Beard-Laney Co.*, 601.

The rule that persons having possession and control over dangerous instrumentalities are under duty to use a high degree of care commensurate with the dangerous character of the article to prevent injury to others applies to firearms, and the instruction in this case *is held* in substantial accord therewith. *Belk v. Boyce*, 24.

§ 7. Proximate Cause in General.

Only negligence which proximately causes or contributes to an injury has legal importance, and foreseeability is a requisite of proximate cause. *Pinyan v. Settle*, 578.

§ 8. Concurring and Intervening Negligence.

The original negligence of one party cannot be insulated by the negligence of another so long as the original negligence plays a substantial and proximate part in causing the injury or loss, or so long as the intervening act and resultant

NEGLIGENCE—*Continued.*

injury could have been reasonably foreseen and expected by the author of the original negligence, and the question of intervening negligence is ordinarily for the jury. *Moore v. Beard-Laney Co.*, 601.

§ 11. Contributory Negligence in General.

Every person having the capacity to exercise ordinary care for his own safety is required to do so, and if his failure to do so concurs and cooperates as a proximate cause of the injury complained of he is guilty of contributory negligence. *Clark v. Roberts*, 336.

A person can not be held contributorily negligent in failing to avoid injury from dangerous machinery unless he acts or fails to act with knowledge and appreciation, either actual or constructive, of the danger. *Ibid.*

§ 24a. Sufficiency of Evidence of Negligence and Nonsuit in General.

Where workman had no notice that ground around defendant's building was glazed with lacquer, his act in working with acetylene torch thereon was not negligent. *Craft Furniture v. Goodman*, 220.

Evidence tending to show that an employee in charge of delivering gasoline to the storage tanks of a filling station was warned that one of the tanks might overflow, that the only way to see when the tank was full was by watching the air vent on the top of the tank, that the employee hooked the tank trailer to the storage tank and started pumping gasoline, then went into the store on the premises, and that the tank overflowed while he was in the store, resulting in the damage in suit, *is held* sufficient to be submitted to the jury on the issue of negligence. *Moore v. Beard-Laney Co.*, 601.

Evidence that plaintiff was injured when he turned the knob on the door of a tobacco curing "pot burner" and as a result the door flew open and a blast of hot steam, scalding oil, hot ashes and soot erupted onto his right arm, *held* insufficient to overrule nonsuit, since an inference of negligence cannot rest on conjecture or surmise, but only upon a premise established by proof. *Monk v. Flanagan*, 797.

§ 24c. Sufficiency of Evidence of Negligence and Nonsuit — Circumstantial Evidence.

Circumstantial evidence, either alone or in combination with direct evidence, is sufficient to be submitted to the jury if the proven facts establish negligence and proximate cause as a more reasonable probability, even though the possibility of mere accident may also arise upon the evidence. *Yates v. Chappell*, 461.

§ 26. Nonsuit for Contributory Negligence.

Nonsuit for contributory negligence may be allowed only when plaintiff's evidence, considered in the light most favorable to him, establishes his own negligence as a proximate contributing cause of the injury so clearly that no other conclusion reasonably can be drawn therefrom. *Brown v. Hale*, 176; *Beam v. Parham*, 417; *Mayberry v. Allred*, 780.

Evidence *held* sufficient to show contributory negligence as a matter of law in failing to warn workman using acetylene torch of danger from lacquer covered ground. *Craft Furniture v. Goodman*, 220.

The evidence will be considered in the light most favorable to plaintiff in passing upon the question of whether plaintiff's own evidence discloses contributory negligence as a matter of law. *Clark v. Roberts*, 336.

NEGLIGENCE—*Continued.*

Evidence *held* not to disclose contributory negligence as a matter of law on part of filling station owner in turning off pump upon seeing underground tank overflowing. *Moore v. Beard-Laney Co.*, 601.

The sufficiency of the evidence to overrule nonsuit must be determined in the light of the facts of each particular case, and nonsuit cannot be granted when the relevant facts are in dispute or opposing inferences are permissible from plaintiff's proof. *Spinning Co. v. Trucking Co.*, 807.

§ 27. Nonsuit for Intervening Negligence.

The evidence tended to show that one of the owners of a gasoline filling station, upon seeing one of the storage tanks overflowing gasoline being pumped from defendant's unattended tank trailer, cut off the electric switch of the pump pumping gasoline into the storage tank, there being no raw gasoline on the ground around the pump, and that a spark emitted when the pump was cut off ignited gasoline fumes, *held* not to show insulating negligence as a matter of law. *Moore v. Beard-Laney Co.*, 601.

§ 28. Instructions in Negligence Actions.

Ordinarily, it is error for the court to instruct the jury that defendant's negligence must be the proximate cause of the injury in order to impose liability, but such instruction is not prejudicial when there is no evidence of concurring negligence or other responsible cause, and only the defendant's negligence is at issue. *Belk v. Boyce*, 24.

§ 37b. Duties to Invitees in General.

The proprietor of a store is not an insurer of the safety of its customers, but it does owe the duty to exercise ordinary care to keep the premises in a reasonably safe condition and to give warning of hidden perils or of unsafe conditions insofar as they are known, or should be known by reasonable inspection. *Routh v. Hudson-Belk Co.*, 112.

§ 37f. Sufficiency of Evidence and Nonsuit in Actions by Invitees.

Evidence that the defendant's employee stopped a manually operated elevator on the balcony floor not even with the floor but at an elevation some two inches above it, and that plaintiff, in entering the elevator did not look, tripped over the two-inch elevation, and fell to her injury, *held* to require nonsuit. *Routh v. Hudson-Belk Co.*, 112.

§ 38. Duties and Liabilities to Licensees.

The owner of premises who injures a licensee as a result of the owner's attempt to shoot a dog on the premises is not liable to the licensee in the absence of negligence, even though his act in attempting to kill the dog is illegal, and if the owner did not know, or in the exercise of reasonable care should not have known, of the presence of the licensee in the vicinity, his act in firing the pistol on his own premises would not be a breach of duty toward the licensee. *Belk v. Boyce*, 24.

NUISANCE.

§ 1. Conditions Constituting Nuisances in General.

A race track is not a nuisance *per se*, but its operation may, under certain circumstances, become a nuisance *per accidens*. *Hooks v. Speedways*, 686.

NUISANCE—*Continued.*

§ 2. Noise and Vibration.

Mere noise may be so great at certain times and under certain circumstances as to amount to an actionable nuisance and entitle the party subjected to it to an injunction. *Hooks v. Speedways*, 686.

§ 7. Abatement.

Enjoining creation of nuisance see Injunctions.

OBSCENITY.

A warrant charging defendant with peeping into the room of a female must set forth the identity of the female person whose privacy defendant is charged with having invaded. *S. v. Banks*, 784.

PARENT AND CHILD.

§ 1. The Relationship and Emancipation.

The emancipation of a child may be partial, in which event the parent relinquishes the right to the child's earnings for a certain period or for certain purposes or under certain circumstances, without disturbing other mutual rights and duties; or complete, in which event the parent surrenders all rights to the services and earnings of the child as well as the right to custody and control of his person. *Gillikin v. Burbage*, 317.

Emancipation is not presumed but the burden is upon the parent or person asserting emancipation to prove it. *Ibid.*

The execution of a formal contract is not required to accomplish the complete emancipation of a minor but the intent and purpose of the parent to emancipate the child may be expressed either in writing or orally, or inferred from the surrounding circumstances or conduct of the parent inconsistent with parental care and control. *Ibid.*

The fact that a minor child living with her parents would not knowingly transgress their wishes, deferred to their advice, and provided her mother with transportation whenever it was requested, does not in itself negate emancipation. *Ibid.*

Evidence that a minor child lived in the home of her parents, deferred to their advice and did not knowingly transgress their wishes, but that she worked and supported herself, that she paid her share of the living expenses, purchased a car with her own earnings, that her wages were entirely her own, and that she came and went at her own pleasure, etc., *held* sufficient to be submitted .to the jury on the issue of the child's complete emancipation. *Ibid.*

§ 2. Liability for Torts Inter Se.

