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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1965

JOHN M. STRONG

REPORTER

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1965

W. W. HORTON, A. G. WHITENER, WHITENER REALTY COMPANY, INC., WOODWORKERS SUPPLY COMPANY, INC., ET AL, ON BEHALF OF THEMSELVES AND ALL OTHER TAXPAYERS OF THE CITY OF HIGH POINT, PLAINTIFFS V. REDEVELOPMENT COMMISSION OF HIGH POINT, P. HUNTER DALTON, JR., JAMES H. MILLIS, FRED W. ALEXANDER, DALE C. MONTGOMERY, CLARENCE E. YOKELEY, AND CITY OF HIGH POINT, A MUNICIPAL CORPORATION, CARSON C. STOUT, MAYOR, ARTHUR G. CORPENING, JR., ROY B. CULLER, R. D. DAVIS, J. H. FROELICH, H. G. IDLERTON, B. G. LEONARD, F. D. MEHAN, AND LYNWOOD SMITH, DEFENDANTS.

(Filed 17 March, 1965.)

1. Municipal Corporations § 4—

A redevelopment commission may not acquire property until the governing body of the municipality has approved the redevelopment plan, which approval is a commitment of the city to a course of action. G.S. 160-463(c).

2. Same—

The redevelopment plan in question contemplated the construction of a plaza over the tracks of a railroad company, which tracks were in a cut traversing the blighted area. *Held:* The area of the railroad right of way is not a "blighted area" as defined by G.S. 160-456(2).

3. Appeal and Error § 49—

Where the evidence does not support the critical findings of the court necessary to support the court's conclusions of law, such conclusions cannot stand.

4. Eminent Domain § 14—

Upon condemnation of leased land the lessee is entitled to compensation for any resulting diminution in the value of its leasehold estate, and lessor is entitled to compensation for any diminution in the value of its property.

5. Eminent Domain § 2—

Where a municipality, pursuant to an urban redevelopment plan, seeks to condemn the right to construct a plaza over the tracks of a railroad company, and the construction of the plaza entails the removal of the railway's passenger station, the operation of trains through a tunnel, and the lessening of the width of the right of way in some instances, the city must condemn something more than a mere easement for light and air.

6. Eminent Domain § 1—

An agency may not condemn land unless it has the money on hand, or the present authority to obtain the money, for payment of just compensation.

7. Eminent Domain § 7c; Municipal Corporations § 4—

Where a redevelopment commission fails to include in its estimate a sum sufficient to acquire an easement necessary to its redevelopment plan because of a misapprehension as to the extent of the easement necessary to accomplish its purpose, it may not proceed until the plan is modified so as to include the sums realistically necessary for the acquisition of such easement.

8. Municipal Corporations § 29—

Where the evidence is sufficient to sustain findings to the effect that defendant municipality had a public need to construct off-street parking in the city, it may issue bonds for this purpose to be paid exclusively from the revenue derived from such off-street parking facilities upon its compliance with the provisions of Article 34 of G.S. 160.

HIGGINS, J., concurring in result.

PARKER, J., concurs in concurring opinion.

APPEAL by plaintiffs from *Gwyn, J.*, Regular August 24, 1964 Civil Session of GUILFORD (High Point Division), docketed and argued as No. 601 at the Fall 1964 Term of this Court.

This is the third time this Court has been called upon to consider this case. It was first here at the Spring Term 1963 on an appeal by plaintiffs from a judgment sustaining a demurrer. That judgment was reversed, see *Horton v. Redevelopment Commission,* 259 N.C. 605, 131 S.E. 2d 464.

The second appeal was from a judgment rendered in the Superior Court in September 1963. The Court then made findings of fact. On those findings, it reached legal conclusions and rendered judgment

from which plaintiffs appealed. That judgment was held erroneous. *Horton v. Redevelopment Commission,* 262 N.C. 306, 137 S.E. 2d 115.

The reports of the prior appeals are referred to for summaries of the pleadings and the questions decided.

Harris H. Jarrell for plaintiff appellants.

Knox Walker; Haworth, Riggs, Kuhn & Haworth, by John Haworth; Jordan, Wright, Henson & Nichols, by Welch Jordan for defendant appellees.

Joyner & Howison and Arnold B. McKinnon, Aricus curiae.

RODMAN, J. It is now settled by the opinions rendered on the prior appeals: (1) The complaint states a cause of action; (2) the city had not, when the last appeal was heard, established its right to consummate five of the items which it had agreed to perform as a part of its contract with the Commission. These five items are enumerated in the opinion reported 262 N.C. 306, 137 S.E. 2d 115. It is there said:

> "[A]s much as we would like to finally dispose of this litigation without further delay, there are five items for which the City intends to claim credit that will necessitate further inquiry, including additional findings."

After the enumeration, it is said:

> "Ordinarily we would not look beyond the determinations hereinabove required. But the matters involved in this case are of serious public concern, and for this reason we take note here of possibilities. It may be determined that one or more of the local grants-in-aid involved in the inquiries are invalid, impossible of accomplishment, or incapable of certainty of accomplishment. In such case the responsible authorities may desire to modify the plan, G.S. 160-463(k), in one or more of the following respects: (1) substituting valid and feasible local grants-in-aid for those found to be invalid or impossible of accomplishment; (2) reducing the redevelopment area; (3) submitting a workable plan to the electors of the City of High Point."

The Court, in August 1964, for the purpose of passing on the validity of the plan, took additional evidence relating primarily to the five items for which the city claimed credit. The first objectionable item, donation of lands, had, prior to the hearing, been eliminated by resolution of the Council of High Point. The Court concluded, on the facts found, that each of the remaining four items was properly included as a credit.

A redevelopment commission may not acquire property until the governing body of the municipality has approved the plan, G.S. 160-463(c). The approval by the governing authority is a commitment to a course of action which the municipality will pursue.

Plaintiffs' challenge to the plan presents, as declared in the preceding appeal, questions of fact rather than issues of fact. The findings, now made, are not binding on one not now a party. The property owner is entitled to be heard in the condemnation proceeding on all questions involving the right to take his property, as well as the price which the government must pay. Both questions of fact and issues of fact may arise in the condemnation proceeding.

The assignments of error present these questions: (1) Is the area proposed for the construction of the Pedestrian Plaza a "blighted area?" (2) Have defendants provided funds to compensate the owners for the property to be taken in the construction of the Plaza? (3) Has High Point given adequate notice of its intent to provide for off-street parking, and to issue revenue bonds for that purpose?

The Legislature has empowered redevelopment commissions to take appropriate action to remedy the problems created by: (1) blighted areas; (2) non-residential redevelopment areas; (3) rehabilitation, conservation and reconditioning areas. The conditions which define an area are enumerated by statute: G.S. 160-456(2) blighted area; (10) non-residential redevelopment area; (21) rehabilitation, conservation and reconditioning area.

Does the evidence, as plaintiffs contend, establish the fact that the area in High Point, between Hayden Place on the west and Hamilton Street on the east, is not in fact a blighted area, but at most a rehabilitation, conservation and reconditioning area? The necessity for an answer is indicated in the opinion reported 262 N.C. by the paragraph at the bottom of p. 322, 137 S.E. 2d 115 at p. 227.

On July 23, 1964, the Redevelopment Commission adopted a resolution modifying the plan with respect to the Pedestrian Plaza. It is stated in that resolution:

> "To properly unify the central business portion of the redevelopment area, to provide a much-needed park area and facility in the central business district of the City and the central business portion of the redevelopment area, to eliminate from this downtown area the blighting influence of the open ditch, and to conserve for the benefit of the City and its citizens the relatively high tax base of real property in the downtown area, the Southern Railway tracks will be covered with a platform which will be landscaped and dedicated to public use as a downtown park."

The original plan, speaking with respect to this area, said:

"The main commercial development planned in the urban renewal project is located in the central business district. Based on the opinion of the market analyst, as well as City Officials and businessmen, the construction of the pedestrian plaza will generate a new commercial market along the plaza, and on both North and South Wren Streets. To further enhance the development of this additional commercial area, it is proposed that the structures on the east side of Main Street develop new facades on the Wren Street side creating a new shopping street. * * *

"The redevelopment proposals for the central business district are centered around the covering of the railroad tracks that now divide the district. This railroad cover will be designed and constructed as a pedestrian plaza, or walkway, that will give the existing one street, strip type shopping area a second orientation. Additional commercial development will be encouraged along both sides of the pedestrian plaza, as well as along Wren Street.

"The proposed development of the plaza includes pedestrian benches, landscaping, lighting, and facilities for a children's play area. In addition, it is planned to utilize a portion of the plaza for a restaurant, rest room facilities, and a news and confection kiosk. These facilities will be provided either by the City, or on this City property leased to private firms working under the City's direction and standards.

"Parking facilities are also planned for the area, a portion of the facilities will be developed over the railroad tracks at the extremities of the plaza structure. It is planned that these facilities could be leased by the City to a 'park and shop' or other similar corporation."

A planning commission may correct objectionable conditions within a redevelopment area, consisting of a blighted area, a non-residential redevelopment area, and a rehabilitation, conservation and reconditioning area, G.S. 160-456(16). We think it apparent, however, that the Legislature never intended to permit a planning commission or a redevelopment commission to include within the boundaries of a "blighted area" an area not meeting the statutory definition, even though the area might qualify as a non-residential area, or as a rehabilitation, conservation and reconditioning area.

Judge Gwyn found:

"The proposal which calls for building a covering over the depression or cut in which the tracks used by Southern Railway

Company pass through the heart of the City for a distance of approximately 2½ blocks is for the specific purpose of providing a downtown park dedicated to general public use. The easement for construction of the covering will be acquired by the Redevelopment Commission at its expense and dedicated by it to the City of High Point for such use as a downtown public park. The cut or depression in which the tracks are located is approximately 35 feet deep of variable width and now spanned by bridges at Main Street, Hamilton Street and Wrenn Street in the area to be covered. The proposed covering structure is designed so that it will at all points provide as much or more clearance, both vertically and laterally, as the existing street bridges. (See Defendants' Exhibit No. 106). The costs of constructing the covering structure will be paid by the City and the estimate as to the costs of building the covering structure contained in the Redevelopment Plan, to wit $1,150,875.00 is realistic and computed in accordance with sound engineering and planning practices. The Southern Railway Company has placed the City and the Redevelopment Commission on notice of its objection to the proposed covering of the tracks. The covering platform as designed and proposed will not materially interfere with the operation of Southern Railway Company's trains and passenger station and it will not materially interfere with the Railway Company's use and enjoyment of the right-of-way it holds under lease from the North Carolina Railroad Company. The depression or cut over which the proposed covering for use as a public park is to be constructed is located within the 'Blighted Area' comprising the East Central Urban Renewal Area in High Point. The plan does not contain or designate and the certification of the Planning Commission does not attempt to qualify as such any 'Rehabilitation, Conservation and Reconditioning Area.' "

Based on the findings, the Court concluded:

"The Redevelopment Commission has the legal right to condemn an easement for the construction of the covering of the railroad tracks used by Southern Railway Company in the heart of the City, provided that the construction of the covering shall not materially interfere with Southern Railway Company's use and enjoyment of its right-of-way.

"The covering of the tracks can be accomplished without material interference with Southern Railway Company's use and enjoyment of its right-of-way.

"The plans for covering the railroad tracks for use as a public park provide that the covering shall be used for a public purpose."

The evidence does not, in our opinion, support the findings on which the legal conclusion is based. George Freeman, an engineer qualified in structural and architectural design, testified his firm had been employed to make preliminary plans for covering the main line tracks of Southern Railway for a distance of approximately 1,000 feet. His firm had prepared "schematic drawings," which set forth the functional program recommended for the Pedestrian Plaza. "It is a public area — public park — such things as a town-square and assembly area; rest shelters; hospitality booth; playground for children; shuffleboard areas; picnic area; public toilets; miscellaneous features such as historical supply areas; community activity areas; then landscaping with certain amount of planning and certain amount of sculpture, lighting, etc. All of these items are things which go to make up a public park. * * * In the final design and in the final fruition of the plan these things, such as golf practice greens, terrace platform and community directory and fountain benches, restrooms, telephone booths, vending machines, could be shifted about and changed to meet whatever final requirements might be made."

He described in detail the manner in which the roof over the tracks would be constructed, how supported, and how the tunnel created by the construction of the roof would be ventilated.

The Railway's right-of-way is 200 feet in width. The span between Wrenn Street and Hamilton Street over the tracks would be 60 feet. For practical purposes, the proposed construction would reduce the usable width of the right-of-way from 200 feet to 60 feet between Wrenn Street and Hamilton Streets. In another segment, the usable area of the right-of-way would be reduced to 85 feet.

The witness estimated the cost of constructing the Plaza to be $1,148,750. He added, "I believe, your Honor, this is within a few thousand dollars [$2,125] of the original budget." He expressed the opinion that covering the tracks "would not interfere with the use of the tracks during construction. * * * After the facility is completed and in use, in my opinion, the structure or facility over the tracks would not interfere with the Southern Railway Company's use and enjoyment of its tracks any more than any normal maintenance." If Freeman ever had any experience in the operation of railroads, the record does not so indicate.

Arthur Kirkman, executive vice president, and for 32 years manager and operator of High Point, Thomasville and Denton Railroad, 35 miles long, testified that he had examined the plans prepared by witness Freeman, and, in his opinion, "the construction of this structure as called for by these plans definitely will not interfere with or impair the operations of the Southern Railway Company for two basic reasons."

One of the reasons assigned was the length of the covered area, 1,000 feet, and the width of the right-of-way which would be allowed the Railway Company for the operation of its business. He testified: "According to these plans it would obliterate that passenger station but I contend that wouldn't interfere with the operation of the Southern Railroad, absolutely not. * * * Even moving the passenger station and other facilities they have up there, elevators and so forth, wouldn't obstruct the operations even temporarily. I don't see how they should. I see in removing the passenger station no reason why they should operate[*sic*] over the tracks. There might be an inconvenience to the passengers. They would use the same station as before. It would not interfere with the operations, not operations as such, no. The pulling of a train through there is operation. Where they take off passengers or take them on is another question." He further expressed the opinion that the Railway Company, under modern conditions, would not need as much right-of-way as was needed one hundred years ago; and the Railway, at the instance and request of High Point, had lowered the tracks and provided bridges where streets had originally intersected the right-of-way.

High Point is a thriving community. It has a population in excess of 60,000. It is on the main line of Southern Railway, one of the main trunk lines of the nation, operating from the Potomac River through Virginia, North Carolina, Tennessee, South Carolina, Georgia, Florida and Alabama, providing transportation for freight and passengers from the Northeast to many large industrial communities along the Atlantic Seaboard and the Gulf of Mexico. The evidence does not disclose the number of Southern's trains passing through High Point in a day. We take notice of the fact that the number is substantial.

If we accept as correct the opinion of witnesses that the shelter could be placed over the Railway's tracks without materially interfering with the ability to move trains, we are unable to agree with the conclusion expressed by these witnesses that work which would necessitate the removal of the Railway's passenger station, elevators and other facilities would not be an "obstruction of operations." We think the quoted phrase broad enough to include any obstacle which tends to drive Railway's customers to its competitors.

Southern Railway has put High Point and Redevelopment Commission on notice that the consummation of the Commission's plan would be detrimental to it.

Defendants question the right of Southern Railway Company, as lessee, to compensation for the construction of the Plaza. A leasehold is a property right, 51 C.J.S. 809. Any diminution of that right by the sovereign in the exercise of its power of eminent domain entitles

lessee to compensation. *Jacobs v. Highway Commission,* 254 N.C. 200, 118 S.E. 2d 416; *Williams v. Highway Commission,* 252 N.C. 141, 113 S.E. 2d 263; *Waste Co. v. R. R.,* 167 N.C. 340, 83 S.E. 618.

North Carolina Railroad Company, lessor of Southern, would likewise be entitled to compensation for any diminution in the value of its property resulting from the construction of the Plaza.

The resolution adopted by the Redevelopment Commission on July 23, 1964, recited: "The easement for covering the tracks will be acquired by the Redevelopment Commission, the cost of acquisition being included in the Commission's budgeted expenditures for acquisition of property." The plan originally submitted by the Commission and approved by the city estimated the Commission would need $5,962,728 for the acquisition of property rights. Included are four pieces listed in the name of Southern Railway shown to contain 79,500 square feet. (This is the area to be covered by the shed.) A footnote to the list states that "air rights only to be acquired" on Southern's properties.

The recital in the Commission's resolution that the cost of *covering* Southern's tracks has been "included in the Commission's budgeted expenditures" must, in view of the evidence, documentary and parol, be interpreted literally. Neither the city, nor the Commission, contemplates compensating the Railway for anything except the loss of the right to have the sun shine on its tracks. The plan and evidence negatives the right of Southern to claim compensation because of impairment of its right to use the right-of-way beyond the area covered by the roof; negatives the idea that Southern would be entitled to compensation because construction of the Plaza would "obliterate" its passenger station, inconveniencing its patrons and creating other problems by the operation of its trains through a tunnel.

Defendants have failed to make a realistic estimate of the cost of creating the proposed Pedestrian Plaza because they used an erroneous yardstick to ascertain the amount of compensation to which Southern and North Carolina Railroad would be entitled. Citizens ought not to be forced to seek compensation from an agency whose cupboard is bare. As said by Higgins, J., "Every landowner has a right to know that the taking agency has on hand the money to pay for his property, or in lieu thereof, has present authority to obtain it." *Redevelopment Commission v. Hagins,* 258 N.C. 220, 128 S.E. 2d 391.

After the opinion on the second appeal was filed, High Point caused a notice to be published that a public hearing would be conducted on the question of providing for off-street parking. The notice fixed the time and place for the hearing. The Council, at the designated time and place, heard citizens opposing and favoring the establishment of off-street parking facilities. By a vote of 6-3, the Council adopted a

resolution reciting the need of 815 off-street parking spaces. The resolution does not undertake to fix the place where the parking facilities would be located. The resolution approved the issuance of $730,485 of revenue bonds to be paid solely from the revenue derived from the off-street parking facilities. It directed the city manager to make necessary provisions for the issuance of the bonds. Following the adoption of the resolution, an ordinance was passed appropriating $81,165 of non-tax revenue for off-street parking facilities.

The City Council was justified in finding that off-street parking facilities would fill a public need, and the appropriations was for a public purpose. Before the bonds may be issued, it will be necessary for the city to fix the time of payment, the rate of interest to be paid, and other details as prescribed by G.S. 160-416. When these terms have been agreed upon, the city may adopt an appropriate resolution authorizing issuance of the bonds.

We conclude:

(1) The plan submitted to, and approved by High Point on August 27, 1962, included areas which may be classified as (a) a blighted area; (b) a non-residential redevelopment area; and (c) a rehabilitation, conservation and reconditioning area.

(2) The evidence negatives defendants' contention that the Railway has blighted the central business district of High Point within the meaning of G.S. 160-456(2), hence the Court's finding and conclusion that the area proposed for use as a Pedestrian Plaza, or that central business district of High Point is a blighted area is erroneous. Areas which are in fact "blighted" cannot be enlarged to include areas which are not in fact "blighted." Any other conclusion would vest a redevelopment commission with authority which the Legislature has expressly denied it. Compare subsections 2, 10 and 21 of G.S. 160-456.

(3) The evidence is insufficient to show adequate provision has been made to compensate Southern if the Plaza is constructed.

(4) The evidence and findings are sufficient to establish a public need for off-street parking in High Point. It may issue revenue bonds for that purpose, to be paid exclusively from the revenue derived from the off-street parking facilities, by complying with the provisions of Art. 34, c. 160 of the General Statutes.

The Commission and High Point may, if they desire, modify the plan, as provided by G.S. 160-464(k), to meet statutory requirements as interpreted in this and prior decisions.

Reversed.

HIGGINS, J., concurring in result:

At its January, 1963, Session the Superior Court of Guilford County entered judgment sustaining the demurrer and dismissing this action in which the plaintiff sought to restrain the City of High Point and its Redevelopment Commission from spending tax money or incurring a debt to finance Redevelopment Project No. R-23 without voter approval. In a unanimous opinion reported in 259 N.C. 605, 131 S.E. 2d 464, this Court reversed the judgment.

On another hearing the Superior Court, as a part of its judgment, entered the following: "(1) That the plaintiff's prayer for judgment to generally restrain the City of High Point and the Redevelopment Commission of High Point from proceeding with its redevelopment plans for the East Central Urban Redevelopment Area be, and the same is hereby, denied."

This Court found error in the judgment and remanded the cause with the following instructions: "Defendants should be restrained from the expenditure on account of the Redevelopment plan of any funds or revenues whatsoever, (and the pledging of the credit of the City of High Point), except nontax funds for the payment of salaries and expenses necessary to maintain the *status quo,* until the inquiries hereinbefore listed are judicially made and the matters therein involved determined to be valid and possible of achievement." The decision is reported in 262 N.C. 306, 137 S.E. 2d 115.

The cause is now back here for the third time. One defect in the plan has been remedied. The City has withdrawn its claim for a credit of $27,526.00 (Item (e)) in its plan because the land which it pledged to convey to the Commission was bought by the City with tax money. *Yokley v. Clark,* 262 N.C. 218, 136 S.E. 2d 564. Some of the other defects have been glossed over but essentially those pointed out in the concurring opinion still infect the plan.

The history of this litigation indicates two things: (1) The City of High Point does not intend to provide cash for its one-third of the project's cost. The landowner whose property is taken cannot be reimbursed for his property by funds spent for street improvements, water, light and sewer lines, etc., during a two-year period before the plan was offered; or by the money Guilford County may or may not spend for schools in the area prior to January 1, 1968. (2) The City is not disposed to have the voters pass on the expenditure of tax money or the incurring of a debt for the money necessary to meet the City's part of the cost.

One of the arguments advanced here for our approval of this plan in its present condition is this: More than six million dollars now available in Washington for the project may be lost unless this plan is ap-

proved. Some other city will get the money. This argument, whether valid or invalid, is political — not legal. It should be made to the voters. Article VII, Section 6, of the North Carolina Constitution was intended to make the argument inapplicable in the courts.

The present opinion of the Court points out with precision and clarity the legal obstacles in the way of consummating the plan for the plaza. This is the heart of project NCP-23. In order that I may not be understood as approving other features not discussed in the opinion, I concur in the result. Instead of returning this proceeding to be nibbled at further by modification, I would give direction that a permanent restraining order issue. This course does not preclude preparation and approval of a lawful plan.

PARKER, J. concurs in concurring opinion.

LONG MANUFACTURING COMPANY, SUCCESSOR TO LONG TANK COMPANY, BY MERGER v. W. A. JOHNSON, COMMISSIONER OF REVENUE FOR THE STATE OF NORTH CAROLINA.

(Filed 17 March, 1965.)

1. Taxation § 29—

A retailer is liable for the sales and use tax on property sold or leased by him when he fails to collect such tax from his vendee or lessee. G.S. 105-164.7.

2. Same—

The execution of Form E-590 by the purchaser relieves the seller of the burden of proving that the sale of tangible personal property was not a sale at retail; nevertheless it remains his duty to make reasonable and prudent inquiry in regard to the business of the purchaser, G.S. 105-164.28, and the Commissioner of Revenue may hold him liable for the sale or use tax upon proof that the sale was not for resale or lease within the purview of the statute.

3. Same—

The findings were to the effect that petitioner manufactured and sold propane gas tanks to propane gas companies, and that the gas companies installed some of the tanks for their customers for a flat installation fee under a contract requiring the customer to use only gas purchased from the company, retaining title to the tank in the gas company, and providing that the agreement should be terminable for breach or upon thirty days' notice. *Held:* The gas companies, in regard to the tanks so installed were not retailers or lessors as defined by statute, G.S. 105-164.3, and petitioner is liable for the sales tax on such tanks.

APPEAL by defendant from *Crissman, J.*, February 24, 1964 Term of WAKE. This appeal was docketed in the Supreme Court as Case No. 450 and argued at the Fall Term 1964.

This proceeding was originated on May 4, 1962, under G.S. 105-241.2, when petitioner sought administrative review by the Tax Review Board of an assessment for additional sales tax made against it by the Commissioner of Revenue. The Tax Review Board, on May 20, 1962, rendered a decision sustaining the Commissioner's assessment. Petitioner then sought judicial review of the Board's decision under G.S. 143-306 *et seq.* Judge Crissman reviewed the record and, on February 24, 1964, entered a judgment reversing the Tax Review Board, adjudging that the Commissioner recover nothing of petitioner. The Commissioner appeals, assigning as error the entry of the judgment.

Bourne & Bourne for petitioner.

T. W. Bruton, Attorney General, Peyton B. Abbott, Deputy Attorney General, Charles D. Barham, Jr., Assistant Attorney General for respondent.

SHARP, J. The Tax Review Board and the Superior Court reached opposite conclusions from the same undisputed facts. This appeal presents only the question whether the facts found by the Tax Review Board support the judgment of Crissman, J.

Petitioner, Long Manufacturing Company, stands in the shoes of Long Tank Company (Tank Company) as a result of a merger of the two companies in March 1961. From January 1, 1957, through February 29, 1960, the period covered by the disputed assessment, Tank Company manufactured in Tarboro propane gas tanks which it sold to independent registered retail dealers in bottled gas (retailers). In addition to gas, these retailers also sold and rented tanks to their customers. Tank Company sold its tanks only from its manufacturing plant; it maintained no warehouse or other place of business. On the transactions here involved petitioner never collected from retailers the 3% sales tax imposed by G.S. 105-164.4. The assessment against petitioner has been made only on tanks which the retailers purchased from Tank Company and placed on the premises of their gas customers, under agreements which the Tax Review Board summarized as follows:

"(a) The dealer owns the gas equipment.

(b) The dealer agrees to install the equipment on the premises of customer.

(c) The dealer retains title to the equipment.

(d) The dealer reserves the right to remove the equipment at the termination of the agreement.

(e) The customer pays a single fee, called an 'installment charge' in some agreements, and in other agreements the fee is referred to as 'a single, non-refundable lease of equipment fee.'

(f) The customer agrees to purchase and use gas in the equipment only from the dealer.

(g) The customer agrees to pay dealer monthly for all gas purchased from dealer, with some of the agreements providing for a monthly minimum charge.

(h) The term of the agreements is almost uniformly for one year, with automatic renewal clause, and usually with right of termination upon 30 days' notice, or for breach. In case of termination there is no provision for refund and renewal is without additional charge."

In pertinent part (summarized except when quoted) G.S. 105-164.4 levies, in addition to all other taxes, a retail sales tax as a privilege or license tax upon every person who engages in the business of selling at retail or renting tangible personal property. The amount of the tax is determined by the application of the following rates against gross sales and rentals:

"(1) At the rate of three per cent (3%) of the sales price of each item or article of tangible personal property when sold at retail in this State . . .

(2) At the rate of three per cent (3%) of the gross proceeds derived from the lease or rental of tangible personal property . . . where the lease or rental of such property is an established business or the same is incidental or germane to said business . . ."

G.S. 105-164.3 defines the words and phrases used in the North Carolina Sales and Use Tax Act (Gen. Stat. ch. 105, art. 5). The definitions pertinent to this decision are quoted below (italics ours):

"(8) 'Lease or rental' means the leasing or renting of tangible personal property and the possession or use thereof by the lessee or rentee for a consideration without transfer of the title of such property.

. . .

(12) '*Purchase*' means acquired for a consideration whether

a. Such acquisition was effected by a transfer of title of possession, or both, or a license to use or consume;

b. Such transfer shall have been absolute or conditional and by whatever means it shall have been effected; and

c. Such consideration be a price or *rental in money or by way of exchange or barter.*

It also includes the procuring of a retailer to erect, install or apply tangible personal property for use in this State.

(13) 'Retail' shall mean the sale of any tangible personal property in any quantity or quantities for any use or purpose on the part of the purchaser other than for resale.

(14) 'Retailer' means and includes every person engaged in the business of making sales of tangible personal property at retail, either within or without this State . . . and every manufacturer, producer or contractor engaged in business in this State and selling, delivering, erecting, installing or applying tangible personal property for use in this State notwithstanding that said property may be permanently affixed to a building or realty or other tangible personal property.

. . .

(15) *'Sale' or 'selling' shall mean any transfer of title or possession, or both, exchange, barter, lease, or rental of tangible personal property,* conditional or otherwise, in any manner or by any means whatsoever, however effected and by whatever name called, *for a consideration paid or to be paid . . .* Provided, however, if a serviceman or repairman furnishes and attaches, annexes, installs, or affixes tangible personal property to the real or personal property of customers for a consideration, the furnishing, attachment, annexation, installation or affixation shall constitute a sale to the extent of the fair market value of the tangible personal property, furnished, attached, annexed, installed or affixed."

(The proviso quoted above was repealed on June 20, 1959, by N. C. Sess. Laws 1959, ch. 1259).

"(16) 'Sales price' means the total amount for which tangible personal property is sold . . . Provided, however, that where a manufacturer, producer or contractor erects, installs or applies tangible personal property for the account of or under contract with the owner of realty or other property, the sales price shall be the fair market value of such prop-

> erty at the time and place of such erection, installation or application . . ."

G.S. 105-164.7 requires every retailer to add the sales tax to the price of the article. Though stated and charged separately from the sales price, the sales tax constitutes a part of the purchase price. Notwithstanding that it is the intent of the law that the sales tax shall be passed on to the customer and that it not be borne by the retailer, the retailer is liable to the Commissioner for the tax if he fails to collect it from his vendee or, in a proper case, from his lessee.

After numerous audits and investigations of petitioner's sales, and, after a hearing, the Commissioner of Revenue made an assessment against petitioner in an amount in excess of $10,000.00 for uncollected and unpaid sales taxes. The assessment bears interest, but no penalty was added. During the audits petitioner obtained from the retailers executed certificates of resale, Form E-590, on the sales in question, G.S. 105-164.28; but at the time petitioner made the sales on which the Commissioner has assessed sales taxes it did not take from the retailer forms E-590. These certificates have been prescribed by the Department of Revenue as Form E-590, and are as follows:

> "I (We), the undersigned, do hereby certify that the tangible personal property purchased from you is purchased as for resale unless the purchase orders specify otherwise, in which event, you are to charge the retail tax on such orders. I (We), by executing this certificate, assume liability for all sales and/or use tax due on said tangible property and agree, when same is sold at retail, or used or consumed by me (us), to remit such tax to the North Carolina Department of Revenue, Sales & Use Tax Division, Raleigh, North Carolina. This certificate is to remain in full force and effect until I (we) revoke same in writing."

The execution of Form E-590 by the purchaser relieves the seller of the burden of proving that a sale of tangible personal property is not a sale at retail. During the audits the Commissioner recognized the delayed certificates in all instances where the purchased tanks were actually sold, *i.e.*, where title passed to the customer for a consideration, and also where they were leased to customers for a cash rental. In each instance in which a tank was leased under the arrangement detailed above, however, he assessed the 3% retail sales tax against petitioner.

The Commissioner agrees with petitioner that all the sales in question were made to retailers as defined by G.S. 105-164.3(14). Retail merchants, however, may themselves make retail purchases, and, when they do, they must, like any other purchaser, pay the retail sales tax.

The crucial question here is this: Did petitioner's sale of tanks to retailers who bought them for the purpose of placing them on the premises of their retail gas customers, upon the terms summarized above, constitute a sale for any purpose other than *resale* or *rental* as those terms are used in the Sales and Use Tax Act?

Petitioner-vendor contends that the transactions between its retailers-vendees and their customers constituted a lease of the tanks, which lease is specifically subjected to the retail sales tax by G.S. 105-164.4; that petitioner's sales to the retailers were, therefore, for no purpose other than resale or rental; that the retailers should have collected the sales tax from their gas customers at the rate of 3% of the market value of the tank at the time it was installed; and that liability for the tax assessed against petitioner falls on the retailers, not on petitioner.

The Commissioner contends that, even if the transaction whereby the retailer, retaining title, agreed to furnish its customer a tank for a specified period in consideration of an installation fee and the customer's agreement to buy gas only from the retailer constituted a lease within the generally accepted meaning of that term, such an arrangement is not a lease as defined in the Sales and Use Tax Act. He argues that the Act manifests the intent of the legislature to tax the consideration received by the lessor from the lessee in the same manner as it taxes the purchase price which a vendee pays a vendor for tangible personal property and that, for a lease to be treated as a sale under G.S. 105-164.3(15), it is necessary that the consideration be paid in money or that it be measurable in money's worth. Such a lease must be "for a consideration paid or to be paid," G.S. 105-164.3(15), and the consideration may be a "rental in money or by way of exchange or barter," G.S. 105-164.3(12). Rentals are taxed "at the rate of three per cent (3%) of the gross proceeds derived from the lease or rental . . ." G.S. 105-164.4. This language clearly contemplates a rental paid periodically in cash or in commodities or services having a monetary value. Retailers' customers on whose premises they have installed tanks make no such periodic payments. The customers' only outlay in money was a single installation fee which bore no relation (1) to the purchase price, (2) to the market value of the tank, or (3) to the duration of the contract. The fee was the same irrespective of whether the arrangement between the retailer and his customer lasted a few weeks or many years. It was charged for the purpose of reimbursing the retail gas dealer in part or in whole for the installation expense and perhaps with the idea of "nailing the customer."

The words used in G.S. 105-164.3(15), "consideration paid or to be paid," do not contemplate *merely* a benefit to the promisee or a detriment to the promisor, that is, *merely* consideration in its usual legal

sense; they mean money or money's worth paid by the lessee for the use of the property. A legal detriment is not taxable. The customer's agreement to buy gas only from petitioner's vendee-retailer was, of course, a detriment to the promisor sufficient to support his contract with the retailer, but it was not rental in money or by way of exchange or barter. How could the consideration which the customer pays for the use of the tanks in question be taxed properly under the Sales and Use Tax Act? (1) It would not be equitable to tax the lessee, as petitioner would do, on the fair market value or on the *purchase price* of property which he does not own and which the lessor could remove on thirty days' notice. (2) Certain it is that the Act nowhere determines the amount of the sales tax upon personal property by *the profit* which its owner derives from its use. The retailer's profit from the lease is taxed as income. (3) The customer pays a sales tax on the gas he buys and stores in the tank, and, to be sure, the law would not expect that he pay an additional 3% tax on his gas purchases for the use of the tank.

On the basis of subsection (16) and the proviso of subsection (15) of G.S. 105-164.3, petitioner contends that the customer should pay a 3% sales tax upon the fair market value of the tank. G.S. 105-164.3(16) provides that the *sales price* of tangible property installed by a "manufacturer, producer or contractor . . . under contract with the owner of realty or other property" shall be "the fair market value of such property at the time and place of such erection, installation or application." The word "contractor" is not here used to mean any person who enters into a contract, but one who, in the pursuit of an independent business, undertakes to perform a job yet retains in himself the right to control the means, method, and manner of accomplishing the desired result. The retailers in this case do not qualify as contractors within the meaning of G.S. 105-164.3(16), nor are they servicemen or repairmen within the meaning of the proviso of G.S. 105-164.3(15), which was repealed June 20, 1959.

In effect, the retailers here are the actual users and ultimate consumers of the tanks in question. They purchased the tanks from petitioner, not for resale or for lease within the accepted meaning of that term, but as equipment which they themselves would use in the promotion of the sale of their product — gas. The contract between the retailer and his customer would appear to create a bailment rather than a lease. See *Freeman v. Service Co.*, 226 N.C. 736, 40 S.E. 2d 365; *Hanes v. Shapiro*, 168 N.C. 24, 84 S.E. 33; 8 Am. Jur. 2d, Bailments §§ 2, 21 (1963). The retailer delivered the tank to the customer for the specific purpose of storing gas purchased from him. The customer agreed to purchase gas only from the retailer, who could reclaim the tank im-

mediately upon breach of this agreement and, in any event, upon thirty days' notice. But, were the transaction a lease in the generally accepted meaning of that term, it was not a lease within the meaning of the Act. Let us suppose that after three years a retailer should remove his tank from the premises of a defaulting customer and install it upon the premises of another under the same agreement. Is it reasonable to assume that the retailer would collect from his new customer a 3% sales or use tax upon the fair market value of the tank? We apprehend that the retailer would no more attempt to collect a sales tax from the second user of the tank than he did from the first customer who "rented" the tank involved here.

In *San-A-Pure Dairy Co. v. Bowers*, 173 Ohio St. 469, 183 N.E. 2d 918, appellant (Dairy) was engaged in the production and sale of ice cream, which it sold both to wholesale and to retail dealers. Dairy bought refrigerator cases which it furnished to certain retailers. The retailers agreed in writing to use the cases exclusively for the storage and display of Dairy's ice cream, and Dairy maintained the cases. When the Tax Commissioner assessed Dairy with a sales or use tax on the equipment, Dairy contended that it was the retailers who were liable for the sales or use tax. The court held, however, that Dairy was the consumer of the refrigerator units and thus liable for the tax; that there was no transfer to the retailer for a consideration as contemplated by the sales and use tax law.

We conclude that the sales in question here were retail sales upon which petitioner should have collected the sales tax from the retailers who were not purchasing the particular property for resale or rental.

If the burden of this assessment must ultimately fall on petitioner, it was not the intent of the law that it should do so. Although, in order to prevent evasion of the retail sales tax, the law presumes that the gross receipts of both wholesale and retail merchants are taxable until the contrary is established by proper records, G.S. 105-164.26, yet, if, at the time of the sale, the vendor takes from his vendee a certificate that the property is for resale, he is relieved of this burden of proof. Notwithstanding, it is still the duty of every wholesale merchant "selling tangible personal property to a retailer for resale to make reasonable and prudent inquiry concerning the type and character of the tangible personal property as it relates to the principal business of the retailer." G.S. 105-164.28. The record discloses that on April 19, 1957, the Department advised petitioner that sales for resale did not include sales of tanks to dealers who in turn placed them on location on their customers' premises for an installment fee and pursuant to the customers' agreement to purchase gas only from the retailer, the owner of the tank.

The judgment of the Superior Court is
Reversed.

RUBY MABE FULP v. JOHN ROBERT FULP.

(Filed 17 March, 1965.)

1. Trusts §§ 13, 14—

No resulting or constructive trust arises when a husband makes improvements on land owned by him with money furnished by himself and wife, even though he obtains his wife's money by promising her to convey to her a half interest, since the husband did not acquire title to the realty with the use of her money in breach of a confidential relationship.

2. Money Received—

Where the husband obtains money from his wife for improvements on his realty by orally promising to convey to her a half interest, the wife is entitled to recover her personal funds as money had and received, notwithstanding the contract to convey is not enforceable upon plea of the statute of frauds, and since the husband's acts constitute a breach of a fiduciary relationship she is entitled to an equitable lien on the realty as an aid in enforcing her rights.

3. Mortgages and Deeds of Trust § 1—

An equitable lien is not an estate in land and does not entitle the creditor to a conveyance of any interest in the land but is solely a charge on specific property declared by equity to provide a more effective method of enforcing an obligation.

4. Limitation of Actions § 18—

Nonsuit is properly entered upon the plea of the applicable statute of limitations by defendant when plaintiff fails to carry the burden of showing that the statute had not run against his cause of action.

5. Limitation of Actions § 11; Husband and Wife § 2—

The relationship of husband and wife does not prevent the statute of limitations from running in his favor against a cause of action accruing to her, or *vice versa.*

6. Money Received—

Where the husband obtains the personal funds of his wife for improvements upon his realty by orally promising to convey to her a half interest, her action for money had and received and for the declaration of an equitable lien against the land accrues upon his categorical disavowal of his promise, and is barred after the lapse of three years. G.S. 1-52.

FULP *v.* FULP.

APPEAL by plaintiff from *McConnell, J.*, March 30, 1964 Civil Session of FORSYTH. This appeal was docketed in the Supreme Court as Case No. 396 and argued at the Fall Term 1964.

This action by plaintiff wife was instituted on December 14, 1959, against defendant husband to establish a resulting or a constructive trust in land or, in the alternative, to recover money allegedly invested in improvements upon the property. In summary, plaintiff alleges: In 1937, defendant purchased specifically described land in Forsyth County with funds belonging to both parties and took title in his name alone. In 1951, defendant began construction of a dwelling house on the property. In consideration of defendant's promise to convey to her a one-half undivided interest in the land, plaintiff agreed to pay one-half the cost of the dwelling, the total cost of which was approximately $8,000.00. Plaintiff paid one-half of this cost, and after the house was completed she and defendant, with their three children, occupied it as their home. Defendant continued to promise plaintiff to convey to her a one-half undivided interest in the property but continually delayed doing so. On May 31, 1959, the parties separated, and defendant has told plaintiff that he did not intend to convey any interest in the property to her. On the contrary, he said he intended to convey the property to some third person in order to cut off her rights in the land. Plaintiff prays that she be declared the owner of a one-half undivided interest in the property and that the property be partitioned; or, in lieu of that relief, that she recover of defendant the sum of $4,000.00. Defendant, by answer filed November 20, 1962, denied that he ever promised to convey any interest in the land to plaintiff. In addition, he pleads in bar of plaintiff's right to recover the statute of frauds, both the three-year and the ten-year statute of limitations, and laches.

Upon the trial plaintiff offered no evidence tending to show that she paid any part of the purchase price of the land which defendant acquired in 1937 and on which the dwelling was subsequently erected. Indeed, her evidence plainly shows that she made no contribution to the initial purchase of the property. With reference to the dwelling, however, her evidence taken in the light most favorable to her, is sufficient to establish these facts:

In 1938, defendant erected a one-room store building on the land. In 1944, with a partition wall, he made it into a two-room dwelling, into which the parties moved with their two children. In 1947, plaintiff went to work for Duplan Corporation at $50.00 a week. In 1951, the parties decided to add three rooms, a bath, and a basement to the house, each agreeing to pay one-half the costs. Together, each contributing identical amounts which varied from week to week, the

parties had saved for this purpose almost $4,000.00 before the work was begun. They kept this money in an old money belt under a mattress in the house. Defendant repeatedly promised, orally, to have the title to the property, which was in his name alone, put in the name of both. In 1952 when the work was all finished except for the bathroom, plaintiff had to cease work owing to confinement with her third child. She borrowed from her father $250.00, one-half the sum which defendant said was required to complete the bathroom, and handed it over to defendant, who had the work completed. When the remodeling was finished, the total cost was $5,000-$6,000. Plaintiff tried time and again to get defendant "to have her name put on the deed," and "he kept promising that he would." During the construction of the house he would say, "Oh, we'll do that later . . . we will, but let's go ahead with it." When the remodeling was completed, plaintiff said, "Well, it is done, let's fix the deed." Defendant's reply was, "You don't think I am a damn fool, do you?" Plaintiff and defendant separated on May 31, 1959, and have not lived together since.

At the conclusion of plaintiff's evidence, defendant's motion for judgment as of nonsuit was overruled. Defendant testified that he had never promised to convey any land to his wife; that they had saved no money together; that she paid nothing whatever on the additions to the house; and that he had paid it all. At the conclusion of all the evidence, the judge allowed defendant's renewed motion for judgment as of nonsuit. From a judgment dismissing the action, plaintiff appeals.

Frank C. Ausband and Randolph and Clayton for plaintiff.
Hayes & Hayes for defendant.

SHARP, J. Plaintiff's evidence is insufficient to establish either a resulting or a constructive trust in the land described in the complaint, for defendant acquired no *title* to realty with the use of plaintiff's money. "(A) resulting trust arises, if at all, in the same transaction in which the legal title passes, and by virtue of consideration advanced before or at the time the legal title passes, and not from consideration thereafter paid." *Rhodes v. Raxter,* 242 N.C. 206, 208, 87 S.E. 2d 265, 267. When one person's money is used to pay for land, title to which is taken in the name of another, equity creates a trust commensurate with his interest in favor of the one furnishing the money. *Bowen v. Darden,* 241 N.C. 11, 84 S.E. 2d 289. A constructive trust, on the other hand, arises when one obtains the legal title to property in violation of a duty he owes to another. Constructive trusts ordinarily arise from actual or presumptive fraud and usually involve the breach of a confidential relationship. *Teachey v. Gurley,* 214 N.C. 288, 199 S.E. 83;

Lee, North Carolina Law of Trusts § 11(a) (1963 Ed.) Plaintiff's evidence is insufficient to establish in herself any equitable title to the land; defendant did not acquire title with her money.

Notwithstanding, plaintiff's evidence is sufficient to establish that, in consideration of defendant's oral promise to convey her a one-half interest in the land, or "to have her name put on the deed," she turned over to him $2,500-3,000 of her money, with which he made improvements on his property. This contract to convey was not specifically enforceable because it was not in writing. Even so, defendant became liable to plaintiff, when he refused to convey, for all the money he received from her under it. *Wells v. Foreman,* 236 N.C. 351, 72 S.E. 2d 765. This would have been true even if the parties were strangers because such an obligation is enforceable in an action in *assumpsit* for money had and received, the most common medium of restitution. Because they were not strangers, plaintiff was entitled not only to a judgment for the money advanced but also to the remedy of an equitable lien.

"The most confidential of all relationships is that between husband and wife, and transactions between them, to be valid, particularly as to her, must be fair and reasonable." *Wolff v. Wolff,* 134 N.J. Eq. 8, 15, 34 A. 2d 150, 155; *accord, Matt v. Matt,* 115 Colo. 589, 178 P. 2d 419; *Brewer v. Brewer,* 84 Ohio App. 35, 78 N.E. 2d 919; *Hodes v. Hodes,* 173 Ore. 267, 145 P. 2d 299; 26 Am. Jur., Husband and Wife § 268 (1940).

> " 'Whenever a husband acquires possession of the separate property of his wife, whether with or without her consent, he must be deemed to hold it in trust for her benefit, in the absence of any direct evidence that she intended to make a gift of it to him.' . . . The reason for the rule is thus stated in *Parrett v. Palmer,* . . . (8 Ind. App. 356, 52 A.S.R. 479): 'The trust and confidence ordinarily reposed by the wife in the husband; her natural reliance and dependence upon him for the management of her business; the fact that, as a rule, the husband is possessed of general business experience, while the experience of the wife is usually limited — all these considerations sustain us in the conclusion that where the wife voluntarily delivers her money to the husband the law presumes that he takes it as trustee for her, and not as a gift, even though there be no express promise to repay . . .' " *Etheredge v. Cochran,* 196 N.C. 681, 682, 146 S.E. 711, 712; *accord, Bowling v. Bowling,* 252 N.C. 527, 114 S.E. 2d 228.

Here, there is no question of a gift, for plaintiff has testified that defendant expressly promised to convey her an interest in the land in

consideration of the money she advanced. In reviewing the motion of nonsuit we accept this testimony as true. Therefore, defendant had the duty to restore plaintiff her funds. Since she is able to trace the money into the improvements which defendant made on the land, any judgment obtainable would qualify as an equitable lien. *Trust Co. v. Barrett,* 238 N.C. 579, 78 S.E. 2d 730; *Edwards v. Culberson,* 111 N.C. 342, 16 S.E. 233.

An equitable lien, or encumbrance, is not an estate in land, nor is it a right which, in itself, may be the basis of a possessory action. It is simply a charge upon the property, which charge subjects the property to the payment of the debt of the creditor in whose favor the charge exists. "It is the very essence of this conception, that while the lien continues, the possession of the thing remains with the debtor or person who holds the proprietary interest subject to the encumbrance." 1 Pomeroy's Equity Jurisprudence § 165 (5th Ed., 1941). "(T)he doctrine of 'equitable liens' was introduced for the sole purpose of furnishing a ground for the specific remedies which equity confers, operating upon particular identified property, instead of the general pecuniary recoveries granted by courts of law." *Id.* § 166. In other words, an equitable lien, by charging specific property, provides an enforcement of the obligation more effective than that provided for the enforcement of the ordinary money judgment.

> " 'An equitable lien arises either from a written contract which shows an intention to charge some particular property with a debt or obligation, or is declared by a court of equity out of the general considerations of right and justice, as applied to the relations of the parties and the circumstances of their dealings.' " *Garrison v. Vermont Mills,* 154 N.C. 1, 6, 69 S.E. 743, 744, 31 L.R.A. (N.S.) 450, 453, *modifying on rehearing* 152 N.C. 643, 68 S.E. 142; *accord, Burrowes v. Nimocks,* 35 F. 2d 152 (4th Cir.); *Jones v. Carpenter,* 90 Fla. 407, 106 So. 127, 43 A.L.R. 1409. See *Stanley v. Cox,* 253 N.C. 620, 630-631, 117 S.E. 2d 826, 833-834.

A lien in equity is analogous both to resulting and to constructive trusts, but between the two there is a fundamental difference, which is drawn in 4 Pomeroy, *op cit. supra* note 5, § 1234:

> "(T)he very essence of every real trust, express, resulting, or constructive, is the existence of two estates in the same thing,— a legal estate vested in the trustee, and an equitable estate held by the beneficiary. In an equitable lien there is a legal estate with possession in one person, and a special right *over* the thing held by another; but here the resemblance, which at most is external, ends.

> This special right is not an *estate* of any kind; it does not entitle the holder to a conveyance of the thing nor to its use; it is merely a right to secure the performance of some outstanding obligation, by means of a proceeding directed against the thing which is subject to the lien. To call this a trust, and the owner of the thing a trustee for the lien-holder, is a misapplication of terms which have a very distinct and certain meaning."

In the absence of a contract an equitable lien most frequently arises in cases where one person has wrongfully expended, for improvements on his property, the funds of another, but instances of this sort of lien are not confined to such cases. See Annot., Remedy of one whose money is fraudulently used in the purchase or improvement of real property, 43 A.L.R. 1415, 1441. This remedy is not a necessary incident to the action for money had and received but results only where there are factors invoking equity, here the confidential relationship. In *Jones v. Carpenter, supra,* the president of a corporation had used corporate funds to make improvements upon his personal residence. In a suit against him by the trustee of the bankrupt corporation, it was held that, since defendant, while acting in a fiduciary capacity, had misappropriated corporate funds, plaintiff was entitled to follow the funds and to assert an equitable lien on the property.

It is apparent, then, that at the time the improvements on defendant's house were completed in 1952, plaintiff could have acquired an equitable lien on the property for the amount of her money which defendant had expended in making the improvements upon it. This brings us to the decisive question in this case: Is plaintiff's action in assumpsit barred by the three-year statute of limitations, which defendant has pleaded? If so, the nonsuit was correct because "where a party against whom the statute has been pleaded fails to sustain the burden on him to show that limitations had not run against his cause of action, it is proper for the court to grant a motion for nonsuit." *Solon Lodge v. Ionic Lodge,* 247 N.C. 310, 317, 101 S.E. 2d 8, 13; *accord, Mobley v. Broome,* 248 N.C. 54, 102 S.E. 2d 407.

Although the rule is apparently otherwise in a majority of the other American jurisdictions — see 34 Am. Jur., Limitation of Actions § 377 (1941); Annot., Applicability of statute of limitations or doctrine of laches as between husband and wife, 121 A.L.R. 1382, 1393, 1403 —, yet in *Graves v. Howard,* 159 N.C. 594, 598, 75 S.E. 998, 1000, Ann. Cas. 1914C, 565, 567, it was said:

> "The statutes of limitation contain no exception in favor of the wife when she holds a claim against her husband . . . Disputes with respect to property may arise between them when the sep-

> arate existence of the wife, and a separate right of property, are recognized at law as in this State, as well as other matters; and when they do arise there is as great necessity for a judicial determination of the questions as when they arise between other parties. A litigation of the kind between husband and wife may be unseemly and abhorrent to our ideas of propriety, but a litigation in one form can be no more so than in another, and no more so than the necessity itself which gives rise to the litigation . . ."

The language of *Graves* is broader than its facts required. At the time the wife in that case became the owner of her husband's note, the subject of the suit, the note was already due. The statute, therefore, had already commenced to run. Under the rule that once the statute begins to run nothing stops it, Pell's Rev. § 365 (G.S. 1-20); *Frederick v. Williams,* 103 N.C. 189, 9 S.E. 298, it continued to run against the wife. That, and nothing more, was the *ratio decidendi* of *Graves.* Nevertheless, we approve the reasoning quoted above and hold that statutes of limitation run as well between spouses as between strangers. Curiously enough, this appears to be a question previously undecided in this State; see *Spence v. Pottery Co.,* 185 N.C. 218, 225, 117 S.E. 32, 36 (dissent).

Plaintiff's action is based on an implied contract and is analogous to one based on the breach of an express trust, which is necessarily based on a breach of contract. *Teachey v. Gurley, supra.* The limitation applicable to both such actions is three years. G.S. 1-52. In the case of an express trust the statute begins to run when the trustee disavows the trust with the knowledge of the *cestui que trust, Solon Lodge v. Ionic Lodge, supra.* Unquestionably, therefore, the statute of limitations began to run against plaintiff's claim against defendant when, upon the completion of the house in 1952, she called upon him to perform his agreement "to put her name on the deed" and he replied "You don't think I'm a damn fool, do you?" This was a flat repudiation of his agreement and was notice to plaintiff that he intended to misappropriate the funds which he had received from her through their confidential relationship. The defense of the statute is not barred by the existence of a fiduciary relation between the parties. *Henry v. Hammon,* [1913] 2 K.B. 515 (action for money had and received). Were plaintiff the *cestui que trust* of a resulting or a constructive trust, the ten-year statute would apply, G.S. 1-56; *Rochlin v. Construction Co.,* 234 N.C. 443, 67 S.E. 2d 464; *Bowen v. Darden, supra; Teachey v. Gurley, supra;* and, she sharing defendant's possession, the statute would not have begun to run against her until the separation of the parties on May 31, 1959, some seven years after the breach of promise,

Solon Lodge v. Ionic Lodge, supra; Bowen v. Darden, supra. The ten-year statute applies when the title to property is at issue, not where, as here, the action is merely for breach of contract, *Barden v. Stickney,* 132 N.C. 416, 43 S.E. 912, though the enforcing remedy, the equitable lien, is analogous to remedies for resort to which the statute of limitations is ten years. As we have seen, however, plaintiff's action is based upon an implied contract, the equitable lien which could have been imposed notwithstanding. See *Reynolds v. Whitin Mach. Works,* 167 F. 2d 78 (4th Cir.), *cert. den.* 334 U.S. 844, 92 L. Ed. 1768, 68 S. Ct. 1513. The applicable statute is G.S. 1-52, three years. This action was not instituted until December 19, 1959, at least four years after it was barred. The nonsuit was proper.

Affirmed.

EDITH P. JOYNER v. REESE B. JOYNER.

(Filed 17 March, 1965.)

1. Husband and Wife § 12—

The resumption of the marital relationship revokes the executory provisions of a prior deed of separation but does not affect those provisions which have been executed, and cannot give to the wife the right to recover personal property transferred to the husband pursuant to the deed of separation or the right to recover damages for its retention, there being no allegation or proof that the husband withheld any property which had been allocated to her or that subsequent to its execution he had transferred or agreed to transfer any interest to her in that portion allotted to him in the division.

2. Same—

Where the wife has conveyed her interest in land to her husband pursuant to a deed of separation executed in accordance with G.S. 52-12, the action of the husband in tearing up the papers subsequent to a reconciliation does not affect the title.

3. Cancellation and Rescission of Instruments §§ 3, 10— Evidence held insufficient for jury in this action to rescind deed for duress.

Plaintiff wife alleged that she signed the conveyance in question pursuant to a deed of separation because of duress exercised by defendant husband in threatening that she could have no further association with their son and that he would have her committed to a mental hospital if she failed to sign the deed. Plaintiff's evidence disclosed that prior to the execution of the deed of separation defendant attempted to take her to a psychiatrist but made no further efforts in this regard after his initial failure, that plaintiff's lawyer prepared the separation agreement and the deed pursuant thereto, that the separation agreement gave defendant full custody and

control of the child of the marriage except during school vacations, that plaintiff signed the agreement upon her lawyer's advice with full understanding, and that the certifying officer fully complied with G.S. 52-12. *Held:* The evidence is insufficient to establish a *prima facie* case for rescission on the ground of fraud, duress or undue influence.

APPEAL by plaintiff from *Bone, E. J.*, December 1964 Civil Term of NASH.

Plaintiff wife instituted this action against defendant husband to set aside a deed of separation and a deed to realty executed pursuant to its terms, and to have it adjudicated that she is the owner of one-half of all personal property which defendant had acquired before and after the marriage of the parties, including defendant's mercantile business; and to recover $5,000 as damages for defendant's wrongful withholding of her share of the property from her.

Plaintiff alleges: She and defendant were married on November 20, 1949, at which time defendant owned the tract of land described in the deed which she attacks. On it he operated "a country store." Soon after the marriage plaintiff and defendant agreed that they would pool their efforts, property, and money and that each would own a one-half interest in all the assets which the other then held or thereafter acquired. In addition to performing her household duties, at intervals plaintiff worked in mills in Rocky Mount. She turned over all of her wages to defendant, who deposited them in a bank account in his name only. When plaintiff was not otherwise gainfully employed, she worked in defendant's store. One son was born to the parties. On March 17, 1960, defendant conveyed the realty, title to which had been in his name alone, to himself and plaintiff and thereby created an estate by the entireties. On October 16, 1960, plaintiff and defendant separated. On November 25, 1960, they executed a deed of separation, and, as a part of the transaction, plaintiff conveyed to defendant all her interest in the property which they then held as tenants by the entireties. These deeds were without consideration, and defendant procured them "by fraud, duress, and undue influence and oppression" in that he represented to plaintiff: (1) that "the paper would protect her rights and give her an opportunity to see her son and did not affect her property rights"; (2) that if she did not sign, she could have no association whatever with her son and she would never get any part of the property; (3) that defendant would have plaintiff committed to a mental hospital if she did not sign; (4) that defendant assaulted, cursed, and so abused plaintiff that she feared for her safety and that of the child. On December 23, 1960, plaintiff and defendant resumed marital relations.

Plaintiff alleges — conclusions of law — that the resumption of marital relations made her, once again, a tenant by the entireties in the realty which she had conveyed to defendant and also gave her title to one-half of all defendant's personal property. She prays that a receiver be appointed to take possession of all defendant's property, real and personal, until the final determination of this action.

Plaintiff's evidence is sufficient to establish these facts: She married defendant when she was sixteen, and her education was "six weeks in the eighth grade." From 1949 until 1960 she worked more or less regularly in various mills in Rocky Mount and earned an unknown amount of money, in excess of $11,000.00, all of which she turned over to defendant pursuant to their agreement that they were "putting their money together, building for the future." Prior to 1960 they remodeled the store and built two dwellings on the property. In 1960 plaintiff told defendant that she no longer loved him and could not stand to live with him. This pronouncement took defendant by surprise, and he concluded from it that plaintiff was crazy and should see a psychiatrist. When he forcibly attempted to take her to see one, she "wrung away" from him and went to her mother's. Thereafter, defendant refused her permission to see their son unless she came "without her people," and he told her that no judge would ever give her custody of the child. "Based upon that statement," she employed an attorney, Mr. Milton P. Fields, to represent her. At her instance, Mr. Fields drew up a deed of separation, and the parties signed it in his office on November 25, 1960. Plaintiff then went to the office of Mr. James T. Buffaloe, a justice of the peace, who, in compliance with G.S. 52-12, privately examined her, separate and apart from her husband. He certified that it appeared to his satisfaction that plaintiff understood the contents of the deed of separation; that it was not unreasonable or injurious to her; and that plaintiff had stated to him that she signed the instrument freely and voluntarily and without fear or compulsion of any person. Contemporaneously with the execution of the deed of separation, plaintiff executed and delivered to defendant a warranty deed conveying to him all her interest in the realty which they owned as tenants by the entireties. This deed, however, was not acknowledged as required by G.S. 52-12. On December 6, 1960, Mr. Fields notified plaintiff of this omission. She then went to Mr. Buffaloe's office and executed a quitclaim deed to defendant for the same property described in her warranty deed of November 25, 1960. This latter deed was acknowledged as required by the statute.

In brief summary, by the deed of separation each party released the other from all obligations arising out of the marriage and each agreed not to molest the other. Plaintiff relinquished to defendant the "full

custody and control of the son of the parties" except for specified intervals during school vacations when the boy was to reside with plaintiff at her expense. The agreement recited that the parties had divided all their personal property between them "to their mutual satisfaction" and that neither party would make any claim to any items then in the control and possession of the other. It also set forth that plaintiff had conveyed to defendant all the real property which they had owned together, and each was empowered thereafter to convey real estate without the joinder of the other.

Plaintiff testified that she fully understood the provisions of the instrument she signed. She agreed to them, she said, because that was the only way she could get to see her son. At the time plaintiff signed the deeds defendant paid her $1,500.00. With this money she bought a Renault Spanelle. About December 23, 1960, plaintiff went back to defendant, and he tore up the deed of separation. He told her that whenever she was ready she "could go back down" and have the real property "put back like it was before," but plaintiff did not do so. Defendant executed no deed reconveying the property to her.

Plaintiff continued to work in Rocky Mount, and when she had accumulated $1,500.00 she returned that sum to defendant. In about six or eight months plaintiff and defendant again separated. After an interval they again resumed cohabitation, but the following month they separated finally. Plaintiff then instituted an action for alimony without divorce against defendant. When that suit was tried, the jury answered the issues against plaintiff.

On November 30, 1962, plaintiff brought this action. At the conclusion of her evidence defendant's motion for nonsuit was allowed, and plaintiff appeals.

Narron, Holdford & Holdford for plaintiff.
Harold D. Cooley and Vernon F. Daughtridge for defendant.

SHARP, J. This is not an action by a wife to recover funds which her husband received from her as a result of the confidential relation existing between them. See *Fulp v. Fulp, ante* 20, 140 S.E. 2d 708. Rather, in this action plaintiff seeks to set aside on grounds of duress a conveyance of realty and a deed of separation, and to recover damages for the detention of personal property transferred pursuant to its property-settlement provisions.

Insofar as the provisions of the deed of separation remained unperformed, any action to set it aside was superfluous.

> "It is well established in this jurisdiction that where a husband and wife enter into a separation agreement and thereafter become reconciled and renew their marital relations, the agreement is terminated for every purpose in so far as it remains executory . . . Even so, a reconciliation and resumption of marital relations by the parties to a separation agreement would not revoke or invalidate a duly executed deed of conveyance in a property settlement between the parties." *Jones v. Lewis,* 243 N.C. 259, 261, 90 S.E. 2d 547, 549; *accord,* 2 Lee, North Carolina Family Law § 200 (3d Ed., 1963).

A reconveyance of the land would have been necessary to change the title to the realty plaintiff had conveyed to defendant. It could not be done by parol or by tearing up the papers.

Likewise, the resumption of marital relations would not invalidate the parties' division of their personal property, and evidence that defendant "tore up" the separation papers and "threw them in the trash box," without more, does not establish a new contract affecting the parties' individual personalty. Plaintiff has no pleading and no proof either that defendant withheld from her any personal property which had been allotted to her at the time the separation agreement was entered into, or that defendant subsequently transferred, or agreed to transfer, to her any interest in the personalty which was allotted to him in the division. With neither allegation nor proof to support her claim to an undivided interest in the personalty described in the complaint, plaintiff has no right to recover it, and *a fortiori,* no case for damages, 18 Am. Jur. 2d, Conversion §§ 53, 144, 156 (1965).

Plaintiff has failed, also, to establish the allegation that her execution of the deed of separation of November 25, 1960, and that of the quitclaim deed of December 6, 1960, were involuntary.

> "Duress exists where one, by the unlawful act of another, is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will . . . Duress is commonly said to be of the person where it is manifested by imprisonment, or by threats, or by an exhibition of force which apparently cannot be resisted. Or it may be of the goods, when one is obliged to submit to an illegal exaction in order to obtain possession of his goods and chattels from one who has wrongfully taken them into possession." *Smithwick v. Whitley,* 152 N.C. 369, 371, 67 S.E. 913, 914.

Plaintiff successfully resisted defendant's attempt to take her to a psychiatrist when she broke his hold on her wrist and went to the home

of her mother. Defendant did not repeat the attempt. If there were other "assaults" and abuses which caused plaintiff to fear for her safety, the evidence does not disclose them. Upon defendant's telling her that no judge would ever award her the custody of their son, plaintiff did not accept defendant's "legal opinion" on this matter. As a result of what he said, she sought the advice of a lawyer who, her present attorney concedes, is competent and learned in the law. From then on the parties dealt with each other at arm's length, and plaintiff negotiated with defendant only through her counsel. Upon his advice she signed the agreement which, she says, she fully understood and which gave defendant full custody and control of the child except during school vacations. It would be odd indeed if plaintiff, as her present counsel now asserts, relinquished the custody of her son in the hope of obtaining it.

The deeds in question here were prepared by plaintiff's counsel, and the record is barren of any evidence that defendant ever made to plaintiff *any* representation, true or false, with reference to the contents or legal effect of either instrument. Upon being advised that the deed of conveyance of November 25, 1960, had not been properly acknowledged, plaintiff voluntarily, and without having seen or talked with her husband, so far as the record discloses, eleven days later went to the office of the justice of the peace, where she properly executed and acknowledged another conveyance of the same property.

When the wife employs an attorney and, through him, deals with her husband as an adversary, the confidential relationship between husband and wife no longer exists, 17A Am. Jur., Divorce and Separation § 898 (1957); 42 C.J.S., Husband and Wife § 593b (1944); and no presumption arises that the husband has exercised a dominant influence over the wife during such negotiations. The presence of able counsel for the wife at the conferences resulting in a separation agreement, and at the time she executes and acknowledges a deed of separation, "negatives the inference or contention that she was incompetent to understand the arrangement, and was ignorant of its terms and did not know what she was doing," *Matthews v. Matthews,* 24 Tenn. App. 580, 592, 148 S.W. 2d 3, 11; *accord, Rendlen v. Rendlen,* Mo., 367 S.W. 2d 596; See *Hughes v. Leonard,* 66 Colo. 500, 181 Pac. 200; *Sande v. Sande,* 83 Idaho 233, 360 P. 2d 998; 1 Nelson, Divorce and Annulment § 13.21 (2d Ed., 1945). "The courts will subject the wife's claim of fraud, duress, or undue influence to a far more searching scrutiny where she was represented by counsel in the making of the agreement and throughout the negotiations leading up to its execution." Lindey, Separation Agreements § 28.IX (1937 Ed.).

Notwithstanding that a wife is represented by counsel, G.S. 52-12 requires the officer before whom she acknowledges a contract of separation or a deed to her husband to include in his certificate "his conclusions and findings of fact as to whether or not said contract is unreasonable or injurious to the wife." In taking the acknowledgment to the deeds under attack here, the certifying officer fully complied with G.S. 52-12. His certificate is conclusive unless "impeached for fraud as other judgments may be." Duress and undue influence are both a species of fraud. *Little v. Bank,* 187 N.C. 1, 121 S.E. 185. Plaintiff's evidence fails to make out a *prima facie* case for rescission on the grounds

The judgment of nonsuit was properly entered.

of fraud, duress, or undue influence.

Affirmed.

FRANCIS C. BOURNE, JR. AND WIFE, ELIZABETH A. BOURNE, AND LUSH LEDFORD AND WIFE, HATTIE B. LEDFORD v. LAY & COMPANY, A TENNESSEE CORPORATION.

(Filed 17 March, 1965.)

1. Registration § 1—

The registration of a deed conveying an interest in land is essential to its validity as against a purchaser for a valuable consideration from the grantor.

2. Same; Frauds, Statute of § 6—

A lease for more than three years must, to be enforceable, be in writing, and to protect it against creditors or subsequent purchasers for value, the lease must be recorded.

3. Registration § 4—

As between two purchasers for value of the same interest in land, the one whose deed is first registered acquires title.

4. Registration § 3—

Actual knowledge, however full and formal, of a grantee in a registered deed of a prior unregistered deed or lease will not defeat his title as a purchaser for value in the absence of fraud or matters creating estoppel.

5. Registration § 6—

The fact that after the description a deed contains a statement that there was a previous lease of the land for a period of ten years to a named lessee and that the warranty excluded such leasehold, *held* not to render the unregistered lease binding on grantees.

6. Estoppel § 4—

The fact that grantees accept rents from grantors' lessees under an unregistered ten year lease does not estop grantees from denying that the unregistered lease was binding on them, since lessees did not perform or omit the performance or any act or change their position in reliance upon the conduct of grantees, and grantees were entitled to rent so long as the lessees remained in possession.

APPEAL by defendant from *McLean, J.*, August Session 1964 of CHEROKEE.

The plaintiffs instituted this action for a declaratory judgment.

The facts were stipulated, and in pertinent part they are as follows:

On 10 April 1961, Margaret Holland McCraney and her husband, Jack L. McCraney, owners of the land involved herein, leased the premises to the defendant, Lay & Company, a Tennessee corporation, for a period of five years, beginning 1 July 1961, at a rental of $75.00 per month, with an option to renew the lease for an additional term of five years.

The lease was not filed for registration in Cherokee County, North Carolina, until 10 September 1962.

On 2 December 1961, Margaret Holland McCraney and her husband, Jack L. McCraney, for a valuable consideration, conveyed the premises involved herein to the plaintiffs. After the description in the deed, the following statement was inserted. "There is a lease on the above described property in favor of Lay & Company which lease is for a period of 10 years and the grantors do not warrant this property as to the provision of said lease agreement."

The warranty clause in the deed contains the following: "* * * (T)hat the grantors are lawfully seized in fee simple of said land and premises, and have full right and power to convey the same to the grantees in fee simple, and that said land and premises are free from any and all encumbrances (with the exceptions above stated, if any)," *et cetera.*

The plaintiffs filed said deed for registration in the office of the Register of Deeds of Cherokee County, North Carolina, on 6 December 1961, and the same is recorded in Deed Book 228, page 262.

The defendant paid the rental of $75.00 per month for said property to Mr. and Mrs. McCraney up to and including November 1961, and then paid the rental of $75.00 per month to the plaintiffs up to and including December 1963. During the month of November 1963 the plaintiffs notified defendant that as of 1 January 1964 the monthly rental would be $120.00 per month.

Defendant has refused to pay $120.00 per month, but has tendered to plaintiffs the sum of $75.00 per month for the months of January

and February 1964, which payments plaintiffs have refused and are demanding a rental of $120.00 per month from defendant for said property.

The plaintiffs instituted this proceeding for a declaratory judgment as to whether or not they are bound by the terms of the aforesaid lease.

The court below held that the plaintiffs are not bound by the terms of said lease and entered judgment accordingly. The defendant appeals, assigning error.

Simms & Simms for defendant appellant.
McKeever & Edwards; Larry Thomas Black for plaintiff appellees.

DENNY, C.J. This appeal poses two questions: (1) Is the plaintiffs' subsequently acquired but prior recorded deed superior to the defendant's lease? (2) Are the plaintiffs estopped from denying the validity of defendant's lease by accepting rent in accordance with its terms for a period of two years and one month?

In our opinion, the first question must be answered in the affirmative and the second in the negative.

The Connor Act provides that "no conveyance of land, or contract to convey, or lease of land for more than three years shall be valid to pass any property, as against creditors or purchasers for a valuable consideration, from the donor, bargainor, or lessor, but from the registration thereof within the county where the land lies." G.S. 47-18.

Our decisions applying the Connor Act establish these legal results:

(1) The registration of a deed conveying an interest in land is essential to its validity as against a purchaser for a valuable consideration from the grantor. *Dulin v. Williams,* 239 N.C. 33, 79 S.E. 2d 213.

(2) A lease for more than three years must, to be enforceable, be in writing, and to protect it against creditors or subsequent purchasers for value, the lease must be recorded. *Mauney v. Norvell,* 179 N.C. 628, 103 S.E. 372.

(3) As between two purchasers for value of the same interest in land, the one whose deed is first registered acquires title. *Combes v. Adams,* 150 N.C. 64, 63 S.E. 186; *Dulin v. Williams, supra; Hayes v. Ricard,* 245 N.C. 687, 97 S.E. 2d 105.

(4) Actual knowledge, however full and formal, of a grantee in a registered deed of a prior unregistered deed or lease will not defeat his title as a purchaser for value in the absence of fraud or matters creating estoppel. *Piano Co. v. Spruill,* 150 N.C. 168, 63 S.E. 723; *Black-*

nall v. Hancock, 182 N.C. 369, 109 S.E. 72; *Patterson v. Bryant,* 216 N.C. 550, 5 S.E. 2d 849; *Eller v. Arnold,* 230 N.C. 418, 53 S.E. 2d 266; *Dulin v. Williams, supra.*

The defendant is relying upon what was said in *Trust Co. v. Braznell,* 227 N.C. 211, 41 S.E. 2d 744, as follows: "When a grantee accepts the conveyance of real property subject to an outstanding claim or interest evidenced by an unrecorded instrument executed by his grantor, he takes the estate burdened by such claim or interest. By his acceptance of the deed he ratifies the unrecorded instrument, agrees to stand seized subject thereto and estops himself from asserting its invalidity. *Bank v. Vass,* 130 N.C. 590 (41 S.E. 791); *Bank v. Smith, supra* (186 N.C. 635, 120 S.E. 215); *Hardy v. Fryer,* 194 N.C. 420, 139 S.E. 833; *Hardy v. Abdallah,* 192 N.C. 45, 133 S.E. 195."

It will be noted, however, that in the *Braznell* case the deed contained the following statement with respect to the outstanding leases: " 'It is understood and agreed that this conveyance is made subject to the leases of the several tenants; * * *.' " The grantors and grantee had agreed to include in the deed a provision which would fully protect the lease of the plaintiff and the leases of the other tenants. This the deed did not do. *Hardy v. Fryer,* 194 N.C. 420, 139 S.E. 833. Therefore, the action was for the reformation of the deed based on mutual mistake. However, this Court did not uphold the validity of the unrecorded leases because the grantee had notice of their existence. The Court explicitly denied such claim. Instead, the Court allowed the unrecorded lease of the plaintiff to be superior because the grantee had agreed to such a result in his contract of purchase and had the deed prepared by his attorney, which did not protect the leaseholders as called for in the sales agreement.

In the case of *Hardy v. Fryer, supra,* Brogden, J., speaking for the Court, said: "The principles deducible from our decisions upon the subject of the sufficiency of the references necessary to impart vitality to a prior unregistered encumbrance, may be stated as follows:

"1. The creditor holding the prior unregistered encumbrance must be named and identified with certainty.

"2. The property must be conveyed 'subject to' or in subordination to such prior encumbrance.

"3. The amount of such prior encumbrance must be definitely stated.

"4. The reference to the prior unregistered encumbrance must amount to a ratification and adoption thereof.

"The theory out of which these principles grow, is that the reference to the unregistered encumbrance, if made with sufficient certainty,

creates a trust or agreement that the property is held subject thereto. * * *"

It has been held that a mere reference to a prior encumbrance not amounting to a ratification of it, and where the conveyance is not expressly made subject to the first, except as it may comply with the requirements of the registration law, the first instrument will be subject to the second instrument where the second one is recorded first. *Hardy v. Abdallah,* 192 N.C. 45, 133 S.E. 195.

We hold that the reference in the deed from the McCraneys to these plaintiffs was not sufficient to make such deed, when registered, subordinate to the defendant's unrecorded lease.

The defendant is wholly responsible for its present situation. It waited eighteen months before filing its lease for registration in Cherokee County, at which time the plaintiffs' deed had been recorded for more than eight months.

On the second question, are the plaintiffs estopped by accepting the rent according to the terms of the lease for more than two years? the answer is found in the case of *Mauney v. Norvell, supra.* "The court erroneously held that the plaintiff, by accepting rent, was estopped to demand possession. * * * He is entitled to rents as long as defendant remains in possession * * *. Acceptance of rents by the landlord does not create a tenancy from year to year nor preclude the landlord from recovery. * * * The receipt of money for the use of premises is not inconsistent with a demand for possession, for it has not misled the defendant nor put him to any disadvantage. * * *"

"It is essential to an equitable estoppel that the person asserting the estoppel shall have done or omitted some act or changed his position in reliance upon the representations or conduct of the person sought to be estopped. A change of position which will fulfill this element of estoppel must be actual, substantial, and justified." 31 C.J.S., Estoppel, § 72(b), page 442.

The judgment of the court below will be upheld.

Affirmed.

PRINCE ARRINGTON, JR., EMPLOYEE v. STONE & WEBSTER ENGINEERING CORPORATION, EMPLOYER AND ROYAL INDEMNITY COMPANY, CARRIER.

(Filed 17 March, 1965.)

1. Master and Servant § 72—

The 1963 amendment to G.S. 97-31 has no retroactive effect, and a claim for compensation for disfigurement occurring prior to the effective date of the amendment must be determined in accordance with the law as it then existed.

2. Same—

G.S. 97-31(21) making compensation for disfigurement of the head mandatory, and G.S. 97-31(22) providing for discretionary compensation for bodily disfigurement, are separate, and the 1957 amendment to the latter section will not be construed to apply to the former and does not authorize compensation for injury to an internal organ of the head when such injury does not result in any disfigurement.

3. Statutes § 7—

Where a statute has two distinct subsections dealing with related matters, an amendment to one of the subsections will not ordinarily be construed to apply to the other also, since it will be presumed that if the Legislature intended it to apply to both it would have expressed such intent.

4. Master and Servant § 72—

Under G.S. 97-31(21) prior to the 1963 amendment (G.S. 97-31(24)), no award of compensation may be allowed for the loss of the senses of taste and smell when the injury causing such loss does not result in any blemish, blot or scar, since such award may be made only when connected with a "serious face or head disfigurement", which limitation requires an external and observable blemish, blot or scar.

5. Statutes § 5—

The interpretation given a statute by the officer or agency charged with its administration will be given due consideration by the courts, but is not controlling.

APPEAL by plaintiff from *Hubbard, J.*, October 1964 Civil Session of HALIFAX.

This is a proceeding under the provisions of the Workmen's Compensation Act.

The facts are not in dispute. Plaintiff was an employee of defendant Stone & Webster Engineering Corporation. He suffered an injury by accident arising out of and in the course of his employment. On 1 September 1961 a piece of timber fell 39 feet and struck him on the head. Compensation was awarded by reason of the phlebitic condition of his leg resulting from the accident and for loss of time and earnings.

Plaintiff lost his senses of taste and smell by reason of the injuries sustained in the accident; these losses are permanent. Plaintiff sustained no loss of time or income by reason of having lost his senses of taste and smell; he has actually earned a greater average weekly wage during the time he has worked since the accident than before.

The Hearing Commissioner declined to award compensation for loss of senses of taste and smell. Upon review the Full Commission reversed the conclusions of the Hearing Commissioner and made a lump sum award of $1000 for such losses, terming them "serious facial or head disfigurement." On appeal, the superior court reversed the opinion and award of the Full Commission and entered judgment in accordance with the opinion and award of the Hearing Commissioner.

Allsbrook, Benton & Knott for plaintiff.

Smith, Moore, Smith, Schell & Hunter and Stephen Millikin for defendants.

MOORE, J. Plaintiff's argument for reversal of the superior court judgment is but an elaboration of the reasoning, conclusions and findings contained in the following excerpts from the opinion and award of the Full Commission:

> "Over the years the Commission has awarded compensation for disfigurements for loss of internal organs or loss of use of said organs when the outward observable blemish or mark was negligible or almost non-existent. Awards have been made in many cases for the loss of the senses of taste and smell as disfigurement. Admittedly there has been some question as to the Commission's authority, as a matter of law, to enter awards where the disfigurement is not of the type that is readily discernible to outward observation. Any such question appears to have been resolved in favor of such awards by virtue of the 1963 amendment to General Statutes 97-31(22) and the addition of General Statutes 97-31(24). These amendments do not apply to the subject case. However, such amendments in the opinion of the Full Commission serve to clarify and make certain the Commission's position with respect to awards for disfigurement in a case such as that now before the Full Commission.
>
> "The loss of plaintiff's senses of taste and smell is a serious loss, perhaps much more serious than the loss of two teeth, as in the case of *Davis v. Construction Company*, 247 N.C. 332 (101 S.E. 2d 40). The senses of taste and smell are very closely allied with the teeth in relation to a worker obtaining proper nourishment to

enable him to gain the strength to work and earn wages. The Workmen's Compensation Act is to be liberally construed."

". . . The complete and permanent loss by plaintiff of his senses of taste and smell is likely to handicap the plaintiff in securing or retaining employment as a laborer, is likely to cause an impairment of his future wage-earning capacity, and constitutes serious facial or head disfigurement."

Under the present law, G.S. 97-31(24), an award of compensation for loss of sense of taste or smell would unquestionably be sustained, where from the circumstances it could be reasonably presumed that the workmen suffered diminution of his future earning power by reason of such loss. In 1963, G.S. 97-31 was amended by striking a clause from subsection (22) thereof and adding subsection (24). S.L. 1963, c. 424. The amending statute is not retroactive. The accident in question occurred in 1961. Therefore, plaintiff's claim based on loss of senses of taste and smell must be considered in the light of the provisions of G.S. 97-31 as they existed prior to the 1963 amendment and at the time of the injury.

The pertinent provisions of G.S. 97-31 are discussed and construed in *Davis v. Construction Co., supra* (1957), which involved a claim for loss of two upper front teeth. The question was whether the loss was compensable as a disfigurement. At the time the opinion was delivered the following subsections of G.S. 97-31 were in force:

"(v) In case of serious facial or head disfigurement, the Industrial Commission shall award proper and equitable compensation not to exceed three thousand five hundred dollars . . .

"(w) In case of serious bodily disfigurement, including the loss *of* or permanent injury to any important *external or internal* organ *or part* of the body for which no compensation is payable under the preceding subsections, but excluding the disfigurement resulting from permanent loss or permanent partial loss of use of any member of the body for which compensation is fixed in the above schedule, the Industrial Commission may award proper and equitable compensation not to exceed three thousand five hundred dollars ($3,500.00); provided, that the Industrial Commission may not make an award for permanent partial or permanent total disability, and also for bodily disfigurement resulting from loss of, or permanent injury to, any internal organ, the loss of which, or the injury to which resulted in such permanent partial or permanent total disability."

[Note: Subsections (v) and (w) have since been codified as (21) and (22). S.L. 1957, c. 1221, amended subsection (w) to insert the words which are italicized thereinabove and to add the proviso following the semi-colon; it also increased the maximum payable compensation in (v) and (w) from $2500 to $3500. This 1957 amending statute became effective on 10 June 1957. The *Davis* opinion was filed on 11 December 1957, after the effective date of the amendment. However, the opinion discusses the subsections as they were before the 1957 amendment. But this fact has no significance either in the *Davis* case or the case at bar.]

The following excerpts from the *Davis* opinion have authoritative bearing upon the question for decision in the instant case:

"In express terms, the Commission based its award of $450.00 on G.S. 97-31(w). The factual basis therefor is that plaintiff 'suffered the loss of or permanent injury to an important organ of the body for which no compensation is payable under the provisions of G.S. 97-31(a) through (v).'

"With reference to (w), it would seem that 'the loss or permanent injury to any important organ of the body for which no compensation is payable under the preceding subsections' may be the basis for a separate award only if it results in 'serious bodily disfigurement.' Such loss or permanent injury to an important organ of the body is not something different from or in addition to 'serious bodily disfigurement' but rather, as indicated by the word 'including,' an instance of what may constitute 'serious bodily disfigurement.' While (v) does not refer in express terms to the loss of or permanent injury to any important organ of the face or head, we think it clear that such loss, if in fact a 'serious facial or head disfigurement,' is compensable thereunder.

"If plaintiff's loss of his two upper front teeth constitutes serious disfigurement within the meaning of G.S. 97-31, it would seem inescapable that this would be a 'serious facial or head disfigurement' compensable under (v) rather than a 'serious bodily disfigurement' compensable under (w).

". . . it appears clearly that the full Commission considered (w) rather than (v) the pertinent provision and that it interpreted (w) as authority for an award for loss or permanent injury to any important organ of the *body*, for which no specified compensation for a definite period was payable under the preceding subsections of G.S. 97-31, without regard to whether such loss constituted 'serious bodily disfigurement.' Hence, the full Commission's find-

ings of fact were made under misapprehension as to the applicable law . . ."

"Under our decisions, there is a serious disfigurement in law only when there is a serious disfigurement in fact. A serious disfigurement in fact is a disfigurement that mars and hence adversely affects the appearance of the injured employee to such extent that it may be reasonably presumed to lessen his opportunities for remunerative employment and so reduce his future earning power. True, *no present loss of wages* need be established; but to be *serious,* the disfigurement must be of such nature that it may be fairly presumed that the injured employee has suffered a diminution of his future earning power. *Stanley v. Hyman-Michaels Co., supra,* (222 N.C. 257, 22 S.E. 2d 570); *Branham v. Panel Co., supra,* (223 N.C. 233, 25 S.E. 2d 865); Larson, Workmen's Compensation Law, Vol. 2, Sec. 58.32; also see (dictum) *Marshburn v. Patterson,* 241 N.C. 441, 448, 85 S.E. 2d 683."

Among other things, the *Davis* case holds, in effect, that subsection (w) deals with disfigurement of the *body* as distinguished from disfigurement of the *head.* Subsection (v) deals exclusively with disfigurement of the face and head. The distinction is implicit in the statute; the General Assembly made provision for compensation for disfigurement of the head and body in separate subsections, and made compensation for head disfigurement *mandatory* and compensation for bodily disfigurement *discretionary.* The 1957 amendment of subsection (w) does not so extend its meaning as to override the distinction. Had the General Assembly intended to extend the amendatory provisions to subsection (v), it would have expressly or by reference incorporated them therein. "Where there are two provisions in a statute, one of which is special or particular and the other general, which, if standing alone, would conflict with the particular provision, the special will be taken as intended to constitute an exception to the general provision, as the General Assembly is not presumed to have intended a conflict." 4 Strong: N. C. Index, Statutes, § 5, pp. 182, 183.

The Commission undoubtedly recognized the distinction discussed above, for it held that the loss of the senses of taste and smell "constitute serious facial or head disfigurement within the meaning of the Workmen's Compensation Act, for which proper and equitable compensation is $1000.00. G.S. 97-31(21)." As noted above, subsection (21) was formerly subsection (v). We agree that the organs of taste and smell are organs of the head. But we do not agree that loss of the senses of taste and smell is compensable under the subsection applicable to head disfigurement. That subsection provides for compensation only in case of "serious facial or head disfigurement." As stated in *Davis,*

"there is a serious disfigurement in law when there is a serious disfigurement in fact." "A disfigurement . . . is a blemish, a blot, a scar or a mutilation that is external and observable, marring the appearance." *Branham v. Panel Co.*, 223 N.C. 233, 25 S.E. 2d 865. Loss of the senses of taste and smell is not *in fact* a disfigurement of the face or head.

We are urged to reverse the superior court judgment because the Industrial Commission has heretofore made awards "in many cases for the loss of the senses of taste and smell as disfigurement." The Commission's interpretation of the statute is persuasive but not controlling. "The interpretation by the department responsible for the administration of a legislative act is helpful to a court when called upon to construe legislative language. *In re Application for Reassignment*, 247 N.C. 413, 420, 101 S.E. 2d 359. The construction placed upon legislation by the officer charged with administration thereof will be given due consideration by the courts, although such construction is not controlling. If there should be a conflict between administrative interpretation and the interpretation of the courts, the latter will prevail. *Campbell v. Currie*, 251 N.C. 329, 333, 111 S.E. 2d 319." *Faizan v. Insurance Co.*, 254 N.C. 47, 57, 118 S.E. 2d 303. The interpretation of the Commission is in conflict with the decisions of this Court.

Affirmed.

NOVELLA SISK v. LEE AUGUSTUS PERKINS, ORIGINAL DEFENDANT, AND DAVID WILLIAM SISK, ADDITIONAL DEFENDANT.

(Filed 17 March, 1965.)

1. Judgments § 29—

Adjudication in an action between the drivers of two vehicles involved in a collision that each was guilty of negligence constituting a proximate cause of the collision is *res judicata* as between the drivers upon the subsequent hearing of an action by a passenger in one of the vehicles against the driver of the other, in which action the passenger's driver is joined for contribution, and the original defendant is entitled to introduce such judgment to establish his claim for contribution.

2. Pleadings § 5—

The rule that a verified pleading requires that subsequent pleadings be also verified, G.S. 1-144, may be waived except in those cases where the form and substance of verification is made an essential part of the pleading.

SISK *v.* PERKINS.

APPEAL by defendant Perkins from *Campbell, J.*, 19 October 1964 Civil Session of GASTON.

This action arose out of an automobile collision between the Sisk automobile, being driven by David William Sisk, and the Perkins automobile, being driven by Lee Augustus Perkins. The plaintiff, Novella Sisk, was a passenger in the Sisk automobile which, at the time of the accident, was being driven by her husband. The accident occurred on a rural paved road, No. 1924, on 18 February 1963, about 2-2/10ths miles northwest of Mt. Holly, North Carolina.

The complaint in this action was filed on 25 April 1963. Plaintiff sought to recover damages from Perkins only. Plaintiff alleged that through the negligent operation of his car, Perkins caused the plaintiff's injury.

On 23 January 1964, defendant Perkins filed an answer denying the plaintiff's allegations of negligence, and in his further answer set up a cross-action against David William Sisk and had Sisk brought in as an additional party-defendant. Perkins alleged the collision was caused solely by the negligence of David William Sisk, and if such allegation should not be sustained, then he alleged the negligence of Sisk was a contributing factor in producing the collision. The answer and cross-action of Perkins were verified.

The additional defendant filed an answer on 13 May 1964 denying the allegations of Perkins that he, Sisk, had been negligent, and for a further answer and defense, Sisk alleged that plaintiff's injury resulted from the sole negligence of Perkins.

As a result of the collision involved herein, Perkins instituted an action against Sisk, and on 7 February 1964 the jury returned a verdict to the effect that both Perkins and Sisk had been negligent and that both had contributed to their own injury, and judgment was entered accordingly.

After the action of *Perkins v. Sisk* was terminated, Perkins was allowed on 2 June 1964 to amend his cross-action against David William Sisk so as to plead the judgment in the action of *Perkins v. Sisk*, which judgment established the negligence of both Perkins and Sisk. The amended answer was not verified.

On 12 June 1964, Sisk moved through his counsel to strike the amendment allowed to the original answer of Perkins. No question about the lack of verification of the amendment to the answer was raised at that time. This motion was denied on 11 September 1964.

Counsel for the additional defendant filed an undated motion to dismiss the amendment to the answer of Perkins, which amendment had been allowed on 2 June 1964, for the reason that such amendment was not verified. The original answer of the original defendant, filed

28 January 1964, was verified. Even so, at no place in the record does it appear that the additional defendant made any effort to have his motion to strike the amendment to the original answer heard by the court below.

Plaintiff's case was submitted to the jury and plaintiff, Novella Sisk, recovered a judgment against Perkins for $5,000.00.

The original defendant assigns as error the ruling of the court below that the judgment theretofore entered in the action between *Lee Augustus Perkins v. David William Sisk* is not *res judicata* in the instant action as between the original defendant and the additional defendant, as shown by the amendment to the answer of defendant Lee Augustus Perkins.

From the refusal of the court below to allow the judgment in the case of *Perkins v. Sisk* to be introduced to establish Perkins' claim for contribution against Sisk, Perkins appeals, assigning error.

Mullen, Holland & Harrell for original defendant appellant.

Childers & Fowler; Whitener & Mitchem for additional defendant appellee.

Verne E. Shive for plaintiff appellee.

DENNY, C.J. The appellant herein assigns as error the ruling of the court below that the judgment heretofore entered in the action between Lee Augustus Perkins and David William Sisk is not *res judicata* in the instant case as between the original defendant and the additional defendant, as shown by the amendment to the answer of defendant Lee Augustus Perkins. "* * * (W)here A sues B alone as tort feasor, and B impleads C on cross-claim allegations of negligence for contribution or indemnification, a resulting judgment in respect of the cross-claim will operate as an estoppel in a subsequent action between B and C based upon allegations of negligence arising out of the same occurrence. The reverse order of actions, where in the former action B sued C, and in the subsequent action by A against C, C impleads B, yields the same result.

"The controlling principle here is that, as the court puts it: 'A judgment ordinarily settles nothing as to the relative rights and liabilities of the co-plaintiffs or co-defendants *inter se*, unless their hostile or conflicting claims were actually brought in issue, litigated and determined.'" McIntosh, North Carolina Practice and Procedure, Vol. 2, Cumulative Supplement, § 1734.5, page 47.

In *Williams v. Hunter*, 257 N.C. 754, 127 S.E. 2d 546, Rodman, J., speaking for the Court, said: "The amendment alleges a prior adjudication of the rights of Barnes and Ferguson in a court having juris-

diction of the parties and the cause of action. If the plea be established, it defeats Ferguson's right to relitigate any question then in controversy. The negligence of each driver, the parties to that action, was necessarily in issue. The adjudication then made is binding on the parties. *Hill v. Edwards,* 255 N.C. 615, 122 S.E. 2d 383; *Bullard v. Oil Co.,* 254 N.C. 756, 119 S.E. 2d 910; *Crain & Denbo, Inc. v. Construction Co.,* 252 N.C. 836, 114 S.E. 2d 809; *Jenkins v. Fowler,* 247 N.C. 111, 100 S.E. 2d 234; *Tarkington v. Printing Co.,* 230 N.C. 354, 53 S.E. 2d 269; *Allen v. Salley,* 179 N.C. 147, 101 S.E. 545."

In *Hill v. Edwards,* 255 N.C. 615, 122 S.E. 2d 383, this Court said: "'(W)here the initial action is instituted by the passenger in one vehicle against the driver of the other vehicle, in which the passenger's driver is joined for contribution, adjudication that the passenger's driver was not guilty of negligence constituting a proximate cause of the accident, is *res judicata* in a subsequent action between the drivers.' Strong's North Carolina Index, Volume III, Judgments, Section 29, page 45, citing *Jenkins v. Fowler,* 247 N.C. 111, 100 S.E. 2d 234.

"It is equally true in such a factual situation, where the plaintiff recovers judgment against the original defendant, and the jury finds the additional defendant guilty of negligence and that such negligence concurred in jointly and proximately causing plaintiff's injuries and gives the original defendant a verdict for contribution pursuant to the provisions of G.S. 1-240, such judgment is *res judicata* in a subsequent action between such drivers, based on the same facts litigated in the cross-action in the former trial."

Since the additional party-defendant did not appeal, and there is no ruling in the court below on his motion to strike the amendment to the original defendant's answer, allowed 2 June 1964 and filed without verification, we are not called upon to rule on the merits of that motion. Even so, we call attention to what is stated in the case of *Calaway v. Harris,* 229 N.C. 117, 47 S.E. 2d 796: "True it is, the statute provides that when one pleading in a court of record is verified, every subsequent pleading in the same proceeding, except a demurrer, 'must be verified also.' G.S. 1-144. The requirement is one which may be waived, however, except in those cases where the form and substance of the verification is made an essential part of the pleading; as in an action for divorce in which a special form of affidavit is required. * * *

"Statutory provisions enacted for the benefit of a party litigant, as distinguished from those for the protection of the public, may be waived, expressly or by implication. * * * For instance, it is provided by G.S. 1-111, that in actions for the recovery of the possession of real property, the defendant, before he is permitted to plead, 'must execute and file' a defense bond, or in lieu thereof certificate and affi-

davit as provided by G.S. 1-112. While this requirement is in practically the same language as that respecting the verification of subsequent pleadings where one is verified, it is subject to be waived unless seasonably insisted upon by the plaintiff. * * *"

The above assignment of error is sustained, and as between the original defendant and the additional defendant there must be a new trial, and it is so ordered. *Stansel v. McIntyre,* 237 N.C. 148, 74 S.E. 2d 345; *Tarkington v. Printing Co.,* 230 N.C. 354, 53 S.E. 2d 269.

We find no error in the trial below that would warrant a new trial in plaintiff's action against the original defendant, and the judgment entered therein is affirmed.

New trial.

ELEANOR N. HAMILTON v. JOHN C. PARKER, JR., TRADING AS PARKER'S FOOD STORE.

(Filed 17 March, 1965.)

1. Negligence § 37b—

A store proprietor is not an insurer of the safety of his patrons and a patron, in order to recover for injury sustained on the premises, must introduce evidence tending to establish actionable negligence on the part of the proprietor, the doctrine of *res ipsa loquitur* not being applicable.

2. Negligence § 37f—

The evidence tended to show that defendant maintained swinging entrance and exit doors with panel glass, that plaintiff was familiar with the doors, and that as plaintiff was entering the righthand door she saw the bag boy rushing toward the exit door, and that the exit door struck her on the rebound after having been opened by the boy. There was no evidence that the doors were improperly constructed, had any mechanical defect, were improperly maintained, or that they were not of the usual type. *Held:* Involuntary nonsuit was properly entered.

APPEAL by plaintiff from *Bundy, J.,* November-December Session 1964 of NEW HANOVER.

This is a civil action to recover for personal injury allegedly sustained when plaintiff was hit in the back by an exit door as she entered the defendant's store about 9:30 a.m. on 22 June 1963.

Plaintiff alleges that as she entered the store through the right-hand door, the entrance door, a bag boy, Rickey Falich, "came rushing real fast from the inside," pushed the exit door open, let it go and it hit plaintiff in the back.

Plaintiff further alleges that the entrance and exit doors were easily pushed in and out, in a dangerous "swinging door" fashion, without any door check or other device or arrangement for stopping, checking, slowing or retarding the momentum of said doors while being so pushed or upon the return swing or rebound thereafter. Plaintiff described the doors as follows: "* * * There are two large, heavy swinging doors, with wooden frames and panel glass * * *."

Plaintiff testified that as she approached the entrance door to defendant's store, she could see in the store and saw the bag boy coming towards the exit door as she was entering the right-hand door; that she does not remember stepping to the left into the path of the exit door. She further testified: "* * * I don't know how I got hit like I did. I can't remember stepping to my left. At the time I was struck I was moving, I think." Plaintiff had been trading at this store for several months before the accident happened.

With respect to whether the plaintiff was moving or standing still at the time she was hit, she testified in her adverse examination: " 'I could not swear that I was moving or I couldn't swear I was standing still, because when the door hit me, I don't know whether I was moving or not.' On my prior visits there, I had used the same doors I was using on June 22nd. I had seen the same doors on many prior occasions. They were the same, so far as I could tell, June 22, 1963, as on all of the other occasions."

The witness further testified that she had never opened these doors prior to that day because of her back trouble; that she had always theretofore been accompanied by someone else who opened the doors for her. The record discloses that the plaintiff had had some seven or eight surgical operations of various kinds, including one on her back, prior to the alleged accident on 22 June 1963. She was wearing a steel brace on her back at the time of her alleged accident.

Mrs. Catherine Ray, a witness for plaintiff, testified: "It was obvious to me that these doors at Parker's Food Store were the type doors that would swing both in and out. Mrs. Hamilton and I had been in the store on a good many occasions prior to June 22, 1963 and had seen many people go in and out. We could see the doors swinging both in and out."

At the close of plaintiff's evidence, the defendant moved for judgment as of nonsuit. The motion was allowed. The plaintiff appeals, assigning error.

L. Gleason Allen, W. G. Smith for plaintiff appellant.
Marshall & Williams for defendant appellee.

DENNY, C.J. Plaintiff's sole assignment of error is to the allowance of defendant's motion for judgment as of nonsuit at the close of plaintiff's evidence.

The plaintiff's evidence clearly establishes the fact that the exit door in defendant's store could not possibly have struck the plaintiff in the back in the manner in which she testified unless she stepped to her left as she entered through the right-hand door and placed herself in the arc of the exit door as it rebounded when released by the bag boy, Rickey Falich.

In the case of *Watkins v. Furnishing Co.*, 224 N.C. 674, 31 S.E. 2d 917, the plaintiff sought to recover damages for personal injuries alleged to have been caused by the negligence of the defendant in the erection, operation and maintenance of "magic eye" doors in the entrance to its store building on Fayetteville Street in the City of Raleigh.

The evidence tended to show that the plaintiff entered through the left side of the double door opening, where the door on the left side was partially open, and that the door suddenly closed and caught the plaintiff between said left door and the other door or door frame.

On appeal from a judgment of nonsuit, this Court said: "There is a total lack of evidence of negligence in the erection, operation or maintenance of the 'magic eye' doors. There is no evidence that the doors involved in the occurrence under investigation ever suddenly closed before said occurrence, or ever caught any one attempting to enter the store, notwithstanding the doors had been installed several months and thousands of customers had entered through the door openings. * * *

"* * * The owner of a store is not an insurer of the safety of those who enter his store for the purpose of making purchases, and the doctrine of *res ipsa loquitur* is not applicable. Before the plaintiff can recover he must, by evidence, establish actionable negligence. * * *

"* * * Persons are held liable by the law for the consequences of occurrences which they can and should foresee, and by reasonable care and prudence guard against. * * *"

In *Coleman v. Colonial Stores, Inc.*, 259 N.C. 241, 130 S.E. 2d 338, the plaintiff brought an action to recover damages for personal injuries allegedly sustained when he tripped over the bottom of a metal screen constructed on the outside of the exit door of defendant's store. In sustaining a judgment as of nonsuit, entered at the close of all the evidence, this Court said: "The metal screen at the exit door was obvious to any ordinarily intelligent person using his eyes in an ordinary manner. No unusual conditions existed at the time. As plaintiff approached the exit door, the metal screen outside could be plainly seen through the glass door. At the time and place the metal screen did not constitute a hidden danger or an unsafe condition to plaintiff, an invitee

using the premises. Defendant was not under a duty to warn its customers of a condition which was obvious to any ordinarily intelligent person. * * * There is no evidence that the metal screen was improperly constructed or maintained at the time plaintiff fell."

In the case of *Olson v. Whitthorne & Swan,* 203 Cal. 206, 263 P. 518, 58 A.L.R. 129, the defendant maintained two swinging doors, used for the purpose of entrance and exit by patrons of the store. The plaintiff had made some purchases at the store and was proceeding to pass out through the swinging door to her right. Instead of continuing to pass through and beyond this door, she paused to hold the door open for a lady following immediately behind her. In doing so, the plaintiff stepped into the swing area of the left-hand door, through which a third lady was hastily proceeding. The rebound of the left-hand door struck plaintiff, and she thereby received the injuries complained of. The Court said: "* * * Swinging doors in buildings and stores are installed and maintained for the accommodation of those who have occasion to enter such buildings. The operation of such doors is not within the exclusive control of the owner of the building or the proprietor of the store. Customers take a very distinct part in their operation and are chargeable with the exercise of ordinary care in their use. * * *

"* * * We think the court was justified in concluding that on any theory of defendant's responsibility in the matter the plaintiff was * * * guilty of contributory negligence. * * * She testified that she was familiar with the operation of these particular swinging doors, had used them many times prior to the accident, and knew of their rebound. Notwithstanding this familiarity and knowledge, she placed herself in a position of danger for reasons which were entirely personal to herself. * * * The evidence fails to disclose the breach of any legal duty which the defendant owed to the plaintiff."