The administrator of an unemancipated minor child killed by the negligence of his parent has no cause of action against the parent for the wrongful death of his intestate. *Capps v. Smith*, 120.

Neither a parent nor his personal representative can sue an unemancipated child for a personal tort, even though liability is covered by insurance, but complete emancipation removes the bar to action between a parent and child for personal torts. *Gillikin v. Burbage*, 317.

The administrator of the mother may not maintain an action against the administrator of the son's estate to recover for wrongful death based upon the tortious act of the unemancipated son. *Cox v. Shaw*, 361.

PARENT AND CHILD—*Continued.*

But this rule will not preclude the administrator of the mother from recovering from the father under the family car doctrine for the son's negligence. *Ibid.*

§ 6. Duty of Parent to Support.

Consent judgment of father for support of child permanently disabled held not to create an obligation surviving father's death. *Layton v. Layton*, 453.

PARTIES.

§ 2. Parties Plaintiff.

Every action must be prosecuted by the real party in interest, and when insurer has paid the entire cost, insured is not the real party in interest. *Parnell v. Ins. Co.*, 445.

PARTITION.

§ 1. Nature and Extent of Right.

Notwithstanding that the procedure for partition is prescribed by statute, partition proceedings are equitable in nature and the statutes do not impose strict limitations upon the authority of the court or deprive the court of jurisdiction to adjust all equities, and therefore the court has the authority to give directions to the commissioners to the end that justice be done between the parties. *Allen v. Allen*, 496.

§ 6. Whether Property Should Be Sold for Partition or Actually Partitioned.

Tenants are entitled to actual partition unless actual partition cannot be had without substantial injury and injustice, and mere convenience of selling tract in its entirety is insufficient to deny actual partition. *Brown v. Boger*, 248.

Whether land should be actually partitioned or sold for partition is a question of fact for decision of the clerk, subject to review by the judge, and is not an issue of fact for a jury. *Ibid.*

A witness may not testify that the property could not be divided without injury to some of the tenants, since this is the very question for the court to determine upon appropriate findings. *Ibid.*

The court must find the essential facts to support its order of sale for partition, and while the court's findings are conclusive if supported by competent evidence and its discretionary determination will not be disturbed in the absence of some error of law, if the court's findings are insufficient to support its conclusion that actual partition cannot be had without material injury to some or all of the cotenants, its order of sale must be vacated and the cause remanded for further proceedings. *Ibid.*

A finding that timber was offered for sale from the tract in question in separate parcels and then as a whole, and brought a higher price as a whole than in separate parcels, is irrelevant to the question of whether a tenant in common is entitled to sale for partition, since the advantages of cutting and removing timber from an entire tract are dissimilar to the advantages of selling the fee in a tract of land as a whole or in parts. *Ibid.*

§ 9. Confirmation.

Where, after the commissioners' report has been set aside, the court orders another partition and directs the commissioners to hear the proof and alle-

PARTITION—*Continued.*

gations of the parties before making such partition, it is error for the court to approve the commissioners' report made without hearing the proof and allegations of the parties as directed. *Allen v. Allen*, 496.

PAYMENT.

§ 3. Application of Payment.

The debtor has the right at the time of payment to specify the debt or debts to which the payment should be applied; if the debtor fails to direct application the creditor may do so; if the parties fail to direct application the duty to do so devolves upon the court. *Heating Co. v. Realty Co.*, 642.

Purchasers failing to obtain lien release held not entitled to object to application of payment by subcontractor. *Ibid.*

PLEADINGS.

§ 2. Statement of Cause of Action.

The complaint should allege the material facts entitling plaintiff to the relief sought consicely so as to pinpoint the controversy and disclose the proper issues for its determination, without allegation of evidentiary facts. *Dowd v. Foundry Co.*, 101; *Green v. Tile Co.*, 503.

Separate causes of action set up in the complaint should be separately stated, and when the complaint does not do so it is subject to demurrer. *Kearns v. Primm*, 423.

A complaint should contain, *inter alia*, a demand for the relief to which plaintiff supposes himself to be entitled. *Ibid.*

It is not sufficient for a pleader to allege conclusions, but it is required that he allege facts from which the legal conclusions arise. *Equipment Co. v. Equipment Co.*, 549.

§ 3. Joinder of Causes of Action.

Causes for declaration of dividends and for dissolution of corporation may be properly joined in action against corporation and its directors. *Dowd v. Foundry Co.*, 101.

Cause to surcharge and falsify administrator's account cannot be joined with action to hold administrator liable as trustee *ex malificio* in purchase at sale of realty by commissioner. *Kearns v. Primm*, 423.

§ 8. Cross-Actions.

In an action in which the rights of the parties are dependent upon the right of the widow to dissent from the will, the widow may not set up a cross action for services rendered testator in the event it be determined she was not lawfully married to testator and therefore could not dissent, since such cause does not arise out of any right under the will. *Cunningham v. Brigman*, 208.

Right to recover damages for temporary flight easement may not be joined in action to condemn a part of the tract obviating the flight easement. *Charlotte v. Spratt*, 656.

§ 8.1. Pleas in Bar.

The court has discretionary power to determine a plea in bar prior to trial on the merits. *Wilson v. Hoyle*, 194.

PLEADINGS—*Continued.*

§ 12. Office and Effect of Demurrer.

A demurrer admits the factual allegations of the complaint. *Green v. Tile Co.*, 503; *Hooks v. Speedways*, 686; and reasonable inferences therefrom, and a demurrer may not invoke matters not appearing on the face of the pleading. *Helicopter Corp. v. Realty Co.*, 139.

The court cannot take in consideration ordinances not pleaded. *Surplus Co. v. Pleasants*, 587.

Upon demurrer, a complaint will be liberally construed with a view to substantial justice between the parties, and the demurrer will be overruled of the complaint in any portion or to any extent states facts sufficient to constitute a cause of action, giving the pleader the benefit of every reasonable intendment and presumption. *Ibid.*

But the rule of liberal construction does not warrant the court in reading into the pleading facts which it does not contain. *Surplus Co. v. Pleasants*, 587.

§ 15. Defects Appearing on Face of Pleading and "Speaking" Demurrers.

Deeds attached to the complaint and made a part thereof can be considered on demurrer. *Page v. Aberdeen*, 820.

§ 18. Demurrer for Misjoinder of Parties and Causes.

Where there is a misjoinder of parties and causes of action, demurrer to the complaint on this ground requires dismissal. *Kearns v. Primm*, 423.

§ 19. Demurrer for Failure to State Cause of Action.

The allowance of a demurrer *ore tenus* to a complaint containing a defective statement of a cause of action does not require dismissal, since plaintiff has the right to move to amend if he so desires. *Equipment Co. v. Equipment Co.*, 549; *Surplus Co. v. Pleasants*, 587.

§ 25. Scope of Amendment to Pleadings.

Where the theory of liability alleged in the complaint is that defendant municipality negligently failed to maintain and keep its culvert in repair after it had actual or constructive notice of defects, a motion to amend, made several days before the call of the case in the Supreme Court, so as to allege the theory of liability that the municipality wrongfully diverted the natural flow of surface waters into the culvert and drains, will be denied, since the proposed amendment sets up a wholly different cause of action or substantially changes the action originally sued upon. *Hormel & Co. v. Winston-Salem*, 666.