In the instant case, while the plaintiff alleged that the defendant maintained such swinging doors in an unsafe and hazardous condition, she offered no evidence to support such allegation. Furthermore, she offered no evidence tending to show that the doors complained of were improperly constructed, or that they had any mechanical defect or were improperly maintained. Neither is there any evidence on the record tending to show that such doors were not the customary type used in grocery stores, nor any evidence to the effect that a similar accident had occurred previously.

In our opinion, the plaintiff has failed to establish actionable negligence against the defendant. Consequently, plaintiff's assignment of error is overruled, and the judgment entered below is

Affirmed.

STATE OF NORTH CAROLINA v. ARTHUR LEARY, JIMMY WILLIAMS, WARREN GRIFFIN, RAY VINES, DONNIE REID, WALTER JONES, JR., WILLIAM WHITAFORD, EDWARD SPELLER, GILBERT BEST, GEORGE GIBSON, OSCAR BURNETT AND JEROME SPRUILL.

(Filed 17 March, 1965.)

1. Constitutional Law § 18; Riot § 1—

Citizens have the right to assemble peacefully for a lawful purpose; nevertheless, even though an assembly be lawful initially it may become a riot if at any time its members act with common intent in committing unlawful or disorderly acts in such a manner as to threaten a breach of the peace.

2. Riot § 2— Evidence of defendant's guilt of participating in riot held sufficient to be submitted to jury.

Evidence tending to show that a large number of demonstrators gathered nightly over a long period of time and marched and sang, that the crowds were beginning to get out of control and feelings were running high, that an officer seeking to stop them from marching to the business district on the occasion in question was hit in the face by a pennant or stick, and that when he entered the crowd to apprehend his assailant a large crowd gathered around him and later, when reinforcements arrived, the crowd began to throw rocks and bottles, break windows and destroy property, *held* sufficient to overrule nonsuit on the part of the defendants identified as members of the crowd and acting with it.

3. Same—

Where the indictment charges that defendants, with others, participated in a riot, it is not necessary to show that defendants acted in concert with each other in committing breaches of the peace, it being sufficient if the evidence show that each defendant acted with other members of the crowd in committing the offense.

ON October 18, 1964, the application of defendants Leary, Williams and Griffin, for a writ of *certiorari* as a substitute for an appeal from a judgment rendered by Peele, J., at the September 1963 Session of MARTIN, was allowed.

The Grand Jury, at the September 1963 Session of Martin Superior Court, by bill, charged that defendants: (a) participated in a riot in Williamston on August 29, 1963; and (b) incited the riot.

Defendants, other than Oscar Burnett, who was then confined in a federal penintentiary, were placed on trial at that Session. (The word "defendants," as subsequently used, does not include Oscar Burnett.)

At the conclusion of the State's evidence, defendants moved for directed verdicts on each charge. The motions were allowed as to all defendants on the charge of inciting a riot. The motions of defendants Leary, Williams and Griffin, for directed verdicts on the charge of par-

ticipating in a riot, were denied. The motions of the other defendants on this charge were allowed.

The jury found Leary, Williams and Griffin guilty of participating in a riot. Leary was sentenced to prison for two years, Williams and Griffin for twelve months each. Williams' prison sentence was suspended on condition he remain on good behavior for a period of three years. Each excepted and appealed.

Appellants were allowed time beyond the statutory period to serve their case on appeal. The solicitor consented to an additional extension of time. The case on appeal was agreed to on January 5, 1964. It should have been docketed here on January 7, 1964, and calendared for argument during the week beginning February 3, 1964. Instead of perfecting the appeal, appellants, on January 9, 1964, applied to this Court for an order permitting them to appeal as paupers. On the first conference day of the Spring Term 1964, we remanded the cause to the Superior Court of Martin County for an inquiry as to their indigency. That question was not determined until October 1964. We then ordered the cause docketed for argument during the first week of the Spring Term 1965.

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

Earl Whitted, Jr. and Samuel S. Mitchell for appellants.

RODMAN, J. During the trial, appellants noted 49 exceptions to the court's rulings and charge. They have now abandoned all except the single question stated in their brief, *viz.*: "Did the court below err by failing to grant appellants' motion for judgment as of nonsuit?"

Whether defendants moved for nonsuit or for a directed verdict, as stated in the judgment, is not material. Appellants make no contention that the form in which their motion was made deprived them of the opportunity to testify. They did not testify nor did they offer other evidence. Their position is, accepting the State's evidence as true, it is insufficient to require submission to the jury because: (1) It does not establish an unlawful assembly; (2) nor does it show that any appellant committed or aided in the commission of an unlawful act.

The State does not controvert the right of its citizens to assemble peacefully for a lawful purpose. On the other hand, lawful original purpose for an assembly cannot excuse subsequent mob action, resulting in wanton destruction of property, and deliberate injury to officers seeking merely to preserve peace. The law, applicable to such situations, was clearly stated by Denny, J. (now C.J.) in *State v. Cole*, 249 N.C. 733, 107 S.E. 2d 732. He said: "The overwhelming weight of

authority seems to be to the effect, in the absence of a statute to the contrary, that persons may assemble together for a lawful purpose, but if at any time during the meeting they act with a common intent, formed before or during the meeting, to attain a purpose which will interfere with the rights of others by committing disorderly acts in such manner as to cause sane, firm and courageous persons in the neighborhood to apprehend a breach of the peace, such meeting constitutes an unlawful assembly."

Appellants, in their brief filed here, give this factual background to measure the conduct and purpose of those who assembled in Williamston on the night of August 29, 1963. "Prior to August 29, 1963, there were demonstrations in the Town of Williamston. These demonstrations would start out in the form of marches from 150 to 200 people. They would march to various spots, sing a number of songs and march back to the church. There had been some picketing going on in front of local business places and houses. The marches start out peaceful but it was beginning to get out of control." This statement is supported by the testimony, on cross examination, of Sheriff Rawls, a State's witness: "There was a mob of them, they were all over the street and the side walks. It is my best knowledge that feeling were running high. For 32 nights I walked in between the two races, spoke on the loud speaker, got on top of cars and did everything I know of to keep from having a riot in this town. I personally know because for 32 nights, I was out there."

About 9 p.m. on August 29, two police officers, one white, the other Negro, sought to persuade a crowd, composed of about 200 Negroes, not to march to the business district of the town. There was a line approximately 50 yards long. It blocked the street and the sidewalks on each side. It overflowed into the yards of private property owners.

The officers requested the crowd to break up and go home. It disregarded the requests. It pushed forward to the business district. The two officers were forced to yield ground. Many in the crowd were carrying placards or billboards. The officers called for reinforcements. The crowd stopped for a while at the corner of Watts and Main Streets. Defendants Leary, Williams and Griffin were members of the crowd. Sergeant Robinson was hit in the face by a pennant or stick. He entered the crowd to apprehend his assailant. A large crowd gathered around him. The crowd was "hollering, yelling, still quite a bit of profanity being used."

When police reinforcements arrived, the crowd turned toward Harrell Street. "[T]hey began throwing rocks, bricks and bottles at the officers who were training [*sic*] along behind the group." Bricks, bottles and other missiles were repeatedly thrown at the officers by members of the

crowd. Members of the crowd threw missiles and broke the windows at the service station belonging to Leroy Goddard, and the windows in the Baker Gas Company building. The crowd was lined up in pairs. "They were approximately 100 couples deep. * * * At that time, it was impossible to determine who was paired off with whom. Leary, Williams and Griffin were in the street. Besides those, there were approximately 200 in the street." Appellants were not seen to form a pair. "In terms of distance they were from anywhere from five to as much as eighteen feet apart."

Sheriff Rawls, lending assistance to the city police, described the gathering as: "It was a mob." Leary threw a brick at Sheriff Rawls. Rawls and two other officers sought to arrest Leary. "[H]e fought us and when I placed him under arrest, he came out with a bursted pop bottle and attempted to get on me."

The officers were unable to say any defendant, except the three appellants, was a part of the crowd. The bill charged defendants and others, to the State unknown, participated in the riot. The bill was, therefore, broad enough to permit the conviction of any of the appellants if he aided or encouraged unnamed members of the gathering. *State v. Wynne,* 246 N.C. 686, 99 S.E. 2d 923; 77 C.J.S. 431. There is plenary evidence that each was in the crowd from the moment it started marching, in defiance of the peace officers, until order was restored some 45 minutes or more later. They were shouting, yelling and lending encouragement to others.

The uncontradicted evidence justified the jury in finding: (1) Appellants were members of an unlawful assembly; (2) an intent to assist all other members of the crowd in defying efforts of officers to preserve the peace; (3) intentional assaults on peace officers seeking to perform their duties, and wanton injury to private property.

The court properly submitted the question of defendants' guilt to the jury. *State v. Moseley,* 251 N.C. 285, 111 S.E. 2d 308; *State v. Cole, supra; State v. Hoffman,* 199 N.C. 328, 154 S.E. 314; 77 C.J.S. 428.

Affirmed.

LYNDA JOYCE PITTMAN BY HER NEXT FRIEND, SAM L. PITTMAN, JR. v. MUNSON RAY SNEDEKER, ORIGINAL DEFENDANT, ISA W. PITTMAN, ADDITIONAL DEFENDANT.

(Filed 17 March, 1965.)

1. Appeal and Error § 22—

An exception to the failure of the court to find certain facts is untenable when appellant fails to introduce evidence in the record which would sustain such findings.

2. Insurance § 66.1—

An insurer compensating its insured for loss sustained by the wrong of a third person is subrogated to the rights of insured against such third person.

3. Same; Judgments § 47; Torts § 4—

The fact that insurer for the original defendant pays plaintiff's judgment against its insured, and plaintiff's judgment is marked paid and satisfied, does not extinguish or affect the judgment in favor of the original defendant against the additional defendant for contribution, G.S. 1-240, and if the additional defendant does not pay same, the original defendant is entitled to enforce the judgment by issuance of execution.

APPEAL by additional defendant, Isa W. Pittman, from *Morris, J.*, November-December 1964 Session of CRAVEN.

This is an appeal from an order refusing to enjoin collection of a judgment rendered in May 1963 in favor of *Munson Ray Snedeker v. Isa W. Pittman.*

The parties waived a jury trial. Judge Morris found these facts: Plaintiff, a minor, was injured when an automobile operated by Isa W. Pittman and an automobile operated by defendant Snedeker collided.

Plaintiff instituted suit against Snedeker to recover compensation for the injuries she sustained in the collision. He denied liability. He stated a cross action against Mrs. Isa W. Pittman, operator of the other automobile, as a tort feasor. She was made a party.

When tried in May 1963, the jury found plaintiff was injured by the negligence of defendant Snedeker. It fixed the amount of plaintiff's damage. It found plaintiff was injured "by the concurrent negligence of defendant Isa W. Pittman, as alleged in the answer of Munson Ray Snedeker."

Based on the jury's verdict, judgment was entered in favor of plaintiff, and against defendant Snedeker. The judgment further provided "that the defendant, Munson Ray Snedeker, upon the payment of said judgment and costs shall have and recover of the defendant, Isa W. Pittman one half of any sums recovered of the defendant, Munson Ray Snedeker by reason of this judgment, and one-half of the cost of

the court by way of contribution as provided in G.S. 1-240." The amount owing plaintiff was paid to the Clerk. He noted on the judgment docket satisfaction of plaintiff's judgment.

Thereafter, counsel for defendant Snedeker caused execution to issue against Isa W. Pittman for one-half of the sum paid in satisfaction of plaintiff's judgment. Mrs. Pittman sought to enjoin collection of the execution. She alleged the judgment in plaintiff's favor had not been assigned. It had been marked "paid and satisfied." The payment to the Clerk was made by Snedeker's liability insurance carrier — Snedeker in fact paid nothing.

The court found United Services Automobile Association, Snedeker's liability insurance carrier, furnished the money to pay plaintiff.

Based on the findings, the court concluded: "That the original defendant, Snedeker, is entitled to have execution issued for one-half the aforesaid judgment and court costs, to wit: $4,500.00 plus one-half the costs." It refused to enjoin collection. Additional defendant excepted and appealed.

David S. Henderson for appellant.
Barden, Stith, McCotter & Sugg for defendant appellee.

RODMAN, J. Appellant assigns as error the failure of the court to find that the policy of insurance issued by the United Services Association to Snedeker obligated it to: (a) defend suits brought against its insured for damages resulting from the negligent use of his automobile; (b) to pay, not in excess of its policy limits, any judgment rendered against its insured; and (c) the insurance company, on payment, would be subrogated to the rights of the insured.

A sufficient answer to this assignment of error is the failure of appellant to include in her evidence the policy issued to Snedeker. Since the policy was not offered in evidence, Judge Morris could not know what its provisions were, and could not make any findings with respect thereto. Manifestly, this assignment cannot be sustained. Nonetheless, the failure to make the finding has not prejudiced appellant. More than half a century ago, this Court expressly declared that where an insurer compensates its insured for loss sustained by the wrong of another, he is subrogated to all of the rights of its insured. *Cunningham v. R. R.*, 139 N.C. 427, 51 S.E. 1029. The conclusion then reached has been reaffirmed in multitudinous subsequent cases. *Burgess v. Trevathan*, 236 N.C. 157, 72 S.E. 2d 231; *Lyon & Sons v. Board of Education*, 238 N.C. 24, 76 S.E. 2d 553; *Insurance Co. v. Trucking Co.*, 256 N.C. 721, 125 S.E. 2d 25; *Phillips v. Alston*, 257 N.C. 255, 125 S.E. 2d

580; *Jewell v. Price*, 259 N.C. 345, 130 S.E. 2d 668; *Insurance Co. v. Spivey*, 259 N.C. 732, 131 S.E. 2d 338.

The right of subrogation, or substitution of the insurer for the insured, does not take place until the insurer has complied with its obligation and made payment to its insured. *Liles v. Rogers*, 113 N.C. 197, 18 S.E. 104.

Appellant's other assignments of error are based on the contention that Snedeker's insurance carrier is seeking contribution from a joint tort feasor; this right arises only by virtue of our statute, G.S. 1-240; the statute does not permit a tort feasor's subrogee to maintain an action for contribution. She relies on *Casualty Co. v. Guaranty Co.*, 211 N.C. 13, 188 S.E. 634, and *Herring v. Jackson*, 255 N.C. 537, 122 S.E. 2d 366, to support her position.

Joint tort feasors were not, at common law, entitled to contribution. *Bell v. Lacey*, 248 N.C. 703, 104 S.E. 2d 833; *Potter v. Frosty Morn Meats, Inc.*, 242 N.C. 67, 86 S.E. 2d 780; *Godfrey v. Power Co.*, 223 N.C. 647, 27 S.E. 2d 736, 149 A.L.R. 1183. That right has now been accorded by statute, G.S. 1-240; but under our decisions, it is a personal right. It is not one that can be assigned or transferred by operation of law under the doctrine of subrogation. That is the holding in *Herring v. Jackson, supra; Squires v. Sorahan*, 252 N.C. 589, 114 S.E. 2d 277; *Casualty Co. v. Guaranty Co., supra*, and like cases.

Appellant ignores the factual differences between the cases on which she relies and the present case. The difference is vital. In *Herring v. Jackson, supra*, Herring's insurance carrier, the real party in interest, caused an action to be instituted against Jackson to enforce the asserted right of contribution which G.S. 1-240 accords joint tort feasors. It was held the action could not be maintained in Herring's name because he was not the real party in interest, nor in the name of the insurance carrier because the statute limited the right to maintain such actions to tort feasors. It is not an assignable cause of action.

In *Casualty Co. v. Guaranty Co., supra*, plaintiff, a subrogee, sought to recover from the liability insurance carrier of a tort feasor.

Here, plaintiff sued Snedeker for $25,000. Snedeker had insurance protection for $10,000. He could not compel plaintiff to sue the additional defendant, plaintiff's grandmother, with whom plaintiff was riding. Since plaintiff elected to sue Snedeker alone, no judgment could be rendered in her favor against Mrs. Pittman. *Bell v. Lacey, supra; Norris v. Johnson*, 246 N.C. 179, 97 S.E. 2d 773. But plaintiff, exercising her prerogative to sue Snedeker alone, could not deprive him of the right accorded by statute to have his joint tort feasor made a party, and her liability to Snedeker determined.

The verdict and judgment rendered in May 1963 settled the question of contribution. The court properly decreed that Snedeker, upon payment of plaintiff's judgment, recover of the defendant, Isa W. Pittman, one-half of the amount paid plaintiff.

The cancellation of plaintiff's judgment against Snedeker established the additional defendant's liability. An assignment of the judgment obtained by plaintiff was not necessary to impose liability on the additional defendant. The moment plaintiff's judgment was satisfied Mrs. Pittman became a judgment debtor. Her liability as a tort feasor merged in the judgment.

There has been no cancellation of the judgment for which appellant is liable. She makes no claim that she has paid the debt which a court of competent jurisdiction has solemnly declared she owes. She seeks to escape her obligation because an insurance company made the payment as required by its contract with the original defendant. The insurance company was not a volunteer. If Snedeker had borrowed the money from someone under no obligation to make a loan, and, as security for the loan, assigned his judgment in favor of the additional defendant, no one would question the right of the assignee to enforce the judgment against the additional defendant. No sound reason appears why the insurance carrier should be penalized for performing its contractual obligation.

Mrs. Pittman can, by paying the amount for which she is liable to the Clerk, have the judgment against her cancelled, G.S. 1-239. If she elects not to pay, the judgment may be enforced by execution issuing thereon. *Jones v. Franklin Estate,* 209 N.C. 585, 183 S.E. 732; *Peebles v. Gay,* 115 N.C. 38, 20 S.E. 173; *Hanner v. Douglass,* 57 N.C. 262; *Connely v. Bourg,* 79 Am. Dec. 568; *Sprigg v. Beaman,* 6 La. 59; *Garvin v. Garvin,* 4 S.E. 148; 2 Freeman on Judgments (5th Ed.) § 1059.

Affirmed.

SOUTHERN RAILWAY COMPANY v. C. B. WOLTZ, ADMINISTRATOR DE BONIS NON OF THE ESTATE OF WILLIAM S. MATTHEWS, DECEASED.

(Filed 17 March, 1965.)

1. Negligence § 24a—

A party whose proof shows his adversary was guilty of actionable negligence is entitled to go to the jury unless he defeats his own cause by showing that he was guilty of contributory negligence as a matter of law.

2. Negligence § 21—

Each party is charged with the duty of exercising such care as the exigencies and circumstances of the occasion may require, and there is no difference in the *quantum* of proof necessary to establish either party's failure to exercise such care, the only difference being that plaintiff has the burden on the issue of defendant's negligence and defendant has the burden upon the issue of plaintiff's contributory negligence.

3. Negligence §§ 24a, 26—

When the evidence is conflicting on the issues of negligence and contributory negligence both issues are for the determination of the jury and may not be answered by the court as a matter of law.

4. Railroads § 5—

Evidence of a railroad company that a driver drove upon the tracks in daylight in front of the company's train, which was traveling some 35 to 40 miles per hour, without observing the approach of the train, which could easily have been seen, and that the train crew had insufficient time to avoid the collision after seeing the driver when he entered upon the tracks, *is held* sufficient to be submitted to the jury on the issue of the driver's negligence in the railroad's action to recover for damages to its engine caused by the collision.

5. Same—

Evidence permitting the inference that a railway train was stopped 35 to 40 feet north of the crossing, that the driver of the car stopped 12 feet from the northbound track, observed the stationary train which gave no indication of moving, and that as the driver undertook to cross the tracks the train suddenly started and collided with the automobile before the driver could clear the crossing, *is held* to take the case to the jury on the issue of the railroad company's negligence.

6. Trial § 18—

The task of weighing conflicting evidence is for the jury and not the court.

APPEAL by both parties from *Latham, S. J.,* October, 1964 Civil Session, GASTON Superior Court.

The claim and counter claim involved in this action grew out of a railroad-highway grade crossing collision between the plaintiff's southbound train and the defendant's intestate's automobile near the southern corporate limits of Bessemer City. The collision occurred about 1:30 p.m. on a clear, cold December day in 1962. The plaintiff's locomotive was damaged. The defendant's intestate, Dr. W. S. Matthews, was killed and his Chevrolet automobile was damaged. By proper pleadings each party alleged the other's actionable negligence was the proximate cause of the collision.

At the conclusion of the evidence, which will be discussed in the opinion, the judge sustained motions for compulsory nonsuit both as

to the claim and the counter claim. From a judgment dismissing the action, both parties appealed.

W. T. Joyner, George B. Mason; Mullen, Holland & Harrell by James M. Mullen for plaintiff appellant-appellee.

Davis & White by James R. Davis, Whitener & Mitchem by Basil L. Whitener, Wade W. Mitchem for defendant appellant-appellee.

HIGGINS, J. The appeal requires the Court to determine whether on the plaintiff's appeal the evidence, in the light most favorable to the railroad, ignoring evidence *contra,* was sufficient to permit a legitimate inference the collision resulted from the negligence of Dr. Matthews; and on the defendant's appeal, whether the evidence in the light most favorable to the defendant, ignoring evidence *contra,* was sufficient to permit a legitimate inference the collision and damages resulted from the negligence of the railroad.

Under proper pleadings, evidence of actionable negligence takes the case to the jury unless contributory negligence appears as a matter of law. A party whose proof shows his adversary was guilty of actionable negligence is entitled to go to the jury unless he defeats his own cause by showing he was guilty of contributory negligence as a matter of law. With respect to the quantum of proof, there is no essential difference between negligence and contributory negligence. On the latter issue the parties reverse positions. In determining liability each party is charged with the duty of exercising such due care as the exigencies and circumstances of the occasion may require. If the evidence is conflicting on issues of negligence and contributory negligence, such are issues of fact and require jury determination. These issues may not be answered by the court as a matter of law. *Weaver v. Bennett,* 259 N.C. 16, 129 S.E. 2d 610; *Kinlaw v. Willetts,* 259 N.C. 597, 131 S.E. 2d 351; *Pruett v. Inman,* 252 N.C. 520, 114 S.E. 2d 360; *Holderfield v. Trucking Co.,* 232 N.C. 623, 61 S.E. 2d 904.

According to the plaintiff's evidence, its train, consisting of a large diesel electric road switch engine and six freight cars, approached from the north the point where State Road No. 1403 crosses the railroad double tracks at right angles. From the road adjacent to the crossing a motorist had an unobstructed view of a train's approach from the north for approximately half a mile. The train was running south at 35 to 40 miles an hour as it approached the crossing. The time was 1:30 p.m. The weather was fair and cold. Railroad crossing signs were in place on Road No. 1403. The defendant's intestate was familiar with the crossing. He came to a momentary stop near the crossing, looked to the south, and moved onto the track in front of the train. The train

struck the automobile, causing damage to the engine in excess of $2,000.00. At all times during the approach the horn on the train was blowing and the bell was ringing. The fireman from his position on the left of the engine saw Dr. Matthews stop, look south, then move onto the track in front of the train without looking north. Immediately on observing the movement the fireman gave the signal, the engineer applied the emergency brakes, but the train was too close to be stopped. Actually it traveled several hundred feet beyond the crossing under emergency brakes.

The plaintiff's evidence permits the inference that Dr. Matthews, in daylight and without observing the approach of the train from the north which he could easily have seen had he looked, entered upon the track in front of the train moving at 35 to 40 miles per hour. The train crew had insufficient time to avoid the collision after first discovering Dr. Matthews intended to cross.

According to the defendant's evidence, Dr. Matthews approached from the east, stopped about 12 feet from the crossing. "He pulled up on the north-bound track and the train was sitting over on the south-bound track. About the time he got on the north-bound track the train started off and they just met right there at the corner . . . and the left side of the train hit him and knocked him frontwards . . . It hit him again . . . about the time he got on the north-bound track the train started off and just as he hit the south-bound track they hit each other . . . As to whether the train got up to 20 miles per hour in 35 feet, my answer is 15 or 20 . . ."

Two eye-witnesses said they did not hear the whistle, bell, or other signal from the train.

The defendant's evidence permits the inference the train was stopped 35 to 40 feet north of the crossing. Dr. Matthews stopped 12 feet from the north-bound track, observed the stationary train which gave no indication of any intended movement, and as he undertook to cross the tracks the train suddenly started, ran over him before he could clear the crossing.

The testimony of the witnesses was sharply conflicting. Resolution of the conflict requires that the evidence be weighed — a jury function. Weighing evidence is not a task assigned to the Court — either trial or appellate.

On Plaintiff's Appeal — Reversed.

On Defendant's Appeal — Reversed.

NANNIE W. McDANIEL, BETTY W. MOORE, KYLE W. SHIPLEY, RUTH W. SHIRLEY, HILDA W. RODER AND HUSBAND, RAY RODER, BRUCE W. MOORE AND HUSBAND, T. C. MOORE, PEARL W. BREEDLOVE AND HUSBAND, L. L. BREEDLOVE, GRACE W. COX AND HUSBAND, ADOLPH COX, SYBIL W. BANKS AND HUSBAND, P. N. BANKS v. R. L. FORDHAM AND WIFE, CLARINE W. FORDHAM, HELEN W. MOORE AND HUSBAND, MATTHEW MOORE.

(Filed 17 March, 1965.)

Judgments § 13—

The court may not enter a judgment by default and inquiry while defendant's motion to strike is pending, since if the motion to strike is made in apt time it is made as a matter of right, G.S. 1-153, while if it is not made in apt time it is addressed to the discretion of the court, G.S. 1-152, and in either event it is error for the court to rule that as a matter of law plaintiff was entitled to judgment by default for want of an answer, since defendant is not required to answer until after the motion to strike has been passed on.

APPEAL by defendants from *Peel, J.*, November, 1964 Session, JONES Superior Court.

The plaintiffs instituted this civil action to impress a parol trust on certain described lands. The action was instituted on June 6, 1963. The defendants filed a joint demurrer on June 27, 1963, and on the 8th of July thereafter, and before hearing on the demurrer, they filed a motion to strike designated portions of the complaint. At the September session, 1963, the court entered judgment sustaining the demurrer and dismissing the action. This Court, on appeal, reversed the judgment. This Court's opinion was certified to the Superior Court on April 3, 1964.

On April 13, 1964, the defendants filed a further motion to strike, incorporating therein the earlier motion which had been filed subsequent to the demurrer but which had never been passed on by the Superior Court. On September 25, 1964, while both motions to strike were still pending, the plaintiffs filed a motion for judgment by default and inquiry for failure to file an answer. On October 2, 1964, the defendants filed an answer to the motion for judgment by default and inquiry and at the same time filed a verified answer to the complaint. The clerk denied the motion for judgment by default and inquiry. The plaintiffs appealed from the clerk's order. The cause was entered on the motion docket for hearing at the November, 1964 session.

In addition to the documentary chronology herein recited, Judge Peel found that extension of time to file pleadings had not been granted and "the time for filing pleadings had expired; . . . It further appearing to the Court that G.S. 1-152, G.S. 1-220, and G.S. 1-276 are not applicable to this situation and that this Court does not have the dis-

cretionary power granted by these statutes; further that the Court has no discretion with respect to consideration or allowance of the defendants' Motion to Strike; and it is of the opinion that the plaintiffs are entitled to their Motion for Judgment by Default and Inquiry as a matter of law."

Judge Peel reversed the order of the clerk, entered judgment by default and inquiry, the inquiry to be executed at the next session of the court. The defendants excepted and appealed.

Donald P. Brock, Darris W. Koonce for plaintiff appellees.

George R. Hughes, Wallace & Langley, Whitaker, Jeffress & Morris by R. A. Whitaker for defendant appellants.

HIGGINS, J. In this case the demurrer was sustained in the Superior Court but was overruled in this Court. See 261 N.C. 423, 135 S.E. 2d 22. Thereafter, the proceeding is governed by that part of G.S. 1-131 which requires an answer within 30 days after the receipt of the certificate from the Supreme Court. Otherwise the plaintiff shall be entitled to judgment by default final or default and inquiry, according to the course and practice of the court. Based upon the foregoing, Judge Peel concluded that he was without power to allow an answer or other act to be done after the expiration of thirty days from the date the mandate was received from the Supreme Court.

Within ten days after this Court's decision was certified down, the defendants filed their second motion to strike. Both were pending and undisposed of when Judge Peel entered the judgment by default and inquiry as a matter of law.

The defendants, in their assignments of error, rely upon the proposition that the court, if not as a matter of right then as a matter of discretion, had authority to allow the answer as provided in G.S. 1-152. "The judge may likewise, in his discretion, and upon such terms as may be just, allow an answer or reply to be made, *or other act to be done,* after the time limited, or by an order may enlarge the time." Interpreting the above section, this Court, in *Tucker v. Transou,* 242 N.C. 498, 88 S.E. 2d 131, said: "But when a motion to strike is not made in apt time, the court has discretionary power to allow or deny such motion, and its ruling will not be disturbed on appeal in the absence of an abuse of discretion." *Bolin v. Bolin,* 242 N.C. 642, 89 S.E. 2d 303; *Parrish v. Railroad,* 221 N.C. 292, 20 S.E. 2d 299. Before the time to plead has expired, a motion may be made as a matter of right. When made thereafter, it is a matter of discretion. *Hill v. Stansbury,* 221 N.C. 339, 20 S.E. 2d 308; *Brown v. Hall,* 226 N.C. 732, 40 S.E. 2d 412.

Conceding the first motion to strike was not filed in apt time, having been filed after the demurrer, how about the second motion which was filed after the demurrer had been removed from the case by the order of this Court? It was certainly filed during the time allowed for answer and before answer. "The statute G.S. 1-153, under which the defendant's motion to strike was made, provides: . . . The defendant lodged his motion before answer, demurrer, or extension of time to plead. This being so, he may claim the benefits of the statute as a matter of right, rather than of grace." *Daniel v. Gardner,* 240 N.C. 249, 81 S.E. 2d 660. If the motion was timely filed, or if allowed to be filed as a matter of discretion, the defendants were not required to answer until the motion was passed on by the judge. *Heffner v. Jefferson Standard Life Ins. Co.,* 214 N.C. 359, 199 S.E. 293.

We pose but do not find it necessary to answer the question whether the defendants filed their second motion to strike in apt time and as a matter of right.

The record discloses with certainty that Judge Peel acted under what he conceived to be the compulsion of law in overruling the clerk and entering the judgment by default and inquiry. If it be determined that the second motion to strike was timely filed, the answer was not due until the motion was allowed or denied, assuming it was not void on its face. In such event the court was without power to enter judgment by default and inquiry. On the other hand, if it be determined the motion was not timely filed, nevertheless the court has discretionary power to allow it and, likewise, to allow the filing of the answer. In any event the court committed error in entering the default and inquiry judgment as a matter of law. For that reason, the judgment of the Superior Court is

Reversed.

STATE v. WAYNE BRYANT.

(Filed 17 March, 1965.)

1. Criminal Law § 74—

Where the State's evidence tends to show that defendant was on the outside of a filling station, presumably endeavoring to repair his companion's car while his companion was breaking into the filling station with intent to commit larceny, testimony elicited by the State on cross-examination of the companion that he did not intend to commit larceny when he entered the building but that when he saw the cash register he attempted to open it

and, upon being unable to do so, undertook to take it to the automobile, *held* competent as tending to throw light on the relationship and understanding between the two.

2. Burglary and Unlawful Breakings § 4— Evidence of defendant's guilt as aider and abetter held for jury.

Evidence that defendant and his companion had ridden around in his companion's car for some several hours prior to the break-in, that defendant was standing at the rear of the car at the filling station in question when the officers passed and became suspicious, and was standing at the front of the car with the hood up when the officers returned, that as the officers were interrogating him they heard a noise inside the station and found the companion hiding in the lubricating room, and that the companion instead of obeying the officers broke and ran, together with evidence that the window of the station had been broken and the cash register moved to the lubricating room from the sales counter, *held* sufficient to be submitted to the jury on the question of defendant's guilt as an aider and abetter.

APPEAL by defendant from *Mintz, J.*, August-September, 1964 Criminal Session, WILSON Superior Court.

The defendant was indicted for the felonious breaking and entering Aubrey Brissette's Sinclair station in Wilson County and the larceny of $52.10 in cash. At the solicitor's instance the court entered a verdict of not guilty on the larceny charge. The jury returned a verdict of guilty of the felonious breaking and from a judgment of imprisonment for eight months, the defendant appealed.

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

Vernon F. Daughtridge for defendant appellant.

HIGGINS, J. The defendant, Wayne Bryant, was tried and convicted upon the theory that he was present at the Sinclair station on the night of April 29, 1964, for the purpose of aiding and abetting his cousin, Earl Bryant, who actually did the breaking and entering with intent to steal the money and chattels kept in the building by the owner. Both were familiar with the setup at the station.

The State's evidence disclosed that the owner closed and locked up about 9:30 at night. There were an illuminated clock and a lighted vending machine in the sales room facing the Raleigh Road. A small light illuminated the apron around the pumps. Two police officers on patrol passed the station about 10:30 p.m. They saw an automobile parked near the pumps. One of the officers saw a man bending over at the rear of the vehicle. The officers became suspicious, drove a short distance, then back to the station. The defendant was then at the front

of the vehicle, with the hood up. He first stated the vehicle belonged to him but when asked for his owner's card he said it belonged to his brother.

While the officers were interrogating the defendant they heard a noise inside the station. One of the officers found Earl Bryant hiding in the lubricating room. When, in obedience to the officer's orders, Earl crawled through the broken window, he "hit the ground running." Refusing to obey the repeated orders to halt, he received a pistol wound in his leg just as he entered the woods.

The cash register had been moved into the lubricating room from the sales counter. It contained $52.10. The parked vehicle actually belonged to Earl Bryant. The two had been "riding around the country" since 6:30. Both had been drinking beer.

When the court overruled the motion for a directed verdict of not guilty, both the defendant and Earl Bryant testified as defense witnesses. The defendant testified that Earl left to go to the restroom in the station. He had no knowledge, according to his story, that Earl might develop interest in some other business such as a cash register.

Earl testified he had no intention of entering the building for the purpose of larceny until he saw the cash register. He entered through the window, attempted to open the cash register, but when the attempt failed he undertook to get it through the window, intending to take it to the automobile. Apparently his efforts alerted the officers who discovered him in the building.

The defendant strenuously objected to Earl's testimony with respect to his intentions to take the cash register to the parked automobile. He assigns its admission as error. The evidence was brought out on cross-examination. Earl was the defendant's witness, his near relative, the owner and driver of the automobile in which they both rode to the scene of the crime and in which both presumably intended to leave the scene. The defendant was charged with aiding and abetting Earl in the felonious breaking. Earl's admission was material as tending to throw light on the relationship and understanding between the two. The evidence permitted an inference the defendant was at the automobile out front to watch while Earl made the felonious entry and that both were acting in concert and intended to share in the loot. The officers appeared before the cash register was opened and Earl not having gained possession of the money, the solicitor dropped the larceny charge.

The assignment of error based on the court's refusal to direct a verdict for the defendant at the close of all the evidence is not sustained.

Other objections interposed during the trial do not disclose error; neither do they require discussion.

No error.

THE EASTERN CONFERENCE OF ORIGINAL FREE WILL BAPTISTS OF NORTH CAROLINA, AN UNINCORPORATED RELIGIOUS ASSOCIATION; AND C. B. HANSLEY, MODERATOR; A. GRAHAM LANE, ASSISTANT MODERATOR; LEMMIE TAYLOR, CLERK; H. M. MALLARD, TREASURER; OFFICERS OF SAID CONFERENCE; C. B. HANSLEY, A. GRAHAM LANE, LEMMIE TAYLOR, H. M. MALLARD AND LLOYD VERNON, EXECUTIVE COMMITTEE OF SAID CONFERENCE, AND CHARLIE PAUL, JOSEPH E. WILLIAMS, MILTON STYRON, THE BOARD OF DEACONS OF THE DAVIS ORIGINAL FREE WILL BAPTIST CHURCH, AND LESLIE STYRON, CLERK; REGINALD STYRON, TREASURER; ALL OFFICERS OF THE DAVIS ORIGINAL FREE WILL BAPTIST CHURCH; AND ROY STYRON AND GUY WILLIS, TRUSTEES OF THE SAID CHURCH; AND HARRY WILLIS, STERLING DIXON, ELMER WILLIS, WORDIE MURPHY, VAN WILLIS, AND OTHERS OF THE DAVIS ORIGINAL FREE WILL BAPTIST CHURCH UNITED IN INTEREST AND PRESENTLY RECOGNIZED BY THE EASTERN CONFERENCE OF ORIGINAL FREE WILL BAPTISTS OF NORTH CAROLINA AS THE ONE AND ONLY VALID DAVIS ORIGINAL FREE WILL BAPTIST CHURCH, ALSO KNOWN AS THE CHARLIE PAUL FACTION, PLAINTIFFS V. CLINTON PINER, JULIUS WILLIS, LLOYD DAVIS, ALL DEFENDANTS PURPORTING TO BE MEMBERS OF THE BOARD OF DEACONS OF THE DAVIS ORIGINAL FREE WILL BAPTIST CHURCH; AND LLOYD DAVIS, GRADY DAVIS, CLYDE STYRON, JOHNNIE DAVIS AND BOBBY DUDLEY, INDIVIDUALLY AND AS THE PURPORTED BOARD OF TRUSTEES OF THE DAVIS ORIGINAL FREE WILL BAPTIST CHURCH; AND T. O. TERRY, PURPORTED PASTOR OF THE DAVIS ORIGINAL FREE WILL BAPTIST CHURCH; AND DAVIS FREE WILL BAPTIST CHURCH, INC., A CORPORATION ORGANIZED AND EXISTING UNDER CHAPTER 55-A OF THE GENERAL STATUTES OF NORTH CAROLINA; AND RALPH LOWRIMORE AND OTHERS UNITED IN INTEREST WITH THE ABOVE NAMED DEFENDANTS AND KNOWN AS THE CLINTON PINER FACTION, DEFENDANTS.

(Filed 17 March, 1965.)

Religious Societies and Corporations § 3; Pleadings § 3—

An action by members of a faction of a church against a person asserting to be pastor of the church to permanently restrain him from occupying the pulpit of the church, and an action by such members against other members belonging to another faction of the church to have plaintiffs declared to be the real and rightful congregation of the church and entitled to the use and control of the church property, should be dismissed upon demurrer for misjoinder of parties and causes, since all of the defendants are not similarly affected in either cause of action.

THE defendants, other than the corporate defendant, appeal from *Peel,* J., June Session 1964 of CARTERET.

This is a civil action instituted on 22 April 1964. The Eastern Conference of Original Free Will Baptists of North Carolina, an unincorporated religious association (hereinafter called Conference), and Charlie Paul and others associated with him (known as the Charlie Paul faction), are, or claim to be, members (some officials) of Davis Original Free Will Baptist Church of Davis, North Carolina (hereinafter called Davis Church). The Conference and the Charlie Paul faction are the plaintiffs in this action.

T. O. Terry is or claims to be pastor of Davis Church. Clinton Piner and others associated with him (known as the Clinton Piner faction) are, or claim to be, members (some officials) of the Davis Church. T. O. Terry and the Clinton Piner faction are the present defendants in this action, the action having been dismissed against the corporate defendant.

The Original Free Will Baptists of North Carolina had their beginning in this State in the year 1727. The Conference was formed in 1895. The Davis Church was organized as an Original Free Will Baptist Church in 1876 and was a charter member of the Conference.

The complaint alleges, in material part, the following: Until 1957, the Davis Church was a harmonious church. Since 1895, the congregation has been a member of the Conference and until 1957 had adhered to the faith and discipline established by the Conference in its *Statement of Faith and Discipline.*

In July 1960, there developed a controversy between the Conference and the Davis Church while the Church was under the leadership of a former pastor. When T. O. Terry became pastor of Davis Church in 1961, he tried in many ways to lead the Church out of the Conference. He was instrumental in influencing the decision not to send representatives to the State and local conventions of the North Carolina Original Free Will Baptists. He attempted to align the Davis Church with the Coastal Association of Free Will Baptists, an organization that the Conference of Original Free Will Baptists did not recognize and with whom it did not hold fellowship.

Defendants T. O. Terry and the Clinton Piner faction, it is alleged, have refused, ignored and defied the Conference and have prohibited the Charlie Paul faction from using the facilities of the Davis Church for any purpose whatsoever and have excluded them altogether from any part in the government of the Church. Whereupon, this action was instituted to obtain the following relief.

"A. That the Davis Original Free Will Baptist Church be declared a member of the Eastern Conference of Original Free Will Baptists of

North Carolina and subject to its rules, regulations and determinations if properly and legally made.

"B. That the Charlie Paul Faction, including the named individual plaintiffs and their associates, be declared the true and rightful congregation of the Davis Free Will Baptist Church and entitled to the sole use, control and dominion of and over the physical properties of the said Church, subject to the customs, laws, usages and practices of the said Church, and in conformity with the said Church's long time connection with the Original Free Will Baptists of North Carolina and the Eastern Conference of Original Free Will Baptists of North Carolina.

"C. That the defendant T. O. Terry be permanently restrained and barred from occupying the pulpit of the said Church or exercising any dominion and control over the same or in any way interfering or attempting to interfere with the property and lawful use of the said Church or its physical facilities by the said plaintiffs or others by them properly and legally designated. That he be further restrained, prevented and barred from holding himself out to be a minister in good standing of the Original Free Will Baptists of North Carolina.

"D. That the other named defendants and their associates be permanently restrained and prevented from holding themselves out to be the true congregation of the Davis Original Free Will Baptist Church, either under the auspices of the corporate entity by them formed and called the Davis Free Will Baptist Church, Inc., and that they, the individuals and the corporation, be permanently restrained and barred from in any way interfering in the proper and legal operation or the carrying forward of the activities of the Davis Original Free Will Baptist Church as recognized by the Eastern Conference," *et cetera.*

The defendants T. O. Terry and the Clinton Piner faction, including the corporate defendant, filed separate demurrers on the ground that there is a misjoinder of parties and causes of action.

The court below overruled the demurrers as to all defendants except the corporate defendant; as to it, the demurrer was sustained and the action dismissed. All the other defendants appeal, assigning error.

Rodman & Rodman, John A. Wilkinson for plaintiff appellees.
Lake, Boyce & Lake; Wheatley & Bennett for defendant appellants.

PER CURIAM. The appellants assign as error that portion of the order entered below overruling the demurrer of T. O. Terry and overruling the demurrer of the other defendants other than the corporate defendant.

The cause of action alleged by the plaintiffs against defendant T. O. Terry, and the relief sought against him, does not similarly affect all the other defendants.

On the other hand, the relief sought by the plaintiffs against the Clinton Piner faction does not similarly affect the defendant Terry. *Cf. Conference v. Creech* and *Teasley v. Creech and Miles,* 256 N.C. 128, 123 S.E. 2d 619, *s. c.* 259 N.C. 1, 129 S.E. 2d 600.

We hold that there is a misjoinder both of parties and causes of action.

For the reasons stated, the order of the court below overruling the demurrers interposed by the appellants is reversed. *Teague v. Oil Co.,* 232 N.C. 65, 59 S.E. 2d 2, *s.c.* 232 N.C. 469, 61 S.E. 2d 345.

Reversed.

STATE OF NORTH CAROLINA v. CHARLES SLADE.

(Filed 17 March, 1965.)

1. Criminal Law § 131—

Where a new trial is awarded upon defendant's own application, the fact that the sentence upon conviction at the second trial exceeds the sentence imposed upon conviction at the first is not ground for legal objection.

2. Same; Constitutional Law § 36—

Sentence within that allowed by statute cannot be cruel or unusual in the constitutional sense.

3. Same—

Where defendant is convicted of a felony on one count and of a misdemeanor on another, the fact that sentence imposed is excessive for conviction of a misdemeanor is immaterial when but one sentence is entered on the verdict of guilty on both counts and the sentence imposed is within that provided by statute for conviction of the felony.

ON *certiorari* from *Campbell, J.,* 29 July 1963 Session, Schedule "A", of MECKLENBURG.

Criminal prosecution on an indictment containing two counts: The first count charges that Charles Slade on 20 November 1962 at and in Mecklenburg County, with intent to commit larceny, did wilfully and feloniously break and enter a dwelling house and building occupied by one Walter Jones, a violation of G.S. 14-54; the second count charges

that defendant Charles Slade at the same time did unlawfully and feloniously steal and carry away a coat of the value of $15, the property of the said Walter Jones.

Plea: Not guilty. Verdict: Guilty of breaking and entering and larceny.

From a judgment of imprisonment in the State's prison for a term of not less than seven years nor more than nine years, defendant appealed in open court to the Supreme Court. Defendant was represented at this trial by his court-appointed attorney at law, Thomas H. Wyche of Charlotte. Wyche did not perfect his appeal. On 28 October 1963, Clarkson, J., presiding over a criminal session, Schedule "B", of Mecklenburg superior court, dismissed the appeal for failure to perfect it. We allowed defendant's petition for *certiorari* to review his trial on 10 September 1964, and ordered that "the superior court shall immediately appoint counsel other than Thomas H. Wyche to prosecute proceedings for appellate relief." On 15 September 1964 Clarkson, J., senior resident judge of the Mecklenburg County district, entered an order appointing Arthur Goodman, Jr., a practicing member of the Charlotte Bar and a member of the present General Assembly of the State of North Carolina, to perfect his appeal and to appear for him in the Supreme Court. The case on appeal and defendant's brief have been mimeographed in the same form as that of any other solvent appellant to this Court, and paid for at public expense.

Attorney General T. W. Bruton and Deputy Attorney General Ralph Moody for the State.

Arthur Goodman, Jr., for defendant appellant.

PER CURIAM. This is the prior history of this case: At the 3 December 1962 Special Criminal Session of the superior court of Mecklenburg County, Fountain, J., presiding, defendant Charles Slade was tried upon the same bill of indictment as in this case. He entered a plea of not guilty and was found guilty by a jury as charged in the indictment. The judgment of the court was that he be imprisoned in the State's prison for a term of not less than three years nor more than five years. At the 8 July 1963 Session, Schedule "C", of the superior court of Mecklenburg County, Brock, J., conducted a post conviction hearing to review the constitutionality of defendant Slade's trial at the 3 December 1962 Session, Schedule "A", of Mecklenburg, upon defendant Slade's petition for a writ of review alleging that he was tried without being represented by counsel. G.S. 15-217 *et seq.* Judge Brock entered an order vacating the verdict and judgment entered at defendant's trial on the ground that when he was tried at the 3 December 1962

Session, Schedule "A", of Mecklenburg, he was not represented by counsel and had not waived his right to have counsel, and ordered a new trial. Judge Brock appointed Thomas H. Wyche of Charlotte to represent defendant Slade on his retrial.

Defendant does not contend that the evidence was insufficient to carry the case to the jury, and to sustain its verdict. When defendant was arrested on the same day the offenses charged were committed, he was wearing under a topcoat Walter Jones' coat. There are no exceptions or assignments of error to the charge. There are two exceptions to the evidence, but defendant in his brief states that he abandons those exceptions.

Defendant assigns as error that it was unconstitutional and an abuse of discretion for Judge Campbell to have sentenced him to imprisonment in the State's prison for a term of not less than seven years nor more than nine years upon his retrial granted at his own request, when upon his prior trial and conviction before Judge Fountain on the same indictment he had received a sentence of imprisonment in the State's prison of not less than three years nor more than five years. On the second trial defendant was convicted of the same offenses on the same indictment. This assignment of error is overruled upon authority of *S. v. White,* 262 N.C. 52, 136 S.E. 2d 205, *cert. den.* ..... U.S. ....., 13 L. Ed. 2d 707 (1 February 1965); *S. v. Williams,* 261 N.C. 172, 134 S.E. 2d 163.

In addition: The first count in the indictment charges a violation of G.S. 14-54. This statute provides that if any person, with intent to commit a felony or other infamous crime therein, shall enter the dwelling house of another otherwise than by a burglarious breaking, he shall be guilty of a felony, and shall be imprisoned for a term of not less than four months nor more than ten years. Judge Campbell's judgment on the first count in the indictment was within the limits authorized by the statute, and this being true it does not offend constitutional provisions forbidding the infliction of "cruel or unusual" punishment. Moreover, the circumstances do not show that Judge Campbell abused his statutory discretion. *S. v. Welch,* 232 N.C. 77, 59 S.E. 2d 199; *S. v. Stansbury,* 230 N.C. 589, 55 S.E. 2d 185; *S. v. Cain,* 209 N.C. 275, 183 S.E. 300. The larceny of personal property from a dwelling by breaking and entering is a felony, G.S. 14-72, for which offense there can be imprisonment for ten years, G.S. 14-70. *S. v. Williams,* 261 N.C. 172, 134 S.E. 2d 163. The second count in the indictment does not charge larceny from a dwelling by breaking and entry, but charges merely larceny of a coat of the value of $15, a misdemeanor. Conceding that the conviction of defendant of larceny as charged in the second count in the indictment will not support a judgment of imprisonment for not less

than seven years nor more than nine years, this is of no benefit to defendant, because the verdict of guilty on the first count in the indictment is sufficient to support Judge Campbell's judgment that defendant be imprisoned for a term of not less than seven years nor more than nine years. It is to be noted that Judge Campbell gave one sentence of imprisonment on the verdict of guilty on both counts in the indictment. *S. v. Womack,* 251 N.C. 342, 111 S.E. 2d 332; *S. v. Oliver,* 213 N.C. 386, 196 S.E. 325.

No error.

STATE v. CAROL WHIDBEE POWELL, JR., PETITIONER.

(Filed 17 March, 1965.)

Automobiles § 71; Constitutional Law § 33; Criminal Law § 55—

Where the person making the test is shown to be qualified as an expert in the field and the manner in which the test is made meets the requirements of G.S. 20-139.1, the testimony of such person as to the results of a breathalyzer test made on defendant some one-half hour after he was apprehended driving a motor vehicle on a highway is competent.

APPEAL by defendant from *Walker, S.J.,* Regular Session "B" Term 1964, November 2, Criminal Session of MECKLENBURG.

Defendant was convicted of operating an automobile, when under the influence of intoxicating liquors, on the public highways of this State. Sentence was imposed. He appealed.

Attorney General Bruton and Staff Attorney Hornthal for the State.
Arthur Goodman, Jr., for appellant.

PER CURIAM. An arresting officer testified defendant was operating his automobile in the wrong direction on a one way street in Charlotte. He stopped defendant and placed him under arrest. He expressed the opinion defendant was, when arrested, intoxicated. In response to inquiries by the officer, defendant admitted: "He had had two or three drinks of Scotch and water."

Defendant was arrested about 5:30 a.m. Lt. Polson of the Charlotte Police Force, not one of the arresting officers, saw defendant at 6:05 a.m. Based on his personal observation, and the quantity of alcohol consumed, as related by defendant, the witness expressed the opinion that defendant was then under the influence of intoxicants.

There was plenary evidence to support the verdict. Defendant did not, by motion to nonsuit, challenge the sufficiency of the evidence. He contends incompetent evidence weighed heavily in the jury's deliberation. He assigns as error the court's ruling in permitting Lt. Polson to state the result of a test made by using a breathalyzer. Polson testified that defendant's breath, when tested, showed .22 per cent of alcohol. Our statute, G.S. 20-139.1 (c. 966, S.L. 1963), creates a presumption of intoxication if as much as .10 per cent alcohol is present in the blood.

Before the witness was asked to relate the results of his test, inquiries were made touching his qualifications to make the test. He testified that he attended the Traffic Institute at Northwestern University in 1960, where he was taught how to use the machine invented by Dr. Borkenstein. While there, he did laboratory work on people given known amounts of alcohol to determine the results from its use. In 1962, he spent 26 days at Rutgers summer school studying alcohol and its effects on the human body. In 1963, he observed chemical tests for alcohol at Indiana University, and at the University of North Carolina. He spent some time in the factory where the machines were manufactured. He exhibited the machine to the jury, and explained the principle on which it worked. In 1964, he took a course given by the State Board of Health for the use of breathalyzers. It licensed him to make the tests.

The qualifications of the person making the test, and the manner in which the tests were made, met the requirements of G.S. 20-139.1. The evidence was competent. *State v. Willard,* 241 N.C. 259, 84 S.E. 2d 899; *State v. Moore,* 245 N.C. 158, 95 S.E. 2d 548; *Robinson v. Insurance Co.,* 255 N.C. 669, 122 S.E. 2d 801.

We quote with approval the language of Brett, P.J., in *Toms v. State,* 239 P. 2d 812. He said: "This court is of the opinion, that we should favor the adoption of scientific methods for crime detection, where the demonstrated accuracy and reliability has become established and recognized. Justice is truth in action, and any instrumentality, which aids justice in ascertainment of truth, should be embraced without delay. But, this decision is not ours to make. We have no legislative powers or duties, but the legislature within its legislative powers and constitutional limitations may do so, possibly on the theory that it is within its police power to regulate the highways for the protection of the public. We believe, in the light of the foregoing, chemical tests by experts of body fluids as blood, urine, breath, spinal fluid, saliva, etc., under varying conditions have been approved as having gained that scientific recognition for infallibility as to be admissible in evidence." A lengthy discussion, supported by references to scientific reports demonstrating the reliability of tests of the kind here in question,

may be found in *People v. Kovacik,* 128 N.Y.S. 2d 492. See also: *State v. Johnson,* 199 A. 2d 809; *State v. Miller,* 165 A. 2d 829; *People v. Conterno,* 339 P. 2d 968; *McKay v. State,* 235 S.W. 2d 173; *People v. Bobczyk,* 99 N.E. 2d 567.

Mr. Justice Clark lists, in a note to his opinion in *Breithaupt v. Abram,* 352 U.S. 432, 1 L. Ed. 2d 448, 77 S. Ct. 408, 23 states which had, prior to 1957, adopted statutes giving rise to a presumption of intoxication based on the finding of fixed percentages of alcohol in the bloodstream. He commented: "The fact that so many States make use of the tests negatives the suggestion that there is anything offensive about them."

Affirmed.

STATE v. DONALD BENFIELD.

(Filed 17 March, 1965.)

1. Criminal Law § 149—

An "appeal" docketed in apt time after adjudication at a post conviction hearing will be treated as a *certiorari.*

2. Criminal Law § 23—

Where it appears at a post conviction hearing that during the course of the trial the court informed defendant's counsel that the court was of the opinion that the jury was going to convict and, if the jury did so, the court felt inclined to give a long sentence, that defendant was informed of the statement of the court, and that defendant knew that his companion in the commission of the offenses, when awarded a new trial, was given a suspended sentence, and that defendant thereupon changed his plea of not guilty to guilty, *held* the circumstances disclose that the plea of guilty was not voluntarily made, and a new trial must be awarded.

APPEAL by defendant from *Campbell, J.,* November 30, 1964 Session of GASTON.

In April 1960, defendant was placed on trial on three bills charging armed robbery, a felony, G.S. 14-87. He was not represented by counsel. The charges were consolidated for trial. The jury returned a verdict of guilty on each charge. A prison sentence of not less than 15 nor more than 20 years was imposed.

Defendant, in 1963, filed a petition, as permitted by Art. 22, c. 15 of the General Statutes, asserting a denial of his constitutional rights when he was tried in 1960. On December 9, 1963, the Superior Court of

Gaston County heard evidence, made findings, and concluded that defendant's constitutional rights were not protected at the 1960 trial. Defendant was awarded a new trial, and counsel was appointed to represent him at the trial thereafter to be had.

The trial, ordered in December 1963, was had in February 1964. Defendant again pleaded not guilty. After the jury was impaneled, and while the State was offering evidence, defendant requested permission to withdraw his plea of not guilty. He then tendered a plea of guilty. The plea was accepted. The court thereupon imposed a prison sentence of not less than 10 nor more than 15 years.

In the Fall of 1964, defendant filed a petition attacking the validity of the trial had in February 1964. He alleged, as a ground to vacate the judgment of imprisonment then imposed, that his plea of guilty was not in fact free and voluntary, but was made under duress; that his companion in the alleged robberies was, when granted a new trial, given a suspended sentence; when he entered his plea of guilty in February, 1964, he understood that he would likewise be given a suspended sentence, but that if he did not so plead, a lengthy prison sentence would be imposed.

Judge Campbell, presiding over the courts of Gaston County, heard evidence. He concluded defendant's plea of "guilty" was freely made. On December 9, 1964, he entered an order denying relief. Defendant gave notice of appeal. By an order entered January 10, 1965, defendant was allowed to appeal as a pauper.

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

Robert E. Gaines for defendant appellant.

PER CURIAM. Defendant was represented in both the hearing below and now by counsel other than the attorney who represented him in February 1964. The record and "appeal" were docketed here on January 26, 1965, less than 60 days from the rendition of the judgment denying defendant relief. We treat the "appeal" as an application for a writ of *certiorari*. The application is granted.

Judge Campbell denied defendant's prayer for a new trial on these findings: The case was regularly called for trial in February 1964. Defendant entered pleas of not guilty. A jury was impaneled. During the course of the trial, the presiding judge had a conference with the solicitor and counsel for defendant, at which time the judge informed defendant's counsel that "he (the judge) was of the opinion that the jury was going to convict the defendant, and, if so, he felt inclined to give him a long sentence, and gave counsel an opportunity to confer

with defendant." The statements made by the judge during the conference were communicated to defendant. The judge did not promise to suspend sentence if a plea of guilty was entered. When defendant was informed of the statements made by the presiding judge at the conference between the solicitor and defendant's counsel, defendant withdrew his plea of not guilty, and tendered a plea of guilty. This plea was accepted. The court then, in open court, inquired whether defendant's plea of guilty was freely and voluntarily made, explaining to defendant that the court could impose sentences providing for imprisonment for a total of 90 years. Hearing this explanation from the court, the defendant stated that his plea of guilty was freely made.

The fact that defendant's companion in the robberies was, when awarded a new trial, given a suspended sentence is not controverted. That fact was known to defendant. It is simply an element which must be taken into consideration in determining whether in fact the plea of guilty was freely and voluntarily made. The fact that the court interrupted the hearing before all the evidence was in to express the opinion that the jury would convict defendant, followed by the statement that, if convicted, defendant could expect "a long sentence," necessarily leads, we think, to the conclusion that defendant changed his plea from not guilty to guilty because of what the judge said. It cannot be said that the plea was in fact a voluntary plea. On the findings made, Judge Campbell should have awarded a new trial. Defendant may now be tried on the bills charging him with armed robbery.

Reversed.

STATE v. CHARLES E. MORROW.

(Filed 17 March, 1965.)

1. Criminal Law § 125—

Repudiation by one witness of his testimony at the trial is not a sufficient basis to invoke the court's discretionary power to order a new trial for newly discovered evidence when the testimony of such witness at the trial was merely cumulative or corroborative of testimony given by other witnesses.

2. Same—

A motion for a new trial for newly discovered evidence is addressed to the sound discretion of the trial court, and the court's determination thereof will not be disturbed in the absence of a showing of abuse of discretion.

STATE *v.* MORROW.

APPEAL by defendant from *Martin, Special Judge,* November 9, 1964 Special Criminal Session of MECKLENBURG.

At April 13, 1964 Special Criminal Session of Mecklenburg, the jury found defendant "guilty as charged of the crime of rape with a recommendation of life imprisonment," and judgment of life imprisonment was pronounced. Upon defendant's appeal, this Court at Fall Term 1964 found "No error." *S. v. Morrow,* 262 N.C. 592, 138 S.E. 2d 245. Thereafter, in the superior court, defendant, attaching thereto an affidavit of Warren H. Summers, filed a motion for a new trial on the ground of newly discovered evidence.

At February 3, 1964 Criminal Session of Mecklenburg, defendant, Charles E. Morrow, and Warren Hill Summers were indicted jointly for the rape on December 21, 1963 of Sara Lee Guion.

At said April 1964 Session, Summers, through counsel, tendered a plea of guilty as charged. The solicitor, with the approval of the court, accepted said plea; and the court, in compliance with G.S. 15-162.1, pronounced judgment that Summers be imprisoned for life in the State's Prison.

In the trial of defendant at said April 1964 Session, Summers, as a witness for the State, testified, in substance, that he and defendant had raped Mrs. Guion. Mrs. Guion and her husband, Benny Guion, as witnesses for the State at said trial, positively identified Summers and defendant as the men involved and testified that each had raped Mrs. Guion.

The affidavit of Summers attached to defendant's said motion for a new trial asserts that his testimony as a State's witness in the trial of defendant "is false."

A plenary hearing in open court on defendant's said motion, defendant being present in person and represented by counsel, was conducted by Judge Martin. Evidence was offered by defendant and by the State.

At said hearing before Judge Martin, Summers testified that he did not rape Mrs. Guion; that he did not see her on the night of December 21, 1963 or on any other occasion prior to his arrest; and that he was not with the defendant on the night of December 21, 1963.

The testimony of Summers at said hearing before Judge Martin was in direct conflict with: (1) Summers written (signed) statement of March 5, 1964; (2) his statements in open court in response to questions by Judge Braswell when his plea of guilty was tendered and accepted; (3) the testimony of counsel who had represented him prior to and on the occasion he tendered his plea of guilty; (4) the testimony of Mr. Stegall, one of the arresting officers; and (5) his own testimony at the trial of defendant at said April 1964 Session.

At the conclusion of said hearing, after stating his findings of fact and conclusions of law, Judge Martin, "in the discretion of the Court," denied defendant's motion and ordered that defendant "be remanded to the custody of the State Prison Department."

Defendant excepted and appealed.

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

George J. Miller for defendant appellant.

PER CURIAM. The evidence offered by defendant in support of his motion was insufficient to establish the prerequisites for granting a new trial on the ground of newly discovered evidence stated by Stacy, C.J., in the oft-cited case of *S. v. Casey,* 201 N.C. 620, 161 S.E. 81. Moreover, a motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court. *S. v. Williams,* 244 N.C. 459, 94 S.E. 2d 374; *S. v. Dixon,* 259 N.C. 249, 130 S.E. 2d 333. The findings of fact are amply supported by the evidence. As stated by Judge Martin, the testimony of Summers at the trial of defendant at said April 1964 Session "was merely accumulative and corroborative of the testimony of the witness Sara Lee Guion and Mr. Guion." Judge Martin, in the exercise of his discretion, denied defendant's said motion. No abuse of discretion is suggested and certainly none appears. We perceive no merit in defendant's appeal. Hence, Judge Martin's order will be and is affirmed.

Affirmed.

PERFECTING SERVICE COMPANY, A CORPORATION v. PRODUCT DEVELOPMENT AND SALES COMPANY, A CORPORATION AND RADIATOR SPECIALTY COMPANY, A CORPORATION.

(Filed 17 March, 1965.)

1. Appeal and Error § 59; Pleadings § 24—

A statement in a decision of the Supreme Court that a party might move to amend a particular pleading for a specific purpose does not import that such party may amend as a matter of right at any time, but only that such party may move for permission to amend in accordance with set procedure.

2. Pleadings § 24—

A motion to be allowed to amend is addressed to the discretion of the court, and the court's decision thereon is not subject to review in the absence of a showing of abuse of discretion.

APPEAL by defendant, Radiator Specialty Company, from *Walker, S. J.*, October 26, 1964, "C" Non-jury Civil Session of MECKLENBURG.

Wardlow, Knox, Caudle & Wade for plaintiff appellee.
Weinstein, Waggoner & Sturges for defendant appellant.

PER CURIAM. This is the third appeal we have heard in this cause. The action was instituted in 1957. It came to trial in February 1962, and verdict and judgment were favorable to plaintiff. Defendants appealed and a new trial was granted. *Service Co. v. Sales Co.*, 259 N.C. 400, 131 S.E. 2d 9. In January 1964 the superior court sustained plaintiff's demurrer to the cross-action and counterclaim set out in the *Third Amended Answer* of defendant, Radiator Specialty Company (Radiator). Radiator appealed and the ruling of the trial judge on the demurrer was affirmed. *Service Co. v. Sales Co.*, 261 N.C. 660, 136 S.E. 2d 56. The pleadings of the parties and the law applicable thereto are set out at length in the opinions on the first and second appeals.

The second opinion states that "Radiator, if so advised, may move to amend its answer so as to set out separately in clear and unambiguous terms the facts upon which it relies for a counterclaim against plaintiff for breach of *express* contract for engineering, designing and fabricating a model." Radiator apparently interpreted this statement as an adjudication that it might as of right file a counterclaim at any time. If so, it was in error. The comment was nothing more than a reminder that it might move in superior court for permission to amend in accordance with the rules of procedure set out in the statutes and decided cases. *Scott v. Harrison*, 217 N.C. 319, 7 S.E. 2d 547.

The second opinion in this cause was issued in May 1964. On 22 October 1964 Radiator, without notice or leave of court, filed counterclaim with the clerk of superior court. Plaintiff demurred and moved to strike. At session Radiator moved the court to allow the filing of the counterclaim as an amendment to its Third Amended Answer. The court "in its discretion" denied the motion to thus amend, and, apparently to avoid still another appeal in the event the ruling on the motion to amend should be overruled, sustained the demurrer and motion to strike.

The motion of Radiator to amend was addressed to the discretion of the court and the court's decision thereon is not subject to review — there is no showing or contention that the court abused its discretion. G.S. 1-125; G.S. 1-131; G.S. 1-141; G.S. 1-163; *Cody v. Hovey*, 217 N.C. 407, 8 S.E. 2d 479; 219 N.C. 369, 14 S.E. 2d 30; *Hardy v. Mayo*, 224 N.C. 558, 31 S.E. 2d 748; 1 McIntosh: North Carolina Practice and Procedure, §§ 1282, 1283, pp. 508-711. Furthermore, the inclusion of

most of the matters alleged in the counterclaim violates the law of the case as declared in the former opinions.

Affirmed.

JUNIOR HALL, INC., T/A SEATON HALL v. CHARM FASHION CENTER, INC.

(Filed 17 March, 1965.)

Evidence § 58—

Where defendant's witness testifies that the merchandise in question was defective and not marketable, it is competent for the seller's attorney to elicit on cross-examination that the witness had appeared as a witness in another like suit and that the witness had known the purchaser over a number of years and was raised in the same town, and the court correctly instructs the jury that such testimony was admitted for the purpose of showing bias, if it did so show.

APPEAL by defendant from *Huskins, J.*, November 9, 1964 "A" Civil Session, MECKLENBURG Superior Court.

Civil action by plaintiff, a Massachusetts corporation, to recover $1,614.25 from the defendant, a North Carolina corporation, allegedly due by account for articles of wearing apparel sold and delivered to the defendant.

The defendant answered, admitted the receipt of certain shipments of wearing apparel, but some of which on account of defective material and workmanship were unsalable and were returned to the plaintiff. The defendant denied there was any balance due on the account.

Both parties introduced evidence. The jury found the defendant was indebted to the plaintiff in the sum of $1,348.25. From a judgment on the verdict, the defendant appealed.

Harkey, Faggart, Coira & Fletcher by Francis M. Fletcher, Jr., for plaintiff appellee.

Winfred R. Ervin for defendant appellant.

PER CURIAM. The plaintiff's evidence, oral and record, was sufficient to go to the jury and to support the verdict. The defendant's sole assignments of error discussed in the brief relate to the questions propounded by counsel to a defendant's witness designed to show bias. The witness testified that she was in defendant's store at the time a

large shipment from Seaton Hall was delivered. "The workmanship was so poor I did not want any of it . . . I told her (Mrs. Davis, President of the defendant) I would not hang it in my store even as seconds or thirds . . . In my opinion the merchandise I saw was not marketable."

On cross-examination, she testified she had known Mrs. Davis "quite a few years. Both of us were raised up near Boone." On cross-examination, the witness testified, over objection, that she had appeared as a witness at the request of Mrs. Davis in another suit involving the return of merchandise from another shipper. The court instructed the jury: "This is admitted . . . for the purpose of showing bias . . . if in fact it does tend to do so . . . a matter for the jury to determine."

The testimony of the witness, in view of her relationship to the president of the defendant, was such as to be admissible on the question of bias. The court limited the testimony to that purpose. In the trial, we find

No error.

JOHNNIE O. BURGESS v. C. G. TATE CONSTRUCTION COMPANY.

(Filed 17 March, 1965.)

Appeal and Error § 39—

The burden is on appellant not only to show error but also that the alleged error is prejudicial.

APPEAL by plaintiff from *Martin, S. J.*, October 26, 1964 Civil Session of NASH.

Plaintiff instituted this action to recover damages for personal injuries which he alleges were caused by defendant's actionable negligence. On September 1, 1962, defendant, a highway contractor, was engaged in construction work on Highway 64 between Nashville and Rocky Mount. About 11:55 p.m., plaintiff, who was operating a pickup truck, collided with an unlighted barricade which defendant's employees had placed across that highway at a detour. In the collision, plaintiff was injured and his truck damaged. Issues of negligence, contributory negligence, and damages were submitted to the jury. The verdict established that plaintiff was injured by the negligence of defendant as alleged in the complaint and that plaintiff, by his own

negligence, contributed to his injuries and damage. From the judgment that he recover nothing, plaintiff appeals, assigning errors in the judge's charge to the jury.

William L. Thorp, Jr.; William D. Etheridge for plaintiff.
Fields & Cooper for defendant.

PER CURIAM. We have examined the record and considered each of plaintiff's assignments of error. We find no error which, in our opinion, affected the verdict. "'Verdicts and judgments are not to be set aside for harmless error or for mere error and no more . . .'" *Collins v. Lamb,* 215 N.C. 719, 720, 2 S.E. 2d 863, 864. The burden is on appellant to show not only that there was error in the trial but also that there is a reasonable probability that "the result was materially affected thereby to his hurt." *Garland v. Penegar,* 235 N.C. 517, 519, 70 S.E. 2d 486, 488. We find no reason to disturb the result of the trial.

No error.

ELIZABETH C. JENKINS v. HARVEY C. HINES COMPANY.

(Filed 24 March, 1965.)

1. Trial § 21—

On motion to nonsuit, plaintiff's evidence must be considered in the light most favorable to plaintiff, and defendant's evidence which is favorable to plaintiff must also be considered in such light.

2. Food § 1— Evidence permitting inference that bottled drink exploded in plaintiff's hand because of defect in bottle held to take case to jury.

Evidence tending to show that a drink bottled by defendant exploded in plaintiff's hand as she was attempting to remove the bottle from a cardboard carton and place it in a refrigerator in her kitchen, and that another bottle prepared by defendant exploded in the hands of another person some two days later under substantially similar conditions, together with evidence offered by defendant that some of the empty bottles returned to his plant for refilling had chips and cracks, that a defective bottle did occasionally get past the inspectors, that bottles had been seen to break or broken bottles were seen in the washers, and that the cap on all bottles was so designed as to allow internal pressure to escape in the event that pressure became abnormally high, *is held* sufficient to be submitted to the jury on the issue of the bottling company's negligence. Whether evidence of

a single similar instance of the breaking of a bottle is alone sufficient to overrule nonsuit, *quaere?*

3. Same—

Evidence that as plaintiff was taking a bottled drink from a cardboard carton to place it in a refrigerator in her kitchen the bottle exploded and that some two days thereafter a bottled drink prepared by the same bottler exploded while in the hands of the purchaser as he was taking it from the "drink box", and that on neither occasion did the bottle strike any object while in the presence or possession of the person in whose hands it exploded, *held* to show substantially similar circumstances and reasonable proximity in time within the rule of competency.

4. Trial § 11—

While counsel is entitled to argue the whole case, the law and the facts, to the jury, G.S. 84-14, it is error for the court to permit counsel to argue matters without factual or legal justification upon the evidence.

5. Same; Damages § 14.1—

Where plaintiff testified that her injury no longer caused pain in her finger but that she had only a drawn feeling amounting to discomfort, argument of counsel to the effect that her life expectancy amounted to so many minutes and that compensation for her *pain* at one cent per minute of such time would amount to a specified figure, *is held* improper as not being justified factually or legally upon the evidence.

6. Appeal and Error § 54—

Whether the Court will grant a partial new trial rests in its sound discretion, and in this case a new trial is awarded on all of the issues, notwithstanding prejudicial error is determined upon the issue of damages alone.

HIGGINS, J., dissents on ground nonsuit should have been entered.

APPEAL by defendant from *Fountain, J.*, February 1964 Session of LENOIR, docketed and argued as No. 308 at Fall Term 1964.

Plaintiff seeks to recover damages for injuries caused by the explosion of a bottle of Coca-Cola she had purchased from a retail grocery store in Kinston, North Carolina. She alleged the Coca-Cola had been bottled and sold by defendant to said store.

Plaintiff alleged the explosion of said bottle of Coca-Cola and her injuries were proximately caused by the negligence of defendant in that defendant had filled a defective and weakened bottle with carbonated Coca-Cola in such manner that the pressure in the bottle was excessive to such extent that defendant knew or should have known that, "in the ordinary handling, storing or use of the same," such bottle was likely to explode and injure persons handling or near such bottle.

Answering, defendant, a corporation, averred that, in August 1961 and for many years prior thereto, it was engaged in Kinston, North

Carolina, in the business of bottling Coca-Cola for sale to the public at wholesale and retail. It denied all allegations relating to its alleged actionable negligence.

Evidence was offered by plaintiff and by defendant.

Answering the two issues submitted, the jury (1) found that plaintiff was injured by the negligence of defendant as alleged in the complaint and (2) awarded damages in the amount of $15,000.00. Judgment for plaintiff in accordance with said verdict was entered. Defendant excepted and appealed.

LaRoque, Allen & Cheek and White & Aycock for plaintiff appellee.
Whitaker, Jeffress & Morris for defendant appellant.

BOBBITT, J. Defendant assigns as error the denial of its motion, at the conclusion of all the evidence, for judgment of involuntary nonsuit.

In *Styers v. Bottling Co.*, 239 N.C. 504, 80 S.E. 2d 253, Parker, J., based on decisions cited, summarizes the legal principles pertinent to decision on this appeal as follows:

"It is well settled law in North Carolina that proof of injury caused by the explosion of a bottle containing a carbonated beverage, standing alone, is not sufficient to carry the case to the jury on the ground of actionable negligence. The principle of *res ipsa loquitur* is not applicable. *Davis v. Bottling Co.*, 228 N.C. 32, 44 S.E. 2d 337; *Enloe v. Bottling Co.*, 208 N.C. 305, 180 S.E. 582; *Cashwell v. Bottling Works,* 174 N.C. 324, 93 S.E. 901.

"The installation by the bottler of modern machinery and appliances, such as is in general and approved use, does not *ipso facto* exculpate the defendant from liability. *Enloe v. Bottling Co., supra; Grant v. Bottling Co.*, 176 N.C. 256, 97 S.E. 27.

"Direct evidence of actionable negligence on defendant's part is not requisite; such negligence may be inferred from relevant facts and circumstances. *Enloe v. Bottling Co., supra; Broadway v. Grimes,* 204 N.C. 623, 169 S.E. 194; *Dail v. Taylor,* 151 N.C. 284, 66 S.E. 135.

"In cases where damages are sought for injuries caused by such explosion, when the plaintiff has offered evidence tending to show that like products filled by the same bottler under substantially similar conditions, and sold by the bottler at about the same time have exploded, there is sufficient evidence to carry the case to the jury, as such facts and circumstances permit the inference that the bottler had not exercised that degree of care required of him under the circumstances. Such similar instances are allowed to be shown as evidence of a probable like occurrence at the time of plaintiff's injury when, and only when, ac-

companied by proof of substantially similar circumstances and reasonable proximity in time. *Davis v. Bottling Co., supra; Ashkenazi v. Bottling Co.*, 217 N.C. 552, 8 S.E. 2d 818; *Enloe v. Bottling Co., supra; Broadway v. Grimes, supra; Perry v. Bottling Co.*, 196 N.C. 175, 145 S.E. 14; *Grant v. Bottling Co., supra.*"

In accord: *Graham v. Bottling Co.*, 257 N.C. 188, 125 S.E. 2d 429.

Plaintiff offered evidence tending to show:

In August 1961 Douglas L. Baker, who operated a self-service retail grocery store under the name of Parkview Superette, purchased wholesale from defendant the bottled Coca-Colas sold in said store. Defendant made deliveries twice (occasionally three times) a week. Defendant's agent (driver) would remove six-bottle pasteboard cartons from wooden crates and stack them six to eight cartons high on the Coca-Cola display stand.

On Friday, August 18, 1961, or on Saturday, August 19, 1961, plaintiff, a regular customer of Parkview Superette, purchased a six-bottle pasteboard carton of regular size Coca-Colas, had it placed in her car and drove to her home. Upon arrival, the Coca-Colas were placed in a refrigerator in a room in a "little house," located "about 100 feet" from plaintiff's home. The Coca-Colas remained in said (extra) refrigerator until plaintiff's husband brought the carton into the kitchen of plaintiff's home about 1:00 p.m. on Sunday, August 20th, and placed it on a counter in the kitchen. Shortly thereafter, while plaintiff was taking one of the bottles from said carton to place it in her (kitchen) refrigerator, it exploded in her right hand. On account of serious injury to her right index finger and other cuts received from "flying glass," plaintiff was taken quickly to a hospital.

After the explosion, the lower part of the bottle, "maybe a third," was in plaintiff's right hand. On the floor, there was a section of the neck of the bottle, "an inch and a half maybe," with the cap or crown on it. There was glass "all over the kitchen and into the dining room from the Coca-Cola bottle." The broken glass was put in a garbage can and disposed of the next day by plaintiff's cook.

On August 22, 1961, one John Kassouf, who had leased from plaintiff's husband a concession stand in a tobacco warehouse, was taking a bottled Coca-Cola from the "drink box." The bottle exploded in his hand, the glass breaking into "some pretty good size and some smaller pieces." No one was injured. Kassouf had purchased Coca-Colas, including the bottle that exploded, from defendant. They had been delivered to him on Friday, August 18th, when Kassouf was stocking the concession stand for the opening of the tobacco market on Tuesday, August 22nd. It was stipulated "that all Coca-Colas bottled by the de-

fendant during 1961 were bottled under substantially similar conditions."

In addition, plaintiff offered evidence tending to show: (1) that the Coca-Colas purchased by plaintiff from Parkview Superette did not strike any object while in her possession or presence; (2) that these Coca-Colas struck no object while in the possession or presence of Mr. Jenkins on Sunday, August 20th; and (3) that the bottle of Coca-Cola Kassouf was bringing out of the "drink box" on Tuesday, August 22nd, after it had been delivered "inside the concession stand," struck no object while in Kassouf's possession or presence.

The testimony as to the explosion in Kassouf's hand on August 22, 1961 of a bottle of Coca-Cola sold and delivered to him by defendant on August 18, 1961, was sufficient, in our opinion, to support a finding that this incident occurred under "substantially similar circumstances and reasonable proximity in time" as the incident when plaintiff was injured by the exploding bottle of Coca-Cola.

Defendant asserts the rule adopted by this Court requires proof of more than one "similar instance." Certainly, the rule as stated refers to "similar instances." With reference to the explosion of a bottle containing a carbonated drink, we find no decision of this Court to the effect that evidence of one similar instance is sufficient to carry the case to the jury. On the other hand, we find no decision where the plaintiff was nonsuited on the ground evidence of one similar instance was insufficient.

When we consider decisions involving deleterious matter in a bottled drink, the following appears: In *Hampton v. Bottling Co.,* 208 N.C. 331, 180 S.E. 584, the third headnote indicates proof of one "similar instance" would be sufficient. However, the record (and less clearly, the opinion) discloses that proof of more than one such instance was offered. In *Tickle v. Hobgood,* 216 N.C. 221, 4 S.E. 2d 444, and in *Elledge v. Bottling Co.,* 252 N.C. 337, 113 S.E. 2d 435, the plaintiff was nonsuited. Although reference is made to the fact that plaintiff offered evidence of only one "similar instance," this was not the basis of decision.

In *Caudle v. Tobacco Co.,* 220 N.C. 105, 16 S.E. 2d 680, where plaintiff was injured by a fishhook in a plug of chewing tobacco, evidence was offered of one other similar (?) instance. This Court, by a majority of four to three, held the case had been properly submitted to the jury. The following from the dissenting opinion of Barnhill, J. (later C.J.), is noteworthy: "Even if it be conceded that one other instance is sufficient to carry the case to the jury this evidence signally fails to establish the essentials of such other instance under the rule to which we

have consistently adhered." Also, see *Corum v. Tobacco Co.*, 205 N.C. 213, 171 S.E. 78.

In our opinion, whether a case should be submitted to the jury should not depend solely upon whether there is evidence of only one or of more than one "similar instance." Depending upon the circumstances, one such instance may well be of greater significance than two or more others.

Conceding, without deciding, that one such "similar instance," nothing else appearing, may not be sufficient, yet such "similar instance" is a significant evidential circumstance for consideration in determining whether, upon all the evidence, the case is one for the jury.

Defendant's evidence as well as that offered by plaintiff is to be considered in the light most favorable to plaintiff. *Pinyan v. Settle*, 263 N.C. 578, 584, 139 S.E. 2d 863.

Defendant offered evidence tending to show its procedures in handling bottles collected and brought to its plant by its drivers, and its procedures in filling, charging, capping, crating, storing and delivering bottled Coca-Colas. While much of this evidence is favorable to defendant, portions thereof from which inferences favorable to plaintiff may be reasonably drawn include the matters set forth below.

The cost of bottles is defendant's "biggest expense item." In 1961, defendant purchased bottles from Laurens and from Owens-Illinois. However, "(a) good percentage of the empty bottles returned to" defendant's plant were not "originally purchased from our company." In the course of its business, defendant collected empty bottles "purchased in other areas," *e.g.*, Fayetteville and Charlotte. "A good percentage of the bottles" returned to defendant's plant were broken, chipped, scuffed, cracked or "in some way defaced." Ordinarily, a bottle was used from one to three years.

Washing the bottles is the first process. If the boys who put the returned bottles on the loading machine "see a bottle that is chipped on the top or cracked or broken, then they dispose of it before it goes into the washer."

The bottles pass from the washer on a stainless steel conveyor belt toward the filler. Two girls, each of whom is relieved by the assistant plant superintendent for fifteen minutes each hour, observe the bottles for defects as they pass at the rate of 240-250 bottles per minute. These girls sit approximately four or five feet apart. Defendant's plant superintendent testified: ". . . the first girl does occasionally miss a bottle." Again: "I do know that no inspection is made of these bottles from the time they pass the second girl, from then on no local inspection is made of these bottles by any member of our company."

After passing inspection of the two girls, the bottles go to the filler, then to the crowner, then pass the RCA electric eye for final inspection for "any foreign matter that might be in the bottle," then "they are cased automatically 24 to the case," then they are stacked on a "case pallet," "42 cases to the pallet." Thereafter, they are stored until the case pallets are placed by means of a "fork lifter" onto trucks for delivery to customers.

Defendant's plant superintendent testified: "In my experience in the summer of 1961, and after and before, I have seen bottles break or broken bottles in these washers." Again: ". . . I have seen bottles of Coca-Cola break at the filler."

Dr. Beisler, an expert witness, testified that "the Coca-Cola bottle is made to withstand a minimum of four hundred pounds per square inch"; that "the maximum pressure that one could get in a Coca-Cola bottle on vigorous shaking," at a temperature of 100 degrees Fahrenheit, "would be approximately eighty pounds per square inch"; and that a Coca-Cola bottle has five times the strength necessary to withstand the pressure normally present under conditions of 100 degrees Fahrenheit.

Dr. Beisler testified that he had "conducted tests to determine the breaking point of Coca-Cola bottles as the result of a sudden change in temperature"; that "the pressure in a Coca-Cola bottle will increase about one pound per square inch for each one degree temperature rise fahrenheit"; and that "if you decrease the temperature the pressure will fall off about that same amount, about one pound per square inch for each one degree fahrenheit."

Dr. Beisler testified that the "crown or cap on a Coca-Cola bottle is so designed as to allow internal pressure to escape in the event that the pressure were to become abnormally high."

Dr. Beisler's admitted testimony and also certain excluded testimony related to sound Coca-Cola bottles.

Based on Dr. Beisler's testimony, it appears that the internal pressure in the bottle handled by plaintiff was not sufficiently high to permit the gas to escape through the crown or cap. If the pressure in the bottle was not "abnormally high," it would seem reasonable to infer that the explosion occurred on account of a defect in the bottle.

When considered in the light most favorable to plaintiff, we are of opinion, and so decide, that the evidence was sufficient to require submission to the jury.

Each of defendant's assignments of error relating to rulings on evidence and to portions of the charge has received careful consideration. Error, if any, in these respects, is not deemed sufficiently prejudicial to justify the award of a new trial.

The record shows that, during the argument of counsel (Mr. Aycock) for plaintiff, the following occurred:

"COUNSEL FOR DEFENDANT OBJECTS TO THE ARGUMENT OF COUNSEL FOR THE PLAINTIFF:

"MR. AYCOCK: I said there are sixty minutes per hour, that the average person sleeps eight hours, that leaves 16 hours, leaves 960 waking minutes, three hundred and sixty-five days a year 350,400 waking minutes in the course of a year.

"MR. JEFFRESS: I anticipate that he was going to evaluate.

"MR. AYCOCK: Take 350,400 waking minutes per year, multiply by 25 years is 8,610,000 waking seconds. This woman is expected to live if she lives the normal expectancy. If we apply one cent per minute for the time she is awake we figure, with her finger paining her, comes to $86,100.00.

"MR. JEFFRESS: We would like the record to show that we object to the computation of counsel on a minute basis for damages.

"OBJECTION, OVERRULED, DEFENDANT EXCEPTS.

"This is DEFENDANT'S EXCEPTION NO. 14."

The record contains no further reference to said incident or argument.

Defendant contends there was no factual or legal basis for the quoted argument; that the court's ruling indicated it was proper for the jury to consider the matters referred to in said argument; and that the court's failure to sustain defendant's objection was prejudicial error.

Defendant relies largely on *Botta v. Brunner,* 138 A. 2d 713, 60 A.L.R. 2d 1331, and cases cited therein. In *Botta,* the Supreme Court of New Jersey, reversing in this respect the decision of the Superior Court, Appellate Division, 126 A. 2d 32, approved the action of the trial judge who, on objection, declared a similar argument to be improper as to "the measure of damages for pain and suffering" and directed that it be discontinued. However, the Supreme Court affirmed the portion of the decision of the Appellate Division which awarded plaintiff a new trial, solely as to the issue of damages, on account of a prejudicial error (not relevant here) in the instructions of the trial judge relating to the issue of damages.

In *Botta,* the questions considered and decided by the Supreme Court are stated in the opinion of Francis, J., as follows: "But since the nature of the subject matter (damages for pain and suffering) admits only of the broad concept of reasonable compensation, may counsel for the plaintiff or the defendant state to the jury, in opening or closing, his belief as to the pecuniary value or price of pain and suffering per hour or day or week, and ask that such figure be used as part of a mathematical formula for calculating the damages to be awarded?

Without expressing a personal opinion, may he suggest that the valuation be based on so much per hour or day or week, or ask the jurors if they do not think the pain and suffering are fairly worth so much per hour or day or week — and then demonstrate, by employing such rate as a factor in his computation, that a verdict of a fixed amount of money would be warranted or could be justified?" The Court answered each question, "No."

For full discussion and supporting authorities, reference is made to the opinion of Francis, J. The following excerpts indicate the basis of decision: "There can be no doubt that the prime purpose of suggestions, direct or indirect, in the opening or closing statements of counsel of per hour or per diem sums as the value of or as compensation for pain, suffering and kindred elements associated with injury and disability is to instill in the minds of the jurors impressions, figures and amounts not founded or appearing in the evidence." Again: "They (such suggestions of valuations or compensation factors for pain and suffering) import into the trial elements of sheer speculation on a matter which by universal understanding is not susceptible of evaluation on any such basis. No one has ever argued that a witness, expert or otherwise, would be competent to estimate pain on a per hour or per diem basis."

For decisions in conflict with *Botta,* see Annotation, "Per diem or similar mathematical basis for fixing damages for pain and suffering." 60 A.L.R. 2d 1347 *et seq.;* 12 Rutgers Law Review 522 *et seq.; Continental Bus System, Inc. v. Toombs (Tex),* 325 S.W. 2d 153.

It is noted that our statute, G.S. 84-14, in pertinent part, provides: "In jury trials the whole case as well of law as of fact may be argued to the jury." Too, under our decisions, "(c)ounsel have a wide latitude in arguing their cases to the jury, and have the right to argue every phase of the case supported by the evidence, and to argue the law as well as the facts." 4 Strong, N. C. Index, Trial § 11, p. 298.

Disposition of this appeal in defendant's favor does not require that we accept without qualification the decision and reasoning in *Botta.* Plaintiff testified: "Answering the question whether at the present time my hand or finger pains me, it feels like it is drawn up, or being drawn; it feels almost like it looks, tight. It doesn't interfere with my rest at night now. It doesn't give me any pain other than the feeling of being drawn. That is a discomfort." In the light of plaintiff's testimony, it is our opinion, and we so decide, that the argument of plaintiff's counsel to which defendant objected was without factual or legal justification and was prejudicial to defendant. Hence, for error in overruling its objection to said argument, defendant is entitled to a new trial.

"It is settled beyond controversy that it is entirely discretionary with the Court, Superior or Supreme, whether it will grant a partial new

trial." *Lumber Co. v. Branch,* 158 N.C. 251, 253, 73 S.E. 164; *Johnson v. Lewis,* 251 N.C. 797, 804, 112 S.E. 2d 512. After full consideration, this Court, in the exercise of its discretion, sets aside the verdict and judgment and awards a new trial on *all* issues raised by the pleadings.

New trial.

HIGGINS, J., dissents on ground nonsuit should have been entered.

OLIVER W. ARNOLD v. RAY CHARLES ENTERPRISES, INC. AND RAY CHARLES (AS LEADER OF "THE SIXTEEN PLUS THE RAELETS, MUSICIANS").

(Filed 24 March, 1965.)

1. Courts § 20—

The law of this State governs all matters of procedure in an action brought here on a contract executed in another state and calling for performance in a third state.

2. Contracts § 12—

Where the terms of a contract are not ambiguous no question of legal interpretation arises.

3. Courts § 20—

Where there is no difference between the law of the state in which the contract was executed and the law of the state in which it was to be performed, there is no necessity of determining which law should be applied.

4. Same—

Ordinarily, the law of the forum controls as to the burden of proof.

5. Contracts § 25—

The burden is on the person failing to discharge a contractual obligation to prove that such failure came within provisions of the contract excusing nonperformance on the happening of certain contingencies.

6. Appeal and Error § 49—

Ordinarily, when the court fails to find a fact essential to support the judgment the cause must be remanded, but where the record discloses that appellants had the burden of proof and failed to carry such burden by introduction of evidence sufficient to support a finding in his favor on the crucial fact, remand would be futile, and the Supreme Court may allow the conclusions of law to stand as a directed verdict.

7. Trial § 31—

The court may always direct a verdict against the party who has the burden of proof if he fails to introduce evidence, or if the evidence offered and taken to be true fails to make out a case in his favor.

8. Contracts § 20—

Where a contract excuses performance upon the happening of certain contingencies, it is the duty of the parties to exercise reasonable care to obviate the happening of such contingencies.

9. Same— Defendants' evidence held insufficient to show the exercise of care to avoid contingency rendering performance on their part impossible.

The contract in suit obligated defendants to give a concert at a specified time. The findings disclosed that plaintiff knew defendants were traveling in their own plane, were to arrive at a nearby airport and had a bus waiting thereat, that defendants' plane arrived at the airport in ample time but was prevented from landing by fog, that the plane was then piloted to a nearby airport with radio notice to plaintiff, who had a bus sent to the second airport, which bus would have brought the troupe to the *locus* about an hour after schedule and that, the weather having improved, defendants attempted again to fly to the port of original destination but were turned back because of oil line trouble. *Held:* In the absence of evidence on the part of defendants that they had exercised reasonable care in the inspection of the engine in order to discover any defects which might prevent its proper operation or had had the prior trouble with the oil line remedied, defendants have failed to carry the burden of showing that their failure to perform was due to "accident or accident to means of transportation" within the exculpatory clause of the contract, and a directed verdict for plaintiff is warranted.

10. Contracts § 29—

Where the contract provides that each party should be entitled to 50% of the proceeds of the ticket sales for the contemplated concert, the measure of damages for breach of the contract is 50% of the value of the tickets sold, without deductions for any unexpended promoting or advertising costs, the gross receipts and not the net profit being the determinative figure under the contract.

HIGGINS, J., dissenting.

PARKER, J., joins in dissent.

APPEAL by defendants from *Shaw, J.*, March 30, 1964 Regular Civil Session of GUILFORD. This appeal was docketed in the Supreme Court as Case No. 607 and argued at the Fall Term 1964.

Civil action to recover damages for breach of contract. The parties waived a jury trial under the provisions of G.S. 1-184. Judge Shaw

heard the case and made the following findings of fact and conclusions of law:

"FINDINGS OF FACT

1. Plaintiff and defendants entered into a written contract by the terms of which defendants agreed to perform for the plaintiff on Sunday evening, September 16, 1962, at 8:00 o'clock p.m. at the Cross Road Mall in the City of Roanoke, Virginia.

2. The contract provided, *inter alia,* that the plaintiff pay to the defendants for said performance a guarantee of $3,500, plus 50% of gross admission receipts in excess of $7,000.00, less admission taxes.

3. The contract also provided as follows: 'The agreement of the employees to perform is subject to proven detention by sickness, accidents or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees (defendants).'

4. The defendants' troupe left Baltimore, Maryland, by private Martin 404 plane owned by the defendants and arrived at Roanoke, Virginia, at 4:30 or 4:40 on the afternoon of the date of the performance. Plaintiff knew that defendants' troupe intended to travel by air and arranged to have buses waiting at the Roanoke Airport for them.

5. The duly constituted authority of the Federal Aviation Agency denied the defendants' troupe permission to land at the airport in Roanoke because of the low ceiling then existing. Defendants' pilot determined that the nearest open airport was at Charlottesville, Virginia, to which airport he proceeded, radioing ahead for buses for transportation.

6. The troupe arrived in Charlottesville, Virginia, on the plane at 5:15 p.m. on the same afternoon, and shortly thereafter found a bus waiting to carry the troupe to Roanoke by bus. Meantime, the pilot discussed with Mr. J. D. Brown, Vice President of the corporate defendant, the question of whether the troupe should take the highway bus to Roanoke or again undertake to land their plane at Roanoke airport.

7. Mr. Brown determined that the troupe should attempt to again land their plane at Roanoke and the plane took off for that city about 6:40 p.m. on the evening of the performance.

8. Prior to defendants' departure from Charlottesville, the Roanoke airport had opened for in flights and Mr. Brown had de-

termined that if the troupe traveled by bus from Charlottesville to Roanoke they would arrive approximately one hour late for the scheduled 8:00 o'clock performance that evening.

9. After take-off, a severe oil leakage occurred in one of the engines on the plane. The pilot declared an emergency and was turned over to a Washington controller of the Federal Aviation Agency. The controller routed the plane back to Charlottesville, Virginia.

10. After landing at Charlottesville for the second time, defendants' manager telephoned the plaintiff about 7:30 p.m. on the day of the scheduled concert and transmitted a message to the plaintiff's mother, which was relayed to him a few minutes before the performance was scheduled to begin. If defendants' troupe had chartered another plane and attempted to reach Lynchburg via air and shuttle to Roanoke via auto the performance could not have taken place until 10:30 or 11:00 o'clock p.m.

11. Defendants refunded to the plaintiff the amount of $1,750.00 deposited with defendants by plaintiff on the signing of the contract and incurred other expenses in their efforts to perform the contract.

Based upon the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. The Court concludes, as a matter of law, that the defendants were not prevented from performing the scheduled engagement within the meaning and intent of the clause in the contract as set out in paragraph three of the foregoing Findings of Fact.

2. In order for a party to be excused from performing his contract obligations under absolving clauses in the contract, the excuse must come, not only within the terms of the clause, but also be reasonably beyond the power of the parties to perform. The defendants had on the same afternoon experienced an inability to land their plane, but an alternate course was left open to them to travel to Roanoke by bus from Charlottesville. Provision for their transportation by bus had been made. Instead of accepting such alternate method of travel, defendants, through their manager, Mr. Brown, elected to endeavor to reach Roanoke again by plane. Such a choice was not the exercise of reasonable care, to prevent 'accident to means of transportation.'

3. The defendants did breach the contract and the plaintiff is entitled to recover the amount stipulated in the contract which was, in effect, 50% of the gross admission receipts, less admission taxes.

4. This Court has determined, from the evidence, that the amount of 50% of the gross receipts, less admission taxes is as follows:

1518 General Admissions		$ 5,313.00
2463 Advance Sales		7,389.00
1299 Reserved Seats		1,299.00
Gross Receipts		$14,001.00
Less admission tax		1,400.10
Balance		$12,600.90
Less guarantee due defendants	$3,500.00	
Less one-half of the amount over $7,000 of gross receipts due defendants	2,800.45	
	$6,300.45	6,300.45
Amount plaintiff is entitled to recover		$ 6,300.45"

From the judgment that plaintiff recover of defendants the sum of $6,300.45, together with the cost of the action, defendants appeal.

Major S. High; Samuel S. Mitchell; Lee and Lee for plaintiff.

Smith, Moore, Smith, Schell & Hunter by Richmond G. Bernhardt, Jr. and James R. Turner for defendants.

SHARP, J. The contract involved in this case was made in New York, it was to be performed in Virginia, and the action for its breach is brought in North Carolina. Unquestionably the law of the forum, North Carolina, governs all matters of procedure. *Howard v. Howard*, 200 N.C. 574, 158 S.E. 101. No question of interpretation arises; the language is clear and unambiguous, leaving no room for construction. The only question of substantive law raised by the assignments of error involves the proper measure of damages. *Johnson v. Lamar*, 250 N.C. 731, 110 S.E. 2d 323; 25 C.J.S., Damages § 4 (1941). Throughout, neither party has made any reference to the law of New York or that of Virginia, yet we are required to take judicial notice of foreign law. G.S. 8-4. It appears that the law of New York, *lex loci celebrationis*, and that of Virginia, *lex loci solutionis*, are no different with reference

to the substantive question here involved. There would be no profit, then, for us to exercise ourselves here to determine which law is to be applied, for to do so would take us into a "highly complex and confused part of conflict of laws." 16 Am. Jur. 2d, Conflict of Laws § 38 (1964). See *Id.* at §§ 38-42; 17 C.J.S., Contracts § 12(1),-(5) (1963); 15 C.J.S., Conflict of Laws §§ 11, 20-22 (1939).

> "The general rule is that, where a person by his contract charges himself with an obligation possible and lawful to be performed, he must perform it . . . (I)f a party desires to be excused from performance in the event of contingencies arising, it is his duty to provide therefor in his contract, at least where he could reasonably have anticipated the event." 17A C.J.S., Contracts § 459 (1963).
>
> "In order that a party shall be excused from performing his contract obligation by an absolving clause contained in the contract, the excuse must not only come within the terms of such clause, but also must be reasonably beyond the power of the party to prevent; that is, such a clause will not give a party the power arbitrarily to refuse performance, but he is under a duty to exercise a reasonable amount of care to prevent the happening of the contingency named." 17 Am. Jur. 2d, Contracts § 409 (1964).

Defendants take no exception to the first eleven findings of fact contained in the judgment. They do except to the findings of fact with reference to the amount of damages contained in Conclusion of Law No. 4, but which should have been included in the Findings of Fact as paragraph No. 12. G.S. 1-184.

The question raised by defendants' first three assignments of error is whether the findings of fact made by the trial judge support his conclusions of law that defendants were not relieved of their obligation to perform the contract in suit by "proven detention by . . . accident or accidents to means of transportation . . . or any other legitimate conditions beyond the control of the employees (defendants)."

Although the judge made no finding based upon it, plaintiff's testimony was that he knew defendants would travel to Roanoke by plane and he made no objection to this means of transportation. Had the parties so agreed, the contract could, of course, have specified another mode of travel as well as have required defendants to arrive in Roanoke on, say, the preceding day.

The findings of fact eliminated one of the questions debated in the brief, *i.e.*, whether, considering the ever-present weather hazards to avigation, defendants allowed themselves too little time to travel from Baltimore to Roanoke. When they left Charlottesville for Roanoke

at 6:40 p.m. on the day of the scheduled concert, the Roanoke Airport was open for "in flights." It was not, therefore, the weather which prevented defendants' arrival in time for the concert; it was an accident to "means of transportation," *viz.*, a severe oil leakage in one of the plane's engines. If this leakage was beyond the control of defendants, they are exculpated from liability under the express provisions of the absolving clause of the contract; if not, they are liable. See Annot., Express provisions in contract of sale, or for supply of a commodity, for relief from the obligation in certain event, 51 A.L.R. 990, 996.

Ordinarily the law of the forum controls as to the burden of proof, *Howard v. Howard, supra;* 3 Beale, Conflict of Laws § 595.3 (1935 Ed.); 15 C.J.S., Conflicts of Laws § 22(i) (1939); and the burden is on defendants to exculpate themselves from liability for their nonperformance. *Potter v. Water Co.*, 253 N.C. 112, 116 S.E. 2d 374; *Crouse v. Vernon*, 232 N.C. 24, 59 S.E. 2d 185; Annot., 51 A.L.R., *supra* at 906.

Defendants, as operators of the airplane upon which they depended for their arrival in Roanoke in time to perform their contract, were under the duty to exercise reasonable care in the inspection of its engines in order to discover any defects which might prevent its proper operation, and they are chargeable with knowledge of any defects which such inspection would disclose. Annot. Duty and liability as to pre-flight inspection and maintenance of aircraft, 30 A.L.R. 2d 1172. The testimony of defendants' booking agent, a witness for defendants, discloses that, after defendants were unable to land in Roanoke, on the flight from there to Charlottesville, the nearest open airport, they "had some oil line trouble with the plane." The agent received this information from the individual defendant's personal manager between 5:00 and 6:00 p.m. on the day in question. Was this trouble investigated, remedied, or attempted to be remedied during the hour and twenty-five minutes defendants were on the ground at Charlottesville? Defendants offered no evidence on this crucial point, and the burden was on them to do so.