§ 28. Variance Between Allegation and Proof.

Plaintiff must make out his case according to his allegations, and the allegations and proof must correspond in order to establish a cause of action. *Hormel & Co. v. Winston-Salem*, 666.

§ 30. Motions for Judgment on the Pleadings.

Judgment of dismissal entered upon consideration of the pleadings in the action, the judgment roll in a prior action, and stipulations as to identity of the parties and of subject matter, is not a judgment on the pleadings but a determination of the plea of *res judicata*. *Wilson v. Hoyle*, 194.

PLEADINGS—*Continued.*

§ 33. Motions to Strike.

The allowance of a motion to strike a defense in its entirety amounts to sustaining a demurrer to such defense, and is immediately appealable. *Galloway v. Lawrence*, 433; *Parnell v. Ins. Co.*, 445.

Allegations of fact are deemed admitted for the purpose of a motion to strike. *Parnell v. Ins. Co.*, 445.

§ 34. Right to Have Allegations Stricken.

The court on motion should strike from the complaint the embellishments and banjowork inserted for their effect upon the jury. *Dowd v. Foundry Co.*, 101.

PRINCIPAL AND AGENT.

§ 5. Scope of Authority.

Principal is bound by acts of agent in scope of apparent as well as actual authority, but doctrine of apparent authority does not apply when person dealing with agent is given notice of limitation of agent's authority, and evidence in this case raised a jury question. *Research Corp. v. Hardware Co.*, 718.

§ 9. Liability of Principal for Torts of Agent.

Evidence that immediately after plaintiff left defendant's store a man with a badge stopped plaintiff in defendant's parking lot and requested to see plaintiff's pocketbook for the purpose of ascertaining if plaintiff had taken property belonging to the store, and that shortly thereafter the man with the badge was in conference with executives of defendant, *held* sufficient to warrant a finding that the man was acting as defendant's agent and within the scope of his employment. *Black v. Clark's*, 226.

PROCESS.

§ 3. Time of Service, Alias and Pluries Summons.

When original process is not served, the action or special proceeding may be kept alive by the issuance of alias and pluries summons. *Sizemore v. Maroney*, 14.

§ 4. Proof of Service and Motions to Quash.

Where no service of process has been had upon an individual in an action *in personam*, but there is nothing to indicate that the action had not been kept alive by the proper issuance of alias and pluries summons, it is error for the court to dismiss the action as to him, since, defendant not having been brought into court, his rights are unaffected by the pendency of the action, and there is no process served on him to quash. *Sizemore v. Maroney*, 14.

The officer's return reciting service raises the legal presumption of due service and places the burden of proof upon the party attacking the service to rebut the presumption by evidence of nonservice. *Finance Co. v. Leonard*, 167.

The officer's return and corroborating testimony afford ample basis for a finding by the court that the process was duly served, notwithstanding positive evidence of nonservice, the credibility of the witnesses and the weight of the evidence being for the determination of the court in finding the facts upon motion to vacate. *Ibid.*

PROCESS—*Continued.*

§ 7. Personal Service on Nonresident in This State.

A husband coming into this State to visit his child pursuant to a decree entered in the state of his residence is not immune to service of process in the wife's action for alimony without divorce instituted in this State, neither G.S. 8-68 nor G.S. 15-79 being applicable. *Cushing v. Cushing*, 181.

The fact that the wife has process served on her husband while he is at her home pursuant to a decree of another state authorizing him to have the custody of the child of the marriage for a specified time provided he return the child to the wife's home in this State by a specified hour on a particular date, is not fraud and will not warrant the court in setting aside the service on motion, since the husband was not induced to come into this State by any false representation or fraudulent promise. *Ibid.*

§ 8. Personal Service on Nonresident Individuals in Another State.

In the wife's action for support and maintenance of the children of the marriage and for alimony without divorce, a judgment *in personam* may not be rendered against the husband served with process outside the State pursuant to G.S. 1-104, since the court must have jurisdiction of the person in order to render a personal judgment. *Surratt v. Surratt*, 466.

§ 13. Service of Process on Foreign Corporation or Association by Service on Secretary of State.

Where, in an action against a labor union, it is alleged that defendant union had agents in this State and carried on in this State the activities for which it was organized in representing employees residing in this State, but the court fails to find any facts in regard to the activities of defendant union, if any, carried on in this State, there are no findings supporting the court's conclusion that the union was not doing business in this State. *Sizemore v. Maroney*, 14.

Whether service of process on a nonresident corporation by service on the Secretary of State under G.S. 55-145 will support an *in personam* judgment against the corporation is a question of due process and must be determined in accordance with decisions of the U. S. Supreme Court. *Equipment Co. v. Equipment Co.*, 549.

Findings *held* to support conclusion that nonresident defendant was doing business in this State for the purpose of service of process under this section. *Ibid.*

§ 16. Nature and Requisites of Action for Abuse of Process.

Action against husband by wife for wrongful commitment to mental hospital is for malicious prosecution and not abuse of process, since, since result accomplished was authorized by the writ. *Fowle v. Fowle*, 724.

QUASI-CONTRACTS.

§ 1. Elements and Essentials.

Where the offeree has performed a part of the service specified in the offer and is prevented by the offerer from completing the service, offeree is entitled at least to a compensation on a *quantum meruit*. *Helicopter Corp. v. Realty Co.*, 139.

§ 2. Actions to Recover on Implied Agreements.

Where defendant declares on a special contract to pay for services rendered and fails to establish the special contract, he may go to the jury on *quantum*

QUASI-CONTRACTS—*Continued.*

meruit if he alleges and proves defendant's knowing acceptance of the services performed in reliance on defendant's promise. *Helicopter Corp. v. Realty Co.*, 139.

Complaint held to allege cause of action on *quantum meruit*. *Ibid.*

RECEIVERS.

§ 12. Priorities.

Where the owner of a development is put into receivership prior to judgment establishing the lien of a material furnisher for work in the construction of houses on the land, the materialman's claim does not constitute a lien against the property remaining in the hands of the owner, although the lien attaches to property sold by the owner prior to receivership. *Heating Co. v. Realty Co.*, 642.

ROBBERY.

§ 4. Sufficiency of Evidence and Nonsuit.

Evidence tending to show that the victim of a robbery was left unconscious from a blow inflicting a wound in the back of her head requiring eight stitches to close and causing her to be hospitalized for two weeks, is sufficient to show that the robbery was committed by the use of a dangerous weapon, since the dangerous character of the weapon may be inferred from the wound. *S. v. Rowland*, 353.

Circumstantial evidence of defendant's guilt of robbery with a dangerous weapon held sufficient to be submitted to the jury. *Ibid.*

Evidence that appealing defendant, if not the owner, was the operator and controller of the automobile in which his confederates perpetrated one robbery and attempted another, is sufficient to be submitted to the jury on the question of the appealing defendant's guilt as an aider and abetter. *S. v. Haney*, 816.

SALES.

§ 8. Parties to Warranties.

Subject to the exception of food or drink in sealed packages with labels bearing representations to the ultimate consumer, the ultimate consumer or subvendee may not ordinarily hold the manufacturer or processor of food or the bottler of drink liable on the theory of breach of implied warranty of fitness for human consumption, since there is no privity of contract. *Terry v. Bottling Co.*, 1.

§ 15. Actions or Counterclaims for Fraud.

The remedy for fraud applies to contracts and sales of both real and personal property. *Johnson v. Owen*, 754.

The maxim *caveat emptor* does not apply in cases of fraud. *Ibid.*

SCHOOLS.