We may concede that the facts found by the judge do not support his conclusions of law. (1) His findings are that, had defendants taken the bus provided for them at Charlottesville, they would have arrived one hour late for the scheduled concert. Their only chance to arrive on time was to undertake to land their plane in Roanoke. Had not engine trouble developed, their judgment would have been vindicated, for the weather had cleared and the airport was opened. Insofar as the findings disclose, at the time the decision to fly was made the only risk which was considered was the weather — not engine trouble. The judge's conclusion, however, was that because weather had once that

day prevented their landing at Roanoke, defendants should have chosen an alternate method of travel even though it would have made them one hour late for their engagement. We think this is a *non sequitur.* (2) He made no finding as to whether the engine trouble was beyond defendants' control. The judgment contains no finding with reference to inspection and repairs to the engine, the pivotal point here, in our view of the case. It does not follow, however, that this judgment must be reversed or remanded.

Ordinarily, when the parties waive a jury trial and the judge omits to find a material fact, we must remand the cause for a finding sufficient to support a judgment. *McMillan v. Robeson,* 225 N.C. 754, 36 S.E. 2d 235; *Shore v. Bank,* 207 N.C. 798, 178 S.E. 572; *Trust Company v. Transit Lines,* 198 N.C. 675, 153 S.E. 158. To remand this case for further findings, however, when defendants, the parties upon whom rests the burden of proof here, have failed to offer any evidence bearing upon the point, would be futile. By stipulation the evidence before the Superior Court consisted entirely of the exhibits and the transcript of proceedings in a former trial of this same case in the Corporation Court of the City of Lynchburg, Virginia, in June 1963. (At the conclusion of the evidence there plaintiff elected to take a voluntary nonsuit.) "The Court may always direct a verdict against the party who has the burden of proof, if there is no evidence in his favor, *as where he fails to introduce any evidence,* or if the evidence offered and taken to be true fails to make out a case." (Italics ours.) *Trust Co. v. Levy,* 209 N.C. 834, 184 S.E. 822; *accord, Strigas v. Insurance Co.,* 236 N.C. 734, 73 S.E. 2d 788; *Sanders v. Hamilton,* 233 N.C. 175, 63 S.E. 2d 187; *McCullen v. Durham,* 229 N.C. 418, 50 S.E. 2d 511. Defendants here, having chosen to rest their defense upon the transcript of a former trial in which they failed to offer evidence essential to the defense, have no cause to complain of an adverse judgment when the transcript affirmatively discloses their failure to carry the burden of proof which the law puts upon them.

Although we do not adopt his reasons, the conclusion of the trial Court that defendants are liable for their failure to perform the contract is sustained.

We come now to the question of damages.

> "For a breach of contract the injured party is entitled as compensation therefor to be placed, insofar as this can be done by money, in the same position he would have occupied if the contract had been performed. The amount that would have been received if the contract had been kept and which will completely indemnify the injured party is the true measure of damages for

the breach." *Service Co. v. Sales Co.*, 259 N.C. 400, 415, 131 S.E. 2d 9, 21.

Accord, New York Water Corp. v. City of New York, 4 App. Div. 2d 209 (1st Dept.), 163 N.Y.S. 2d 538; *Orebaugh v. Antonious,* 190 Va. 829, 58 S.E. 2d 873.

The amount of the gross receipts from ticket sales for the scheduled concert is not a subject for speculation. The tickets had been sold and the money was in hand when defendants failed to perform. The trial judge found the gross receipts, less admission taxes, to have been $12,600.90. The evidence sustains the finding. It is, therefore, conclusive on appeal. *Construction Co. v. Crain and Denbo, Inc.,* 256 N.C. 110, 123 S.E. 2d 590. Having gross receipts in excess of $7,000.00, *by the terms of the contract* plaintiff was entitled to 50% of the proceeds and defendant to 50%. The amount of damages which the judge awarded plaintiff, $6,300.45, was 50% of the gross receipts.

Defendant contends that plaintiff's one-half should be reduced by $1,000.00, the amount which plaintiff agreed to pay the Y.M.C.A. for promoting the concert, but did not pay, and by deducting plaintiff's expected expenses, also. This contention is without merit.

Under the terms of this contract, the amounts which plaintiff expended or agreed to expend, in promoting, advertising, and preparing for the concert are of no concern to defendants. All such expenses came out of plaintiff's one-half of the gross receipts. Had defendants performed the contract, plaintiff would have received $6,300.45, one-half of the admission receipts, regardless of the expenses he might have incurred. That sum, and not his net profit, is therefore, the measure of plaintiff's damages in this case. *New York Water Corp. v. City of New York, supra; Orebaugh v. Antonious, supra.* Plaintiff's net profit, of course, will ultimately depend upon the amount of his expenditures in promoting the concert; the less expended, the more his profit. Judge Shaw correctly measured and assessed plaintiff's damages.

The judgment of the court below is

Affirmed.

HIGGINS, J., dissenting:

I am unable to agree with the trial court's conclusion of law "that the defendants were not prevented from performing the scheduled agreement within the meaning and intent of the (escape) clause in the contract as set out in paragraph 3 of the foregoing Findings of Fact." The contract provided: "The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other

legitimate conditions beyond the control of the employees (defendants)."

The trial court found these facts: The performance was to begin at 8:00 p.m. The plaintiff not only knew the troupe would travel by air from Baltimore to Roanoke, arriving at about 4:30 p.m., but actually had busses at the airport to meet them. When the plane arrived at Roanoke, federal authorities refused permission to land due to local weather conditions. The defendant's pilot, in this emergency, ascertained the nearest open airport was Charlottesville, approximately 100 highway miles from Roanoke. A bus trip to Roanoke would delay the performance at least an hour. In the meantime, the pilot ascertained weather conditions had improved at Roanoke sufficient to permit a landing there in time for the performance to begin on schedule. The defendants, in this emergency, (not of their making) chose to take to the air again in order to meet their obligation. The decision to fly would appear to be the wiser choice. After take-off an oil leak developed in one of the engines. Report of this trouble resulted in a federal order for the plane to return to Charlottesville.

These accidents were to the means of transportation. These findings made by the trial judge not only do not support the conclusion of law No. 1, but compel a contrary conclusion. The decision must rest squarely on the facts found. Additional facts may not be assumed. When the facts are not in dispute, decision becomes a matter of law, and a judgment not supported by the facts will be reversed. Strong's North Carolina Index, Vol. 1, Appeal and Error, § 21, pp. 93-94, n. 225. I vote to reverse.

PARKER, J., joins in this dissenting opinion.

FARMERS OIL COMPANY, INC. v. JOSEPH HERMAN MILLER
AND
WILLIAM E. BATTEN v. JOSEPH HERMAN MILLER.

(Filed 24 March, 1965.)

1. Automobiles § 8—

Before making a left turn from a highway, a driver is required to first ascertain that the movement can be made in safety and, when the movement may affect any other vehicle, to give the statutory signal for the turn, and his failure to perform either duty is negligence *per se*, and is actionable when a proximate cause of injury.

2. Same—

The statutory signal required before a motorist may turn from a straight line must be given for a sufficient distance and length of time to enable the driver of a following vehicle to observe it and understand therefrom what movement is intended.

3. Same—

G.S. 20-154 must be given a realistic interpretation and does not preclude a left turn unless the movement is absolutely free from danger but only requires that a motorist not turn left without exercising reasonable care under the circumstances to ascertain that such movement can be made in safety.

4. Automobiles § 41h—

Plaintiff's evidence tending to show that defendant driver saw a tractor-tanker, driven by plaintiff, following him when it was some 300 or 400 feet behind him on a straight highway, that after driving some distance defendant attempted to turn left into a private driveway without again looking back or exercising any care to see that the movement could be made in safety, that notwithstanding plaintiff driver, in attempting to pass, blew his air horn three or more times, defendant continued to turn left, and that the collision occurred on the drivers' left side of the highway, *held* sufficient to be submitted to the jury on the issue of defendant's negligence.

5. Automobiles § 14—

Yellow lines are designed primarily to prevent collision between an overtaking and a passing automobile and a vehicle approaching from the opposite direction, and the crossing of a yellow line may be an evidential detail in the totality of circumstances on the question of negligence.

6. Same—

A party may not rely upon the violation of G.S. 20-150(e) by his adversary when he does not allege the violation of the statute or allege any fact showing such violation or, even though his adversary crossed a yellow line in his lane of travel, does not show that the highway was marked by the Highway Commission so as to indicate that passing should not be attempted. It is a matter of common knowledge that the words "Do Not Pass" are posted on portions of the State highways.

7. Automobiles § 18—

A private driveway is not an intersecting highway within the meaning of G.S. 20-150(c), and in order for provisions of the statute to apply there must be not only an intersection of highways but such intersection must be marked by appropriate signs by the duly constituted authorities.

8. Automobiles § 42e— Evidence held not to show that plaintiff was guilty of contributory negligence as a matter of law in crossing yellow line to pass preceding vehicle.

Evidence tending to show that plaintiff driver upon cresting a hill at a lawful speed saw an automobile being driven slowly ahead in its right lane of travel in the same direction, that plaintiff coasted behind the car until he ascertained that the car was not turning left into an intersecting rural

road, that thereafter he could see a quarter of a mile ahead that the highway was free of oncoming traffic, and crossed a yellow line in his lane of traffic and started to pass the car, that the driver of the car started veering to the left to turn into a private driveway, that plaintiff repeatedly blew his air horn, that the first time he blew his horn defendant was in his right traffic lane, and that defendant kept turning his automobile to the left, and that the collision occurred on the drivers' left side of the highway, *is held* not to show contributory negligence as a matter of law on the part of plaintiff.

9. Negligence § 26—

What is the proximate cause of an injury is ordinarily a question for the jury to determine from the attendant circumstances, and conflicting inferences of causation preclude nonsuit on the ground of contributory negligence.

APPEAL by plaintiffs from *Parker, J.*, 7 December 1964 Session of GREENE.

Two actions *ex delicto,* by consent, consolidated and tried together: one by the corporate plaintiff to recover for damages to its tractor-tanker unit, for cost of wrecker service, and for rent paid for tractor-tanker equipment, while its tractor-tanker unit was being repaired, and the other by the personal plaintiff, agent and driver of the corporate plaintiff's tractor-tanker unit, to recover damages for physical injuries. Each plaintiff in identical allegations in each complaint alleges that while William E. Batten, the agent and driver of the corporate plaintiff's tractor-tanker unit, was attempting to overtake and pass on Highway 11 an automobile owned and driven by defendant, defendant negligently turned his automobile from a direct line on the highway to his left in the path of plaintiff's tractor-tanker unit without first seeing that such movement could be made in safety, and without giving a plainly visible signal of his intention to make such a left-turn movement, negligently failed to keep a proper lookout, and negligently operated his automobile so as to endanger the person and property of others using the highway; and that such negligence on defendant's part proximately caused a collision between plaintiff's tractor-tanker unit and his automobile resulting in damage to the corporate plaintiff's property and costs incident thereto, and in physical injuries to the personal plaintiff.

Defendant, in a separate answer in each action, denies that he was negligent and avers a counterclaim to recover for damages to his automobile allegedly proximately caused by the negligence of Batten, driver of the corporate plaintiff's tractor-tanker unit, in operating the tractor-tanker unit in a careless and reckless manner in violation of G.S. 20-140, in operating it at a speed greater than was reasonable and proper

under the attendant circumstances in violation of G.S. 20-141, in failing to keep a proper lookout and to keep it under control, in driving on the left side of the highway without passing two feet to the left of his automobile traveling in the same direction, in attempting to overtake and pass his automobile without giving any signal of his intention to pass and without seeing that his movement could be made in safety, and in attempting to pass at or near an intersection. Defendant in each answer conditionally pleads Batten's contributory negligence — the same allegations of negligence as in his counterclaim in each action — as a bar to any recovery by both plaintiffs.

From a judgment of compulsory nonsuit entered at the close of plaintiffs' evidence, plaintiffs appeal. After the expiration of the December Session, defendant on 29 December 1964 appeared before the clerk of the superior court of Greene County and took judgment of voluntary nonsuit of its counterclaim against each plaintiff, such judgment being signed by the clerk.

Lewis and Rouse by Robert D. Rouse, Jr., for plaintiff appellants.
Braswell & Strickland by Roland C. Braswell for defendant appellee.

PARKER, J. Plaintiffs assign as error the judgment of compulsory nonsuit. Considering their evidence in the light most favorable to them, *Bridges v. Graham,* 246 N.C. 371, 98 S.E. 2d 492, it tends to show the following facts:

About three miles north of the town of Kenansville, Highway #11 runs in a general north-south direction, and has pavement 20 feet wide. To the south of where the collision hereinafter set forth occurred, the highway is straight for about 4/10's of a mile and is downgrade. Going north on this straight stretch of highway, there is an unpaved rural road, #1380, on the left about 18 feet wide, and on its side where it intersects Highway #11 on the left there is a stop sign. About 250 feet north of rural road #1380 and on the left of Highway #11, there is an unpaved private driveway or lane about 12 feet wide leading to a house in a field. Highway #11 about 500 feet north of rural road #1380 is straight, downgrade, and then has an "S" curve. On the shoulder of the highway there was a sign indicating a curve ahead. The speed limit where the collision occurred was 60 miles an hour for passenger automobiles and 50 miles an hour for trucks. The point of collision between plaintiff's tractor-tanker unit and defendant's automobile was at the entrance of the private driveway or lane as it enters the highway from the left going north. In the center of Highway #11 there is a broken white line. Beginning approximately 389 feet south of the point

of collision and continuing through the "S" curve, there was a solid yellow line in the right lane for traffic traveling north.

About 4:30 p.m. on 13 January 1964 Batten was operating the corporate plaintiff's tractor-tanker unit, filled with gasoline and kerosene, north on Highway #11 approximately three miles north of the town of Kenansville at a speed of 40 to 45 miles an hour. He came around a curve and a hill, and saw defendant's automobile 300 or 400 feet ahead of him traveling very slow north in the right lane of traffic where it approached the point where rural road #1380 comes into the highway from the left. The highway was downgrade about 20%, and he "coasted" along behind to see if defendant was going to turn left into rural road #1380. He has been traveling this highway five years and knew rural road #1380, but had not observed before the private driveway to its north. When defendant's automobile passed the intersection of rural road #1380, he could see about a quarter of a mile ahead, and seeing no traffic approaching and traveling about twice as fast as defendant was traveling, he turned on his left-turn signals, pulled into the left lane for traffic and started to overtake and pass defendant, who at that time was traveling far over to his right-hand side of the highway. When he got within 20 or 30 feet of defendant, defendant "veered" over toward the center line of the highway. Whereupon, he blew his air horn, which is operated by air pressure and sounds like a diesel train engine. When he first blew his air horn, defendant was still in his right traffic lane. Defendant kept turning his automobile to the left, and he blew his air horn two or three more times. He was watching defendant's automobile to see if he gave a turning signal, and saw none given. As defendant continued to turn left, he pulled the tractor-tanker toward the shoulder of the road to avoid defendant, but defendant still continued to turn left, and as defendant got on the left side of the highway the right front part of the tractor struck defendant's automobile as he was turning into the private driveway. The impact pushed the tractor-tanker unit over to the edge of a drain ditch. He was applying his brakes, and stopped by the drain ditch. Its dirt gave way, and the tanker turned over on its side. In the collision Batten sustained physical injuries.

A. S. Butler, a State highway patrolman, arrived at the scene of the collision shortly after it occurred. He saw defendant there. He testified in respect to a conversation with defendant at the scene as follows:

> "I asked Miller what happened. He stated that he was going north on N. C. 11 and was attempting a turn into his driveway leading to his residence. I asked him did he at any time see the vehicle operated by Batten. He stated that the last time that he

saw the subject Batten was when he was coming over a hill. He stated that as he was attempting his turn that he failed to check his rear and the exact location he did not know. He stated that he did not look back before he made his turn. He stated he gave his signal, but did not look back and went ahead to make his turn. The hill to which I refer is about 4/10 of a mile back."

G.S. 20-154(a) provides in relevant part: "The driver of any vehicle upon a highway before * * * turning from a direct line shall first see that such movement can be made in safety, * * * and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required in this section, plainly visible to the driver of such other vehicle of the intention to make such movement." This statute imposes two duties upon a motorist upon a highway intending to turn left from a direct line: (1) To "see that such movement can be made in safety," and (2) to give the required signal "whenever the operation of any other vehicle may be affected by such movement." It is negligence *per se*, if a motorist fails to observe either of these safety requirements of the statute, and such negligence is actionable, if it proximately causes injury to another. *Tart v. Register*, 257 N.C. 161, 125 S.E. 2d 754; *Mitchell v. White*, 256 N.C. 437, 124 S.E. 2d 137; *Grimm v. Watson*, 233 N.C. 65, 62 S.E. 2d 538; *Cooley v. Baker*, 231 N.C. 533, 58 S.E. 2d 115.

G.S. 20-154(b) provides in relevant part: "All hand and arm signals shall be given from the left side of the vehicle and all signals shall be maintained or given continuously for the last one hundred feet traveled prior to stopping or making a turn." This safety requirement of the statute means that a signal must be maintained for a sufficient distance and length of time to enable the driver of the following vehicle to observe it and to understand therefrom what movement is intended. *Ervin v. Mills Co.*, 233 N.C. 415, 64 S.E. 2d 431.

The manifest purpose of G.S. 20-154 is to promote safety in the operation of automobiles on the highways, and not to obstruct vehicular traffic. This safety statute must be given a reasonable and realistic interpretation to effect the legislative purpose. The Court said in *Cooley v. Baker, supra:*

> "The statutory provision that 'the driver of any vehicle upon a highway before . . . turning from a direct line shall first see that such movement can be made in safety' does not mean that a motorist may not make a left turn on a highway unless the circumstances render such turning absolutely free from danger. It is simply designed to impose upon the driver of a motor vehicle, who is about to make a left turn upon a highway, the legal duty to ex-

ercise reasonable care under the circumstances in ascertaining that such movement can be made with safety to himself and others before he actually undertakes it."

Plaintiffs' evidence would permit a jury to find that defendant saw some 300 or 400 feet or more behind him on a straight highway an approaching tractor-tanker unit, that he did not look back again, that when he approached the entrance into the highway of a 12-foot-wide unpaved driveway or lane on his left, he began, without giving any signal of his intention to turn left from the right lane he was traveling in, to turn left without exercising any care to see that such movement could be made in safety, that before he got out of his right lane of traffic Batten blew his air horn, that defendant continued to turn left, though Batten blew his air horn two or three more times, until he drove in front of the tractor-tanker and a collision occurred, and that defendant was guilty of negligence *per se* in such operation of his automobile, which proximately caused the ensuing collision and damage and injury to plaintiffs.

The crucial question for determination is whether plaintiffs' own evidence, considered in the light most favorable to them, shows contributory negligence on Batten's part, imputable to his principal, so clearly that no other conclusion can be reasonably drawn therefrom. *Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307; *Ramey v. R. R.*, 262 N.C. 230, 136 S.E. 2d 638.

Defendant in his brief contends that Batten was guilty of legal contributory negligence, which is imputed to his principal, the corporate plaintiff, in that in the operation of the tractor-tanker unit he violated the provisions of G.S. 20-149(b); in that he crossed a yellow line in his line of traffic in attempting to overtake and pass defendant; in that he violated G.S. 20-150(e); and in that he attempted to pass at or near an intersection.

G.S. 20-149(b) provides: "The driver of an overtaking motor vehicle not within a business or residence district, as herein defined, shall give audible warning with his horn or other warning device before passing or attempting to pass a vehicle proceeding in the same direction, *but his failure to do so shall not constitute negligence or contributory negligence per se in any civil action; although the same may be considered with the other facts in the case in determining whether the driver of the overtaking vehicle was guilty of negligence or contributory negligence.*" (Emphasis ours.)

Defendant's answer in each case does not allege as an act of negligence in the counterclaim or as an act of negligence in the plea of contributory negligence that Batten crossed a yellow line, or that Batten

violated the provisions of G.S. 20-150(e), though the answer in each case in the counterclaim and in the plea of contributory negligence alleges Batten operated the tractor-tanker unit in a careless and reckless manner in violation of G.S. 20-140.

In *Rushing v. Polk,* 258 N.C. 256, 128 S.E. 2d 675, the Court said:

> "Yellow lines are designed primarily to prevent collision between an overtaking and passing automobile and a vehicle coming from the opposite direction, and to protect occupants of other cars, pedestrians and property on the highway. *Powell v. Clark,* 255 N.C. 707, 710, 122 S.E. 2d 706; *Walker v. Bakeries Co.,* 234 N.C. 440, 443, 67 S.E. 2d 459. The presence and the crossing of a yellow line are evidential details in the totality of circumstances in the instant case."

G.S. 20-150(e) reads: "The driver of a vehicle shall not overtake and pass another on any portion of the highway which is marked by signs or markers placed by the State Highway Commission stating or clearly indicating that passing should not be attempted."

G.S. 20-150(e) cannot be relied on by defendant to contend that plaintiffs' actions should be nonsuited on the ground of legal contributory negligence for the reason that he neither avers in his plea of contributory negligence that Batten was guilty of violating its provisions nor does he aver any facts showing that he was guilty of violating its provisions, thereby proximately causing his damage, and on the further ground G.S. 20-150(e) is not applicable here because there is no evidence in the record that any portion of the highway where the collision occurred "is marked by signs or markers placed by the State Highway Commission stating or clearly indicating that passing should not be attempted." It is a fact commonly and generally known that many portions of the State highways have signs or markers bearing the words, "Do Not Pass," as required by G.S. 20-150(e). In *Hunt v. Wooten,* 238 N.C. 42, 76 S.E. 2d 326, the Court said:

> "The statute now codified as G.S. 1-139 specifies that 'in all actions to recover damages by reason of the negligence of the defendant, where contributory negligence is relied upon as a defense, it must be set up in the answer and proved on the trial.' The defendant must meet the two requirements of this statute to obtain the benefit of the affirmative defense of contributory negligence. The first requirement is that the defendant must specially plead in his answer an act or omission of the plaintiff constituting contributory negligence in law; and the second requirement is that the defendant must prove on the trial the act or omission of the

plaintiff so pleaded. Allegation without proof and proof without allegation are equally unavailing to the defendant."

G.S. 20-150(c) provides: "The driver of a vehicle shall not overtake and pass any other vehicle proceeding in the same direction at any steam or electric railway grade crossing nor at any intersection of highway unless permitted so to do by a traffic or police officer. *For the purposes of this section the word 'intersection of highway' shall be defined and limited to intersections designated and marked by the State Highway Commission by appropriate signs, and street intersections in cities and towns.*" (Emphasis ours.) There is no evidence in the record that the entrance of the unpaved driveway or lane into the highway was marked by the State Highway Commission, and therefore, this subsection of the statute does not apply here. *Pruett v. Inman*, 252 N.C. 520, 114 S.E. 2d 360. Further, this court held in *Levy v. Aluminum Co.*, 232 N.C. 158, 59 S.E. 2d 632, that a private driveway is not an intersecting highway within the meaning of G.S. 20-150(c).

Plaintiffs' evidence, considered in the light most favorable to them, shows that Batten driving a tractor-tanker unit at a speed of 40 to 45 miles an hour on a straight highway saw ahead of him defendant's automobile traveling very slow in the right lane of traffic in the same direction he was traveling, that he "coasted" along behind to see if defendant was going to turn left into rural road #1380, that when defendant's automobile passed the rural road intersection, he could see a quarter of a mile ahead, and seeing no traffic approaching him, he crossed a yellow line in his lane of traffic and started to overtake and pass defendant's automobile. That he did not blow his air horn until he got within 20 or 30 feet of defendant, when defendant veered over toward the center line of the highway, whereupon he blew his air horn. That when he first blew his air horn defendant was still in his right traffic lane. Defendant kept turning his automobile to the left, and he blew his air horn two or three more times. He was watching defendant's automobile and saw no turning signal given. That defendant got on the left side of the highway, and the collision occurred.

When motor vehicles are proceeding along a highway in the same direction, there is no rule of law that compels one to travel indefinitely behind the other or gives one the unqualified right to overtake and pass the other. 7 Am. Jur. 2d, Automobiles and Highway Traffic, § 221.

What is the proximate cause of an injury is ordinarily a question for a jury. It is to be determined as a fact from the attendant circumstances. Conflicting inferences of causation arising from the evidence carry the case to the jury. *Pruett v. Inman, supra.*

We have found no case in our Reports with similar facts. Considering plaintiffs' evidence in the light most favorable to them, we conclude that plaintiffs have not proved themselves out of court by their own evidence on the ground of legal contributory negligence, because conflicting inferences of causation of their damage and injury arise from their evidence. In our opinion, and we so hold, plaintiffs' evidence was sufficient to withstand a motion to nonsuit, and the issues of negligence and contributory negligence should be submitted to a jury for their determination under proper instructions from the trial court. The judgment of involuntary nonsuit was improvidently entered, and is

Reversed.

UNITED STATES LEASING CORPORATION, A CORPORATION v. FRED THOMAS HALL T/A HALL SUPPLY COMPANY AND MATHIAS BUSINESS EQUIPMENT COMPANY, INC., ADDITIONAL PARTY DEFENDANT.

(Filed 24 March, 1965.)

1. Chattel Mortgages and Conditional Sales § 1; Lease of Equipment § 1— Instrument held lease agreement and not conditional sale.

Defendant, a prospective purchaser of a business machine, expressed a preference to rent the equipment rather than purchase it, and pursuant thereto the parties executed an agreement under which the additional defendant purported to sell to the plaintiff and defendant agreed to pay plaintiff rent in a stipulated amount monthly for a period of five years, with provision that at the expiration of the term he would surrender the machine to plaintiff. *Held:* There being no contention that defendant was induced to sign the lease by misrepresentation or fraud or that he was unfamiliar with its terms and conditions, the instrument constitutes a lease and not a chattel mortgage or conditional sale, and parol evidence that the instrument was intended as a conditional sale is incompetent.

2. Evidence § 27—

It will be presumed that all prior negotiations are merged in the written instrument, and parol evidence is not admissible to contradict, add to, take from, or vary the terms of the writing.

3. Lease of Equipment § 2—

Where a lease of business equipment makes no provision that lessee might recover damages because of any defect in the equipment at the time of delivery and that lessee should give lessor written notice of any defect within five days or it would be conclusively presumed that the equipment was delivered in good repair, lessee is not entitled to damages or replacement as against lessor for an asserted defect or misrepresentation as to the condi-

tion of the machinery at the time of delivery, no notice of any defect having been given lessor as required by the instrument.

4. Same; Principal and Agent § 2—

Upon statement of the original defendant that he would rather lease than purchase the business equipment in question, the additional defendant sold it to plaintiff and plaintiff leased it to the original defendant. The original defendant filed cross action alleging that the additional defendant misrepresented that the equipment had been reconditioned and that the agent making the misrepresentation was the agent of both plaintiff and the original defendant, *held* in the absence of evidence to support the allegations of double agency plaintiff may not be held liable in damages for the misrepresentation.

5. Fraud § 11; Sales § 15—

Upon the statement of the original defendant that he would rather lease than purchase the business equipment in question, the additional defendant sold it to plaintiff and plaintiff leased it to the original defendant. Evidence of the original defendant that he was induced to execute the agreement by the misrepresentation of the additional defendant that the equipment had been reconditioned *is held* sufficient to support findings against the additional defendant on the original defendant's cross action.

6. Appeal and Error § 49—

Where, in the trial by the court under agreement of the parties, the judgment of the court erroneously includes an item not recoverable as damage and fails to consider certain evidence relative to waiver because of a misapprehension of the applicable law, a new trial will be awarded.

APPEAL by plaintiff and additional party defendant from *Phillips, E.J.*, 21 September 1964 Regular Schedule "D" Nonjury Session of MECKLENBURG.

This is an action instituted by the plaintiff against the defendant Hall, trading as Hall Supply Company (hereinafter called Hall), for rent alleged to be due under the terms of a lease agreement.

Defendant Hall filed answer denying the material allegations of the complaint, set up a counterclaim and cross action against plaintiff and Mathias Business Equipment Company, Inc., and moved to have the latter made an additional party defendant. The motion was allowed.

In his cross action, defendant Hall alleged that the plaintiff and the additional defendant, acting through their common agent R. W. Mathias, sold to defendant Hall an alleged reconditioned Model 241 Davidson Offset Duplicator for a balance of $1,500.00, taking in exchange therefor a Gestetner Duplicating Machine; that the additional defendant agreed "to have the unpaid balance of $1,500.00 on the Offset Duplicator financed for a period of five years"; that plaintiff took a chattel mortgage for the unpaid balance; that by false representations in the sale and financing, the plaintiff and the additional defen-

dant obtained from defendant Hall $477.97, for which he demanded judgment.

The parties waived a jury trial and the matter was heard by the trial judge. After hearing the evidence, the trial judge found the facts, made his conclusions of law and entered judgment accordingly.

The plaintiff offered and the court below admitted in evidence the affidavit of Mr. H. H. Eastman, pursuant to the provisions of G.S. 8-45, with exhibits attached thereto, including a copy of the lease agreement held by the plaintiff, and a statement of the rent alleged to be due and unpaid. Mr. Eastman is Assistant Treasurer of United States Leasing Corporation.

Defendant Hall offered evidence tending to show that the additional defendant sold him the Davidson Offset Duplicator prior to 13 October 1961, and that the additional defendant did not own the machine on 18 October 1961, the day the additional defendant purported to sell said machine to the plaintiff in connection with the lease agreement. Defendant Hall further offered evidence tending to show that the machine had not been reconditioned and was not in satisfactory operating condition as warranted by the additional defendant; that it would cost from $150.00 to $200.00 to put the machine in "reconditioned" condition as represented by the agent of the plaintiff and the additional defendant.

R. W. Mathias, president of additional defendant, testified that he agreed that if defendant Hall would purchase the Davidson Offset Duplicator for $1,500.00, he (Mathias) would take up the Gestetner machine, previously purchased by Hall from the additional defendant, and pay the balance due thereon to the American Guaranty Corporation, the original lessor; that this was to be a separate transaction. "I took possession of the Gestetner by paying his obligation to American Guaranty. I did that if he would purchase the Davidson machine, which he did. * * * A few days, it may have been four days or may have been two weeks, before October 13, 1961, I took to Hall to sell to him a Davidson offset printer and delivered it to 908 South Cedar Street. I was selling the machine to Mr. Hall. In other words, it was an agreement. He would buy the machine if it would do what he wanted it to do and at that time we would decide on what settlement he would care to make for the machine. We would decide how he would pay for it. * * *" This witness further testified: "Mr. Hall agreed that he would prefer to go through U. S. Leasing or lease the equipment from U. S. Leasing Co. and I secured the forms and carried the ball from there."

On 13 October 1961, Hall signed a lease agreement whereby plaintiff, United States Leasing Corporation, purported to buy the recondi-

tioned machine from the additional defendant and pay it $1,500.00 and lease said machine to Hall for a monthly rental of $35.54. The evidence tends to show that Hall agreed to pay the monthly rental of $35.54 for a period of five years and at the end of the term surrender the machine to the plaintiff. Hall also agreed to maintain the machine.

In the lease executed by defendant Hall on 13 October 1961, the United States Leasing Corporation is designated as lessor, Hall Supply Company as lessee, Mathias Business Equipment Company, Inc. as supplier of the equipment, and R. W. Mathias as the supplier's salesman. The lessor executed the agreement on 31 October 1961.

Among other things, the lease contains the following statements and conditions:

> "4. WARRANTIES. Lessor will request the supplier to authorize lessee to enforce in its own name all warranties, agreements or representations, if any, which may be made by the supplier to lessee or lessor, but lessor itself makes no express or implied warranties as to any matter whatsoever, including, without limitation, the condition of equipment, its merchantability or its fitness for any particular purpose. No defect or unfitness of the equipment shall relieve lessee of the obligation to pay rent or of any other obligation under this lease.
>
> "10. NOTICE OF DEFECTS. Unless lessee gives lessor written notice of each defect or other proper objection to an item of equipment within five (5) business days after receipt thereof, it shall be conclusively presumed, as between lessee and lessor, that the item was delivered in good repair and that lessee accepts it as an item of equipment described in this lease.
>
> "26. ENTIRE AGREEMENT; WAIVER. This instrument constitutes the entire agreement between lessor and lessee. No agent or employee of the supplier is authorized to bind lessor to this lease, to waive or alter any term or condition printed herein or add any term or condition printed herein or add any provisions hereto. Except as provided in Paragraph 3 hereof, a provision may be added hereto or a provision hereof may be altered or varied only by a writing signed and made a part hereof by an authorized officer of lessor. Waiver by lessor of any provisions hereof in one instance shall not constitute a waiver as to any other instance."

The lease also contains the following language immediately above the signature of defendant Hall: "The undersigned agree to all the terms and conditions set forth above and on the reverse side hereof, and in witness thereof hereby execute this lease."

At the close of all the evidence, the court below being of the opinion that the lease was in fact a conditional sale, nonsuited the plaintiff and allowed Hall's counterclaim, based on the misrepresentations of the plaintiff and the additional defendant, in the sum of $477.97, and entered judgment accordingly.

The plaintiff and the additional defendant appeal, assigning error.

Fairley, Hamrick, Hamilton & Monteith; Laurence A. Cobb attorneys for plaintiff appellant.

James A. Carson, Jr., attorney for additional defendant appellant.

Richard M. Welling attorney for defendant appellee.

DENNY, C.J. The plaintiff and the additional defendant assign as error the finding of the court below that the contract between the plaintiff and defendant Hall is a chattel mortgage agreement and not a lease.

The evidence, in our opinion, is insufficient to support such a finding. While defendant Hall alleged in his counterclaim and cross action that R. W. Mathias brought to him for execution the "papers * * * for their finance of conditional sale agreement for payment in equal monthly installments of the $1,500.00, together with interest and carrying charges, over a five-year period, 60 months," the defendant Hall did not allege that he was induced to sign said lease agreement because of misrepresentations made by the plaintiff or the additional defendant, or that he was unfamiliar with the terms and conditions of said lease, or that by reason of fraud the lease agreement did not express the true intention of the parties.

Conceding that the additional defendant agreed to sell to defendant Hall the equipment involved herein for $1,500.00, the evidence, we think, tends to show that after Hall had received the equipment and when he came to consider the method to be used in financing the purchase price of $1,500.00, he expressed a preference to rent the equipment rather than purchase it, and that the additional defendant, in accord with such expressed preference, proceeded to arrange the sale to plaintiff with the understanding that plaintiff would lease the equipment to Hall. Such arrangement was perfected and Hall executed the lease agreement. This assignment of error is sustained.

The plaintiff likewise assigns as error the admission of parol evidence to contradict the terms of the aforesaid lease. It is a well established principle of law that all negotiations leading up to the execution of a written instrument are considered to be merged into the written instrument. Parol evidence is not admissible to contradict, add to, take from, or vary the terms of a written contract. *Bank v. Slaugh-*

ter, 250 N.C. 355, 108 S.E. 2d 594; *Neal v. Marrone,* 239 N.C. 73, 79 S.E. 2d 239; *Wilkins v. Finance Co.,* 237 N.C. 396, 75 S.E. 2d 118; *Bost v. Bost,* 234 N.C. 554, 67 S.E. 2d 745.

In *Wilkins v. Finance Co., supra,* the written agreement required the plaintiff to carry collision insurance on the automobile purchased from C. W. Myers Trading Post, Inc., so long as any indebtedness on the note given by the plaintiff for the balance of the purchase price remained unpaid. Such note was secured by a chattel mortgage on the car involved. The note was assigned to defendant Finance Company. The plaintiff contended he had a parol agreement with the Motor Company to carry collision insurance on said car which had been involved in a collision, and the court permitted him to introduce parol testimony to that effect. The purchaser had obtained no insurance on the car. This Court said: "This case is much simplified when the judicial gaze is focused steadily on the crucial circumstances that the pleadings of the plaintiffs do not allege that the execution of these documents was procured by fraud, or that, by reason of fraud, they do not express the true intention of the parties. *Willett v. Insurance Co.,* 208 N.C. 344, 180 S.E. 580; *Hill v. Insurance Co.,* 200 N.C. 502, 157 S.E. 599; *Hardware Co. v. Kinion,* 191 N.C. 218, 131 S.E. 579. * * *

"The pleadings of the plaintiffs do not attack the written instruments for fraud or other invalidating cause. This being true, it must be conclusively presumed under the evidence and pleadings in this particular case that the writings supersede the oral agreements of the parties and express their actual engagements. * * *"

This assignment of error is sustained.

The appellants further assign as error the allowance of Hall's counterclaim in the sum of $477.97, based on misrepresentations of the plaintiff and the additional defendant.

There are certainly no misrepresentations or fraudulent conduct alleged with respect to the execution of the lease agreement, nor are there any misrepresentations as to the condition of the equipment except as to the additional defendant.

In the lease agreement between the plaintiff and the defendant Hall there is no provision that gives defendant Hall any right to recover from the plaintiff for damages because of any defect in the leased equipment at the time of its delivery. The lease agreement expressly provides: "Unless lessee gives lessor written notice of each defect or other proper objection to an item of equipment within five (5) business days after receipt thereof, it shall be conclusively presumed, as between the lessee and lessor, that the item was delivered in good repair and that lessee accepts it as an item of equipment described in this lease."

The defendant Hall testified that he never at any time gave the plaintiff written notice of any defect in the equipment described in the lease.

The defendant Hall further testified that in April 1962, about six months after delivery of the equipment to him, he told Mr. Mathias that he had decided not to make any further payments on the machine, and had not used the machine since that time. Even so, on 14 April 1962 he paid plaintiff $107.62 as rent under the terms of the lease; on 15 August 1962 he made another payment to the plaintiff under the terms of the lease in the sum of $109.50; and on 5 February 1963 he made an additional payment to the plaintiff in the sum of $106.62. Therefore, while the defendant Hall had paid only $106.62 on the machine before he stated that he would make no more payments, he did, in fact, pay to the lessor $323.74 after his refusal to make any more payments.

Moreover, the court below included in its judgment in favor of Hall the sum of $47.61, the amount which defendant Hall had paid to the American Guaranty Corporation, lessor, on 5 July 1961, as rent on the Gestetner duplicator, covering rent therefor for a period of three months, which machine defendant Hall had leased from the American Guaranty Corporation on 2 March 1961 for a period of three years at a rental of $47.61 per quarter. The supplier of that equipment is the additional defendant in this action.

It appears from the evidence that defendant Hall had possession of the Gestetner machine between seven and eight months, but paid only three months' rent thereon, although he testified that he was satisfied with the Gestetner equipment. However, this rental item, paid to the American Guaranty Corporation, lessor, on 5 July 1961, in the sum of $47.61, is included in the judgment against the plaintiff and the additional defendant. We find no evidence which, in our opinion, justified the inclusion of this item in the judgment entered below against these appellants.

There is sufficient evidence to support the finding that the equipment supplied by the additional defendant and leased to defendant Hall had not been reconditioned as represented to Hall by the additional defendant. Even so, in our opinion, the allegations in defendant Hall's cross action to the effect that R. W. Mathias was the agent of plaintiff as well as the agent of the additional defendant, are not supported by the evidence.

There are other assignments of error, but in our opinion it is unnecessary to discuss them since they may not arise on another hearing.

Therefore, we have reached the conclusion that the nonsuit entered as to the plaintiff should be reversed, and that the additional defendant is entitled to a new trial, and it is so ordered.

As to plaintiff — Reversed.
As to additional defendant — New trial.

RAYMOND E. HARGRAVE v. WADE A. GARDNER, ADMINISTRATOR OF THE ESTATE OF LILLIAN E. GRADY, DECEASED.

(Filed 24 March, 1965.)

1. Executors and Administrators § 18—

Where an administrator is appointed prior to the institution of probate proceedings and plaintiff files claim for money advanced deceased upon her promise to repay or make testamentary provision in payment, judgment dismissing claimant's suit against the estate cannot have the effect of preserving plaintiff's claim against the bar of the statute of limitations in the event the will is not upheld, even though the judgment of dismissal is "without prejudice", since the court has no authority to waive a defendant's right to plead the statute of limitations. G.S. 28-112.

2. Limitation of Actions § 9—

G.S. 1-24 does not suspend the running of the statute of limitations against a claim against an estate during controversy on probate of a will when an administrator has been appointed for the estate and the claim has been duly filed with and rejected by the administrator.

3. Pleadings § 12—

The complaint must be liberally construed upon demurrer, and the facts alleged and relevant inferences of facts deducible therefrom must be taken as true, without considering matters *dehors* the pleading.

4. Executors and Administrators § 2—

The authority of an administrator continues until properly revoked, and the presentation of a paper writing to the clerk for probate does not revoke such authority, nor does the order of the clerk directing the administrator to suspend further proceedings except for the preservation of the property and the collection of debts and the payment of liens, pending the decision of the issue in the will contest, prevent the administrator from suing and being sued. G.S. 31-36.

5. Actions § 3; Payment § 1; Executors and Administrators § 18; Wills § 8— Claimant may maintain action notwithstanding probate of paper writing providing payment, final payment being merely affirmative defense.

Plaintiff alleged that he advanced money to decedent upon her promise to repay same or make testamentary provision in payment. An administrator was appointed for decedent and thereafter probate proceedings of a paper writing were instituted. Plaintiff admitted that the paper writing devised property to him in satisfaction of his claim. *Held:* The unprobated

and unrecorded paper writing cannot constitute payment, and plaintiff's action on his claim against the administrator is improperly dismissed on demurrer on the ground that no cause of action accrued to plaintiff unless and until it was determined that the paper writing was not the last will and testament of decedent. Further, the probate of the paper writing in common form does not alter this result when an appeal is taken therefrom, since the vesting of the title under the probated will cannot be final until the determination of the caveat, which must proceed judgment, and plaintiff's claim against the estate subsists until discharged by final payment, which is an affirmative defense to be alleged and proven by the administrator.

APPEAL by plaintiff from *Mintz, J.*, October 1964 Civil Session of WILSON.

Civil action for money loaned. The complaint alleges in substance these facts:

Lillian E. Grady, a resident of Wilson County, North Carolina, died 24 May 1963. From time to time over a period of twenty years prior to decedent's death, plaintiff loaned and advanced to her sums of money, totaling $15,000, for living expenses and her other needs. The loans and advances were made at decedent's request upon her promise to repay them or make adequate provision for repayment in her will. She did not make repayment, but after her death a paper writing, in her own handwriting, was found among her possessions; it purported to will and devise to plaintiff an interest in her real estate, ample in value to repay the loans and advances. A petition has been filed with the clerk of superior court of Wilson County to obtain the probate of the paper writing as the last will and testament of said Lillian E. Grady. Her heirs at law have answered the petition and denied that the paper writing is a valid will. Prior to the filing of the petition and institution of the probate proceeding defendant was appointed administrator of the estate of Lillian E. Grady. To protect his rights plaintiff filed with defendant administrator a claim for the $15,000 due him, but defendant denied the claim. When the petition to probate the will was filed, the clerk of superior court entered an order directing defendant to suspend all further proceedings in relation to the estate until a final determination is had in the probate proceedings. If, upon final determination of the probate proceeding the paper writing is not probated as the last will and testament of Lillian E. Grady, plaintiff will be entitled to recover of her estate said sum of $15,000 by virtue of her failure to make payment thereof personally or by valid will. (A copy of the paper writing is attached to the complaint marked "Exhibit A", and made a part of the complaint by reference.)

Defendant demurred to the complaint on the ground that it "does not state facts sufficient to constitute a cause of action, in that it affirm-

atively appears upon the face of the complaint that plaintiff's alleged cause of action, if any, is solely predicated upon a contingency which has not happened."

The court, being of the opinion that the complaint shows on its face that the cause of action stated therein had not accrued, ordered the action dismissed "without prejudice to the right of plaintiff to maintain his action in the event Exhibit A . . . is finally adjudged not to be the will of Lillian E. Grady."

Plaintiff noted his exception and appeals.

Carr and Gibbons for plaintiff.

Lucas, Rand, Rose and Morris and Louis B. Meyer for defendant.

MOORE, J. The demurrer was sustained below on the theory that the facts alleged by plaintiff affirmatively show that the purported cause of action has not accrued and will not accrue until there has been a final judicial determination that the paper writing is not the last will and testament of Lillian E. Grady, that is, that the cause of action "is solely predicated upon a contingency which has not happened." The action was dismissed. This result, if sustained, leaves plaintiff entoiled in a procedural snarl which may ultimately defeat his claim, assuming the claim is meritorious and he is entitled to payment. If the paper writing is finally adjudged to be decedent's will, the devise to plaintiff will constitute payment. If the adjudication is otherwise, the cause of action will be barred.

The judge, realizing plaintiff's dilemma, undertook to protect his rights by dismissing the action "without prejudice to the right of plaintiff to maintain his action in the event Exhibit A attached to the complaint is finally adjudged not to be the will of Lillian E. Grady." We do not perceive how this provision of the judgment improves plaintiff's position. The action was "dismissed at the cost of plaintiff"; the "without prejudice" provision does not serve to retain it. An action may be *maintained* though subject to a plea in bar — on the hope that defendant will not plead the statute of limitations. There is nothing in the complaint or demurrer to indicate that defendant has waived his right to plead the statute; the court has no authority to waive it for him or to deprive him of this or any other defense, and has not undertaken to do so. The clerk of superior court appointed an administrator of the estate as in case of intestacy. Plaintiff filed his claim with the administrator, who denied it. Therefore, to preserve the claim it was necessary for plaintiff to institute action thereon within three months after notice of the denial. G.S. 28-112. An adjudication that the paper writing is not the will of decedent would establish that Lillian E. Grady

died intestate. A suit filed after such adjudication would arise more than three months after rejection of the claim and would therefore be barred.

It is suggested that, by virtue of G.S. 1-24, the running of any applicable statute of limitations is suspended during the controversy on probate of the will. This statute has no application where, as here, an administrator has been appointed. *Stelges v. Simmons,* 170 N.C. 42, 86 S.E. 801; *Hughes v. Boone,* 114 N.C. 54, 19 S.E. 63.

We come now to consider whether the complaint states an existing cause of action. Facts alleged, and relevant inferences of facts deducible therefrom, are deemed admitted where the sufficiency of a complaint is tested by demurrer. *Copple v. Warner,* 260 N.C. 727, 133 S.E. 2d 641; *Stegall v. Oil Co.,* 260 N.C. 459, 133 S.E. 2d 138. Matter *dehors* the pleading may not be considered in passing upon a demurrer. *Jewell v. Price,* 259 N.C. 345, 130 S.E. 2d 668. The judge must accept the facts as alleged and bottom his judgment thereon. The complaint must be liberally construed, giving the plaintiff the benefit of every reasonable intendment in his favor. 3 Strong: N. C. Index, Pleadings, § 12, p. 624.

These facts appear: Plaintiff loaned money to Lillian E. Grady upon her promise to personally repay or to make provision for repayment in her will. She died without having paid the debt. It has not otherwise been paid. Defendant was appointed administrator of Lillian E. Grady's estate; plaintiff filed his claim with defendant administrator; defendant denied the claim. A paper writing purporting to be a will was found; it undertakes to devise property to plaintiff in compliance with decedent's agreement. A petition has been filed with the clerk of superior court offering the paper writing for probate; decedent's heirs contest the validity of the paper writing. It has not been admitted to probate.

According to the agreement of plaintiff and Lillian E. Grady with respect to the loan, payment became due in any event at the moment of her death. The debt has not been paid, and defendant refused to recognize it. The existence of the paper writing did not postpone the accrual of the cause of action. At the time the action was instituted and the complaint was filed, the paper writing had not been admitted to probate. Both the claim and the validity of the paper writing had been denied. An unprobated will is not muniment of title; it cannot be established as a will in a collateral proceeding; it conveys no title to property until it is probated and recorded. G.S. 31-39; *Paul v. Davenport,* 217 N.C. 154, 7 S.E. 2d 352; *Osborne v. Leak,* 89 N.C. 433. Title to land descends to the heirs, subject to be divested in favor of a devisee when a will is duly admitted to probate. *Floyd v. Herring,* 64 N.C. 409. When the paper writing in the case at bar was presented to

the clerk for probate, defendant's authority to administer the estate was not revoked by the clerk or by operation of law. The authority of the administrator continues until properly revoked. *Floyd v. Herring, supra.* The clerk entered an order directing defendant to suspend further proceedings, except preservation of property, collection of debts, and payment of taxes and debts which are a lien on property, pending the decision on the issue in the will contest. G.S. 31-36. But this does not prevent the administrator from suing and being sued. *In re Palmer's Will,* 117 N.C. 133, 23 S.E. 104; *Hughes v. Hodges,* 94 N.C. 56; *Syme v. Broughton,* 86 N.C. 153. He has authority to defend an action against the estate for collection of an alleged debt.

The provisions of the unprobated, unrecorded and contested will do not amount in law to payment of plaintiff's claim, nor proof of such payment, nor proof of compliance by decedent with her contract. They do not convey title to plaintiff and do not constitute a defense to the action. Plaintiff's allegations with respect to the paper writing are in explanation of the contract and in support of the validity of the contract. Plaintiff frankly states that, in the event the paper writing is finally determined to be the will of decedent, he will accept the property devised as payment of the indebtedness. Plaintiff's cause of action does not arise because of the will or its invalidity; it arises because of the debt. The will, if valid, is a matter of defense. The contingency, of which defendant speaks, relates to the defense and not to the prosecution of the claim. If the will is finally established, defendant will have a perfect defense to the action. If the will is not upheld, defendant must resort to some other available defense, if any there be.

The court erred in sustaining the demurrer. In the orderly litigation of the rights of the parties, it would seem inappropriate to bring this case to trial prior to the final disposition of the will contest. However, this is not a matter for our decision on this record.

Pending the hearing of this appeal, defendant filed in this Court a motion to dismiss the appeal on the ground that it has become moot by reason of the probate and recordation of the paper writing as the last will and testament of Lillian E. Grady, since the ruling on the demurrer.

In support of the motion defendant adverts to these principles of law: "Under the statute now codified as G.S. 31-19, the order of the clerk admitting the paper writing to probate constitutes conclusive *evidence* that the paper writing is the valid will of decedent until it is declared void by a competent tribunal or an issue of *devisavit vel non* in a caveat proceeding." *Holt v. Holt,* 232 N.C. 497, 61 S.E. 448. Once it is admitted to probate and recorded by the clerk, it relates back to the death of the testator. G.S. 31-41; *In re Marks' Will,* 259 N.C. 326,

130 S.E. 2d 673. "The probated will constitutes a muniment of title unassailable except in direct proceedings. G.S. 31-19. It operates as a conveyance of title to the land devised. Any action or proceeding contesting its validity directly assails the validity of such conveyance and necessarily involves the title." *Whitehurst v. Abbott,* 225 N.C. 1, 5, 33 S.E. 2d 129. These are sound propositions of law when appropriately applied.

Here we set out defendant's contentions verbatim. "Plaintiff's cause of action is based upon the premise that Lillian E. Grady died without a will providing for repayment of the sums advanced to her by plaintiff. A will has now been probated which fulfills the testatrix's promises to the plaintiff. Title to the property sought by the plaintiff has now vested in him. Only upon the successful caveat of this will would testatrix's estate be indebted to the plaintiff. Only until that contingency occurs, if it ever does, would the plaintiff's cause of action accrue." Further: "Plaintiff contends that, if the caveat is successful and the paper writing is adjudged not to be the will of Lillian E. Grady, he would then be unable to maintain this suit because of the statute of limitations. As to this, the appellee contends that the plaintiff, already having filed his suit, is now protected in this contingency by the judgment of Mintz, J., sustaining the demurrer . . ."