§ 4. Duties and Authority of School Boards and Committees.

School committees are not given corporate status by statute and have no right to sue and defend in the courts. *Revels v. Oxendine*, 510.

SCHOOLS—*Continued.*

§ 13. Principals and Teachers.

Charges implying incompetence of a teacher, made by a school principal to the superintendent of schools, which charges induce the authorities not to renew the teacher's contract, may not be made the basis for recovery of damages in an action against the principal in the absence of evidence that the charges were falsely made for the purpose of injuring the teacher or gaining some advantage at her expense, since the principal has the statutory duty to advise the superintendent in regard to teachers' proficiency. *Johnson v. Gray*, 507.

§ 14. Liability of Parent Refusing to Send Child to School.

Where school authorities send a child home for failure of the child's parents to have the child vaccinated and immunized as required by statute and the parent does everything in his power to keep the child in school except to waive what he believed to be his right not to have the child vaccinated and immunized, such parent cannot be convicted under G.S. 115-166. *S. v. Miday*, 747.

A jail sentence may be imposed on a parent under G.S. 115-169 only after a fine has been imposed upon the parent for failure to send his child to school and the parent has refused to pay such fine, and a jail sentence entered immediately upon conviction of violating G.S. 115-116 is not warranted. *Ibid.*

SEARCHES AND SEIZURES.

§ 1. Necessity for Search Warrant.

A search warrant is not necessary to the search of defendant's car incident to defendant's lawful arrest. *S. v. Haney*, 816.

SPECIFIC PERFORMANCE.

Breach of contract to sell personal property ordinarily gives rise to an action for damages, and an action for specific performance will not lie unless the injured party cannot be adequately compensated by a monetary payment. *Bell v. Concrete Products*, 389.

Where contract provides that defendant could pay liquidated damages upon election not to complete performance, specific performance may not be decreed. *Ibid.*

STATE.

§ 5d. Negligence of State Employee or Agency.

The owner of a pond may not recover under the State Tort Claims Act for damage to the pond resulting from silt washed down from a fill necessarily incident to the improvement of a highway, the improvement having been made in accordance with the plans and specifications, and there being no contention that the plans and specifications were faulty or negligently formulated. *Wrape v. Highway Comm.*, 499.

Recovery under the State Tort Claims Act must be based upon negligence of commission on the part of a named State employee, G.S. 143-297(2), and mere omission or failure to act will not support a tort claim. *Ibid.*

STATUTES.

§ 2. Constitutional Proscription Against Passage of Special Acts Relating to Designated Subjects.

An act permitting the county board of equalization of one particular county to revalue property for taxation after the expiration of the time limited in the other counties, would be unconstitutional. *Spiers v. Davenport*, 57.

§ 4. Construction in Regard to Constitutionality.

A municipal ordinance, as well as a statute, may be valid in part and invalid in part, and its constitutionality may be more satisfactorily determined upon the basis of a particular factual situation rather than upon attack of its constitutionality generally. *Ice Cream Co. v. Hord*, 43.

Where a statute is susceptible to two constructions, one of which is constitutional and the other not, the constitutional construction will be given it. *Spiers v. Davenport*, 56; *Finance Co. v. Leonard*, 167.

§ 5. General Rules of Construction.

Where a statute requires an administrative board to act "not later than" a specified time, the time limit is mandatory. *Spiers v. Davenport*, 56.

The doctrine of *ejusdem generis*, when applicable, requires that general words of a statute which follow a designation of particular subjects or things be restricted by the particular designations to things of the same kind, character and nature as those specifically enumerated. *S. v. Fenner*, 694.

The doctrine of *ejusdem generis* is but a rule of construction to aid in ascertaining the legislative intent and may not be used to defeat the legislative will, and the rule does not apply to restrict the operation of a general expression when such expression and the specific things enumerated have no common characteristic. *Ibid.*

The doctrine of *ejusdem generis*, requiring that general words of a statute following particular words should embrace only articles of similar kind as those described by specific appellation, applies in apposite upon the theory that if the legislative body had intended the general words to be used in their unrestricted sence the specific words would have been omitted. *S. v. Garrett*, 773.

A statute creating a criminal offense must be strictly construed. *Ibid.*

TAXATION.

§ 23. Construction of Statutes Imposing Tax or Prescribing Procedure.

A county board of equalization and review and the State Board of Assessment are both creatures of the Legislature, and have only such powers as the Legislature confers. *In re Freight Carriers*, 345.

A county board of equalization and review has authority to pass upon the tax situs of personal property as well as jurisdiction to list values and assess property. G.S. 105-327(g). *Ibid.*

The State Board of Assessment has jurisdiction to determine the tax situs of personal property upon appeal from the determination of that question by a county board of equalization and review. G.S. 105-275, or the tax payer may follow the procedure prescribed by G.S. 105-406 if he prefers. *Ibid.*

§ 24. Situs of Property for Purpose of Taxation.

The residence of a corporation is the place of its principal office in the State, and the situs of its personal property for taxation is the county of its residence, G.S. 105-302(a), except for personal property owned by it which is sit-

TAXATION—*Continued.*

uated in another county within the meaning of G.S. 105-302(d). *In re Freight Carriers*, 345.

An interstate carrier having its principal office in a county of this State maintained "break-bulk" terminals in other counties and listed for taxation in such other counties only such equipment as was permanently stationed at such terminals, but listed its "line-haul" equipment only in the county of its residence. *Held:* The county of its residence is the situs of its "line-haul" equipment for the purpose of taxation, since the "line-haul" equipment has no situs in the counties of the "break-bulk" terminals. The fact that, for the purpose of internal control, the carrier assigned certain of its tractors to the "break-bulk" terminals does not altar this result. *Ibid.*

Situs of property for taxation within the meaning of G.S. 106-302(d) means more than mere temporary presence and connotes a more or less permanent location. *Ibid.*

§ 25. Listing, Levy and Assessment of Property for Ad Valorem Taxes.

G.S. 105-327(e) stipulating that a county board of equalization and review complete its duties "no later than" the date specified is mandatory in requiring that the board complete its work within the time prescribed, at least to the extent authority is given the board to act *ex mero motu*, and therefore the board may not in December increase the assessed valuation of realty after the taxpayer has already paid the taxes for that year based on the valuation theretofore placed on the property in the regular octennial revaluation. *Spiers v. Davenport*, 56.

Chapter 916, Session Laws 1961, applicable only to Mecklenburg County, does not have the effect of extending the time for the assessment of taxes in Mecklenburg County, but merely gives the board of equalization and review of that county opportunity to act on appeal by property owners from the assessing authorities, and the statute does not vest the board with authority *ex mero motu* to increase valuations after the time limited by G.S. 105-327(e), and to construe it as having such affect would render it unconstitutional as a special act. *Ibid.*

§ 26. Franchise and License Taxes.

The contract between a carrier and the labor unions representing its employees, differentiating for the purpose of computing the drivers' rate of pay between a "peddle run" and a "pickup and delivery" shipment, is not binding upon the State in ascertaining the tax due by the carrier to the State for the use of the State highways. *Freight Carriers v. Scheidt*, 737.

In ascertaining that portion of an interstate carrier's revenue derived from the transportation of goods on the highways of this State, the total mileage within the State must be computed on the basis of the place where the carrier takes possession of the goods for shipment and the place where the carrier surrenders possession to the consignee, regardless of whether such points are at terminals or on "peddle runs" or "pickup and delivery" points. *Ibid.*

§ 29. Levy and Assessment of Sales, Use and Excise Taxes.

An oil company having fuel oil delivered on its order to another oil company direct from the port terminal is a distributor within the meaning of the statute and liable for the tax imposed by the statute and is entitled to the tare or deduction specified therein. *In re Oil Co.*, 520.

TAXATION—*Continued.*

§ 31. Liens on Personalty and Persons Liable.

The lien of the Federal Government for taxes upon the recording of notice of Federal tax lien in the office of the register of deeds of a county is effective only against the property of the taxpayer, and the property or property rights of the taxpayer to which the lien attaches must be determined by State law. *Trust Co. v. Ins. Co.*, 32.

Where the purchaser of a motor vehicle executes a conditional sales contract and note for the deferred portion of the purchase price, his property right is subject to the purchase money lien, which has priority over the lien of the Federal Government for taxes upon the subsequent recording of notice of Federal tax lien in the office of the register of deeds of the county, even though the conditional sales contract is not registered. *Ibid.*

TELEPHONE COMPANIES.

§ 1. Regulation and Control.

Commission must set rates which will bring fair return on property of utility within this State without regard to utility's return on property in another State. *Utilities Comm. v. Telephone Co.*, 702.

TENANTS IN COMMON.

§ 5. Conveyance or Encumbrancing Property.

The conveyance of a right of way by one tenant in common does not affect the title of the other. *Browning v. Highway Comm.*, 130.

TENDER.

Where the purchaser in a contract for the sale of unique personal property, asserting his right to specific performance, refuses to accept a tender by the seller of the amount of liquidated damages specified in the contract, such refusal does not discharge the seller's obligation to pay the liquidated damages, and judgment for such damages, and not a judgment of nonsuit, should be entered upon the purchaser's failure to make out his case for specific performance. *Bell v. Concrete Products*, 389.

TORTS.

§ 7. Effect of Release of One Tort-Feasor.

A release from liability for injuries resulting from negligence does not bar an action against a physician or surgeon for malpractice in treating the injured person, unless the language of the release makes it plainly appear that the parties intended to include therein damages resulting from malpractice, since the subsequent malpractice is a separate tort. *Galloway v. Lawrence*, 433.

TRADEMARKS AND TRADENAMES.

Generic words and phrases are *publici juris* and may not be monopolized. *Steak House v. Staley*, 199.

TRESPASS.

§ 10. Criminal Trespass.

Where State Board of Health regulations require separate toilet facilities for the races, Negro cannot be convicted of trespass in refusing to leave restaurant. *S. v. Fox*, 233.

In a prosecution under G.S. 14-134 for refusing to leave private premises after being directed to do so by the person in lawful possession, the warrant or indictment must charge, in substance at least, that defendant's acts were "without a license therefor." *S. v. Smith*, 788.

TRIAL.

§ 10. Expressions of Opinion on Evidence by Court During Progress of Trial.

A litigant has the right to trial of the cause before an impartial judge, and expressions from the bench which contain the slightest intimation from the judge as to the weight, importance, or effect of the evidence should be scrupulously avoided. *Upchurch v. Funeral Home*, 560.

In this case, exchanges between the court and the attorneys in the presence of the jury are not approved, but under the facts of this case in which a part of the colloquy related to the obvious fact that in approaching the intersection each driver was in sight of the other at the same time, and another part contained a statement in regard to the applicable law favorable to appellant, the incident *is held* not prejudicial. *Ibid.*

§ 21. Consideration of Evidence on Motion to Nonsuit.

On motion to nonsuit, plaintiff's evidence is to be considered in the light most favorable to it. *Spinning Co. v. Trucking Co.*, 807.

On motion to nonsuit, plaintiff's evidence must be considered in the light most favorable to plaintiff, giving him the benefit of every reasonable inference therefrom, and defendant's testimony will also be considered insofar as it is favorable to plaintiff. *Pinyan v. Settle*, 578.

The entering of nonsuit as to one defendant at the close of all of plaintiff's evidence will not be held for error on the ground that nonsuit should not have been entered until all of the evidence was in and that testimony of another defendant was sufficient to complete the case against the first, since plaintiff is not entitled to rely upon the evidence of the codefendant to prove his case against the first defendant, but has the burden of proving his own case, with the right to call defendants as witnesses, to contradict their testimony or cross-examine them, if he so desires. *Powell v. Cross*, 764.

§ 22. Sufficiency of Evidence to Overrule Nonsuit in General.

Plaintiff must make out his case by proving the facts essential to his cause of action or by proving facts permitting an inference of the material facts as a fair and logical conclusion, but an inference must be based on direct evidence and cannot be based on a presumption or some other inference or surmise, and evidence which presents a mere choice of possibilities is insufficient to be submitted to the jury. *Powell v. Cross*, 764.

§ 23. Sufficiency of Evidence — Prima Facie Case.

A *prima facie* showing is sufficient to carry the case to the jury but does not affect the burden of proof, which remains on plaintiff throughout the trial to prove his case. *Electric Corp. v. Aero Co.*, 437.

TRIAL—*Continued.*

§ 33. Instructions — Statement of Evidence and Application of Law Thereto.

Ordinarily, it is not sufficient for the court to state the evidence only in giving the contentions of the parties. *Pressley v. Godfrey*, 82.

The trial court is required to relate and apply the statutory as well as the common law to the variant factual situations having support in the evidence. *Correll v. Gaskins*, 212; *Pinyan v. Settle*, 578.

It is error for the court to fail to instruct the jury upon a substantial feature of the case presented by the evidence, even in the absence of a request. *Research Corp. v. Hardware Co.*, 718.

The court may not submit a case to the jury on a particular theory unless such theory is supported by both allegation and evidence. *Thacker v. Ward*, 594.

§ 35. Expression of Opinion on Evidence in Instructions.

Where the evidence of each party is approximately equal, a charge of the court which states the contentions of one party in grossly disproportionate length must be held for prejudicial error. *Pressley v. Godfrey*, 82.

Where defendant's answer denies any negligence on the part of his driver in connection with the accident complained of and his counsel throughout the trial so maintains, an instruction by the court in stating the evidence and in stating defendant's contentions that defendant did not controvert the question of negligence must be held for prejudicial error. *Evans v. Bova & Co.*, 91.

Charge of court held prejudicial as expression of opinion on evidence. *S. v. Anderson*, 124; *Power Co. v. Black*, 811.

§ 42. Form and Sufficiency of Verdict.

The verdict will be interpreted with reference to the pleadings, evidence, and charge, and to the extent it is not inconsistent and repugnant when so construed, is acceptable. *Wilson v. Wilson*, 88.

§ 45. Acceptance or Rejection of Verdict by the Court.

The court is without authority to reduce the verdict rendered by the jury without the consent of the interested party. *Brown v. Griffin*, 61.

§ 48. Power of Court to Set Aside Verdict and Order New Trial.

The failure of the court to order a mistrial as to the second defendant upon the granting of nonsuit as to the first defendant will not be held for error, since the matter rests in the court's discretion and plaintiff could have stopped the trial at any time by taking a voluntary nonsuit. *Powell v. Cross*, 764.

§ 51. Setting Aside Verdict as Being Contrary to Evidence.

The discretionary refusal to set aside a verdict as being contrary to the weight of the evidence will not be disturbed when the evidence on the crucial point is conflicting so that the verdict depends upon the resolution of factual controversy, which is peculiarly the province of the jury. *Mangum v. Yow*, 525.

§ 52. Setting Aside Verdict for Inadequate or Excessive Award.

Motion to set aside the verdict on the ground that the damages were excessive is addressed to the discretion of the trial court and is not reviewable in the absence of abuse of discretion. *Knight v. Seymour*, 790.