From the order of the clerk admitting the paper writing to probate, a copy of which is attached to the motion, it appears that the heirs at law of Lillian E. Grady and *defendant administrator* excepted and gave notice of appeal to the superior court. It is patent that defendant does not concede that the will is valid and he and the heirs intend to contest it by caveat. Moreover, if defendant did concede the validity of the will, it would not be binding on the court in the caveat proceeding. "The (caveat) proceeding must proceed to judgment, and nonsuit and directed verdict are inapposite." 4 Strong: N. C. Index, Wills, § 12, p. 485. Conceding that title to the land devised is at the moment vested in plaintiff, such title, if the question were properly presented to the court, would not justify a ruling that the debt has been paid. The final determination as to the validity of the will has not been made. Under the contract between plaintiff and the deceased, *temporary* payment does not discharge the debt.

If it is finally determined that the paper writing is not the will of deceased, such determination will establish that Lillian E. Grady died intestate and the status of intestacy will be deemed to have existed at all times since her death. What was said above concerning the "without prejudice" provision of the judgment below, as bearing on the statute of limitations, is equally valid on this motion to dismiss the appeal, and will not be repeated in this connection.

If defendant desires to take advantage in this action of the clerk's order or any future order or judgment of superior court in the will contest, he must do so by answer and upon trial. Under plaintiff's pleadings, payment by devise is a matter of defense. The motion to dismiss the appeal is overruled.

The judgment below is

Reversed.

STATE v. RALPH MONROE DUNCAN.

(Filed 24 March, 1965.)

1. Automobiles § 59—

Evidence tending to show that a driver was operating a vehicle at 65-75 miles per hour in a posted 45 miles per hour zone along a three lane street within the corporate limits of a municipality, that the street was wet and that as the driver attempted to pass a car traveling in the same direction he lost control, skidded sideways, and collided with a car traveling in the opposite direction, *is held* sufficient to be submitted to the jury on the question of culpable negligence.

2. Same; Automobiles § 41p—

Evidence tending to show that immediately after the accident defendant was lying injured on the highway and the body of the owner of the car was found in the front seat of the car, together with testimony of an investigating officer, corroborated by two other officers who were present, that, upon being questioned in the hospital several hours after the accident, defendant seemed normal and talked in a normal manner, and recounted what happened while he was driving at the time of the accident, *is held* sufficient to support a jury finding that defendant was driving, notwithstanding substantial evidence introduced by defendant that the owner was operating the car.

3. Automobiles §§ 15, 60— G.S. 20-148 is not applicable to a three-lane highway.

The accident in suit occurred on a three-lane highway having the northern and center lanes for westbound traffic and the southern lane for eastbound traffic, and occurred as the car driven west by defendant in the center lane went out of control as it was passing a car in the north lane, and skidded into a car traveling east in the southern lane. *Held:* An instruction charging the jury upon the statute requiring drivers of vehicles traveling in opposite directions to pass each other to the right, giving the other one-half of the main-traveled portion of the roadway as near as possible, must be held for prejudicial error as charging law having no pertinency to the facts in evidence.

4. Criminal Law § 107—

It is error for the court to charge upon a principle of law having no pertinency to the facts in evidence in the case.

APPEAL by defendant from *Froneberger, J.*, November 1964 Session of RUTHERFORD.

Defendant was indicted, tried and convicted of involuntary manslaughter in connection with the death on February 14, 1964, of Margaret L. Campbell as a result of a collision of automobiles. Judgment imposing a prison sentence of six years was pronounced. Defendant appealed.

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

Hamrick & Hamrick for defendant appellant.

BOBBITT, J. The collision occurred on Saturday, February 14, 1964, about 4:00 p.m., on U. S. Highway #74 (West Main Street) within the corporate limits (west end) of Forest City.

Approaching the point of collision, the hard-surfaced (east-west) highway consists of three traffic lanes. The northern and center lanes are for westbound traffic toward Spindale. The southern lane is for eastbound traffic toward the business district of Forest City. The posted speed limit was 45 miles per hour. It had been raining steadily. The highway was wet and slick.

A 1957 green Ford operated by Mrs. Paul Haines was traveling west in the northern lane. A Ford station wagon operated by W. C. Campbell was traveling east in the southern lane. The operator of a Chevrolet, traveling west in the center lane, was attempting to overtake and pass the Haines car. The occupants of the Chevrolet were Jack Tolley, the owner, and Ralph Monroe Duncan, the defendant.

We consider first whether the State's evidence was sufficient to withstand defendant's motion for judgment "as in case of nonsuit." G.S. 15-173.

Evidence favorable to the State tends to show the Chevrolet was being operated on said slick highway, attempting to overtake and pass the Haines car, at a speed of 65-75 miles per hour; that it "went into a fish-tail" and skidded sideways, out of control, "for 200 or 300 feet"; that, proceeding sideways, the left center of the Chevrolet crashed into the front of the oncoming Campbell station wagon; and that thereafter both cars involved in said collision struck the Haines car.

Two persons died instantly as a result of said collision, to wit, Mrs. (Margaret L.) Campbell, a passenger in said Ford station wagon, and Tolley, the owner-occupant of said Chevrolet. Others were injured.

After the collision, Tolley's body was in the front seat of his car. Defendant, "lying in the road," injured, was taken by ambulance to the Rutherford Hospital.

A person whose culpable (criminal) negligence in the operation of an automobile proximately causes death is guilty of manslaughter at least. The pertinent and oft-stated legal principles are well established. *S. v. Cope*, 204 N.C. 28, 167 S.E. 456; *S. v. Hancock*, 248 N.C. 432, 103 S.E. 2d 491. Based thereon, the evidence, when considered in the light most favorable to the State, *S. v. Orr*, 260 N.C. 177, 179, 132 S.E. 2d 334, was amply sufficient to support a finding that the driver of Tolley's Chevrolet was guilty of involuntary manslaughter.

With reference to nonsuit, the crucial question is whether the evidence is sufficient to support a finding that defendant (rather than Tolley) was such driver.

The State offered evidence tending to show: About three hours after the collision, two police officers of Forest City, Sgt. Robert Adams and Wheeler Lowrance, accompanied by State Highway Patrolman H. O. White, went to the Rutherford Hospital. After speaking to the "head nurse," they went to a ward room occupied by defendant and three other patients.

Adams testified: "I went into this room and walked up to the bed Ralph Duncan was in, and I said, 'Ralph, I am Sgt. Bob Adams of the Forest City Police Department.' He looked up and said, 'Hi, Bob.' I said, 'It looks like you got the worst end of this accident, got roughed up a bit.' He said, 'Yes, sir, I did.' I said, 'Can you tell me what happened in the accident, Ralph?' and he said, 'I started to pass a green car.' I said, 'A '57 Ford?' and he said, 'Yes, sir.' He said as he started to pass it it went into a skid, or something, and he blacked out; that's all he remembered. I said, 'How fast were you going?' He said, '50 or 55 miles an hour.'" Again: ". . . he seemed to be normal; he talked just like we are talking."

Lowrance, with reference to said conversation, testified: "Sgt. Adams, said, 'Just what happened?' Mr. Duncan said, 'I was passing a car, . . .' Sgt. Adams interrupted and asked him if it was a green Ford, and he said, 'I believe that's right.' Sgt. Adams asked him what happened, and he said he either lost control or went to sleep, he didn't remember anything after that." Again: "(H)e (defendant) said: 'I was passing another car and lost control or went to sleep, I don't know what.'" Lowrance testified defendant said "he was traveling 50 or 55 miles an hour"; that he (Lowrance) "did not observe anything ab-

normal about" defendant; and that defendant talked "in a normal voice, spoke distinctly," and "was well understood."

White testified he went into the ward room with Adams and Lowrance, heard Adams introduce himself and ask defendant what had happened. He testified: "I was not paying too close attention to the conversation. I was looking more or less around the room. I did hear Mr. Duncan say he lost control of the car, and I walked over to an old gentleman lying in another bed, talked to him and I did not hear any more. So far as I could tell, Mr. Duncan was talking normally." White testified he "did not investigate the accident."

Evidence for defendant is in conflict with the State's evidence in material respects with reference to what defendant told the officers. Defendant testified he had no recollection of any conversation with the officers in the hospital. Too, defendant testified Tolley was the driver and offered evidence tending to corroborate and support his testimony.

While conceding there was substantial evidence that Tolley was the driver, the evidence of Adams, Lowrance and White, when considered in the light most favorable to the State, was sufficient to support a jury finding that defendant was the driver. Hence, the motion for judgment as of nonsuit was properly overruled.

A portion of the charge, to which defendant excepted, is as follows: "(If a person intentionally violates the provisions of the statute and thereby causes the death of another, he is deemed to be criminally negligent and is guilty of involuntary manslaughter.) EXCEPTION #35. (Hence, if the jury should find beyond a reasonable doubt from the evidence that the defendant, while driving a motor vehicle upon the public highways, if you do find that he was driving, intentionally violated the statute designed to protect life and limb, then the defendant would be guilty of involuntary manslaughter.) EXCEPTION #36."

Defendant asserts the sentence to which Exception #35 is directed failed to explain that the instruction is applicable only to a statute designed to protect life and limb; and defendant asserts the sentence to which Exception #36 is directed contains no reference to proximate cause. While these contentions appear to be technical and without substantial merit, the quoted excerpts must be considered in relation to the particular statutes to which the court had directed the jury's attention.

The court had previously instructed the jury as follows: "Now, the statutes that the State is relying upon . . . the first I will call your attention to is meeting vehicles, which is 20-148, which reads as follows: 'A driver of a vehicle proceeding in an opposite direction shall pass each other to the right, each giving the other at least one-half of the main-traveled portion of the roadway as nearly as possible.' "

If G.S. 20-148 were applicable, certainly the driver of the Chevrolet intentionally violated its provisions. The driver of the Chevrolet, approaching the scene of collision in the center lane, did not give, and did not intend to give, the Campbell station wagon "at least one-half of the main-traveled portion of the roadway as nearly as possible." This statute was not relevant to the three-lane highway involved in this case. Indeed, absent negligence in other respects, defendant would have been entitled to an instruction to the effect that the driver of the Chevrolet was entitled under the law to use the center lane in attempting to overtake and pass the 1957 green Ford.

A safety statute, such as G.S. 20-148, is pertinent when, and only when, there is evidence tending to show a violation thereof proximately caused the alleged injuries or death. *Farfour v. Fahad,* 214 N.C. 281, 199 S.E. 521.

"It is established by our decisions that an instruction about a material matter not based on sufficient evidence is erroneous. (Citations.) And it is an established rule of trial procedure with us that an abstract proposition of law not pointing to the facts of the case at hand and not pertinent thereto should not be given to the jury. (Citations.)" *Childress v. Motor Lines,* 235 N.C. 522, 530, 70 S.E. 2d 558; *McGinnis v. Robinson,* 252 N.C. 574, 578, 114 S.E. 2d 365. We are constrained to hold that the instructions discussed above, in relation to the present factual situation, were erroneous and prejudicial. See *Powell v. Clark,* 255 N.C. 707, 122 S.E. 2d 706; *McGinnis v. Robinson, supra; Lookabill v. Regan,* 245 N.C. 500, 96 S.E. 2d 421.

The questions raised by defendant's other assignments of error may not recur upon a new trial. Hence, particular consideration thereof upon the present record is deemed inappropriate.

New trial.

JOHNNY R. WATT, BY HIS NEXT FRIEND, JOHN MACK WATT v. HOUSING AUTHORITY OF THE CITY OF CHARLOTTE, A NORTH CAROLINA CORPORATION.

(Filed 24 March, 1965.)

1. Negligence § 37f— Evidence held insufficient for jury on issue of negligence of proprietor in failing to discover and remove dangerous substance.

Plaintiff, a minor, was injured when another child threw a can containing a caustic substance in his face as he was playing in the yard of de-

fendant's apartment building. Plaintiff's evidence was to the effect that some two or three months before the injury a former tenant of an adjacent apartment had a can of Drano therein, and that another occupant saw a Drano can on the windowsill of the apartment about noon and again as she brought in her clothes before night on the day plaintiff was injured. *Held:* The evidence is insufficient to be submitted to the jury on the question of defendant's negligence in failing to make reasonable and proper inspection to discover and remove dangerous substances around the premises where small children were known to play.

2. Negligence § 24a—

Negligence may be established by circumstantial evidence, but an inference of negligence must be based upon facts established by direct testimony and may not be based upon another inference or presumption.

3. Trial § 22—

Evidence which raises a mere speculation or conjecture is insufficient to be submitted to the jury.

APPEAL by plaintiff from *Riddle, J.*, October 1, 1964 Schedule "D" Session, MECKLENBURG Superior Court.

The plaintiff, age eight years, by his father as Next Friend, instituted this civil action against the defendant Housing Authority to recover damages for personal injuries sustained on October 23, 1962, when another child threw "a part of the contents of a can of Drano, a caustic, poisonous chemical, into the face of the minor plaintiff while he was playing in the yard of the apartment building . . . blinding him in one eye and substantially impairing his vision in the other."

The plaintiff based his claim upon the allegations that the defendant's employees were negligent in that while cleaning and repainting its apartment No. 319, they left, or failed to remove, a can of Drano from the reach of small children known to be playing around the building; and thus the defendant negligently failed to maintain, in a reasonably safe condition, the premises under its control.

The plaintiff offered evidence that he and his family lived in apartment No. 317 in the Authority's building. About two months before plaintiff's injury the former occupant of adjoining apartment No. 319 had in the apartment a part of a can of Drano, a chemical used in flushing water pipes. When she vacated the apartment she did not remove the can and did not know whether it was there when her family left. The defendant's employees cleaned, renovated, and spray-painted the apartment, completing the work about 3:30 on October 23. The apartment was locked at all times except when the employees were at work.

The plaintiff offered evidence that a can of Drano was sitting on a windowsill outside the window at the back of Apartment 319. The can

was observed at about twelve o'clock and again shortly thereafter on the afternoon of October 23 — the date of plaintiff's injury. The window was closed. After the injury an empty Drano can with the screw cap missing was found "at the end of the drainspout (around the corner of the building) . . . the can was . . . empty." There was evidence that a circle — or clean place — about the size of the bottom of the can was on the windowsill, surrounded by green paint. The windowsill was 61½ inches from the ground and about 30 inches from the porch of apartment No. 319. The can was not there when the place was examined after the plaintiff's injury.

The plaintiff, age 10 at the time of the trial, testified: "This other boy when I first saw him was at the end corner of the house . . . When I first saw him, he had something in his hand. His arm was moving. I couldn't see what he had in his hand but whatever it was, I say it was wet." The substance struck him in the face.

The plaintiff introduced the adverse examination of the two men employees of the defendant who did the cleaning and painting in the apartment. They concluded the work about an hour before the plaintiff was injured. Neither used or saw any can of Drano about the apartment or the windowsill. One of them checked the meter near the window. He did not see any can on the windowsill. The Housing Authority did not furnish or use Drano, but a different chemical in its cleaning operations.

Dr. Harold S. Pride testified with respect to the character and extent of the plaintiff's injuries. He expressed this opinion as to the cause of the injury: "As to the apparent cause of that condition, it appeared as if some type of caustic substance had come in contact with his skin and eyes . . . I am familiar with burns caused by a product called Drano. In my opinion the condition which I saw there could have been caused by Drano."

At the conclusion of the plaintiff's evidence the court, on defendant's motion, entered a judgment of compulsory nonsuit. The plaintiff excepted and appealed.

Kennedy, Covington, Lobdell & Hickman by Hugh L. Lobdell, Charles V. Tompkins, Jr., for plaintiff appellant.

Carpenter, Webb & Golding by John G. Golding for defendant appellee.

HIGGINS, J. The evidence disclosed that two or three months before the plaintiff's injury a former tenant of apartment No. 319 had a can of Drano in the apartment. Evidence that the can was seen thereafter is lacking. The owner had not seen it. She cleaned the apartment

prior to moving. Those who helped to move did not see it. The agents of the defendant who spray-painted and cleaned the interior of the apartment testified for the plaintiff by adverse examination. They did not use and did not observe any can of Drano, either in, or about the apartment.

An occupant of another apartment testified she saw a can of Drano on the windowsill of the apartment about noon and again as she brought in her clothes before night on the day the plaintiff was injured. For the purpose of testing the sufficiency of the evidence, we must give full weight to her testimony. She had no opportunity to know whether the can was full, partially full, or empty; so, whether the can contained Drano is speculation. There is no proof any employee of the defendant put the can on the windowsill, or knew it was there. All the direct and positive evidence of those who were in a position to know was to the contrary. There is no evidence in the record that any agent of the defendant knew a can containing any dangerous substance was on the windowsill or anywhere else about the apartment where children might discover it and be injured. The most that may be inferred is that a Drano can was on the windowsill at twelve o'clock and still there at the time the witness cleared her clothesline in the afternoon. It may not be inferred that this short time was sufficient to charge the defendant with constructive notice sufficient to show a negligent failure to make reasonable and proper inspection, and discover and remove a dangerous condition.

Only by inference may we charge the defendant with the responsibility for placing a can of Drano in reach of children. Another inference is necessary before we may place that particular can in the hands of the boy who threw some burning liquid into the face of the plaintiff. Another inference is necessary to identify the harmful fluid as Drano. The plaintiff's doctor said the injury may have been caused by Drano.

In the law of negligence, inferences may be drawn if a proper factual basis exists for them. But they must be drawn from facts in evidence. An inference may not be based on other inferences. "Evidence of actionable negligence need not be direct or positive. Circumstantial evidence is sufficient, either alone or in combination with direct evidence . . . A basic requirement of circumstantial evidence is reasonable inference from established facts. Inference may not be based on inference. Every inference must stand upon some clear and direct evidence, and not on some other inference or presumption." *Lane v. Bryan,* 246 N.C. 108, 97 S.E. 2d 411. "We may say with certainty that evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it is so, is an insufficient foundation for a verdict and should not be left to the jury." *Lee v. Stevens,*

251 N.C. 429, 111 S.E. 2d 623; *Miller v. Coppage,* 261 N.C. 430, 135 S.E. 2d 1; *Kelly v. Willis,* 238 N.C. 637, 78 S.E. 2d 711; *Sowers v. Marley,* 235 N.C. 607, 70 S.E. 2d 670; *Poovey v. Sugar Co.,* 191 N.C. 722, 133 S.E. 12.

Under the authority of the foregoing and other decisions to like effect, we hold the evidence offered was insufficient to make out a case for the jury. The judgment of nonsuit entered in the Superior Court is Affirmed.

CONTINENTAL CASUALTY COMPANY v. W. S. FUNDERBURG AND CLARA F. FUNDERBURG.

(Filed 24 March, 1965.)

1. Appeal and Error § 49—

A conclusion of law of the lower court is reviewable on appeal notwithstanding it is denominated a finding of fact.

2. Contracts § 4—

Where the parties make reciprocal promises and one of the parties fulfills his promise, the law will not permit the other promisor to avoid his obligation on the ground that he received no consideration.

3. Same; Indemnity § 1— Execution of surety bond after execution of indemnity agreement furnishes consideration for the indemnity agreement.

After execution of a surety bond for the project causing the loss in suit the principal and his wife executed a contract indemnifying the surety against loss on bonds theretofore or thereafter executed. It was made to appear that in negotiations prior to the execution of the surety bond the surety agreed to extend a line of credit in executing a series of surety bonds if the principal and his wife would execute the indemnity agreement, and that subsequent to the execution of the indemnity contract the surety did execute a number of surety bonds. *Held:* The execution of surety bonds subsequent to the execution of the indemnity agreement furnished a legal consideration for the indemnity agreement, and the wife cannot avoid her liability thereunder for the loss in suit upon the plea of no consideration.

APPEAL by plaintiff from *Bundy, J.,* September 1964 Session of NEW HANOVER.

Plaintiff alleged: On April 27, 1960, it became surety on a performance and payment bond on which W. S. Funderburg was principal. By reason of its execution of the bond, it sustained a loss of $15,000. On June 10, 1960, defendants executed an indemnity contract agreeing to

indemnify plaintiff against loss by reason of its suretyship on bonds executed for defendants, or either of them.

Feme defendant denied liability because, as she alleged, there was no consideration for her execution of the indemnity agreement.

The parties waived a jury trial. They stipulated facts. The stipulated facts were supplemented by parol evidence. The court, concluding W. S. Funderburg was liable to plaintiff for $15,000, the amount claimed, rendered judgment against him.

The court found "as a fact that the general contract of guaranty, as alleged * * * against Clara F. Funderburg is wanting of legal and sufficient consideration to support same." It dismissed the action as to *feme* defendant. Plaintiff, having excepted to the finding and judgment, appealed.

Poisson & Barnhill for plaintiff appellant.
Stevens, Burgwin, McGhee & Ryals for defendant appellee.

RODMAN, J. While the court states as a fact that *feme* defendant received no consideration binding her on the contract of indemnity, and for that reason is not liable, the question for determination is not a factual question, but one of law, *viz:* Do the undisputed facts establish a consideration imposing liability on *feme* defendant?

W. S. Funderburg, on April 27, 1960, contracted with the United States for the construction of a dike near Charleston. At the request of W. S. Funderburg, plaintiff (Continental) executed a bond guaranteeing performance of the contract and payment of labor and material used in performing the contract. Funderburg sublet the work to Bradham & Sons. Funderburg collected $26,049.60 for work and material, pursuant to the contract. He paid Bradham & Sons $10,000. The United States, on October 27, 1960, terminated Funderburg's contract because of nonperformance. Suit was thereafter brought in the U. S. District Court for the Eastern District of South Carolina by the United States, for the use and benefit of Bradham & Sons, against W. S. Funderburg and Continental, as surety on the performance and payment bond. Judgment was rendered in the U. S. District Court against W. S. Funderburg and Continental for $14,648, with interest, the amount he owed Bradham & Sons for work done and material furnished in constructing the dike. On January 17, 1962, Continental paid $15,000 in settlement of the judgment rendered in the U. S. District Court. The judgment was assigned for the surety's protection. No part of the judgment has been paid.

Prior to execution of the bond of April 27, 1960, defendants sought assurances from plaintiff that it would execute, as surety, bonds when

requested by W. S. Funderburg. In May 1960, male defendant was informed that a line of credit would be extended upon execution of an indemnity contract. Defendants, on June 10, 1960, executed the indemnity contract, on which this action is based. Continental extended the requested line of credit.

The contract of June 10, 1960 begins with this recital:

> "WHEREAS the undersigned or one or more of them (hereinafter called the Indemnitor) HAVE HERETOFORE required, and may hereafter require suretyship upon certain obligations of suretyship on behalf of the undersigned, or of one or more of them or some other person or corporation, and HAVE APPLIED, and one or more of them may hereafter apply to the CONTINENTAL CASUALTY COMPANY (hereinafter called the Surety) to execute such INSTRUMENTS, as Surety."

Indemnitors agreed:

> "Indemnitor will perform all the conditions of EACH SAID BOND, and any and all renewals and extensions thereof, and will at all times indemnify and save the Surety harmless from and against every claim, demand, * * * judgment and adjudication whatsoever, and will place the Surety in funds to meet the same before it shall be required to make payment.
>
> * * * *
>
> "Indemnitor will, on the request of the Surety, procure the discharge of the Surety from ANY SUCH SURETYSHIP, and all liability by reason thereof."

Feme defendant does not question her execution of the contract. She testified: "I recall signing a paper writing which the plaintiff calls a general contract of indemnity sometime in June 1960. This is my signature on that paper writing. * * * I knew it was a legal instrument. * * * I thought it was an indemnity bond. * * * I knew what I was signing."

Male defendant contracted with the Corps of Engineers for snagging work in Perquimans River. On September 29, 1960, Continental became surety on male defendant's bond guaranteeing performance of that contract. Male defendant, in October 1960, contracted with the Corps of Engineers for work in Wilmington Harbor. He gave a bond guaranteeing performance of that contract. Continental signed that bond as surety. Subsequent to June 1960, Continental executed other bonds as surety for W. S. Funderburg.

It is not here necessary to take issue with *feme* defendant's statement of the law that, "A mere promise, without more, lacks considera-

tion and is unenforceable." Where, however, parties make reciprocal promises and one of the parties fulfills his promise, the law will not permit the other promisor to avoid his obligation on the assertion that he received no consideration. *Fertilizer Co. v. Eason*, 194 N.C. 244, 139 S.E. 376; *Brown v. Taylor*, 174 N.C. 423, 93 S.E. 982; *Storm v. United States*, 94 U.S. 76, 24 L. Ed. 42; 17 Am. Jur. 2d 452.

When, subsequent to June 10, 1960, the date Mrs. Funderburg executed the indemnity agreement, Continental became surety for W. S. Funderburg, one of the indemnitors, it supplied the consideration which bound the *feme* defendant to comply with the promises made in the indemnity agreement.

Contracts of indemnity may be limited to undertakings thereafter executed, or may provide for indemnification against losses resulting from contracts theretofore executed. "Whether or not a guaranty is retrospective or is merely prospective depends entirely upon the form of the contract. It is easily possible to make the contract one or the other, or both." Stearns Law of Suretyship, 5th Ed., § 4.10.

The intent of the parties, shown by the words used to state their respective rights and obligations, is controlling. 42 C.J.S. 574-5.

We have no difficulty in reaching the conclusion that the defendants, when they executed the indemnity agreement, understood it to afford Continental protection against losses which it might sustain by reason of prior, as well as subsequent guaranties, executed for W. S. Funderburg.

Reversed.

STATE v. CLARENCE K. JONES AND ROY LEE.

(Filed 24 March, 1965.)

1. Burglary and Unlawful Breakings § 2—

G.S. 14-54, as amended, constitutes unlawful breaking or entering a building a felony when such breaking or entering is done with intent to commit a felony or other infamous crime therein and a misdemeanor in the absence of such felonious intent, and constitutes the misdemeanor a less degree of the offense.

2. Burglary and Unlawful Breakings § 5; Criminal Law § 109—

Where there is evidence that defendant unlawfully broke into and entered a building, but the only evidence of any felonious intent in doing so is entirely circumstantial, it is the duty of the court to submit the question of defendant's guilt of the misdemeanor of breaking and entering without

felonious intent, this being a less degree of the crime presented by the evidence. G.S. 15-170.

3. Burglary and Unlawful Breakings § 2.1—

An indictment for an unlawful breaking with intent to steal should designate precisely and accurately the occupant of the building and the owner of the personal property therein.

APPEAL by defendants from *Parker, J.*, August 1964 Session of WAYNE.

Defendants were tried on a bill of indictment charging that they, on August 5, 1964, in Wayne County, "a certain storehouse, shop, warehouse, dwelling house and building occupied by one Casey's Laundry wherein merchandise, chattels, money, valuable securities were and were being well kept, unlawfully, wilfully and feloniously did break and enter with intent to steal, take, and carry away the merchandise, chattels, money, valuable securities of the said Casey's Laundry," etc.

The only evidence was that offered by the State.

As to each defendant, the jury returned a verdict of "guilty." Judgment as to Lee: Confinement in State's Prison for not less than five nor more than seven years. Judgment as to Jones: Confinement in State's Prison for not less than nine nor more than ten years. Defendants appealed.

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

Herbert B. Hulse and Julian T. Gaskill for defendant appellants.

BOBBITT, J. The State's evidence, in brief summary, tends to show: On August 5, 1964, Robert Casey, Sr. was engaged in the laundry and dry cleaning business in Goldsboro. There is no door between the main building of his plant and the adjoining boiler room. About 9:00 p.m. defendants broke an outside window to the boiler room. Later that night, having entered the boiler room, defendants broke an inside window between the boiler room and the main building. Robert Casey, Jr. was in the main building and heard the noise. He accosted defendants. They fled through the boiler room. They were arrested later that night.

There was no evidence any personal property within the boiler room or main building of Casey's Laundry was stolen or disturbed. There was no positive testimony as to whether "merchandise, chattels, money, valuable securities" were in the boiler room or main building.

There was no motion for judgment "as in case of nonsuit." G.S. 15-173. Defendants' assignments of error relate to the charge.

The court instructed the jury to return a verdict of guilty if satisfied from the evidence beyond a reasonable doubt "that at the time they broke and entered . . . they had the intent to take, steal and carry away goods, chattels or merchandise in Casey's Laundry building"; and, if not so satisfied, to return a verdict of not guilty. Defendants contend the court should have, but did not, charge the jury substantially as follows: If the State has satisfied you from the evidence beyond a reasonable doubt that defendants unlawfully (wrongfully) broke and entered Casey's Laundry, but has failed to satisfy you beyond a reasonable doubt that they did so "with intent to commit a felony or other infamous crime therein," they would be guilty of a misdemeanor; and in such case it would be your duty to return a verdict of guilty as to such misdemeanor. Defendants excepted to and assign as error the court's failure to so charge.

G.S. 14-54, on which the indictment is based, was amended in 1955 (S.L. 1955, c. 1015) by adding this sentence: "Where such breaking or entering shall be wrongfully done without intent to commit a felony or other infamous crime, he shall be guilty of a misdemeanor." It is noted: In the original portion of G.S. 14-54, the phrase "break *or* enter" (our italics) appears in the definition of the felony.

To convict of the felony defined in G.S. 14-54, the State must satisfy the jury from the evidence beyond a reasonable doubt that a building described in the statute was broken into or entered "with intent to commit a felony or other infamous crime therein." *S. v. Cook,* 242 N.C. 700, 703, 89 S.E. 2d 383, and cases cited. Felonious intent, an essential element of the felony defined in G.S. 14-54, "must be alleged and proved, and the felonious intent proven, must be the felonious intent alleged, which, in this case, is the 'intent to steal.' " *S. v. Friddle,* 223 N.C. 258, 25 S.E. 2d 751, and cases cited.

G.S. 15-170 provides: "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime."

G.S. 14-54, as amended, defines a felony and defines a misdemeanor. The unlawful breaking or entering of a building described in this statute is an essential element of both offenses. The distinction rests solely on whether the unlawful breaking or entering is done "with intent to commit a felony or other infamous crime therein." Hence, the misdemeanor must be considered "a less degree of the same crime," an included offense, within the meaning of G.S. 15-170.

"The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser

degree was committed. The *presence of such evidence* is the determinative factor." *S. v. Hicks,* 241 N.C. 156, 159, 84 S.E. 2d 545. *Cf. S. v. Summers,* 263 N.C. 517, 139 S.E. 2d 627.

There was ample evidence to support the conviction of defendants of the misdemeanor defined in G.S. 14-54. The only evidence relevant to defendants' alleged felonious intent is circumstantial in nature and is summarized in the first paragraph of this opinion. Defendants contend, and we agree, that the court's failure to submit for jury consideration and decision whether defendants were guilty of the misdemeanor was prejudicial error. Error in this respect is not cured by a verdict convicting defendants of the felony. *S. v. Hicks, supra,* p. 160, and cases cited. On account of such prejudicial error, defendants are entitled to a new trial.

It is noted: Under G.S. 14-72, as amended in 1959 (S.L. 1959, c. 1285), larceny by breaking or entering a building referred to therein is a felony without regard to the value of the stolen property. *S. v. Cooper,* 256 N.C. 372, 378, 124 S.E. 2d 91.

We take notice *ex mero motu* of a question concerning the sufficiency of the indictment. The indictment refers to the building as "occupied by one Casey's Laundry" in which there was merchandise, etc., of "said Casey's Laundry." The evidence refers to a laundry and dry cleaning business operated by Robert Casey, Sr., at 1109 North William Street, Goldsboro. Since a new trial is awarded, whether the indictment is deficient need not be determined. In this connection, see *S. v. Stinson,* 263 N.C. 283, 139 S.E. 2d 558, and cases cited; *S. v. Brown,* 263 N.C. 786, 140 S.E. 2d 786. Doubtless, before proceeding further, the solicitor will submit a new bill in which the occupant of the building and the owner of the personal property therein will be precisely and accurately described and identified.

New trial.

PEGGY JOYCE WARREN, BY HER NEXT FRIEND, SAMUEL McD. TATE v. ROSE S. LONG.

(Filed 24 March, 1965.)

Parent and Child § 2—

A child who, because of mental incompetency, is unable to support or care for herself, and who at all times has been supported and cared for by her parent, may not maintain an action against the parent in tort, even though the child is over the age of 21 years.

APPEAL by plaintiff from *Patton, J.,* October, 1964 Session, BURKE Superior Court.

This action was instituted on behalf of Peggy Joyce Warren by her next friend to recover damages for the personal injury she sustained while riding as a passenger in the automobile owned and operated by the defendant, her mother. The pleadings and all the evidence disclose that Peggy Joyce Warren is 30 years of age. She is now, and all her life has been, mentally incompetent — unable to support or care for herself. Except at such times as she has spent in an institution, she has lived as a dependent member of her mother's family. The defendant at all times has assumed and has discharged the responsibility for her care and support.

The defendant, by way of further defense, alleged that the plaintiff is an unemancipated, incompetent daughter of the defendant, a dependent member of her household, and as such cannot maintain this tort action.

At the conclusion of the evidence, Judge Patton entered judgment dismissing the action. The plaintiff excepted and appealed.

John H. McMurray for plaintiff appellant.
Patton, Ervin & Starnes by Sam J. Ervin, III, for defendant appellee.

HIGGINS, J. At the outset the Court is faced with the question whether the defendant's further defense, supported as it is by the pleadings and all the evidence, presents a bar to this action. This Court has held in many well considered opinions that an unemancipated child who is a dependent member of the household cannot maintain an action in tort against the head of the household. "The common law does not recognize the right of an unemancipated minor child, living in the household of its parents, to maintain an action in tort against its parents or either of them." *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. "This rule implements a public policy protecting family unity, domestic serenity, and parental discipline." *Gillikin v. Burbage,* 263 N.C. 317, 139 S.E. 2d 753.

Ordinarily, the bar to actions in tort by the child is lifted by complete emancipation, which may be by act of the parent, by marriage, by arriving at the age of 21, or by leaving the household and becoming self-supporting. However, if "the child is so weak in mind or body that he is unable to support himself and remains in the parent's home, unmarried, . . . the parent's duty to support the child continues." *Gillikin v. Burbage, supra; Wells v. Wells,* 227 N.C. 614, 44 S.E. 2d 31. "And where a child is of weak body or mind and unable to care for it-

self after coming of age, the duty of the father to support the child continues as before." *Layton v. Layton*, 263 N.C. 453, 139 S.E. 2d 732.

Although the plaintiff is now 30 years of age, nevertheless, the pleadings and all the evidence disclose her complete dependence upon the defendant for a home, support, care and attention. That dependence is no less complete now than it was before she became 21. Upon the undisputed facts, Judge Patton correctly concluded, as a matter of law, that this action should be dismissed. Hence we need not consider the question of negligence.

The judgment of the Superior Court dismissing this action is

Affirmed.

STATE HIGHWAY COMMISSION v. RALEIGH FARMERS MARKET, INC., RALEIGH SAVINGS & LOAN ASSOCIATION, AND L. N. WEST AND WIFE, BETSEY JOHN H. WEST.

(Filed 24 March, 1965.)

1. Appeal and Error § 53—

A petition to rehear may be granted in order to clarify a decision of the court which the parties concerned misconstrue.

2. Appeal and Error § 59; Eminent Domain § 7a—

Decision of the Supreme Court that whether the act of the Highway Commission amounted to a "taking" of a property right by eminent domain presented on the record a question of law and fact for the court, does not purport to impair either party's right to jury trial on the other issues.

ON rehearing.

Attorney General Bruton, Assistant Attorney General Lewis, Trial Attorney Rosser; Young, Moore & Henderson by Associate Counsel J. Allen Adams for the State.

Manning, Fulton & Skinner and Jack P. Gulley for defendant appellant.

RODMAN, J. The opinion in this cause, filed January 29, 1965, is reported 263 N.C. 622, 139 S.E. 2d 904.

In apt time, plaintiff and Farmers filed a petition to rehear. Rehearing was requested because, in the opening paragraph of the opinion, it is said: "In substance, the action of the parties amounted to a waiver

of a jury trial * * *." The petition was allowed "for clarification of opinion with respect to right of trial by jury."

An order which does nothing more than settle the issues is interlocutory. An appeal from such an order is premature. *DeBruhl v. Highway Com.*, 241 N.C. 616, 86 S.E. 2d 200. The sentence containing the quoted language was inserted merely to show that the appeal should be considered as within the spirit, if not the letter, of G.S. 1-277. It was not intended to limit, nor has either party's right to jury trial been impaired by what was said.

The conclusion heretofore reached is

Reaffirmed.

EARL F. WEEKS v. CHARLOTTE LIBERTY MUTUAL INSURANCE COMPANY.

(Filed 24 March, 1965.)

1. Evidence § 24—

A duly certified death certificate is competent in evidence and establishes *prima facie* the facts stated therein. G.S. 130-73.

2. Appeal and Error § 41—

The exclusion of a death certificate from evidence is not prejudicial when the party offering the certificate has the benefit of unimpeached testimony establishing all he was entitled to prove by the certificate.

3. Insurance § 17—

Insurer's evidence as to the health of insured at the time of application held not so categorical as to entitle insurer to a directed verdict on the issue.

APPEAL by defendant from *Hubbard, J.*, December, 1964 Session, WAYNE Superior Court.

The plaintiff, beneficiary, instituted this civil action to recover from the defendant, insurer, the sum of $1,000.00 on account of the death of Naomi C. Weeks, the insured in defendant's life insurance policy No. 798640, issued March 18, 1963. The defendant admitted the execution of the policy, the receipt of the premium, and the death of the insured on December 26, 1963, within the period of the coverage.

The defendant, by answer, sought to limit its liability to a return of the premium, contending the insured, in the application for the policy made February 2, 1963, stated she was in good health when in fact

she was then not in good health, but was then suffering from multiple sclerosis.

After the plaintiff introduced the policy in evidence, the defendant offered, and the court excluded, over objection, the death certificate signed by Dr. Lonnie Hayes. The certificate listed as the cause of death: (a) Immediate cause, respiratory failure; antecedent causes (b) paralysis of respiratory muscles, and (c) multiple sclerosis. Dr. Hayes testified that he saw the insured in September, 1963, again in October, following, and the last time on December 24, 1963. He testified: ". . . (I)t is my opinion that her death was primarily due to respiration failure due to paralysis of the respiratory muscles secondary to multiple sclerosis . . . It is my opinion that she had multiple sclerosis since February, 1963 . . . The onset is insidious. It is not noticeable or detectable in its early stages . . . It can be fast in its course or can last over a . . . longer period . . . The only way to tell positively what was the cause of death is from an autopsy . . . No autopsy was performed on Mrs. Weeks."

The jury answered, Yes, to the issue of good health as of the date of the policy, and $1,000.00 as to the amount due the plaintiff thereunder. From a judgment on the verdict, the defendant appealed.

Sasser & Duke by John E. Duke for plaintiff appellee.
Herbert B. Hulse for defendant appellant.

PER CURIAM. The defendant assigns as error the court's refusal (1) to admit the death certificate, and (2) to instruct the jury "that although the burden of proof was on the defendant as to the first issue, that if the jury believed the evidence it should answer the first issue, No."

G.S. 130-73 provides: ". . . (A)ny copy of a record of a birth or a death, with the certification of same, so signed or with the fascimile of the State Registrar affixed thereto shall be *prima facie* evidence in all courts and places of the facts therein stated." *Blalock v. Durham,* 244 N.C. 208, 92 S.E. 2d 758.

Although the trial judge appears to have committed error in excluding the certificate, nevertheless, the error was harmless in this case for the reason that Dr. Hayes, the author of the certificate, was present in court and testified as a witness for the defendant. His testimony was in accordance with, and included all the statements made in the certificate. The plaintiff did not undertake to impeach any part of the testimony. The defendant had the benefit of all that was useful in the certificate.

The evidence in the case, since the burden was on the defendant, presented an issue of fact for the jury as to the state of the insured's health at the time she signed the application for the policy, February 2, 1963, and at the time the policy was issued, March 18, 1963. The evidence was not such as to require or permit the court to answer the issue of fact in favor of the defendant as a matter of law. The court properly refused the instruction and left the issue to the jury.

No error.

JAMES L. GOODING v. MACK MANUEL TUCKER.

(Filed 24 March, 1965.)

1. Automobiles §§ 21, 37—

Where defendant contends that the door of plaintiff's vehicle was defective, causing the door to come open and strike defendant's car, it is competent for an officer to testify from an inspection of plaintiff's car that the latching mechanism of the door was worn so that the door would not stay closed, since such defect would perforce be caused by long use rather than a sudden impact, and the witness was testifying from personal observation.

2. Evidence § 36—

The statement of a witness that plaintiff "could not close" the door to his car *held* not incompetent as an expression of opinion by the witness when in context it appears that the statement referred to the condition of the door of which the witness had personal knowledge, and therefore was a "shorthand statement of fact."

3. Automobiles §§ 21, 37—

Where there is competent evidence that the door of plaintiff's vehicle was defective so that the latch would not hold it closed, testimony of other witnesses that on prior occasions they had seen plaintiff driving the car with the door open is competent as bearing upon the condition of the car and as corroborating the other testimony.

APPEAL by plaintiff from *Parker, J.*, October 19, 1964, Session of LENOIR.

Action to recover damages for injuries sustained in an automobile collision.

The collision occurred about 9:45 A.M., 25 August 1963, on Adkin Street in the city of Kinston. Plaintiff was driving his automobile southwardly on said street; defendant was driving his automobile northwardly. The vehicles collided near the center of the street and at a

point where the street curves to the left for northbound traffic and to the right for southbound traffic. The left front door of plaintiff's car was damaged, and plaintiff suffered personal injuries. The left front fender of defendant's car was damaged.

Plaintiff's pleadings and evidence furnish this account of the occurrence: Defendant's car veered to plaintiff's side of the street and struck the left front door of plaintiff's car, causing the door to open and plaintiff to fall from the car. Plaintiff's car was a 1951 Chevrolet, he had owned it six years. "There was nothing wrong with the door"; it was closed prior to the impact; plaintiff was not holding it closed with his arm.

Defendant's version: As the cars were meeting on the curve, the left front door of plaintiff's car came open, all the way open, and banged into the left front fender of defendant's car. Plaintiff had his arm on the door; as the car came around the curve the door slipped from under plaintiff's arm and came open. Defendant was on his proper side of the street.

The jury found that the collision was not caused by the negligence of defendant. Judgment was entered accordingly. Plaintiff appeals.

Turner and Harrison for plaintiff.
Ward and Tucker for defendant.

PER CURIAM. Plaintiff's assignments of error relate to the admission of evidence.

(1) E. A. Brooks, the investigating police officer, testified for defendant as follows (over plaintiff's objection): "I examined the latching mechanism" of the left front door of plaintiff's car. "I found after the accident that the latch on the door would not work. It would come to but I couldn't fasten it." The latch was worn. "As I recall, the striking part of the car door was worn to the extent that, when you closed the door, it would not stay closed."

This testimony is relevant and competent. Defendant's principal defense is that the door was defective, plaintiff was attempting to hold it closed with his arm, and as the car was turning to the right on the curve the door slipped from under plaintiff's arm and swung open. The officer was testifying from his own observation. He found the latching mechanism "worn." This is a condition which is not caused by a sudden impact; it requires comparatively long use; the car was old. The witness was testifying to a condition which, if it existed at all, existed prior to the accident. He found further that the mechanism would not fasten the door. If the fact that the door would not stay closed resulted in whole or in part from any injury to the door caused by the

collision, plaintiff was at liberty to make the explanation. The cases relied on by plaintiff are inapposite.

(2) Manley Hatcher, an eyewitness to the collision, testified for defendant: "I saw the Gooding (plaintiff's) car before the collision and at that time, the left door was not closed. It was open a few inches; and I continued to observe the car until the impact." The door was not closed before the two cars came together; *"he* (plaintiff) *couldn't close it.* I have known James Gooding a good many years; and I have seen him driving this very car before."

Q. "When you have seen him drive this car before, how did he drive it; was the left front door open or closed?

A. "Open."

Plaintiff objected to the italicized portion of the testimony and to the question and answer expressly set out above.

(3) G. H. Sparrow also testified that he had seen plaintiff on previous occasions driving his car with the left front door open.

We do not agree with the contention of plaintiff that the statement of the witness Hatcher, "he could not close it," is an expression of opinion. When considered with his entire testimony, it appears that he was testifying from his knowledge of the car, which he had seen plaintiff operate many times. It was a "shorthand statement of fact" or "the statement of a physical fact rather than the expression of a theoretical opinion." Stansbury: North Carolina Evidence, 2d Ed., § 125, p. 287.

The testimony of witnesses Hatcher and Sparrow that they had seen plaintiff on occasions prior to the collision driving his car with the left front door open is competent as bearing upon the condition of the car and tends to corroborate the testimony of the police officer and defendant.

No error.

STATE v. JAMES EDWARD WADE.

(Filed 24 March, 1965.)

Parent and Child § 1; Bastards § 5—

While a married woman may testify as to illicit sexual relations during coverture in an action directly involving the parentage of her child, she may not testify as to nonaccess of the husband when such testimony tends to basterdize her child begotten or born during the existence of the marriage.

STATE *v.* WADE.

APPEAL by defendant from *Parker, J.*, November 1964 Criminal Session of WAYNE.

Prosecution upon a warrant charging defendant with violating G.S. 49-2 by unlawfully and wilfully neglecting to support and maintain his illegitimate son, James Ray Vernatte, and that Peggy Jean Vernatte is the mother of said illegitimate child. The date of wilful nonsupport is not alleged in the warrant, though it does allege the illegitimate child was born within three years prior to the date the warrant was sworn out, which was on 17 April 1964.

Plea: Not guilty. Verdict: Guilty as charged.

From judgment imposed defendant appeals.

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

John S. Peacock and Joseph H. Davis for defendant appellant.

PER CURIAM. The State offered in evidence the testimony of one witness, Peggy Jean Vernatte. She testified without objection as follows in substance: She is married to Jesse Willard Vernatte. She met defendant in 1962. She became pregnant by defendant in June or July 1963, which resulted in her giving birth to James Ray Vernatte on 13 March 1964. Defendant is his father. She asked him to support his son, which he refused to do, and she took out a warrant against him.

For the purpose of showing nonaccess of her husband when the child was begotten, the State was permitted, over defendant's objections, to have Peggy Jean Vernatte to testify to the effect that she and her husband separated on 9 July 1961 in Jacksonville, Florida, and she has not seen him since. The defendant excepted to the admission of this evidence, and assigns its admission as error.

The rule is firmly settled in this jurisdiction that neither the husband nor the wife is competent to testify as to the nonaccess of the husband in a bastardy or other proceeding, where such testimony tends to bastardize a child of the wife either begotten or born during the existence of the marriage. The evidence of nonaccess, if there be such, must come from third persons. *S. v. Aldridge*, 254 N.C. 297, 118 S.E. 2d 766; *S. v. Campo*, 233 N.C. 79, 62 S.E. 2d 500; *S. v. Bowman*, 231 N.C. 51, 55, S.E. 2d 789; *S. v. Bowman*, 230 N.C. 203, 52 S.E. 2d 345; *Ray v. Ray*, 219 N.C. 217, 13 S.E. 2d 224; *Boykin v. Boykin*, 70 N.C. 262, 16 Am. Rep. 776; *S. v. Wilson*, 32 N.C. 131; *S. v. Pettaway*, 10 N.C. 623. Therefore, the court committed error in receiving the evidence given by Peggy Jean Vernatte.

In *Ray v. Ray, supra*, the Court, speaking of the competency of a married woman to testify as to the paternity of her child born in wed-

lock, had this to say: "The wife is not a competent witness to prove the nonaccess of the husband. * * * However, she is permitted to testify as to the illicit relations in actions directly involving the parentage of the child, for in such cases, proof thereof frequently would be an impossibility except through the testimony of the woman."

For error in the admission of prejudicial evidence, defendant is entitled to a new trial. *S. v. Virgil,* 263 N.C. 73, 138 S.E. 2d 777. The Attorney General with his customary fairness confesses error.

The solicitor should move in the superior court to amend the warrant so as to allege the date of the offense charged.

New trial.

PAUL McNAIR, A MINOR REPRESENTED HEREIN BY CHANNIE McNAIR, HIS NEXT FRIEND v. MARION COLE GOODWIN.

(Filed 24 March, 1965.)

1. Appeal and Error § 42—

The inadvertent use of the phrase "beyond a reasonable doubt" in charging upon the *quantum* of proof in a civil action must be held for prejudicial error, notwithstanding that in other portions of the charge the court correctly states the *quantum* of proof required.

2. Automobiles § 7—

The duty of a motorist to exercise due care to avoid colliding with another vehicle is not limited to other vehicles being operated as required by law, since reasonable prudence requires a motorist who sees another vehicle being operated in a negligent manner to take all the more care to avoid collision. G.S. 20-141(c).

APPEAL by plaintiff from *Parker, J.,* September-October 1964 Civil Session of WAYNE.

Action for personal injuries. On September 9, 1961, about 6:30 p.m., plaintiff was a guest passenger in the automobile of Clifton Forte, who was traveling west on a two-lane, unpaved country road. Forte was following a vehicle driven by Robert Wellington and was meeting defendant, who was traveling east. The road was very dusty. After defendant passed the Wellington car, there was a collision between his vehicle and that of Forte. The impact seriously injured plaintiff. He alleges, and offered evidence tending to show, that defendant operated his vehicle to his left of the center of the road and thereby proximately caused the collision. Defendant alleges, and offered evidence tending

to show, that the collision occurred when Forte drove his automobile into defendant's lane of travel. The jury answered the issue of negligence in favor of defendant. From a judgment that plaintiff recover nothing he appeals, assigning errors in the charge.

James N. Smith and W. Harrell Everett, Jr., for plaintiff.
Braswell & Strickland for defendant.

PER CURIAM. As his last mandate to the jury on the first issue, his Honor instructed as follows:

> "If the plaintiff has failed to satisfy you of any one of the alleged acts of negligence, from the evidence, or by its greater weight, or has further failed to satisfy you that either one or more of such alleged acts of negligence, if he has satisfied you of their truth beyond a reasonable doubt, was one of the proximate causes, or the proximate cause, of the injury or damage, it would be your duty to answer the first issue 'No'."

This instruction is so obviously conflicting and confusing that it must be held to be prejudicial error. With reference to a similar instruction, this Court said in *Askew v. Coach Co.*, 221 N.C. 468, 468, 20 S.E. 2d 286, 286: "While the use of the phrase 'beyond a reasonable doubt' in the instruction complained of was evidently an inadvertence on the part of the judge, it was none the less prejudicial to the plaintiff, and necessitates a new trial." It is true here, as it was in the *Askew* case, that in preceding portions of the charge, the court had given the correct rule as to the quantum of proof required of the plaintiff on the first issue and had explained the meaning of greater weight of the evidence. Nevertheless, this instruction carried the implication that to establish *acts of negligence* a higher degree of proof was necessary than to establish proximate cause.

After instructing the jury that there was no evidence that either Forte or defendant was exceeding the speed limit, the judge charged:

> "But, of course, the fact that the speed is lower than the maximum limit set out in the statute does not relieve the operator of the duty to decrease speed when traveling upon a road where special hazard exists, either by traffic on the road, condition of the road, weather conditions or the width of the road, or any other highway conditions, and the operator is required to decrease speed to such extent as may be necessary to avoid colliding with any other (motorists) . . . who, themselves, are complying with the

law, with the legal requirements, and the duty of all operators of motor vehicles to exercise and use due care."

The import of this instruction is that a motorist has no duty to decrease his speed to avoid colliding with another vehicle on the highway which is being driven in a negligent manner. This is not the law. Reasonable prudence requires a motorist who sees another vehicle being operated upon the highway in a negligent manner, to take all the more care to avoid a collision. G.S. 20-141(c) does not limit its protection to motorists and the passengers of motorists who are within the law; it enjoins all motorists "to avoid causing injury to *any* person or property either on or off the highway, in compliance with legal requirements and the duty of all persons to use due care." (Italics ours.) The challenged instruction bore too heavily upon plaintiff, a passenger who needed to show only that defendant's negligence was *one* of the proximate causes of his injuries in order to recover from defendant.

For the errors noted there must be a

New trial.

KELLY KORNEGAY AND CHARLES C. HOOKS, TRADING AS GOLDSBORO NEON SIGN COMPANY v. B. S. WARREN, TRADING AS BOBBY'S CHICKEN KING.

(Filed 24 March, 1965.)

Evidence § 58—

In an action to recover the contract price of an advertising sign erected for defendant, it is competent upon cross-examination to question defendant concerning a prior transaction in which defendant did not pay plaintiffs for a sign until suit was brought, the question being within the bounds of permissible cross-examination as bearing on credibility.

APPEAL by defendant from *Parker, J.*, September-October 1964 Session of WAYNE.

Plaintiffs alleged they constructed and installed a billboard sign for defendant in full compliance with the terms of their written contract (Exhibit A) for which defendant, as provided in said contract, was obligated to pay the sum of $772.44 but refused to do so. Defendant, answering, admitted it entered into said contract, but asserted the billboard constructed and installed by plaintiffs did not comply in certain particulars with the specifications set forth therein. Appropriate issues were submitted to the jury and answered in favor of plaintiffs. Judg-

ment for plaintiffs in accordance with the verdict was entered. Defendant excepted and appealed.

Langston & Langston for plaintiff appellees.
Edmundson & Edmundson for defendant appellant.

PER CURIAM. The court, during the cross-examination of defendant, permitted plaintiffs' counsel, over objection, to question defendant concerning a prior transaction in which defendant did not pay plaintiffs for a sign until plaintiffs brought suit and recovered judgment therefor. All of defendant's assignments of error are based on exceptions to said rulings. When considered in the context of all the evidence herein, the questions to which defendant objected were permissible on cross-examination as bearing on the credibility of his testimony. Moreover, the testimony elicited thereby was of minimal significance.

No error.

STATE OF NORTH CAROLINA v. JOHN S. HORD.

(Filed 7 April, 1965.)

1. Municipal Corporations § 4—

A municipal corporation has only such powers as are granted to it by its charter and by the general law, together with such powers as are necessarily implied from those given.

2. Municipal Corporations § 7—

A municipal corporation is delegated power to appoint police officers having the same authority to make arrests and execute criminal process within the municipal limits as is vested by law in a sheriff. G.S. 160-20, G.S. 160-21.

3. Same; Public Officers § 1—

A chief of police, as well as a policeman, when duly appointed pursuant to statutory authority is charged with the duty of enforcing the ordinances of the municipality and the criminal laws of the State within the limits of the municipality, and therefore is an officer within the meaning of G.S. 14-230.

4. Public Officers § 1—

The essential difference between a public office and a mere employment is that the incumbent of a public office is charged with duties involving the exercise of some portion of the sovereign power.

5. Indictment and Warrant § 9—

Ordinarily an indictment for a statutory offense may charge the offense in the language of the statute, but if the statute does not set forth with sufficient certainty all of the essential elements necessary to constitute the offense so as to inform defendant of the exact charge, enable him to prepare his defense, support a plea of former jeopardy to a subsequent prosecution for the same offense, and enable the court upon conviction to pronounce sentence, the language of the statute must be supplemented so as to provide this certainty.

6. Public Offices § 11—

An indictment charging the chief of police or a police officer of a municipality with unlawfully, wilfully and corruptly refusing to discharge his duty to investigate and bring to prosecution a named person for maintaining a house of prostitution, without charging that such house of prostitution was maintained within the jurisdiction of the municipal police department, is fatally defective.

7. Same—

An indictment charging that the chief of police or a police officer of a municipality did unlawfully, wilfully and corruptly omit to discharge his duties to investigate and bring to prosecution a named person for maintaining a house of prostitution on a designated street within the city, sufficiently charges a violation of G.S. 14-230 by the officer, since it charges a failure of the officer to act in regard to a violation of law within the jurisdiction of the municipal police department. G.S. 14-204.

8. Same—

An indictment of the chief of police or a police officer for unlawfully, wilfully and corruptly failing to investigate a designated tourist home and the occupants thereof at a designated locality, without averring facts disclosing the reason or necessity for such investigation, is insufficient to charge a violation of G.S. 14-230.

9. Same—

An indictment charging the chief of police with unlawfully, wilfully and corruptly failing to discharge a duty of his office in that he failed to investigate the handling and failure of his officers to make an arrest in regard to breaking and entering a designated store "all to the knowledge" of the said chief of police, without alleging any mishandling of the case or any reason why the chief of police should have concerned himself particularly with the case, *held* not to charge a violation of G.S. 14-230, since an administrative department head is not under duty to supervise each activity of each member of his department.

10. Same—

An indictment charging a chief of police with unlawfully, wilfully and corruptly failing to exercise proper supervision, proper control, proper discipline and failing to investigate various activities of members of the police department of a city, fails to charge a violation of G.S. 14-230.

11. Same—

An indictment charging a chief of police or police officer with unlawfully, wilfully and corruptly failing to investigate and bring to prosecution for gambling persons in a designated block of a city, without averring what people were guilty of gambling, does not charge a violation of G.S. 14-230.

12. Same—

An indictment charging a chief of police with unlawfully, wilfully and corruptly neglecting to cite a named police officer before the Civil Service Commission prior to the time of the resignation of such officer, without averring that the officer had committed any crime or other infraction of law which would justify or require the chief to report such officer to the Civil Service Commission before the time of his resignation, fails to charge a violation of G.S. 14-230.

APPEAL by the State from *Latham, S.J.*, 14 December 1964 Conflict Criminal Session of MECKLENBURG.

The court below heard a motion to quash the sixteen bills of indictment returned against the defendant on two grounds: (1) That these bills are defective in that they "(F)ail to allege lucidly and accurately all the essential elements of the offense endeavored to be charged so as to enable the defendant to identify the offense with which he is sought to be charged; to protect the defendant from being twice put in jeopardy for the same offense; to enable the defendant to prepare for trial; and to enable the court on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights in the case"; and (2) that the defendant is not a public official within the purview of G.S. 14-230, the statute which these bills purport to charge the defendant with having violated.

The first bill of indictment listed in each of the numbered paragraphs set out below charges the defendant with having *wilfully* failed to discharge his official duties with respect to the matters charged therein, and the second bill of indictment charges the defendant with having *corruptly* failed to discharge his official duties with respect to the same matters. The formal parts of these bills, which appear in each of them, will be copied only in paragraph (1) below. The remaining pertinent parts of the sixteen bills of indictment are as follows:

(1) Bills Nos. 42968 and 42969 charge the defendant with failing "to investigate and bring to prosecution, Mary Trapp for setting up, maintaining and operating a place, structure and building for the purpose of prostitution and assignation, all to the knowledge of John S. Hord and to the injury of the public and the people of the City of Charlotte, North Carolina, all in violation of his oath and public duty, against the form of the statute in such

case made and provided and against the peace and dignity of the State."

(2) Bills Nos. 42970 and 42975 charge the defendant with failing "to investigate and bring to prosecution Babe Broadway for setting up, maintaining and operating a place, structure and building for the purpose of prostitution and assignation on East Ninth Street, Charlotte, North Carolina * * *."

(3) Bills Nos. 42971 and 42972 charge the defendant with failing "to investigate the Queens Tourist Home and the occupants thereof, 517 West Ninth Street, Charlotte, North Carolina * * *."

(4) Bills Nos. 42973 and 42974 charge the defendant with failing "to investigate the handling and failure to make arrest in the cases of breaking and entering at Louis and Son's Dry Goods Store, Charlotte, North Carolina * * *."

(5) Bills Nos. 42977 and 42976 charge the defendant with failing to exercise "the proper supervisions, proper control, proper discipline, thorough investigation of activities, and thorough inspection of the various activities of various members of the Police Department of the City of Charlotte, North Carolina * * *."

(6) Bills Nos. 42978 and 42979 charge the defendant with failing to discharge his official duties in that he omitted to investigate "into the handling of the case of State of North Carolina against Herbert P. Cook on the charge of did steal, take and carry away 1208 gallons of Gulf No-Nox gasoline the property of Gulf Oil Corporation, * * * of the value of more than $200.00, to wit: $366.02, he, the said John S. Hord being the Chief of Police of the City of Charlotte, North Carolina, responsible for and in charge of all investigations by the police officers of the City Police Department, of the City of Charlotte, North Carolina * * *."

(7) Bills Nos. 42980 and 42981 charge the defendant with having failed in his duty "to investigate and bring to prosecution for gambling, persons in the 4100 block of North Tryon Street, Charlotte, North Carolina * * *."

(8) Bills Nos. 42982 and 42983 charge the defendant with having neglected "to cite police officer Bernie W. Stogner of the Police Department of the City of Charlotte, North Carolina, before the Civil Service Commission of Charlotte, North Carolina, before his resignation on September 14, 1964 * * *."

The motion to quash each of the sixteen bills of indictment was allowed and the State appeals, assigning error.

Attorney General Bruton, Deputy Attorney General Harry W. McGalliard, Asst. Attorney General James F. Bullock for the State, appellant.

Bailey & Booe for defendant appellee.

DENNY, C.J. At the threshold of this appeal, we must determine whether or not the position of the defendant as Chief of Police of the City of Charlotte is an office within the meaning of G.S. 14-230, which reads as follows:

> "If any clerk of any court of record, sheriff, justice of the peace, recorder, prosecuting attorney of any recorder's court, county commissioner, county surveyor, coroner, treasurer, constable or official of any of the State institutions, or of any county, city or town, shall willfully omit, neglect or refuse to discharge any of the duties of his office, for default whereof it is not elsewhere provided that he shall be indicted, he shall be guilty of a misdemeanor. If it shall be proved that such officer, after his qualification, willfully and corruptly omitted, neglected or refused to discharge any of the duties of his office, or willfully and corruptly violated his oath of office according to the true intent and meaning thereof, such officer shall be guilty of misbehavior in office, and shall be punished by removal therefrom under the sentence of the court as a part of the punishment for the offense, and shall also be fined or imprisoned in the discretion of the court."

First, let us examine the history of the foregoing statute. A statute containing provisions similar to those in the first sentence of the above statute was enacted in Chapter 32, § 107, Battle's Revisal of 1873, amended and codified in The Code of North Carolina, 1883, Vol. I, § 1090, the latter statute reading as follows:

> "If any clerk, sheriff, justice of the peace, or any other officer, who is required, in entering upon his office, to take an oath of office, shall wilfully omit, neglect or refuse to discharge any of the duties of his office, for default whereof it is not elsewhere provided that he shall be indicted, the clerk or other officer so offending shall be guilty of a misdemeanor. And if it shall be proved, that any such officer, after his qualification, shall have violated his said oath, and willingly and corruptly have done anything contrary to the true intent and meaning thereof, such officer shall be guilty of misbehaviour in office, and shall be punished by removal therefrom under the sentence of the court as a part of the punishment for the offence; and shall also be fined and imprisoned, in the discretion of the court."

Section 1090 was superseded in 1901 by Chapter 270, § 2, of the Public Laws of 1901, and codified in the Revisal of 1905, in § 3592, with substantially the same provisions which exist in our present statute. See also C.S. 4384.

It will be noted that the words, "who is required, in entering upon his office, to take an oath of office," were omitted in Chapter 270, § 2, of the Public Laws of 1901, codified in the Revisal of 1905, in § 3592. The General Assembly undoubtedly felt that such words were mere surplusage in light of the statement in the second sentence in the statute, to wit: "(O)r willfully and corruptly violated his oath of office according to the true intent and meaning thereof * * *."

A municipal corporation has only such powers as are granted to it by the General Assembly in its specific charter or by the general laws of the State applicable to all municipal corporations, or such powers as are necessarily implied by those given. G.S. 160-1 through G.S. 160-509; *Starbuck v. Havelock*, 252 N.C. 176, 113 S.E. 2d 278; *S. v. McGraw*, 249 N.C. 205, 105 S.E. 2d 659; *Laughinghouse v. New Bern*, 232 N.C. 596, 61 S.E. 2d 802; *Stephenson v. Raleigh*, 232 N.C. 42, 59 S.E. 2d 195.

The power of a municipal corporation to appoint policemen is given in G.S. 160-20. *Green v. Kitchin*, 229 N.C. 450, 50 S.E. 2d 545. Moreover, G.S. 160-21 provides: "A policeman shall have the same authority to make arrests and to execute criminal process, within the town limits, as is vested by law in a sheriff."

The case of *Barlow v. Benfield*, 231 N.C. 663, 58 S.E. 2d 637, was an action in the nature of *quo warranto* to determine the right of Benfield to hold the office of Chief of Police of Granite Falls. G.S. 160-25 at that time provided: "No person shall be mayor, commissioner, intendant of police, alderman or other chief officer of any city or town unless he shall be a qualified voter therein." Benfield was not a qualified voter of Granite Falls. Devin, J., later C.J., speaking for the Court, said: "The office of chief of police of an incorporated town, as Granite Falls is admitted to be, is a public office. *Foard v. Hall*, 111 N.C. 369, 16 S.E. 420."

G.S. 160-25 was rewritten in Chapter 24 of the 1951 Session Laws of North Carolina to read as follows: "No person shall be mayor, commissioner, councilman, or alderman of any city or town unless he shall be a qualified voter therein." This change in the law, however, in our opinion, has no bearing whatever on the question as to whether or not a chief of police or a policeman is a public officer. The statute deals merely with the qualification of the appointee and not with the character of the office.

In the case of *Foard v. Hall,* 111 N.C. 369, 16 S.E. 420, this Court held that the office of chief of police is such an office that a *quo warranto* might be brought to try the title thereto.

In *McIlhenny v. Wilmington,* 127 N.C. 146, 37 S.E. 187, 50 L.R.A. 470, this Court held that a policeman is an officer of the State.

Some jurisdictions in this country hold that policemen are officers of the state because they exercise the sovereign powers of the state in performing their duties as policemen; others hold that such policemen are officers of the municipality because they are charged with the duty to enforce the ordinances of the municipality. Some others hold that policemen are merely employees of the municipality. The statutory provisions involved in the different jurisdictions in this country vary widely. However, in our opinion, a chief of police as well as a policeman, when duly appointed to such position, pursuant to statutory authority, is an officer within the meaning of G.S. 14-230, and we so hold.

It is not the method by which a policeman becomes a member of the police force of a municipality that determines his status but the nature and extent of his duties and responsibilities with which he is charged under the law. *Cornet v. Chattanooga,* 165 Tenn. 563, 56 S.W. 2d 742.

To constitute an office, as distinguished from employment, it is essential that the position must have been created by the constitution or statutes of the sovereignty, or that the sovereign power shall have delegated to an inferior body the right to create the position in question. Anno. — Office and Employment — Distinction, 140 A.L.R. 1079.

An essential difference between a public office and mere employment is the fact that the duties of the incumbent of an office shall involve the exercise of some portion of the sovereign power. 42 Am. Jur., Public Officers, § 13, page 891; 93 A.L.R. 337 Anno. — Office and Employment — Distinction; Sixth Decennial Digest, 1946-1956, Vol. 24, Officers, Key Number 1, where the authorities are collected from 21 jurisdictions which support the above view, and none are cited to the contrary.

In view of the fact that a chief of police as well a policeman is charged with the duty to enforce the ordinances of the city or town in which he is appointed to serve, as well as the criminal laws of the state within the limits of such city or town, such chief of police or policeman is an officer of such city or town within the meaning of G.S. 14-230, and this view is in accord with the following authorities. McQuillin on Municipal Corporations, Vol. 16, § 45.11; *S. v. Stone,* 240 Ala. 677, 200 So. 756; *S. v. Kurtz,* 78 Ariz. 215, 278 P. 2d 406; *Brown v. Boyd,* 33 Cal. A. 2d 416, 91 P. 2d 926; *Temple v. City of New Brittain,* 127 Conn. 170, 15 A. 2d 318; *S. v. Glenn,* 39 Del. 584, 4 A. 2d 366; *Curry v. Hammond,* 154 Fla. 63, 16 So. 2d 523; *Buchholtz v. Hill,* 178

Md. 280, 13 A. 2d 348; *Olson v. City of Highland Park,* 312 Mich. 688, 20 N.W. 2d 773; *Duncan v. Board of Fire and Police Com'rs.,* 131 N.J.L. 443, 37 A. 2d 85; *Canteline v. McClellan,* 282 N.Y. 166, 25 N.E. 2d 972; *S. v. Scott,* 95 Ohio App. 197, 118 N.E. 2d 426; *Morris v. Parks,* 145 Ore. 481, 28 P. 2d 215; *Mann v. City of Lynchburg,* 129 Va. 453, 106 S.E. 371; *National L. R. Bd. v. Jones & Laughlin Steel Corp.,* 331 U.S. 416, 91 L. Ed. 1575.

In the last cited case, the question was whether certain employees of the defendant corporation who, at its request, had been appointed special policemen to guard its plants during wartime, were still employees of the company and entitled to maintain their rights in the labor union in which they were members. The Labor Board held their rights were not impaired by reason of their having been deputized as special policemen. The Board was overruled and appealed to the Supreme Court of the United States which reversed the decision of the lower court. The Court said:

> "We find it impossible to say that the Board is wrong in adopting this policy as to deputized guards. It is a common practice in this country for private watchmen or guards to be vested with the powers of policemen, sheriffs or peace officers to protect the private property of their private employers. And when they are performing their police functions, they are acting as public officers and assume all the powers and liabilities attaching thereto. *Thornton v. Missouri P. R. Co.,* 42 Mo. App. 58; *Dempsey v. New York C. & H. R. R. Co.,* 146 N.Y. 290, 40 N.E. 867; *McKain v. Baltimore & O. R. Co.,* 65 W. Va. 233, 64 S.E. 18, 23 L.R.A. N.S. 289, 131 Am. St. Rep. 964, 17 Ann. Cas. 634; *Neallus v. Hutchinson Amusement Co.,* 126 Me. 469, 139 A. 671, 55 A.L.R. 1191. But it has never been assumed that such deputized guards thereby cease to be employees of the company concerned or that they become municipal employees for all purposes. * * *
>
> "The court below pointed out that the Ohio law on the status and duties of special policemen is in accord with the general rule which we have noted. In other words, special policemen are public officers when performing their public duties. *New York, C. & St. L. R. Co. v. Fieback,* 87 Ohio St. 254, 100 N.E. 889, 43 L.R.A. N.S. 1164; *Pennsylvania R. Co. v. Deal,* 116 Ohio St. 408, 156 N.E. 502. But none of the Ohio cases attempts to say that the public status of special policemen destroys completely their private status as employees of individual companies. * * *"

Since we have reached the conclusion that a chief of police as well as a policeman is an officer of the municipality which engages his ser-

vices, within the meaning of the provisions of G.S. 14-230, we must now consider whether the sixteen bills of indictment returned against the defendant, or any of them, are valid and should not have been quashed.

In the case of *S. v. Greer,* 238 N.C. 325, 77 S.E. 2d 917, Parker, J., speaking for the Court, said:

> "The authorities are in unison that an indictment, whether at common law or under a statute, 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 indentify the offense with which the accused is sought to be charged; (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 or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case. *S. v. Cole,* 202 N.C. 592, 163 S.E. 594; *S. v. Gregory,* 223 N.C. 415, 27 S.E. 2d 140; *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166; *S. v. Miller,* 231 N.C. 419, 57 S.E. 2d 392; *S. v. Gibbs,* 234 N.C. 259, 66 S.E. 2d 883. * * *
>
> "The general rule in this State and elsewhere is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words. * * * This rule does not apply where the words of the statute do not, without uncertainty or ambiguity, set forth all the essential elements necessary to constitute the offense sought to be charged in the indictment, so as to inform the defendant of the exact charge of which he is accused to enable him to prepare his defense, to plead his conviction or acquittal as a bar to further prosecution for the same offense, and upon conviction to enable the court to pronounce sentence. In such a situation the statutory words must be supplemented in the indictment by other allegations which explicitly and accurately set forth every essential element of the offense with such exactitude as to leave no doubt in the minds of the accused and the court as to the specific offense intended to be charged. * * *"

Bills Nos. 42968 and 42969 charge that the defendant unlawfully, wilfully and corruptly did omit and refuse to discharge one of his official duties to investigate and bring to prosecution Mary Trapp, for setting up, maintaining and operating a place, structure and building for the purpose of prostitution and assignation. However, there is nothing in these bills alleging that Mary Trapp maintained such a place of prostitution within the City of Charlotte or in Mecklenburg County,

within the jurisdiction of the Police Department of the City of Charlotte. In our opinion, such bills are defective and were properly quashed.

Bills Nos. 42970 and 42975 charge that the defendant did unlawfully, wilfully and corruptly omit to discharge one of his official duties as Chief of Police of the City of Charlotte, said duty being to investigate and bring to prosecution Babe Broadway, for setting up, maintaining and operating a place, structure and building for the purpose of prostitution and assignation, on East Ninth Street, Charlotte, North Carolina, all to the knowledge of the defendant, *et cetera*.

G.S. 14-204 provides that it is "* * * unlawful: 1. To keep, set up, maintain, or operate any place, structure, building or conveyance for the purpose of prostitution or assignation."

These bills of indictment charge that the defendant knew that Babe Broadway was operating a place of prostitution in violation of the law, on East Ninth Street in the City of Charlotte, and that he wilfully and corruptly did omit to investigate and bring to prosecution Babe Broadway for such violation. We think these bills of indictment adequately informed the defendant as to the specific offenses intended to be charged. Therefore, we hold that these bills are valid and should not have been quashed.

Bills Nos. 42971 and 42972 charge that the defendant did unlawfully, wilfully and corruptly fail to investigate the Queens Tourist Home and the occupants thereof, 517 West Ninth Street, Charlotte, North Carolina. The reason or necessity for such investigation is undisclosed. Certainly no offense is charged against the defendant in these bills, and they were properly quashed.

Bills Nos. 42973 and 42974 charge that the defendant unlawfully, wilfully and corruptly failed to discharge the duties of his office in that he did not "investigate the handling and failure to make arrest in the cases of breaking and entering at Louis and Son's Dry Goods Store, Charlotte, North Carolina, all to the knowledge of John S. Hord * * *."

These bills do not allege that there was any mishandling of the breaking and entering in the Louis and Son's Dry Goods Store cases. The indictments do not allege that there was any reason why the defendant should have concerned himself particularly with those cases. It is well known that the head of an administrative department does not personally supervise each activity of the members of his department. If he were required to investigate and handle each case himself, there would be no reason for having subordinates. Until the State can allege that there was some reason for the Chief of Police to investigate these cases, or that to his knowledge there was some mishandling of the cases that required his personal attention, then it is not per-

ceived how he was derelict in his duties in failing to become personally involved in the cases. These bills of indictment do not allege any such circumstances; therefore, we hold they were properly quashed.

Bills Nos. 42977 and 42976 charged that the defendant did unlawfully, wilfully and corruptly fail to exercise the proper supervision, proper control, proper discipline, thorough investigation of activities, and thorough inspection of the various activities of various members of the Police Department of the City of Charlotte.

There is nothing charged in these bills to indicate any criminal neglect on the part of the defendant. The disclosures in these bills, if true, tend to suggest the need for an investigation by the defendant's superiors and not a criminal proceeding. In our opinion, these bills were properly quashed.

Bills Nos. 42978 and 42979 were properly quashed for the reasons stated with respect to bills Nos. 42973 and 42974. Moreover, the conviction of H. P. Cook for the theft of the property described in said bills was upheld by this Court on 24 February 1965, in the case of *S. v. Cook,* 263 N.C. 730, 140 S.E. 2d 305.

Bills Nos. 42980 and 42981 charge that the defendant unlawfully, wilfully and corruptly failed in his duty to investigate and bring to prosecution for gambling, persons in the 4100 block of North Tryon Street, Charlotte, North Carolina. What people are gambling on North Tryon Street in the City of Charlotte? Neither of these bills meets the requirements for a valid bill of indictment as set out in *S. v. Greer, supra,* and they were properly quashed.

Bills Nos. 42982 and 42983 charge the defendant with unlawfully, wilfully and corruptly having neglected to cite police officer Bernie W. Stogner of the Police Department of the City of Charlotte, North Carolina, before the Civil Service Commission of Charlotte, before his resignation on 14 September 1964.

There is no indication that Stogner had committed any crime or any other infraction of the law that would justify or require the Chief of Police of the City of Charlotte to report him to the Civil Service Commission of Charlotte prior to the time of his resignation; therefore, these bills were properly quashed.

The ruling of the court below is reversed in part and affirmed in part, as hereinabove indicated.

Reversed in part.

Affirmed in part.

STATE OF NORTH CAROLINA v. JACK FESPERMAN.

(Filed 7 April, 1965.)

APPEAL by the State from *Latham, S.J.*, 14 December 1964 Conflict Criminal Session of MECKLENBURG.

The defendant was charged in Bill of Indictment No. 42959 with having wilfully failed and refused to discharge one of his official duties as a police officer of the City of Charlotte, North Carolina, said duty being to-wit: "the arrest of Mary Trapp for setting up, maintaining and operating a place, structure and building for the purpose of prostitution and assignation, all to the knowledge of Jack Fesperman and to the injury of the public and the people of the City of Charlotte, North Carolina, all in violation of his oath and of his public duty," *et cetera.*

The defendant was charged in Bill of Indictment No. 42932 with having corruptly and wilfully failed to discharge one of his official duties with respect to the same matters set forth in Bill No. 42959.

The defendant moved to quash these bills on the same grounds set out in the case of *S. v. Hord*, filed this day, *ante* 149. The motion was allowed as to both bills, and the State appeals pursuant to the provisions of G.S. 15-179, and assigns error.

Attorney General Bruton, Deputy Attorney General Harry W. McGalliard, Asst. Attorney General James F. Bullock for the State, appellant.

Carswell & Justice for defendant appellee.

PER CURIAM. On authority of *S. v. Hord, ante* 149, we hold that a duly appointed policeman of the City of Charlotte, North Carolina, is an officer of said City within the meaning of G.S. 14-230.

The motion to quash, allowed by the court below, will be upheld for the reasons set out in the *Hord* case.

Affirmed.

STATE OF NORTH CAROLINA v. W. F. HUCKS.

(Filed 7 April, 1965.)

Public Officers § 11—

An indictment charging a police officer with wilfully and corruptly failing to arrest a designated person for a felony, without averring that a

warrant for arrest had been issued or that the offense was committed in the presence of the officer or that the officer had reasonable ground to believe that such felony had been committed and that the accused would evade arrest if not immediately taken into custody, fails to charge a violation of G.S. 14-230.

APPEAL by the State from *Latham, S.J.*, 14 December 1964 Conflict Criminal Session of MECKLENBURG.

The defendant was charged in Bill of Indictment No. 42984 with having corruptly and wilfully omitted to discharge his duty as a police officer of the City of Charlotte, North Carolina, during the years 1963 through 1964, such duty being to-wit: "the arrest and apprehension of Betty Deloris Helms on the charge of did, unlawfully and feloniously of her own head and imagination did wittingly and falsely make, forge and counterfeit and did wittingly assent to the falsely making, forging and counterfeiting certain checks on Mr. and Mrs. Fletcher M. Poole, for the period of May 30, 1962 to June 2, 1962 which is a felony under the laws of the State of North Carolina, to the knowledge of W. F. Hucks, to the injury of the public and the people of the City of Charlotte, North Carolina, all in violation of his oath and of his public duty," *et cetera.*

The defendant was charged in Bill of Indictment No. 42985 with having wilfully failed to discharge his duty with respect to the same matters set forth in Bill No. 42984.

The defendant moved to quash these bills on the same grounds set out in the case of *S. v. Hord*, filed this day, *ante* 149. The motion was allowed as to both bills, and the State appeals pursuant to the provisions of G.S. 15-179, and assigns error.

Attorney General Bruton, Deputy Attorney General Harry W. McGalliard, Asst. Attorney General James F. Bullock for the State, appellant.

James B. Ledford for defendant appellee.

PER CURIAM. On authority of *S. v. Hord, ante* 149, we hold that the defendant at the time referred to in these bills of indictment, was an officer of the City of Charlotte, North Carolina, within the meaning of G.S. 14-230. Even so, this does not mean necessarily that he acted wilfully or corruptly in failing to arrest Betty Deloris Helms for forgery under the circumstances set out in these bills of indictment.

G.S. 15-41 reads as follows: "A peace officer may without warrant arrest a person: (a) When the person to be arrested has committed a felony or misdemeanor in the presence of the officer, or when the officer has reasonable ground to believe that the person to be arrested has committed a felony or misdemeanor in his presence; (b) When

the officer has reasonable ground to believe that the person to be arrested has committed a felony and will evade arrest if not immediately taken into custody."

There is no indication that the defendant in 1963 and 1964, the years in which he is charged with having acted wilfully and corruptly by failing to arrest Betty Deloris Helms for a forgery or forgeries allegedly committed during the period from 30 May 1962 and 2 June 1962, had any personal knowledge of such forgery or forgeries at the time they were committed.

Moreover, there is nothing in the above statute that makes it mandatory or permissible for such officer to arrest a felon without a warrant when the felony was not committed in his presence, unless he has reasonable ground to believe such felony had been committed and that the accused would evade arrest if not immediately taken into custody. There is no suggestion that either Mr. or Mrs. Peele had caused process to be issued for the arrest of Betty Deloris Helms, or that such process had been issued and placed in the hands of the defendant for service.

On the grounds hereinabove set out, we uphold the ruling of the court below.

Affirmed.

STATE OF NORTH CAROLINA v. FRED A. TEETER.

(Filed 7 April, 1965.)

APPEAL by the State from *Latham, S.J.*, 14 December 1964 Conflict Criminal Session of MECKLENBURG.

The defendant was charged in Bill of Indictment No. 42986 that during the year 1963 through 1964 he did unlawfully and wilfully refuse and neglect to discharge one of his official duties as a police officer of the City of Charlotte, North Carolina, said duty being to-wit: "the arrest and apprehension of Carrie Bell Williams, Cornelia Black and Mary McCoy Stinson for larceny that is Carrie Bell Williams, Cornelia Black and Mary McCoy Stinson did unlawfully and wilfully take, steal, and carry away the goods, chattels and personal property of Belk's Department Store, a corporation, of the value of less than $200.00 all to the knowledge of Fred A. Teeter and to the injury of the public and of the people of the City of Charlotte, North Carolina, all in violation of his oath and public duty," *et cetera.*

The defendant was charged in Bill of Indictment No. 42988 that he corruptly and wilfully failed and neglected to discharge one of his official duties with respect to the same matters set out in Bill No. 42986.

The defendant moved to quash these bills on the grounds set out in *S. v. Hord,* filed this day, *ante* 149. The motion was allowed as to each bill, and the State appeals, pursuant to the provisions of G.S. 15-179, and assigns error.

Attorney General Bruton, Deputy Attorney General Harry W. McGalliard, Asst. Attorney General James F. Bullock for the State, appellant.

Charles E. Knox for defendant appellee.

PER CURIAM. On authority of *S. v. Hord, ante* 149, we hold that a duly appointed policeman of the City of Charlotte, North Carolina, is an officer of said City within the meaning of G.S. 14-230.

There is nothing in these bills of indictment to indicate the time of the alleged larceny from Belk's Department Store, except that sometime "during the year of our Lord one thousand nine hundred and sixty-three through 1964," the defendant failed to discharge his duty by omitting to arrest the named parties. There is nothing to indicate that any officer of Belk's Department Store caused process to be issued for the arrest of the named parties, or that any officer of Belk's Store requested the defendant to arrest these parties. Moreover, there is nothing to indicate that the alleged larceny took place in the presence of the defendant officer.

In our opinion, these bills are insufficient to meet the requirements of a valid bill of indictment as set forth in G.S. 15-153 and *S. v. Greer,* 238 N.C. 325, 77 S.E. 2d 917.

The motion to quash, allowed by the court below, will be upheld for the reasons hereinabove stated.

Affirmed.

STATE OF NORTH CAROLINA v. BERNIE W. STOGNER.

(Filed 7 April, 1965.)

Public Officers § 11—

A warrant charging a police officer with corruptly and wilfully failing to arrest a named person for another municipal corporation on the charge of obtaining property by larceny by trick, without averring that process had

issued at the instance of the police department of the other municipality and placed in the hands of the defendant, fails to charge a violation of G.S. 14-230.

APPEAL by the State from *Latham, S.J.,* 14 December 1964 Conflict Criminal Session of MECKLENBURG.

The defendant was charged in Bills of Indictment Nos. 42961 and 42931 with having wilfully and corruptly, on or about June 1963 to July 1964, omitted and refused to discharge one of his official duties as a police officer of the City of Charlotte, North Carolina, such duty being to-wit: "the arrest of Mary Trapp for setting up, maintaining and operating a place, structure and building for the purpose of prostitution and assignation, all to the knowledge of Bernie W. Stogner and to the injury of the public and the people of the City of Charlotte, North Carolina, all in violation of his oath and of his public duty," *et cetera.*

The defendant was charged in Bill of Indictment No. 42934, during the year 1963 to July 1964, with corruptly and wilfully neglecting and refusing to discharge one of his official duties as a police officer of the City of Charlotte, North Carolina, said duty being to-wit: "the arrest of Mary Trapp for having and keeping in her possession spirituous and intoxicating liquors for the purpose of sale to his Bernie W. Stogner's knowledge, to the injury of the public and the people of the City of Charlotte, North Carolina, all in violation of his oath and duty to the public," *et cetera.*

The defendant was charged in Bill of Indictment No. 42929 with, on or about September 1963, corruptly and wilfully refusing and neglecting to discharge one of his official duties as a police officer of the City of Charlotte, North Carolina, such duty being to-wit: "the arrest, apprehension, and assisting in the arrest and apprehension of George Baker, 113 Sycamore Street, Charlotte, North Carolina, on the charge of obtaining property by flim-flam or larceny of property by trick or artifice for the High Point, North Carolina, Police Department to the injury of the public and the people of the City of Charlotte, North Carolina, all in violation of his oath and duty to the public," *et cetera.*

The defendant moved to quash these bills on the same grounds set out in the case of *S. v. Hord,* filed this day, *ante* 149. The motion was allowed as to each bill, and the State appeals, pursuant to the provisions of G.S. 15-179, and assigns error.

Attorney General Bruton, Deputy Attorney General Harry W. McGalliard, Asst. Attorney General James F. Bullock for the State appellant.

William L. Stagg for defendant appellee.

PER CURIAM. On authority of *S. v. Hord, ante* 149, we hold that a duly appointed policeman of the City of Charlotte, North Carolina, is an officer of said City within the meaning of G.S. 14-230.

For the reasons set out in the *Hord* case, we hold that Bills of Indictment Nos. 42961 and 42931 were properly quashed. There is nothing in these bills alleging that Mary Trapp maintained a place of prostitution within the City of Charlotte or in Mecklenburg County, within the jurisdiction of the Police Department of the City of Charlotte.

Furthermore, Bill of Indictment No. 42934 does not charge that Mary Trapp kept in her possession spirituous and intoxicating liquors for the purpose of sale in the City of Charlotte or in Mecklenburg County, within the jurisdiction of the Police Department of the City of Charlotte. Therefore, we hold that this bill was properly quashed.

It may be inferred from Bill of Indictment No. 42929 that George Baker, who lives at 113 Sycamore Street, Charlotte, North Carolina, at some undisclosed time obtained certain property from some undisclosed party or parties by larceny or trick in the City of High Point, and that the Police Department of the City of High Point may have requested his arrest. Even so, no such facts are disclosed in the bill of indictment. Moreover, there is no allegation that any process was issued at the instance of the Police Department of the City of High Point and placed in the hands of the defendant, directing him to arrest George Baker. We hold that the court below properly quashed this bill of indictment.

For the reasons hereinabove stated, the ruling of the court below, quashing each of the above bills of indictment, will be upheld.

Affirmed.

STATE OF NORTH CAROLINA v. W. A. McCALL.

(Filed 7 April, 1965.)

Public Officers § 11—

An indictment charging the captain of detectives of a municipal police force with corruptly intimidating a prospective State's witness by permitting the prime suspect in the case to go to his home, *held* insufficient to charge a violation of G.S. 14-230, it appearing that the case was in the investigative stage and therefore that the act of the officer in permitting the prime suspect to go to his home could not be a violation of the officer's duty.

STATE *v.* McCALL.

APPEAL by the State from *Latham, S.J.*, 14 December 1964 Conflict Criminal Session of MECKLENBURG.

The defendant was charged in Bill of Indictment No. 42963 that on or about 31 January 1964 he unlawfully and wilfully did neglect to discharge one of his official duties as a police officer of the City of Charlotte, North Carolina, said duty being to-wit: "the investigation and handling of the case of State of North Carolina against Herbert P. Cook on the charge of did steal, take and carry away 1208 gallons of Gulf No-Nox gasoline the property of Gulf Oil Corporation, * * * of the value of more than $200.00 to wit: $366.02, he, the said W. A. McCall wilfully failed to perform his official duties as a police officer of the City of Charlotte, North Carolina, by corruptly intimidating the prospective State's witness, James Atkinson, during said investigation in order to influence his testimony by wilfully letting or permitting Herbert P. Cook, the prime suspect in the case to go home after apprehension without bond, and by wilfully not charging the prime suspect Herbert P. Cook with any crime or charge before he was released to go home without bond. He, the said W. A. McCall, being the Captain of Detectives of the City of Charlotte, North Carolina, Police Department, the department in charge of the investigation of said larceny * * *, to the injury of the public and the people of the City of Charlotte, North Carolina, all in violation of his oath and of his public duty," *et cetera.*

The defendant was charged in Bill of Indictment No. 42362 with having corruptly and wilfully failed and neglected to discharge one of his official duties with respect to the same matters set out in Bill No. 42963.

In Bill of Indictment No. 42965, the defendant was charged with having wilfully failed to discharge one of his official duties as a police officer of the City of Charlotte, North Carolina, said duty being to-wit: "the arrest and apprehension and assisting in the arrest and apprehension of James Lee Harris on the charge of obtaining property by flimflam or larceny of property by artifice or trick for the Police Department of Lancaster, South Carolina, to the injury of the public and the people of the City of Charlotte, North Carolina, all in violation of his oath and of his public duty," *et cetera.*

The defendant was charged in Bill of Indictment No. 42964 with having corruptly and wilfully failed to discharge one of his official duties with respect to the same matters set forth in Bill No. 42965.

The defendant moved to quash these bills on the grounds set out in *S. v. Hord*, filed this day, *ante* 149. The motion was allowed as to each bill, and the State appeals pursuant to the provisions of G.S. 15-179, and assigns error.

Attorney General Bruton, Deputy Attorney General Harry W. McGalliard, Asst. Attorney General James F. Bullock for the State appellant.

Robert G. Sanders and J. Howard Bunn, Jr., for defendant appellee.

PER CURIAM. On authority of *S. v. Hord, ante* 149, we hold that a Captain of Detectives of the Police Department of the City of Charlotte, North Carolina, is an officer of said City within the meaning of G.S. 14-230.

The charges against the defendant in Bills of Indictment Nos. 42362 and 42963 are to the effect that the defendant wilfully and corruptly failed to discharge one of his official duties as a police officer of the City of Charlotte in connection with the investigation and handling of the case of *State v. Herbert P. Cook* on the charge of stealing 1208 gallons of Gulf No-Nox gasoline, the property of the Gulf Oil Corporation.

Apparently, the crime sought to be established against the defendant is that the defendant, by corruptly intimidating the prospective State's witness, James Atkinson, during such investigation, undertook to influence his testimony. As we interpret the charge in these bills, the corrupt and unlawful conduct of the defendant, if any, consisted of his permitting Herbert P. Cook, the prime suspect in the case, to go to his home after apprehension without posting bond, and by not charging him with any crime before he was permitted to go to his home.

We can see no connection between the alleged intimidation of James Atkinson and the release of Herbert P. Cook to visit his home. Moreover, the case was apparently in the investigative stage since no formal charge had been lodged against the suspect at the time. We do not construe the conduct of the defendant, as set out in these bills, to be of such nature as to charge any criminal misconduct on his part. Consequently, we hold that these bills were properly quashed.

Bills of Indictment Nos. 42965 and 42964 contain the same defects pointed out in similar bills set out in the case of *S. v. Stogner, ante* 163, and the motion to quash allowed in the instant case will be upheld on the grounds set forth in the *Stogner* case.

Affirmed.

STATE OF NORTH CAROLINA v. EARL FESPERMAN.

(Filed 7 April, 1965.)

APPEAL by the State from *Latham, S.J.,* 14 December 1964 Conflict Criminal Session of MECKLENBURG.

The defendant was charged in Bills of Indictment Nos. 43270 and 43271 that on or about September 1963 he wilfully and corruptly refused and neglected to discharge one of his official duties as a police officer of the City of Charlotte, North Carolina, said duty being to-wit: "the arrest, apprehension, and assisting in the arrest and apprehension of George Baker, 113 Sycamore Street, Charlotte, North Carolina, on the charge of flim-flam or larceny of property by trick or artifice, for the High Point, North Carolina, police department to the injury of the public and the people of the City of Charlotte, North Carolina, all in violation of his oath and duty to the public," *et cetera.*

The defendant moved to quash these bills on the same grounds set out in the case of *S. v. Hord,* filed this day, *ante* 149. The motion was allowed as to both bills, and the State appeals pursuant to the provisions of G.S. 15-179, and assigns error.

Attorney General Bruton, Deputy Attorney General Harry W. McGalliard, Asst. Attorney General James F. Bullock for the State, appellant.

Bailey & Booe for defendant appellee.

PER CURIAM. On authority of *S. v. Hord, ante* 149, we hold that a duly appointed policeman of the City of Charlotte, North Carolina, is an officer of said City within the meaning of G.S. 14-230.

The ruling of the court below, quashing these bills of indictment, will be upheld for the reasons stated in the case of *S. v. Stogner,* filed this day, *ante* 163.

Affirmed.

JAMES ASKEW, EMPLOYEE v. LEONARD TIRE COMPANY, EMPLOYER AND TRAVELERS INSURANCE COMPANY, CARRIER.

(Filed 7 April, 1965.)

1. Master and Servant §§ 47, 48, 82—

The existence of the employee-employer relationship is jurisdictional to the application of the Workmen's Compensation Act.

2. Courts § 2—

A challenge to jurisdiction may be made at any time, even in the Supreme Court.

3. Master and Servant § 93—

Jurisdictional findings of the Industrial Commission are not binding on the Superior Court upon appeal, but the Superior Court has the power and duty to consider all of the evidence in the record and make its own findings in regard to jurisdictional questions.

4. Same—

It is error for the Superior Court, if aptly requested to do so, to fail to find the jurisdictional facts on appeal from the Industrial Commission and set them out in the judgment, but the Superior Court may by reference adopt the findings of the Commission as its own.

5. Same; Master and Servant § 94—

Where on appeal to the Superior Court from the Industrial Commission there is no request for independent findings of the jurisdictional facts and the judgment affirms the findings of the Commission without incorporating therein independent findings of such facts, it will be presumed on further appeal, unless it clearly appears to the contrary from the record, that the Superior Court reviewed the evidence in the light of its authority and duty to make the jurisdictional findings, and its affirmance of the Commission's findings will be deemed an adoption by it of such findings of the Commission.

6. Master and Servant § 3—

An independent contractor is one who contracts to do a piece of work according to his own judgment and methods and who is not subject to the employer except as to the result of the work and who has the right to employ and direct the acts of other workmen without the interference or right of control on the part of the employer, and whether a particular person is an employee or an independent contractor must be determined upon the varying factual elements of each particular case.

7. Master and Servant § 48—

Findings to the effect that claimant did not hold himself out as a painting contractor and consistently worked for others for fixed hourly wages, except upon a single prior instance, and that he contracted to paint the inside of defendant's building for a stipulated hourly wage, with defendant to furnish the paint and claimant to furnish the brushes, ladders and other equipment etc., *held* sufficient to support a finding that claimant was an employee and not an independent contractor, notwithstanding other evidence sufficient to support a contrary finding.

8. Master and Servant § 94—

The jurisdictional findings of the Superior Court which are supported by competent evidence are binding on the Supreme Court upon further appeal.

9. Appeal and Error § 2—

Even though an appeal be technically premature, the Supreme Court, in the exercise of its supervisory jurisdiction, may determine the question

sought to be presented to obviate a wholly unnecessary and circuitous course of procedure. Constitution of North Carolina, Art. IV, § 10.

APPEAL by defendants from *Hubbard, J.*, October 1964 Civil Session of HALIFAX.

Proceeding pursuant to the Workmen's Compensation Act. Plaintiff suffered an injury by accident which he alleges arose out of and in the course of his employment with defendant, Leonard Tire Company.

About 4:00 P.M. on Thursday, 28 February 1963, plaintiff, while painting the interior of the sales room of the Tire Company's building in Murfreesboro, N. C., fell from the ladder on which he was working to the concrete floor below and was rendered unconscious. He was hospitalized about a month and was out of work about three months on account of the injuries suffered in the fall; he has a permanent partial disability of the left arm.

The principal controversy is whether plaintiff was an employee of defendant Tire Company or an independent contractor. The hearing commissioner found facts and upon such findings concluded as a matter of law that at the time of the accident the employer-employee relationship existed between plaintiff and defendant Tire Company, that plaintiff sustained an injury by accident arising out of and in the course of the employment by said defendant, and that plaintiff's average weekly wage was $60.00. Compensation was awarded. Upon review, the full Commission adopted "as its own the findings of fact and conclusions of law of the Hearing Commissioner," and affirmed the award.

Upon appeal, the superior court struck the following findings on the ground that they were not supported by any competent evidence in the record: "Plaintiff was not free to use such assistance as he thought proper"; "Plaintiff's average weekly wage . . . was $60.00 . . ." Defendant's exceptions to all other findings of fact and conclusions of law were overruled; the court held that these findings of fact are supported by competent evidence. Judgment was entered remanding the cause to the Industrial Commission "to ascertain the average weekly wage of the plaintiff and to enter an award (of compensation) thereon in compliance with the terms of this judgment . . ." Defendants appeal.

Jones, Jones & Jones and Pritchett & Cooke for plaintiff.

Allsbrook, Benton & Knott and Dwight L. Cranford for defendants.

MOORE, J. To be entitled to maintain a proceeding for compensation for personal injury under the provisions of the Workmen's Compensation Act the claimant must be, in fact and in law, an employee of the alleged employer. The question whether the employer-employee relationship exists is clearly jurisdictional. *Richards v. Nationwide*

Homes, 263 N.C. 295, 139 S.E. 2d 645; *Pearson v. Flooring Co.,* 247 N.C. 434, 101 S.E. 2d 301; *Francis v. Wood Turning Co.,* 204 N.C. 701, 169 S.E. 654. A challenge to jurisdiction may be made at any time, even in Supreme Court. *Richards v. Nationwide Homes, supra; Dependents of Thompson v. Funeral Home,* 205 N.C. 801, 172 S.E. 500. We have said repeatedly that when a party 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, and 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. *Richards v. Nationwide Homes, supra; Pearson v. Flooring Co., supra.* See 3 Strong: N. C. Index, Master & Servant, § 93, pp. 290-1, and cases cited.

If the superior court, in the instant case, made independent findings of fact from the evidence in the record, on the jurisdictional question, it failed to set out such findings in the judgment. The judgment holds that the material findings of the Commission as to the employer-employee relationship are supported by competent evidence; it overrules appellants' exceptions and assignments of error.

Appellants contend that plaintiff was not an employee of defendant Tire Company, but was an independent contractor. They contend that the court erred in failing to consider the evidence in the record and make therefrom independent findings of jurisdictional facts. It is apparent from an examination of the judgment that the judge did review and consider all of the evidence in the record. The narrow question presented is whether it is mandatory that the superior court, on an appeal from the Commission, after considering all the evidence in the record, make independent findings of fact on jurisdictional questions and *set out* such findings in the judgment, though the court is in agreement with and affirms the Commission's findings of jurisdictional facts.

As pointed out in *Pearson v. Flooring Co., supra,* there is apparent conflict in some of the decided cases as to whether the superior court *must* make independent findings of jurisdictional facts. In some of the cases the question as to employer-employee relationship was not *expressly* presented as jurisdictional, and the Court, perhaps unmindful of the jurisdictional nature of the question, applied the rule that the Commission's findings of fact are conclusive on appeal when supported by competent evidence — the rule (G.S. 97-86) as to findings of non-jurisdictional facts. *Hawes v. Accident Association,* 243 N.C. 62, 89 S.E. 2d 739; *Hinkle v. Lexington,* 239 N.C. 105, 79 S.E. 2d 220; *Perley v. Paving Co.,* 228 N.C. 479, 46 S.E. 2d 298; *Beach v. McLean,* 219 N.C. 521, 14 S.E. 2d 515; *Cloninger v. Bakery Co.,* 218 N.C. 26, 9 S.E. 2d 615; *Bryson v. Lumber Co.,* 204 N.C. 664, 169 S.E. 276. In most of

the cases in which the superior court has reversed the opinion and award of the Commission on jurisdictional questions, the judge has made independent findings of jurisdictional facts, and the Supreme Court has approved that procedure. *Richards v. Nationwide Homes, supra; Hart v. Motors,* 244 N.C. 84, 92 S.E. 2d 673; *Francis v. Wood Turning Co., Supra; Aycock v. Cooper,* 202 N.C. 500, 163 S.E. 569.

In *Beach v. McLean, supra,* it is stated that the inquiry whether employer-employee relationship exists is a mixed question of fact and law, and the correct determination depends "upon the answer to two questions: (1) What are the terms of the agreement — that is, what was the contract between the parties; and (2) what relationship between the parties was created by the contract — was it that of master and servant or that of employer and independent contractor? The first involves a question of fact and the second is a question of law." The opinion states further: ". . . the Commission has found the facts which constitute the contract. The facts as thus found are conclusive."

In *Aylor v. Barnes,* 242 N.C. 223, 87 S.E. 2d 269, the crucial inquiry was whether the employee was a resident of North Carolina, a jurisdictional question. The Commission concluded, upon facts found, that the employee was a resident of North Carolina at the time of his fatal injury, and awarded compensation to his dependent. On appeal, the superior court overruled defendants' exceptions and assignments of error and affirmed all of the findings of fact and conclusions of law and the award of the Commission. The court recited in the judgment that "the entire record" had been "examined and considered." The Supreme Court declared: ". . . it is not enough that the Judge of Superior Court overrule the exceptions to the findings of fact and conclusions of law, and affirm the findings of fact and conclusions of law made by the Industrial Commission." The cause was remanded to superior court for rehearing and independent findings of jurisdictional facts by the judge.

In *Pearson v. Flooring Co., supra,* the question was whether the employer-employee relationship existed. The superior court entered judgment declaring that the evidence in the record had been reviewed, the Commission's findings of fact are supported by competent evidence, the Commission's conclusions of law are correct, and the award should be affirmed. The judgment overruled defendants' exceptions and assignments of error and adopted the findings of fact and conclusions of law of the Commission "as fully as if set forth *verbatim* in this judgment." On appeal to Supreme Court defendants contended that the judge erred in failing to "make independent findings of fact relevant to the controverted jurisdictional question." After reviewing the many cases dealing with the subject this Court said:

". . . we need not undertake to reconcile or to resolve the apparent conflict in the cited decisions.