A motion to set aside the verdict for inadequacy of award is addressed to the discretion of the court, and the fact that plaintiff has introduced evidence that he incurred medical and hospital bills in an amount exceeding the award,

TRIAL—*Continued.*

without anything for physical suffering, does not show abuse of discretion in the refusal of the court to set aside the verdict, since the jury was not compelled to accept plaintiff's testimony with respect to his expenditures. *Brown v. Griffin*, 61.

§ 56. Trial and Hearing by the Court.

The rules of evidence are not so strictly enforced where jury trial is waived. *Oldham & Worth v. Bratton*, 307.

The court is required to find only the ultimate facts, and when the court finds crucial facts sufficient to support its order exception to the court's failure to find other evidentiary facts cannot be sustained. *Equipment Co. v. Equipment Co.*, 549.

TRUSTS.

§ 6. Title, Authority and Duties of Trustee.

A trustee does not have power to sell property of the trust estate unless he is authorized to do so by the trust instrument, either expressly or by implication from language necessarily requiring the exercise of such power to accomplish the purpose of the trust or to the discharge of powers or duties expressly conferred upon the trustee. *Bank v. Broyhill*, 189.

UNFAIR COMPETITION.

If generic words or descriptive terms are used for so long or so exclusively by a particular business as to connote the business in the public mind, the use of such words by another business may be restrained as constituting unfair competition when, under the circumstances, their use tends to confuse the public and amounts to the selling of goods by one person as the goods of another, but, even so, another may use such words when he adds thereto his own name or other words dissimilarity sufficient to preclude confusion in the public mind. *Steak House v. Staley*, 199.

Plaintiff operated a restaurant under the name "Charcoal Steak House." Thereafter defendant instituted a business under the name of "Staley's Charcoal Steak House" with the word "Staley's" in letters larger than those of the rest of the tradename. *Held:* Defendant's tradename was sufficiently dissimilar to obviate public confusion, and, there being no evidence of bad faith or any attempt on defendant's part to deceive, either in his business sign or the location of the business, plaintiff is not entitled to enjoin the use by defendant of the tradename. *Ibid.*

UTILITIES COMMISSION.

§ 1. Nature and Functions of Commission in General.

It is the function of the Utilities Commission and not the courts to fix rates of a public utility, and upon a petition for increase in rates the Commission is not required to accept the proposed rates or to reject them all together. *Utilities Comm. v. Telephone Co.*, 702.

§ 6. Hearings and Orders in Respect to Rates.

G.S. 62-133 which supercedes G.S. 62-124 is not in conflict with the former statute but merely codifies the former statute as interpreted by the Supreme Court. *Utilities Comm. v. Tel. Co.*, 702.

UTILITIES COMMISSION—*Continued.*

Whether a given rate is just and reasonable depends largely upon whether the Utilities Commission has placed a fair value on the property of the utility useful in producing its revenue in this State. *Ibid.*

A finding by the Utilities Commission as to the fair value of a utility's property within this State, which finding is made without giving any consideration to replacement costs as required by G.S. 62-133(b)(1), cannot be allowed to stand, since it is not supported by competent, material and substantial evidence. *Ibid.*

When a utility operates in two or more states the operations must be treated as separate businesses for the purpose of rate regulation, and the Commission must fix a rate which will give a reasonable or fair return on the company's investment within this State without reference to the company's return on property in another state or its overall return on all its operations. *Ibid.*

§ 4. Jurisdiction and Authority in Regard to Electric Companies.

The Utilities Commission has authority to regulate which customers shall be served respectively by an electric membership corporation and a power company, notwithstanding the provisions of a contract between such companies with respect to service. *Membership Corp. v. Light Co.*, 428.

WAIVER.

§ 2. Nature and Elements of Waiver.

Ordinarily, a waiver is an intentional relinquishment or abandonment of a known right or privilege. *S. v. Roux*, 149; *Hospital v. Stancil*, 630.

Waiver of a substantive right must be supported by consideration. *Hospital v. Stancil*, 630.

WEAPONS AND FIREARMS.

§ 2. Liability for Injuries.

The rule that a person violating the law in shooting a weapon is civilly liable for injuries resulting to another person, irrespective of negligence, applies when the shooting of the weapon is in violation of an ordinance or statute for the safety of persons, and therefore the fact that a person firing a pistol was illegally attempting to kill a dog does not render him absolutely liable for injury to another, since the statutes relating to the killing of domestic animals were not enacted for the protection or safety of persons. *Belk v. Boyce*, 24.

WILLS.

§ 8. Probate in Common Form.

The clerk of the Superior Court as probate judge has the sole power in the first instance to determine whether defendant died testate or intestate and whether a script offered for probate is his will. *In re Will of Charles*, 411.

Upon proof of the execution of a paper writing as a will it should be admitted to probate in common form, the proceeding being *ex parte*, and when so probated the paper writing stands as a will and the only will of testator until challenged and reversed in a proper proceeding before a competent tribunal, and other writings executed by decedent may not thereafter be offered for probate in common form, since this would be a collateral attack on the first probate. *Ibid.*

WILLS—*Continued.*

§ 12. Nature and Jurisdiction of Court Proceedings.

Challenge to the probate of a paper writing in common form is by direct attack by caveat, which transfers the proceeding to the civil issue docket for trial by a jury after notice to all interested persons, and if decedent has executed other writings which parties interested wish to probate, such writings must be presented in the caveat proceeding in order that the court in one proceeding may adjudicate if there is a valid will and, if so, which or what part of the written instruments is the will. *In re Will of Charles*, 411.

Upon the filing of a caveat the Superior Court acquires jurisdiction of the whole matter in controversy. *Ibid.*

§ 22. Instructions in Caveat Proceedings.

Notwithstanding that proof of the formal execution of a paper writing in accordance with statute raises a *prima facie* presumption that the paper writing is a will, and notwithstanding that the burden is upon caveator to establish mental incapacity relied on by him, the writing is not established as a will until the verdict of the jury does so, and reference in the court's instruction to the paper writing as the "alleged will" is not an expression of opinion by the court that the paper writing was not in fact a valid will. *In re Will of Iseley*, 239.

§ 26. General Rules of Construction.

The intention of the testator as gathered from the entire instrument is the primary object in interpreting a will, and must be given effect unless contrary to some rule of law or at variance with public policy. *Bank v. Broyhill*, 189.

§ 40. Rule Against Perpetuities.

The rule against perpetuities requires that an estate vest no later than twenty-one years plus, when apposite, the period of gestation after the life or lives of persons in being at the time of the creation of the estate, and is a rule of law and not of construction. *Farnam v. Bank*, 106.

Time of vesting and not time of payment is determinative of whether bequest violates rule against perpetuities. *Ibid.*

§ 50. Designation of Charities.

Bequests to charities in this case *held* not void for vagueness. *Farnan v. Bank*, 106.

§ 60. Dissent of Spouse.

The right of the widow to dissent is based upon a valid marriage. *Cunningham v. Brigman*, 208.

Under the present statute the failure of the surviving spouse to resign as personal representative during the time the right to dissent is determinable under the provisions of G.S. 30-1 cannot constitute a waiver of the right to dissent. *Bank v. Stone*, 384.

Where at the time of qualifying as executrix the widow did not know the value of the estate or the value of the provisions made for her in the will, her act in qualifying does not preclude her from dissenting from the will upon learning of the value of the estate and the value of its provisions for her. *Ibid.*

§ 61. Conditions and Restrictions.

Where a will directs trustees to pay to a designated charity certain funds upon the acceptance in writing by the charity of certain conditions of the be-

quest, the acceptance of the conditions by the charity vests the funds in it, and the rights of the parties in the event the conditions should thereafter be broken will not be determined until the happening of such contingency, since the courts will not enter anticipatory judgments. *Farnan v. Bank*, 106.

GENERAL STATUTES, SECTIONS OF, CONSTRUED.

G.S.

1-65.1. Appointment of guardian *ad litem* by Superior Court need not be supported by specific finding that defendant was *non compos mentis*. *Bell v. Smith*, 814.

1-95. Action may be kept alive by alias and pluries summons. *Sizemore v. Maroney*, 14.

1-97(6) Facts alleged, if true, held sufficient to support conclusion that labor union was doing business in this State. *Sizemore v. Maroney*, 14.

1-104. Judgment *in personam* may not be rendered against defendant served with process outside State. *Surratt v. Surratt*, 466.

1-113, 1-114, 1-115. Are applicable only when obligations of defendants are joint and are not applicable when they are joint and several. *Finance Co. v. Leonard*, 167.

1-122. Complaint should contain statement of material facts and not evidentiary facts. *Green v. Tile Co.*, 503; *Dowd v. Foundry Co.*, 101.

1-122(3). Complaint should contain demand for relief. *Kearns v. Primm*, 423.

1-123. Separate causes should be separately stated. *Kearns v. Primm*, 423.

1-131. Allowance of demurrer does not require dismissal since plaintiff has right to amend. *Equipment Co. v. Equipment Co.*, 549.

1-137. Right to recover damages for temporary flight easement may not be joined in action to condemn a part of the tract obviating flight easement. *Charlotte v. Spratt*, 656.

1-180. Reading of applicable statute and summary of evidence and contentions is insufficient. *S. v. Coggin*, 457; *Pinyan v. Settle*, 578.

Prejudicial expression of opinion on evidence. *S. v. Anderson*, 124.

Court is not required to charge upon less degree of crime in absence of supporting evidence. *S. v. Summers*, 517.

1-183. Failure to order mistrial as to one defendant upon granting nonsuit as to other defendant not error. *Powell v. Cross*, 764.

1-209.2. Commission may not take nonsuit after filing of declaration of taking. *Highway Comm. v. Industrial Center*, 230.

1-255. Right of widow to dissent may be determined under Declaratory Judgment Act. *Cunningham v. Brigman*, 208.

1-353. All claimants to payment out of a particular fund should be given notice and an opportunity to be heard. *Couture, Inc. v. Rowe*, 234.

1-540.1. Release of tort-feasor does not bar subsequent action for malpractice. *Galloway v. Lawrence*, 433.

1-541. Tender of judgment after appeal entry is not timely made. *Oldham & Worth v. Bratton*, 307.

4-1. Common law is in force in this State. *S. v. Lowry*, 536.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

8-46. Court must charge provisions of statement relating to Mortuary Tables. *Kinsey v. Kenly*, 376.

Where plaintiff introduces evidence that injuries are permanent, Mortuary Tables are competent. *Kight v. Seymour*, 790.

8-53. Relationship of physician and patient does not exist when third party employs physician. *S. v. Hollingsworth*, 158.

8-68, 15-79. Husband coming into this State to visit child pursuant to decree entered in the State of his residence is not immune to service in wife's action for alimony. *Cushing v. Cushing*, 181.

14-39. The offense is defined by the common law. *S. v. Lowry*, 536.

14-55. Tire tool is not instrument of housebreaking. *S. v. Garrett*, 773.

14-87. Dangerous character of weapon may be inferred from the wound. *S. v. Rowland*, 353.

14-134. Indictment for trespass must charge that defendant's acts were "without license therefor." *S. v. Smith*, 788.

14-177. Statutory offense includes all the crimes against nature defined by common law. *S. v. O'Keefe*, 53.

14-335. Statute applies to drunkenness at any public place and is not limited to drunkenness on public highway or at public meeting. *S. v. Fenner*, 694.

14-360, 67-3, 67-14. Owner of premises may not kill dog thereon in absence of legal justification. *Belk v. Boyce*, 24.

15-4.1. Does not apply to preliminary examination prior to arrest and prior to indictment. *S. v. Elam*, 273.

Plea of *nolo contendere* is within purview of statute requiring court to warn defendant without counsel of consequences of plea. *S. v. Payne*, 77.

Indigent defendant is entitled to counsel and to have record made available for appeal. *S. v. Roux*, 149.

Defendant held to have knowingly waived counsel. *S. v. Bines*, 48.

It is not required that waiver of counsel be in writing. *S. v. McNeil*, 260.

15-4.1, 15-5. Findings held to disclose that defendant did not waive right to appeal. *S. v. Roux*, 149.

15-10. Does not apply to person allowed bail. *S. v. Lowry*, 536.

15-41(a). Police officer may arrest without warrant person drunk at public place in his presence. *S. v. Fenner*, 694.

15-143. Bill of particulars cannot supply averment essential to charge. *S. v. Banks*, 784.

15-147. When warrant sufficiently charges offense, the fact that it defectively attempts to charge prior conviction of like offense is not ground for quashal. *S. v. Morgan*, 400.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

15-170. Nonsuit is properly overruled if there is evidence to support conviction of crime charged or included offense. *S. v. Virgil*, 73.

15-173. Judgment of nonsuit has effect of verdict of not guilty. *S. v. Stinson*, 283.

Where defendant introduces evidence, only motion made at close of all evidence will be considered.

15-179. State may not appeal from judgment allowing plea of former jeopardy. *S. v. Reid*, 825.

15-180. Defendant has right to appeal from a conviction of any criminal offense. *S. v. Roux*, 149.

15-217. Trial court's holding that delay in filing petition for post conviction hearing was not due to laches held not supported by evidence. *S. v. Johnson*, 479.

15-222. Supreme Court may issue writ of *certiorari* in its discretion to review judgment in a post conviction hearing. *S. v. Roux*, 149.

18-78.1. The 1959 Amendment does not require actual knowledge of the sale of beer to minor before revocation or suspension of license. *Campbell v. Board of Alcoholic Control*, 224.

20-17(2), 20-16(a)(1). Conviction of reckless driving during period of revocation of license for drunken driving, without conviction of driving while license was revoked, does not warrant suspension of license for additional period of a year. *In re Bratton*, 70.

20-71.1. Stipulation that car was owned by designated person is sufficient to take issue of agency to jury. *Yeats v. Chappell*, 461.

20-88(e). Computation of total mileage in this State of interstate carrier for purpose of excise taxation. *Freight Carriers v. Scheidt*, 737.

20-134. It is negligence or contributory negligence *per se* to stop motor vehicle on hard surface at nighttime without lights. *Correll v. Gaskins*, 212.

20-138. Evidence held insufficient to show violation of statute. *S. v. Hewitt*, 759.

20-141(e). Evidence held not to show contributory negligence as matter of law in crashing into vehicle standing on highway at nighttime without lights. *Brown v. Hale*, 176.

20-154. Evidence of negligence in turning left held for jury. *Mayberry v. Allred*, 780.

20-155(b). Evidence held for jury on question of defendant's negligence in entering intersection after plaintiff was already in the intersection. *Mayberry v. Allred*, 780.

20-156(a). Construction of limited access highway held to substantially reduce land owner's access for which compensation must be paid. *Highway Comm. v. Farmers Market*, 622.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

20-161(a). Stopping of police car to enable officers to determine whether driver of another car has license does not constitute parking. *Kinsey v. Kenly*, 376.

20-166(c). Evidence held for jury on question whether defendant knowingly and wilfully failed to render aid to injured passenger. *S. v. Coggin*, 457.

20-169. Municipality may adopt ordinance requiring ambulances to observe traffic control signals. *Uchurch v. Funeral Home*, 560.

20-173, 20-174, 20-38(1). "Y" intersection of rural paved road held not to constitute unmarked crosswalk. *Nix v. Earley*, 795.

20-279.21(c). Operator's policy protects against liability resulting from insured's operation of any motor vehicle. *Lofquist v. Insurance Co.*, 615.

22-2. Denial of contract is equivalent to plea of statute of frauds. *Hines v. Tripp*, 470.

Lease for one year need not be in writing. *Helicopter Corp. v. Realty Co.*, 139.

28-147. Failure of administrator to account for designated personal assets of the estate is proper subject for action under the statute. *Kearns v. Primm*, 423.

30-1. Qualification as executrix does not preclude widow's dissent. *Bank v. Stone*, 384.

36-21, 36-23.1. Bequests to charities held not void for vagueness.

41-1. Conveyances to named person and the heirs of his body creates an estate tail converted into fee simple. *Tremblay v. Aycock*, 626.

42-2. Conveyance of land subject to valid lease gives purchaser no rights to rents accrued but does give him right to rents thereafter accruing. *Pearce v. Gay*, 449.

42-8. Stipulation in deed that it was made subject to rental contract does not have effect of reserving to grantors rents accruing subsequent to deed. *Pearce v. Gay*, 449.

44-1. Lien properly filed relates back to time of commencement of work and is prior to all subsequent instruments. *Heating Co. v. Realty Co.*, 642.

44-8. Invoices alone insufficient notice to owner of claim of material furnisher. *Oldham & Worth v. Bratton*, 307.

44-65. Property to which Federal tax lien attaches must be determined by State law. *Trust Co. v. Insurance Co.*, 32.

45-21.12. Fact that purchaser of equity of redemption assumes debt does not extend period of limitation. *Lowe v. Jackson*, 634.

46-22. "Injury" justifying sale is substantial or material impairment so as to render actual partition unconscionable. *Brown v. Boger*, 248.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

50-16. Court has jurisdiction to award custody of children notwithstanding complaint fails to allege action for divorce. *Cushing v. Cushing*, 181.

52-10.1. One spouse may maintain action in tort against other or against other's administrator. *Cox v. Shaw*, 361.

55-50(k), 1-123. Causes for declaration of dividends and dissolution of corporation may be properly joined in action against corporation and its directors. *Dowd v. Foundry Co.*, 101.

55-145. Findings held to support conclusion that defendant was doing business in this State for purpose of service of process by service on Secretary of State. *Equipment Co. v. Equipment Co.*, 549.

62-121.7(8). If a carrier of agricultural products is exempt from Federal franchise, he is subject to State regulations. *Byrd v. Motor Lines*, 369.

62-133. Is not in conflict with former statute. *Utilities Comm. v. Telephone Co.*, 702.

62-133(b)(1). Replacement cost is essential element in fixing rate structure *Utilities Comm. v. Telephone Co.*, 702.

63. Contemplates full cooperation and compliance with Federal statutes and regulations. *Charlotte v. Spratt*, 656.

97-2, 97-19. Employer not liable for injuries to independent contractor. *Richards v. Nationwide Homes*, 295.

97-30, 97-31(22). Industrial Commission may make award for partial incapacity and for disfigurement. *Hall v. Chevrolet Co.*, 569.

97-36. Harbor Workers' Act does not preclude compensation under Workmen's Compensation Act. *Rice v. Boy Scouts*, 204.

97-47. Industrial Commission may grant rehearing for newly discovered evidence within year after rendition of award. *Hall v. Chevrolet Co.*, 569.

105-275, 105-406. Tax payer may appeal from board of equalization or file suit to recover tax paid under protest. *In re Freight Carriers*, 345.

105-302(a). Situs of personal property is county of corporation's residence except for personal property owned by it situated in another county within the meaning of G.S. 105-302(d), which means more than mere temporary presence. *In re Freight Carriers*, 345.

105-327(e). Statutory requirement that Board complete its duties "no later than" date specified is mandatory. *Spires v. Davenport*, 56.

105-327(g). County Board has authority to pass upon tax situs of personalty. *In re Freight Carriers*, 345.

105-434. Oil company having oil delivered directly from port terminal is distributor and entitled to tare. *In re Oil Co.*, 520.

106-95.1, 1-6-99. Farmers raising chicks held employees of company furnishing feed and therefore such company was exempt from inspection fee. *Graham v. Farms, Inc.*, 66.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

115-69 *et seq.* School committees are not given right to sue and defend in the courts. *Revels v. Oxendine*, 510.

115-166. Jail sentence can be imposed only after fine has been imposed and not paid. *S. v. Miday*, 747.

126-46. Commitment of person to mental hospital maliciously and without probable cause gives rise to action for malicious prosecution. *Fowle v. Fowle*, 724.

130-93.1(h). Whether teachings of defendant's religious sect justify defendant in refusing to have child vaccinated held for jury. *S. v. Miday*, 727.

136, Art. 9. After filing of declaration of a taking, Highway Commission may not take voluntary nonsuit. *Highway Comm. v. Industrial Center*, 230.

136-89.48 *et seq.* The General Assembly has authorized the Highway Commission to construct limited access highways in rural and urban areas. *Wofford v. Highway Comm.*, 677.

136-108. Whether upon facts, limitation of access constituted a "taking" held question of law and fact for court. *Highway Comm. v. Farmers Market*, 622.

143-297(2). Recovery under Tort Claims Act must be based upon negligence of commission and not mere omission. *Wrape v. Highway Comm.*, 499.

153-9(17), 160-200(11). City is authorized to close street regardless of whether street is acquired by dedication. *Wofford v. Highway Comm.*, 677.

160-52, 160-200(6), (7), (10). Municipal Sunday ordinance is within police power. *Charles Stores v. Tucker*, 710.

160-204, 160-205. Negotiation with wife is not necessary after unsuccessful negotiation with husband for land held by entireties. *Hertford v. Harris*, 776.

160-272. Court will not take judicial knowledge of municipal and county ordinances. *Surplus Co. v. Pleasants*, 587.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

Art. I, § 17. Refusal to permit cross-examination of jurors for purpose of impeaching their verdict does not violate constitutional rights. *S. v. Hollingsworth*, 158.

Findings held to support conclusion that defendant was doing business in this State for purpose of service of process by service on Secretary of State. *Equipment Co. v. Equipment Co.*, 549.

Construction of limited access highway across municipal streets does not take easement of access of property owners left in *cul-de-sac*. *Wofford v. Highway Comm.*, 677.

Commission may not take nonsuit after filing of declaration of a taking. *Highway Comm. v. Industrial Center*, 230.

Art. IV, § 10. Supreme Court will dismiss *habeas corpus* proceeding *ex mero motu* when it appears that prior action between parties was pending for custody of child. *In re Custody of Ponder*, 530.

Art. IV, § 10(1). Supreme Court will take cognizance of variance between the indictment and proof notwithstanding absence of motion to nonsuit. *S. v. Brown*, 786.

CONSTITUTION OF THE UNITED STATES, SECTIONS OF, CONSTRUED.

Fourteenth Amendment. Prohibits use of confession coerced by physical or mental means. *S. v. Chamberlain*, 406.

Refusal to permit cross-examination of jurors for purpose of impeaching their verdict does not violate constitutional rights. *S. v. Hollingsworth*, 158.

Indigent defendant is entitled to have counsel appointed for him unless he understandingly waives counsel. *S. v. Johnson*, 479.

Findings held to support conclusion that defendant was doing business in this State for purpose of service of process by service on Secretary of State. *Equipment Co. v. Equipment Co.*, 549.

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