"The record, fairly interpreted, does not show that Judge Rosseau failed to consider the evidence and make his own findings of fact therefrom. Indeed, the stronger inference is that he did so. Certainly, if he considered the findings of fact of the Commission correct, and his judgment so states, the rule contended for by appellants would not require a mere rephrasing of essentially the same factual findings in order to demonstrate that the findings made by him were his own rather than an approval of the Commission's findings because supported by *some* competent evidence.

"The record shows that Judge Rousseau, after a *full review* of the evidence, found not only that the findings of fact of the Commission were supported by competent evidence but that they were correct. He adopted the findings of fact made by the Commission as his own 'as fully as if set forth *verbatim* in this judgment.' "

We are not disposed to draw fine distinctions in an effort to harmonize our former decisions, and thereby add confusion to uncertainty. Decision in the case at bar could well rest upon the authority of either *Beach* or *Aylor,* which are apparently in direct conflict. *Beach* is neither distinguished nor cited by *Aylor,* and it does not appear that it was intended that the latter overrule the former. It is not clear that the Court was mindful of the jurisdictional aspect of the question in the *Beach* case; in *Aylor,* the Court made a more comprehensive and absolute application of the rule with respect to jurisdictional findings than the cases cited in support justify. *Pearson* is well reasoned, avoids extremes, and modifies the holding in *Aylor.* Yet, it does not provide general guide lines; it is authoritative only with respect to the particular circumstances therein presented. Duty now dictates that we no longer leave the subject rule in the twilight of uncertainty; we must declare with as much certainty and specificity as possible the meaning of the rule.

The rule in question was first declared in *Aycock v. Cooper, supra.* The superior court had made independent findings of jurisdictional facts, contrary to the findings of the Commission. The evidence in the record was conflicting in the sense both the judge's findings and the Commission's findings had support therein. The substance of the rule laid down is that (1) the Commission's findings of fact, upon which its jurisdiction depends, are not conclusive on appeal to superior court, and (2) the superior court "has both the power and duty . . . to consider all of the evidence *in the record,* and find therefrom the jurisdictional facts, without regard to the finding of such facts by the Commission." The

Court stated: "The question has not heretofore been presented to this Court and we, therefore, have no decision which may be cited as authority . . ." The rationale of decision is that "A contrary holding might present a serious question as to the validity of the statutory provision with respect to the effect of the findings of fact made by the Commission." In case after case the rule has been approved by us, and must be considered as settled law. The problem is in its application.

From a consideration of all of the cases interpreting and applying the rule in question, and the purpose of and reason for the rule, we deduce and declare the following principles. The Commission's findings of jurisdictional facts are not conclusive on appeal to superior court, even if supported by competent evidence. The judge may *ex mero motu* make findings of jurisdictional facts from the evidence in the record and set out his findings in the judgment, without regard to the findings of the Commission. Where the judge is of the opinion, upon a fair and impartial consideration of the evidence in the record, that the Commission's findings of jurisdictional facts lead to an improper assumption or rejection of jurisdiction by the Commission, he has the duty to make independent findings of jurisdictional facts and to set them out in the judgment. If a party to the proceeding in apt time requests the judge to make independent findings of jurisdictional facts, it is error for him to refuse to do so, and such facts found by him must be set out in the judgment or incorporated therein by reference; if the judge's findings are in agreement with those of the Commission, he may by reference in the judgment adopt the latter as his own. But it is error for the judge to proceed upon the theory that he is bound by the Commission's findings of jurisdictional facts. A jurisdictional question may be raised at any stage of the proceeding. Where there has been no request in superior court for independent findings of jurisdictional facts and there has been no independent findings of such facts in that court and the Commission's findings were affirmed, and the jurisdictional aspect of findings of fact are expressly suggested and such findings challenged for the first time in Supreme Court, it will be presumed that the judge reviewed the evidence in the light of his authority and duty and his findings were in accord with those of the Commission, and his overruling of exceptions to and his affirmance of the Commission's findings will be deemed an adoption by him of such findings as his own, unless it clearly appears from the record on appeal in Supreme Court that the judge proceeded upon the mistake of law that the Commission's findings of jurisdictional facts were binding on him and he was without authority to make independent findings.

Testing the judgment in the instant case by the foregoing guides, we conclude that the court below did not err in failing to set out indepen-

dent findings of jurisdictional facts. There was no request therefor. It is clear that the judge carefully reviewed the evidence in the record. He struck out certain of the findings. He overruled the exceptions to the material findings of jurisdictional facts made by the Commission, affirmed them and directed that an award be made accordingly. There is nothing in the record and judgment to indicate that he was not aware of his authority and duty, or that he considered the findings of the Commission to be conclusive. We are confirmed in our opinion that he was fully aware of his authority and duty for that he is the same judge who in January 1964, in *Richards v. Nationwide Homes, supra,* found independent facts on the question of employer-employee relationship, and reversed the Commission.

The pertinent findings of the Commission, affirmed in superior court, are these:

"1. In February 1963 the plaintiff and Mr. Leonard, President and General Manager of defendant employer, entered into an oral contract or agreement, whereby plaintiff agreed to paint the outside of a building owned by defendant employer at Murfreesboro. Plaintiff was to furnish the paint brushes, ladders and other equipment, and defendant employer was to furnish the paint. Plaintiff was to be paid an agreed sum of $125.00 to do such work, and the contract or agreement was carried out in accordance with such terms.

"2. After plaintiff had completed the painting of the outside of the defendant employer's building at Murfreesboro, Mr. Leonard contacted Mr. W. S. Outland, defendant employer's service manager at Murfreesboro. Mr. Leonard authorized Outland to get plaintiff to paint the inside of defendant employer's building at Murfreesboro. Outland therefore contacted plaintiff concerning the painting of the inside of the building, and plaintiff advised that he would do such painting and that he charged $1.50 an hour to do painting.

"3. Plaintiff thereafter commenced the painting of the inside of defendant employer's building. Plaintiff was not engaged in an independent business, calling, or occupation, he having never contracted to do painting for a fixed sum prior to his agreeing to paint the outside of defendant employer's building on a contract basis. Plaintiff was not doing a specific piece of work at a fixed price or for a lump sum, but was working for an hourly wage of $1.50 per hour. Plaintiff . . . was engaged to paint the inside of the building personally, there being no authorization to employ anyone else to do the painting. Plaintiff was not required to work any

specific hours in doing the painting, but was requested to do the painting as soon as possible, in order that defendant employer's establishment at Murfreesboro could be opened. The employer-employee relationship existed between plaintiff and defendant employer while plaintiff was painting the inside of defendant employer's building."

At only a few points is there conflict in the evidence. The controversy centers on the questions, what was the agreement between the parties and what relationship did it create?

Plaintiff testified in substance: After he had finished painting the outside of the building, Mr. Outland, service manager of Tire Company's Murfreesboro shop, requested him to paint a portion of the inside — the sales room. Mr. Outland asked what he would charge and plaintiff told him $1.50 an hour. Mr. Outland told him to go ahead and paint and keep his own time. Tire Company was to furnish the paint; plaintiff was to furnish paint brushes and ladders. The number of hours he was to work each day was not specified; plaintiff was to complete the work as soon as possible so that the place could be opened for business. Plaintiff worked alone, and had made 39 hours at the time of his injury. Mr. Leonard, president and general manager of the Tire Company, after plaintiff's injury, made out a check for $58.50 — on the basis of 39 hours at $1.50 an hour. Plaintiff did not cash the check because it had a notation thereon, "Paint Contractor." Plaintiff was not a painting contractor. He was 65 years old and had been a painter for many years. His regular wage was $1.50 an hour. He had never done painting by the job for a lump sum except on the one occasion when he painted the outside of the Tire Company's building.

Mr. Leonard testified: Mr. Outland called him relative to the painting of the inside of the building. He told Mr. Outland to get plaintiff to paint it. Plaintiff had done a good job on the outside. He, Mr. Leonard, assumed that plaintiff would do the painting on the inside for a flat sum; he did not personally deal with plaintiff. "Mr. Outland . . . didn't have any authority to employ anyone."

Mr. Outland testified: He asked plaintiff to do the painting and asked him what he would charge. Plaintiff "said he worked by the hour, he got $1.50 an hour." He told plaintiff it was satisfactory if he wanted "to base it on that, but it would be the contract price." There was no understanding that plaintiff was working on an hourly basis; it was understood that plaintiff was "performing on the inside in the same manner that he was performing on the outside."

It is seen that on the crucial question, whether plaintiff was an employee of defendant Tire Company, the evidence is in direct conflict. There is evidence which would justify a finding that plaintiff was an

independent contractor, but we are of the opinion that there is evidence which supports the findings that "Plaintiff was not doing a specific piece of work at a fixed price or for a lump sum, but was working for an hourly wage of $1.50 per hour. . . . The employer-employee relationship existed between plaintiff and defendant employer (Tire Company) while plaintiff was painting the inside of defendant employer's building." There are many elements to be considered in determining whether a person in the execution of work for another is an employee or independent contractor, and no particular element is controlling. *Hayes v. Elon College,* 224 N.C. 11, 29 S.E. 2d 137. An independent contractor has been defined as one who exercises an independent employment, contracts to do a piece of work according to his own judgment and methods, and without being subject to his employer, except as to the result of the work, and who has the right to employ and direct the action of other workmen in the prosecution of the work without interference or right of control on the part of his employer. *Graham v. Wall,* 220 N.C. 84, 16 S.E. 2d 691. Plaintiff is a painter of long experience, who has consistently worked for others for fixed hourly wages. He does not hold himself out as a painting contractor. During his long experience he has only once done a painting job for a lump sum. It is to be inferred that plaintiff was employed by defendant employer because of the quality of his individual work, that he was not to employ or delegate the work to others, and that he was to be paid an hourly wage for such time as he worked. Other established elements involved are insufficient to compel the conclusion that he was an independent contractor at the time of his injury. In this area of employer-employee relationships there are no two cases which are exactly similar factually. However, the following cases are sufficiently analagous to the case at bar to be authoritative: *Smith v. Paper Company,* 226 N.C. 47, 36 S.E. 2d 730; *Johnson v. Hosiery Company,* 199 N.C. 38, 153 S.E. 591. The findings below are supported by competent evidence, and are conclusive on appeal to *Supreme Court.*

The judge below ordered the cause remanded to the Industrial Commission "to ascertain the average weekly wage of the plaintiff and to enter an award (of compensation) thereon." It was suggested by plaintiff that the cause should have been remanded to the Industrial Commission for compliance with the judge's order before an appeal was entertained in Supreme Court, that is, that the appeal is premature. Technically, the suggestion is correct. However, this Court in the exercise of its supervisory jurisdiction concluded to determine the questions presented to obviate a wholly unnecessary and circuitous course of procedure. Constitution of North Carolina, Art. IV, § 10; *Edwards v. Raleigh,* 240 N.C. 137, 81 S.E. 2d 273. The cause is remanded to the end

that the judgment of the superior court herein at the October 1964 Civil Session of Halifax shall be complied with.

Affirmed.

FURMAN GREENE v. MARY ANNE MEREDITH.

(Filed 7 April, 1965.)

1. Trial § 21—

On motion to nonsuit, plaintiff's evidence, together with so much of defendant's evidence as is favorable to plaintiff, will be considered in the light most favorable to plaintiff, while defendant's evidence which tends to contradict or impeach plaintiff's evidence will be disregarded.

2. Automobiles § 41g—

Evidence favorable to plaintiff tending to show that defendant approached the intersection with the traffic control signal on green, in heavy fog, in a 35 mile per hour zone, at a speed of some 35 to 50 miles per hour, and, upon seeing plaintiff's car, which had approached from the opposite direction, making a left turn, applied her brakes and skidded for a distance of some 93 feet and collided with the right front of plaintiff's car, which had turned left into defendant's lane of travel, *held* sufficient to be submitted to the jury on the issue of defendant's negligence. G.S. 20-155(b).

3. Automobiles § 42h—

Evidence tending to show that plaintiff, faced with a green traffic control signal, approached an intersection in heavy fog, that before attempting to make a left turn at the intersection he stopped and looked down the highway and, seeing no approaching car, put his automobile in low gear and entered the intersection at a speed of 10 miles per hour, and that, as he was attempting to make a left turn into the intersecting street, he was struck by defendant's car which had approached from the opposite direction at excessive speed, *is held* not to show contributory negligence on the part of plaintiff as a matter of law.

4. Negligence § 1—

A person is required to exercise that degree of care which a reasonably prudent person would exercise under like circumstances, the standard of care being constant while the degree of care varies with the exigencies of the occasion.

5. Automobiles § 7—

A motorist is required not merely to look but to keep a lookout in his direction of travel so as to avoid collision with vehicles or persons on or near the highway, and will be held to the duty of seeing what he ought to have seen.

6. Negligence § 26—

Nonsuit for contributory negligence is proper only when plaintiff's evidence, considered in the light most favorable to him, discloses contributory negligence so clearly that no other reasonable conclusion can be drawn therefrom.

7. Trial § 22—

Discrepancies and contradictions, even in plaintiff's evidence, do not warrant nonsuit.

8. Automobiles § 38; Evidence § 16—

It is prejudicial error to admit evidence of defendant's excessive speed some two miles from the collision when there is no evidence that defendant continued to maintain such speed to the scene of the collision.

APPEAL by defendant from *Froneberger, J.*, September 1964 Session of RUTHERFORD.

Action *ex delicto* to recover for personal injuries and damage to an automobile sustained in a collision in an intersection between plaintiff's automobile and an automobile driven by defendant.

Defendant in her answer denies that she was negligent, conditionally pleads contributory negligence of plaintiff as a bar to any recovery by him, and alleges a counterclaim for damages for personal injuries.

The jury by its verdict found that plaintiff was injured and his automobile was damaged by defendant's negligence, that plaintiff did not by his negligence contribute to his injuries and damages to his automobile, left unanswered the issue "was the defendant injured by the negligence of the plaintiff," and awarded plaintiff $500 for personal injuries and $850 for damages to his automobile.

From a judgment on the verdict, defendant appeals.

Keener and Butner and Stover P. Dunagan by Hurshell H. Keener for defendant appellant.

Hamrick & Jones by Fred D. Hamrick, Jr., for plaintiff appellee.

PARKER, J. Both parties introduced evidence. Defendant assigns as error the denial of her motion for judgment of compulsory nonsuit of plaintiff's action renewed at the close of all the evidence.

The following facts are shown by judicial admissions in the pleadings and by uncontradicted evidence:

U. S. Highway #64 runs east-west, and passes straight through the town of Ruth. U. S. Highway #74 enters U. S. Highway #64 in the town of Ruth from the south, and at its intersection with U. S. Highway #64 it makes a 90-degree left turn, and proceeds west on U. S. Highway #64 as one highway numbered U. S. Highways #64 and #74. At this intersection there are signal lights which turn from green to

yellow to red to control vehicular traffic, erected and maintained pursuant to a duly enacted ordinance of the town of Ruth. About 9:30 a.m. on 1 February 1964, plaintiff was driving his automobile in a westerly direction along U. S. Highway #64 in the town of Ruth and approaching its intersection with U. S. Highway #74. About the same time, defendant driving an automobile owned by Peggy Mowery, who was a passenger therein, was traveling east on U. S. Highway #64 and #74 and approaching their intersection with U. S. Highway #74. At the time of the collision in the intersection between plaintiff's automobile and the automobile driven by defendant, the signal light at the intersection was green for traffic traveling west on U. S. Highway #64 to and through the intersection, and also green for traffic traveling east on U. S. Highways #64 and #74 to and through the intersection. Both highways are main-traveled highways, and both are hard surfaced, 20 feet wide.

Plaintiff's evidence, considered in the light most favorable to him, *Scott v. Darden*, 259 N.C. 167, 130 S.E. 2d 42, shows the following facts:

Where U. S. Highway #74 intersects U. S. Highway #64, U. S. Highway #74 is about 45 feet wide and in its center there is a raised concrete traffic island with an overhead traffic light to control traffic. As he approached the intersection, U. S. Highway #64 is straight and slightly downhill, and on a clear day one can see as he nears the intersection as much as 300 or 400 feet ahead down U. S. Highway #64 and U. S. Highways #64 and #74. On this morning there was a heavy fog. He intended to turn left in the intersection and proceed south on U. S. Highway #74. When he came to within about 20 to 40 feet of the intersection, he stopped his automobile, looked ahead down U. S. Highways #64 and #74 and saw nothing. His lights were on low beam. His left turn signal light was on. He put his automobile in low gear and entered the intersection at a speed of ten miles an hour on the east side of the signal light. He then turned to his left to proceed south on U. S. Highway #74, and when the front end of his automobile had crossed the center of the highway two and one-half or three feet, he saw within two or three feet of him an automobile on his right traveling east straight through the intersection from U. S. Highways #64 and #74. The left front part of this automobile driven by defendant collided with the right front part of his automobile. His automobile was moved two or three feet by the impact. The automobiles stayed together.

J. C. Walker, a witness for plaintiff, stopped the taxicab he was driving on U. S. Highway #74 at the stop light at its intersection with U. S. Highway #64. He saw the collision. He testified in part: "As the light changed to yellow I eased up and looked to the left and saw the car being operated by Miss Meredith approaching from my left. I saw

her car about 150 feet away. The car was coming probably 40 to 50 miles per hour. It was heavy fog there. Miss Meredith's car was skidding. I don't know how far. I didn't look to my right and didn't see the Greene car. The accident happened right in front of my cab. Glass and stuff flew and hit my cab. It was a tremendous impact. The car driven by Miss Meredith crashed into the Greene car. * * * The point of impact was south of the center line and in the lane for eastbound traffic. On this morning you could see 150 to 200 feet down Highway 64-74, and I saw the defendant's car about 150 feet west of the intersection."

Defendant was driving a white Corvair. Paul G. Albergine, a State highway patrolman, arrived at the scene of the collision shortly after it occurred. He testified: "It was a very heavy foggy morning and was also very heavy in the area of the collision. There were skid marks on U. S. Highway #74 and #64 as they approach the intersection going east and they led up to the white Corvair. The skid marks leading up to the Corvair were 93 feet long. * * * The impact was in the defendant's lane of travel and took in the whole center towards the southwest of the highway. * * * This intersection is within the town of Ruth and the speed limit is 35 miles per hour."

Defendant's evidence shows the following facts:

Fern Blankenship was driving his automobile two or three car lengths behind plaintiff's automobile, and saw the collision. He testified: "He [plaintiff] was starting to turn left. I did not see any signal. In turning he was angling across to turn left at the island. He started angling in front of the store. Just as he started to turn left it looked to me as if he had speeded up some. I saw the collision. At the time of the collision Mr. Greene's car had crossed into the left-hand side. * * * It was a foggy morning and the fog was very dense. I could see about 10 — 15 car lengths."

Defendant was driving a Corvair automobile owned by Peggy Mowery, who was a passenger, from Greenville, South Carolina, to Blowing Rock, North Carolina, for a week end of skiing. She testified: "I was driving the car as we approached the town of Rutherfordton and Ruth. The weather was foggy. It had been raining in Greenville but was misting a little bit in Rutherfordton; however, it wasn't raining. We were traveling east on Highway 64 and were going to go through the intersection and continue on 64. As we approached the intersection we could see 175 feet to 200 feet in front of our car. The lights on our vehicle were on dim. As I approached the intersection I saw a car at the intersection and that it had stopped. I observed the car, but I didn't see any indication of it turning. It was sitting there so I proceeded through the intersection, and just as I did the car turned and I hit it. * * * Before I got to it I saw him start to turn and I applied my brakes. I

started sliding. I tried to turn the wheels so I could slide sideways instead of head-on, which I did. At the time of the collision his vehicle was on my side of the road, *i.e.*, the east side. In crossing the intersection the plaintiff started turning in front of me. He was sitting there and the next moment he was turning. * * * I was back about 200 feet when I first saw Mr. Greene's car. I was going approximately 35 miles an hour when I first put on my brakes."

In the collision both automobiles were damaged, and both parties received personal injuries.

Considering plaintiff's evidence in the light most favorable to him, and so much of defendant's evidence as is favorable to him, and ignoring defendant's evidence which tends to contradict or impeach the evidence of plaintiff, as we are required to do in ruling upon a motion for an involuntary judgment of nonsuit, *Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307, the jury could find the following facts: Plaintiff was already in the intersection giving the statutory left turn signal and making a left turn to enter U. S. Highway #74 and proceed south at a time when defendant in a dense fog was at least 93 feet away from the intersection and approaching it at a speed of 35 to 40 to 50 miles an hour. That when defendant saw plaintiff's automobile in the intersection making a left turn, she applied her brakes and skidded 93 feet and crashed into plaintiff's automobile in the intersection. That defendant under all the attendant circumstances was driving the automobile, as alleged and as shown by plaintiff's evidence and her own evidence favorable to him, without due caution and circumspection and at a speed and in a manner so as to endanger or be likely to endanger any person or property on the highway, and by such driving of the automobile was unable to delay her entrance into the intersection until plaintiff had cleared it entirely, G.S. 20-155(b), *Mayberry v. Allred*, 263 N.C. 780, 140 S.E. 2d 406, and that defendant was negligent in the operation of the automobile, and such negligence was a proximate cause of plaintiff's injuries and damage to his automobile.

Defendant contends that plaintiff's own evidence shows that he was guilty of legal contributory negligence. Defendant alleges in his answer that plaintiff was guilty of negligence in the following respects, which proximately contributed to his injuries and damage: (1) He was guilty of reckless and careless driving as defined in G.S. 20-140; (2) he drove his automobile at a speed greater than was reasonable and proper under the circumstances; and (3) he failed to keep a proper lookout, failed to keep his automobile under control, and failed to avoid a collision with defendant's automobile and to yield the right of way to defendant's automobile, which was well into the intersection.

Plaintiff's evidence tends to show there was dense fog at and near the intersection and that he entered the intersection with his left turn signal on when defendant was at least 93 feet away. When he came to within 20 to 40 feet of the intersection, he stopped his automobile and looked ahead down U. S. Highways #64 and #74 and saw nothing. His lights were on low beam. He put his automobile in low gear and entered the intersection at a speed of ten miles an hour. He turned left to proceed south on U. S. Highway #74, and when the front end of his automobile had crossed the center of the highway two and one-half or three feet, he saw within two or three feet of him defendant's automobile skidding into him. Defendant's witness Fern Blankenship testified, "I could see about 10 — 15 car lengths." There is no evidence plaintiff was driving his automobile at an excessive speed.

It is true J. C. Walker, a witness for plaintiff, testified he saw defendant's car 150 feet away, and defendant testified she could see 175 to 200 feet in front of the car she was driving.

The evidence is conflicting as to the distance a car could be seen from another car in the dense fog, which presents a jury question.

The standard of care is always the conduct of the reasonably prudent man. The rule is constant while the degree of care which a reasonably prudent man exercises or should exercise varies with the exigencies of the occasion. *Raper v. McCrory-McLellan Corp.*, 259 N.C. 199, 130 S.E. 2d 281. For instance, what would constitute a proper degree of care in turning left in an intersection in clear weather would not be adequate in making such a turn in a dense fog. It is hornbook law that it is the duty of a motorist to exercise that degree of care which an ordinarily prudent person would exercise under similar circumstances. And in the exercise of such duty he is required not merely to look, but to keep a lookout in his direction of travel, and he is held to the duty of seeing what he ought to have seen, so as to avoid collision with vehicles or persons upon the highway. *Clontz v. Krimminger*, 253 N.C. 252, 116 S.E. 2d 804.

Considering plaintiff's own evidence in the light most favorable to him, it does not show plaintiff is guilty of contributory negligence so clearly that no other conclusion can be reasonably drawn therefrom. *Short v. Chapman*, 261 N.C. 674, 136 S.E. 2d 40. Plaintiff has not proved himself out of court. *Lincoln v. R. R.*, 207 N.C. 787, 178 S.E. 601.

It is elementary that discrepancies and contradictions even in plaintiff's evidence are matters for the jury and not the judge. *Lincoln v. R. R., supra.*

The trial court properly overruled the motion for judgment of compulsory nonsuit, and correctly submitted the issues of negligence and contributory negligence to the jury.

Defendant assigns as error that plaintiff was permitted over his objection to offer evidence that before the collision defendant was driving the Corvair automobile on U. S. Highway #221 about two miles below Rutherfordton in a heavy fog at a speed of 50 to 60 miles an hour, and that a volunteer in the Life Saving Department in Rutherfordton had a flashlight in his hand and had to run out of the road. The brief of counsel for defendant states that about two miles below Rutherfordton is about three miles from the scene of the collision. The brief for plaintiff states:

> "It is a matter of common knowledge that the Town of Rutherfordton is a very small town and the Town of Ruth is a still smaller town, and that their corporate limits adjoin. As the defendant proceeded along Highway #74 out of the Town of Rutherfordton and into the Town of Ruth she crossed immediately from one town to the other, and the accident occurred shortly after she entered the city limits of the Town of Ruth.
>
> "From the testimony hereinabove set forth, that is, the testimony of the defendant, and Peggy Mowery, it is quite clear that after the defendant was stopped by the rescue squad she proceeded on for a short distance through the Town of Rutherfordton and to the point of collision."

There is no evidence in the record from which a jury could reasonably infer that such a speed of 50 to 60 miles an hour continued to the scene of the collision. Its admission in evidence was prejudicial error which entitles defendant to a new trial. *Corum v. Comer,* 256 N.C. 252, 123 S.E. 2d 473, and cases cited.

New trial.

SELL *v.* HOTCHKISS AND COLLER *v.* HOTCHKISS AND HOTCHKISS *v.* HOTCHKISS.

BARBARA SELL, BY HER NEXT FRIEND, WILLIAM A. BASON v. ARLO M. HOTCHKISS.

AND

MARGARET M. COLLER v. ARLO M. HOTCHKISS.

AND

MARGUERITE M. HOTCHKISS v. ARLO M. HOTCHKISS.

(Filed 7 April, 1965.)

1. Evidence § 3; Torts § 7—

Ambiguity in a written contract will be resolved against the party preparing the instrument, and the courts will take judicial notice that releases and covenants not to sue are ordinarily prepared by the insurer of the releasee or covenantee, and also that such covenants are intended for use in the several states.

2. Negligence § 9—

A party compelled to pay for an injury solely under the doctrine of *respondeat superior* may recover indemnity against his agent whose negligence caused the injury.

3. Torts § 7— Covenant not to sue one driver and those for whose acts or to whom he may be liable held not to preclude suit against other driver.

Passengers in a car involved in a collision executed a covenant not to sue in favor of the driver of the other car involved in the collision, his agents, successors and assigns, and "all other persons, firms, or corporations for whose acts or to whom they or any of them might be liable" and expressly reserved the right to proceed against all others. *Held:* The phrase "for whose acts or to whom" the covenantees might be liable may be given significance only by construing it with reference to the principal-agent relationship and the right to indemnity arising therefrom, and such construction is also necessary in order to give any effect to the reservation of rights against others, and therefore the covenant not to sue does not preclude the passengers from thereafter instituting an action to recover for the negligence of the driver of the car in which they were riding.

4. Contracts § 12—

A contract will be construed to give effect to the intent of the parties as ascertained from the language used considered in the light of the subject matter, the end in view, the purpose sought, and the situation of the parties at the time.

5. Infants § 1—

The right of an infant to recover for a tort done him cannot be precluded by a covenant not to sue executed by his parent, since a settlement of an infant's tort claim becomes effective only upon judicial examination and adjudication

APPEAL by defendant from *Crissman, J.*, February 1964 Civil Term of WAKE. This appeal was docketed and argued in the Supreme Court at the Fall Term 1964 as cases nos. 475, 476, and 477.

SELL *v.* HOTCHKISS AND COLLER *v.* HOTCHKISS AND HOTCHKISS *v.* HOTCHKISS.

These three actions for personal injuries, each instituted on August 5, 1963, grow out of the same automobile accident. Each appeal tests the ruling on plaintiff's demurrer and motion to strike directed to defendant's Second Further Answer and Defense. The cases were briefed and argued here as one.

Allegations and admissions in the pleadings reveal these facts: Plaintiffs and defendant are residents of Connecticut. On August 10, 1960, the three plaintiffs were passengers in an automobile owned and operated by defendant. On that date, on U. S. Highway No. 301, near Rocky Mount, defendant's vehicle had a head-on collision with an automobile operated by F. S. Hinkley, a resident of Florida. The collision occurred when Hinkley drove to his left of the center of the highway in an attempt to pass another car proceeding in the same direction. As a result of the impact each plaintiff was injured, and each alleges that defendant's negligence was a proximate cause of her injuries. In identical answers to each complaint, defendant denies any negligence on his part and alleges that the collision was caused solely by the negligence of Hinkley. As a Second Further Answer and Defense he pleads a covenant not to sue, which plaintiff had executed and delivered to Hinkley. Except for the recited consideration the covenants are identical. To plaintiff Marguerite M. Hotchkiss, Hinkley paid $2,500.00; to plaintiff Margaret M. Coller, $6,667.00; to Marguerite M. Hotchkiss, "mother and natural guardian of Barbara Sell, minor," he paid $2,900.00. The covenant which defendant pleads as a defense to the suit of Barbara Sell, minor, was signed Marguerite M. Hotchkiss, "mother and natural guardian of Barbara Sell." The covenants (consideration and signatures left blank) are in identical words as follows:

COVENANT NOT TO SUE

FOR THE SOLE AND ONLY CONSIDERATION OF....., receipt of which is hereby acknowledged; the undersigned (and each of them, if more than one), does hereby covenant and agree to forever refrain from instituting, prosecuting or in any way aiding any claim or suit against Frank Sylvester Hinkley of West Palm Beach, Florida, and all agents, successors and assigns thereof, and all other persons, firms and corporations for whose acts or to whom they or any of them might be liable, (hereinafter referred to as said parties), for or on account of injuries or damages to person or property, or both, or loss of time, or loss of services or society, or expenses, or impairment or loss of any right, or other loss, cost or damage of any and every nature whatsoever, sustained by or accruing to the undersigned, whether now known or unknown, resulting from, or in any manner connected with or

growing out of accident or occurrence on or about August 10, 1960, at or near U. S. Route 301, near Perkins' Metal Driveway, in Rocky Mount, North Carolina; and to indemnify them for and save them harmless from all loss, cost and expense resulting from any such claim or suit.

For said consideration it is hereby further agreed: that no promise or agreement not herein expressed has been made; that this agreement is not executed in reliance upon any statement or representation made by said parties, or any of them, or by any person employed by or representing them, or any of them; that all claims, if any, for attorneys' liens are included in this agreement; that the payment of said consideration is not to be construed as an admission of liability, all liability being expressly denied by said parties; that all rights which the undersigned may have to proceed against all parties other than said parties are expressly reserved; and that the terms hereof are contractual and not mere recitals.

I HAVE READ THE FOREGOING COVENANT NOT TO SUE AND FULLY UNDERSTAND IT.

EXECUTED this 25th day of July 1963.

(s) ..... (SEAL)

From a judgment sustaining each plaintiff's demurrer to defendant's Second Answer and Defense and her motion to strike it, defendant appeals.

Yarborough, Blanchard & Tucker for plaintiff appellees.
Lake, Boyce & Lake for defendant appellant.

SHARP, J. The essential terms of the covenant not to sue are these:

"(T)he undersigned . . . does hereby covenant and agree to forever refrain from instituting, prosecuting or in any way aiding any claim or suit against Frank Sylvester Hinkley . . . and all agents, successors, and assigns thereof, and all other persons, firms and corporations for whose acts or to whom they or any of them might be liable . . . for or on account of injuries or damages to person or property . . . sustained by or accruing to the undersigned . . . resulting from, or in any manner connected with or growing out of accident or occurrence on or about August 10, 1960, at or near U. S. Route 301 . . . Rocky Mount, North Carolina . . . All rights which the undersigned may have to proceed

against all parties other than said parties are expressly reserved; and that the terms hereof are contractual and not mere recitals."

The determinative question is: By this covenant did each plaintiff, as defendant contends, agree not to sue defendant, as well as Hinkley? Defendant's argument is:

(1) That plaintiff has covenanted not to sue:

(a) Hinkley "and all agents, successors and assigns thereof,"

and (b) "All other persons, firms and corporations *for whose acts* . . . they or any of them (*i.e.* Hinkley and his agents, successors, and assigns) might be liable," (Italics ours)

or (c) "All other persons, firms, and corporations . . . *to whom* they or any of them (*i.e.* Hinkley and his agents, successors and assigns) might be liable"; (Italics ours)

(2) That Hinkley might be liable to defendant for contribution, since defendant is the only other possible active joint tortfeasor;

(3) That, therefore, under (1)(c) above, plaintiff has agreed not to sue defendant.

Plaintiffs' counter to this argument is that defendant's interpretation of the covenant is strained and ignores the clear intent of the parties. They correctly point out that defendant's argument ultimately hangs on the clause, "and all other persons, firms and corporations for whose acts or to whom they or any of them might be liable," (1)(c) above. They denominate this clause "a perfect example of gobbledygook which sometimes creeps into stereotyped instruments." For good measure plaintiffs then add that "it would be a formidable challenge to the average law professor, an absurdity to the English student, and an absolute nullity to a layman of normal intelligence."

We are compelled to agree that this covenant, at least upon first perusal, is certainly not the plain and unambiguous document which every painstaking craftsman attempts.

Since the three covenants under consideration here are in identical language, we are, we think, justified in assuming that the agreement was prepared by a representative of defendant. Indeed, we take notice that nowadays both covenants not to sue and releases are ordinarily prepared by attorneys representing the insurance company of the covenantee or releasee, and that they are intended for use in the several states, as this case illustrates. It is a rule of construction that "an am-

biguity in a written contract is to be inclined against the party who prepared the writing," *Jones v. Realty Co.*, 226 N.C. 303, 305, 37 S.E. 2d 906, 907, here defendant.

Had both parties to the covenant meant to take away the right of plaintiffs to sue defendant, how easily this result could have been accomplished by simply saying, "The undersigned further covenants not to sue any person to whom Hinkley, his principal, or his agents, might be liable for contribution in any action growing out of the aforesaid accident." This they did not say, but they did expressly stipulate that "all rights which the undersigned may have to proceed against all parties other than said parties are expressly reserved." The "said parties" are "all other persons, firms and corporations for whose acts or to whom they or any of them might be liable." "They" means Hinkley, his agents, successors, and assigns.

If this final stipulation is to mean anything at all, it must mean that plaintiffs, covenantors, were reserving their rights of action against defendant. Who, then, specifically, are the "said parties" for whose acts and to whom Hinkley, his agents, successors, and assigns (Hinkley *et al.)* might be liable and whom plaintiffs have agreed not to sue? The answer is, we think, that "said parties" are those who stand in the relationship of either principal or agent to Hinkley. The "said parties" *to whom* Hinkley, his agents, successors, and assigns (Hinkley *et al.*) might be liable would be Hinkley's principal, if any, who would be jointly and severally liable with Hinkley to third persons for Hinkley's primary negligence and whom Hinkley would be liable to indemnify for any loss Hinkley's negligence caused the principal. "Said parties" *for whose acts* Hinkley *et al.* might be liable are their own agents, if any, for whose negligence Hinkley as principal would be similarly liable and entitled to indemnification. As to third persons, the principal and his agent are jointly and severally liable for the agent's negligent acts committed within the scope of his employment; but, when a principal's liability rests solely upon the doctrine of *respondeat superior*, he may recover over against the agent if compelled to pay damages for the agent's negligence. *Steele v. Hauling Co.*, 260 N.C. 486, 490, 133 S.E. 2d 197, 200. See *Cox v. Shaw*, 263 N.C. 361, 367, 139 S.E. 2d 676, 681.

On the question whether a covenant not to sue the master or the servant will likewise bar a suit against the other, courts are not in agreement. 35 Am. Jur., Master and Servant § 535 (1941). See Annot., Release of (or covenant not to sue) one tort-feasor as affecting liability of others, 124 A.L.R. 1298, 1312; Annot., Release of (or covenant not to sue) master or principal as affecting liability of servant or agent for tort, or vice versa, 92 A.L.R. 2d 533.

> "(I)t is suggested that where there is any possibility that a tort-feasor compromising a claim may be or become liable to contribute to or reimburse any other tort-feasor or person whatsoever for any damages which the latter may be required to pay the injured party on account of the tort, such tort-feasor should insist that the injured party give him a release without reservation of rights against others, instead of a covenant not to sue or a release reserving rights against other parties. Otherwise, if he accepts a mere covenant not to sue, he may find himself called upon to pay damages in addition to the amount he has already paid in consideration of the covenant," Annot., 124 A.L.R. 1298, 1312.

The crucial clause here under consideration, "for whose acts or to whom" said parties might be liable, makes sense when related to those relationships involving primary and secondary liability and requires no such strained construction as that for which defendant contends. Only by relating this clause to the principal-agent relation can the final stipulation as to reservation of rights have any meaning at all. A contract must be construed as a whole, and each of its provisions must be examined in its proper relation to the others. Furthermore, each provision of a contract must be given effect if such a result can be fairly and reasonably accomplished. *Jones v. Realty Co., supra; Electric Supply Co. v. Burgess,* 223 N.C. 97, 25 S.E. 2d 390.

With those persons to whom and for whom Hinkley might be liable thus identified and segregated as persons within a principal-agent relationship, against whom have plaintiffs, covenantors, reserved rights? Defendant alone. He is the only other possible joint tort-feasor, and he and Hinkley, the covenantee, are not in the relationship of principal and agent. We are strengthened in this conclusion by *Holland v. Utilities Co.,* 208 N.C. 289, 180 S.E. 592, wherein the plaintiff, who had been injured in a collision between vehicles owned by the Southern Public Utilities Co. and the Southeastern Express Co., joint tort-feasors, gave to the Express Co., for a consideration of $500.00, a covenant in which he agreed (1) "to forever refrain from instituting, procuring, or in any way aiding any suit, cause of action, or claims against the Southeastern Express Company and all persons, firms, and/or corporations for whose acts or to whom said party or parties might be liable," on account of a certain accident; and (2) "to save harmless and indemnify the parties from all else and/or expense resulting from any such suit, cause of action or claim." The plaintiff, covenantor, expressly reserved, however, "all rights to proceed against any person or persons other than the parties aforesaid for all loss and/or expense arising out of said accident." When the plaintiff sued it, the Utilities Company, although a joint tort-feasor, made no contention that it had been released

from suit by the covenant quoted above, notwithstanding that the contribution statute, then N.C. Code of 1931, § 618, now G.S. 1-240, was in effect. The Utilities Company merely contended — correctly, this Court held — that it was entitled to credit the judgment which the plaintiff secured against it with the $500.00 the Express Co., covenantee, had paid the plaintiff.

The efforts of legal draftsmen to anticipate and guard against every potential hazard in any instrument entrusted to them, particularly one involving insurance matters, often result in labored documents subject to different interpretations. Such instruments end up not well-wrought, but over-wrought. It is still the law, however, that "(t)he heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." *Electric Co. v. Insurance Co.*, 229 N.C. 518, 520, 50 S.E. 2d 295, 297; *accord, Howland v. Stitzer*, 240 N.C. 689, 84 S.E. 2d 167. On these indicia, we hold that defendant is not a covenantee within the protection of the covenant between plaintiffs and Hinkley. Had plaintiffs understood him to be, it is hard to believe they would have instituted a suit against him within eleven days after signing a covenant not to sue him.

Although this point was not discussed in the briefs, we note that, irrespective of what construction is put on the covenant signed by Marguerite M. Hotchkiss, mother and natural guardian of plaintiff Barbara Sell, minor, defendant could not use it as a defense to the minor's suit against him. A parent cannot bind his minor child by the execution of such a covenant as the one we have here. The settlement of an infant's tort claim becomes effective and binding upon him only upon judicial examination and adjudication. *Oates v. Texas Co.*, 203 N.C. 474, 477, 166 S.E. 317, 318; *Rector v. Logging Co.*, 179 N.C. 59, 101 S.E. 502. See *Gillikin v. Gillikin*, 252 N.C. 1, 113 S.E. 2d 38.

The order of the trial judge sustaining the demurrer and allowing the motion to strike defendant's Second Further Answer and Defense is Affirmed.

STATE v. THURSTON BROWN.

(Filed 7 April, 1965.)

1. Arrest and Bail § 2—

A warrant charging defendant with wilfully refusing to aid an officer in arresting a person having committed the crime of trespass fails to charge

an offense, since G.S. 15-41, as rewritten in 1955, withdrew the authority of an officer to call bystanders to his aid, and G.S. 15-45 does not include trespass as one of the offenses for which an officer may summon help to make an arrest, and the right to require aid in making an arrest for a simple trespass does not exist under the common law.

2. Statutes § 5—

A criminal statute must be strictly construed in favor of the accused.

3. Criminal Law §§ 121, 139—

The Supreme Court will take notice of a fatal defect appearing upon the face of the warrant.

APPEAL by defendant from *Carr, J.*, September, 1964 Criminal Session, WARREN Superior Court.

This criminal prosecution originated in the recorder's court of Warren County upon a warrant based on affidavit which charged: "(T)hat at and in said county, on or about the 31st day of March, 1964, Thurston Brown did unlawfully and willfully neglect and refuse to aid an officer, to-wit, James H. Hundley, Sheriff of Warren County, in arresting certain persons, whose names are unknown to the State, said persons having committed the crime of trespass in the presence of said officer, the said Thurston Brown then and there having been lawfully commanded by the said James H. Hundley, Sheriff of Warren County, to aid him in arresting said persons, against the form of the statute in such case made and provided, and contrary to the law and against the peace and dignity of the State."

From a verdict of guilty entered by the Recorder's Court and a judgment that the defendant be confined in the county jail for 60 days, suspended on condition he be of good behavior for two years and pay a fine of $100.00 and costs, the defendant appealed to the Superior Court.

In the Superior Court the defendant entered a plea of not guilty to the charge contained in the warrant. The jury returned a verdict of guilty. From a judgment that the defendant pay a fine of $25.00 and costs, he appealed to the Supreme Court.

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

T. T. Clayton, Samuel S. Mitchell, W. G. Pearson, II, J. LeVonne Chambers for defendant appellant.

HIGGINS, J. The warrant which is the basis of this prosecution charges or attempts to charge, the offense contained in G.S. 14-224:

> *"Failing to aid police officers.* — If any person, after having been lawfully commanded to aid an offiicer in arresting any person, or

in retaking any person who has escaped from legal custody, or in executing any legal process, wilfully neglects or refuses to aid such officer, he shall be guilty of a misdemeanor."

The foregoing statute has been in effect since 1889. This Court, in the opinion by Clark, C. J., in *State v. Ditmore*, 177 N.C. 592, 99 S.E. 368, states: "It is his duty as a good citizen, and in obedience to the authority of the State as represented by a lawful officer, to aid in the arrest." At the time the sheriff summoned Ditmore he had a capias for the arrest of one Crisp. In the case at bar, at the time Sheriff Hundley attempted to call the defendant to aid in the arrest of unknown persons for the crime of trespass, March 31, 1964, he did not have any process or order for arrest. The State contends the trespass was being committed in the presence of the Sheriff and, hence, he was authorized to make the arrest without a warrant or other process.

Prior to the opinion of this Court in *State v. Mobley*, 240 N.C. 476, 83 S.E. 2d 100, decided July 9, 1954, G.S. 15-41 provided:

"*When officer may arrest without warrant.* — Every sheriff, coroner, constable, officer of police, or other officer, entrusted with the care and preservation of the public peace, who shall know or have reasonable ground to believe that any felony has been committed, or that any dangerous wound has been given, and shall have reasonable ground to believe that any particular person is guilty, and shall apprehend that such person may escape if not immediately arrested, shall arrest him without warrant, and may summon all bystanders to aid in such arrest."

Such had been the law since 1868 and was in effect at the time *State v. Ditmore* was decided, May 27, 1919. However, at the first session of the General Assembly after the decision in *State v. Mobley, supra*, G.S. 15-41 was rewritten, effective as of February 15, 1955:

"*When officer may arrest without warrant.* — A peace officer may without warrant arrest a person:

(a) When the person to be arrested has committed a felony or misdemeanor in the presence of the officer, or when the officer has reasonable ground to believe that the person to be arrested has committed a felony or misdemeanor in his presence;

(b) When the officer has reasonable ground to believe that the person to be arrested has committed a felony and will evade arrest if not immediately taken into custody."

The section as rewritten extended the power of an officer to make an arrest without a warrant for any offense committed in his presence.

The Act which gave the officer authority (which he did not theretofore have) to arrest for any misdemeanor, withdrew the authority to call bystanders to his aid. Therefore, the authority to call for assistance in making arrest was withdrawn except as authorized by G.S. 15-45, which provides:

> "*Persons summoned to assist in arrest.* — Every person summoned by a judge, justice, mayor, intendent, chief officer of any incorporated town, sheriff, coroner or constable, to aid in suppressing any riot, rout, unlawful assembly, affray or other breach of the peace, or to arrest the persons engaged in the commission of such offenses, or to prevent the commission of any felony or larceny which may be threatened or begun, shall do so."

Trespass is not within the authorized offenses embraced in G.S. 15-45.

The provision authorizing the arresting officer to summon aid having been stricken from G.S. 15-41, and not being embraced within the provisions of G.S. 15-45, no other statutory authority is found authorizing the officer to call bystanders. If, therefore, the authority exists, it does so under the common law and not by virtue of statute. Does it exist at common law?

"In cases of misdemeanor a peace officer, like a private person, has at common law no power of arresting without a warrant, except when a breach of the peace has been committed in his presence or when there is reasonable ground for supposing that a breach of the peace is about to be committed or renewed in his presence." Halsbury's Laws of England, (3rd Ed., 1955), Vol. 10; Criminal Law and Procedure, p. 345 (cases are cited in n (1)); see to the same effect: *Alexander v. Lindsey,* 230 N.C. 663, 55 S.E. 2d 470; *State v. Belk,* 76 N.C. 10; 6 C.J.S., Arrest, § 6; 1 Bishop, New Criminal Procedure, § 183 (1913); Clark, Criminal Procedure, (1st Ed., 1895), p. 40; 4 Wharton's Criminal Law and Procedure, § 1597, p, 247 (1957); Machen, Arrest Without Warrant In Misdemeanor Cases, 33 N.C.L.R. 17, 18 (1954); 7 N.C.L.R. 67.

This Court said in *Alexander v. Lindsey,* 230 N.C. 663, 55 S.E. 2d 470: "And we have a number of other statutes authorizing arrests without a warrant, under certain circumstances, but we know of no modification *of the common law rule which would authorize the arrest of this plaintiff on a charge of simple trespass, without a warrant.*" (emphasis added).

The Legislature, in striking from G.S. 15-41 the authority of an officer in a simple misdemeanor to call for assistance in making an arrest was mindful of the changes which have taken place in law enforcement since the remote time when the peace officer needed authority to assemble a *posse comitatus* to aid in keeping the peace and in pursuing

and arresting felons. 1 Blackstone Commentaries, 343. Now a peace officer, in need of help, may by telephone and radio summon highway patrol, rural and city policemen, the sheriff and his deputies, who in high-powered vehicles with two-way communication systems, will converge in moments at the place of need. Well trained and heavily armed peace officers rather than unarmed bystanders offer better security. The bystander need respond only to a legal demand on the part of the officer.

From the foregoing authorities we conclude that G.S. 15-41, as rewritten in 1955, authorized Sheriff Hundley to arrest anyone committing the crime of trespass in his presence; nevertheless, the statute withdrew the authority to call for assistance in making the arrest. That authority was, therefore, withdrawn from the statute. G.S. 15-45, though still in effect, does not include *trespass* as one of the offenses for which an officer may summon help to make an arrest.

Courts are charged with the duty of construing criminal statutes strictly. This rule does not permit us to extend the power of arrest, or the right of the arresting officer to summon aid, beyond the statutory authority when strictly construed in favor of the accused. *State v. Garrett,* 263 N.C. 773, 140 S.E. 2d 315; *State v. Humphries,* 210 N.C. 406, 186 S.E. 473.

We conclude, therefore, that Sheriff Hundley neither by statute nor by common law could lawfully command the defendant to assist him in arresting for trespass. The defect appears upon the face of the warrant which must be interpreted in the light of applicable law. This disposition requires that the judgment be arrested for failure of the warrant to charge a criminal offense.

Judgment arrested.

ARTHUR HARVEY WHISNANT v. NATIONWIDE MUTUAL INSURANCE COMPANY.

AND

MYRTICE WHISNANT v. NATIONWIDE MUTUAL INSURANCE COMPANY.

(Filed 7 April, 1965.)

Insurance § 54—

The policy in suit covered insured and members of his family while riding in a vehicle owned or operated by insured, but excluded coverage if insured was operating a non-owned vehicle furnished for the regular use of insured. *Held:* The exclusion does not apply to injuries occasioned in

the emergency use of a vehicle by insured on a purely personal mission while on vacation, even though such vehicle was furnished by insured's employer on a regular basis solely for the performance of the duties of the employment, such occasion being an isolated and casual use of the vehicle by the insured for a personal mission.

APPEAL by defendant from *Patton, J.*, October Regular Session 1964 of BURKE.

These actions were consolidated for trial by consent of the parties, brought by the respective plaintiffs to recover benefits allegedly due them under the terms of the Medical Payments provision of a policy of insurance issued by the defendant.

On 19 July 1961, the defendant issued to the male plaintiff, Arthur Harvey Whisnant, a policy of family automobile and comprehensive liability insurance on the male plaintiff's 1952 Chevrolet automobile. As a part of said policy, the defendant insured the plaintiff and members of his family, including his wife, the *feme* plaintiff, under Coverage G. Medical Payments, up to $500.00 per person per accident. By the terms of said policy, however, coverage under Coverage G did not apply to bodily injury sustained by the named insured or a relative while occupying an automobile furnished for the regular use of the named insured. This policy of insurance was in full force and effect on 31 August 1961, the date of the accident hereinafter referred to.

At the time of the accident, the male plaintiff, an employee of Clark Tire & Auto Supply Co., Inc., was operating a 1959 Ford truck owned by his employer. The truck was furnished to the male plaintiff by his employer on a regular basis, for his use in performing his duties as an outside collector. The male plaintiff used the truck to go to and from his home to his employer's place of business daily in addition to using it in his employer's business.

On the day of the accident, the male plaintiff was on vacation. His personal automobile, the Chevrolet, was not available when he received a message that his daughter was ill, so he took the truck. Except on this one occasion, the truck was never used by the male plaintiff or any member of his family for personal purposes.

The plaintiffs, husband and wife, were injured in a motor vehicle accident which occurred on 31 August 1961 in Burke County, North Carolina. As a result of said accident, the male plaintiff incurred hospital and doctor bills in excess of $500.00 and the *feme* plaintiff incurred similar expenses amounting to $265.93.

The parties waived trial by jury and requested the court to hear the evidence, find the facts, and make conclusions of law thereon. After hearing the evidence, the court below found the following facts:

"That on August 31, 1961, at approximately 10:00 P.M., the plaintiff (Arthur Harvey Whisnant) was the driver of a pickup, and that said truck became involved in a collision with an unlighted truck on U.S. 64-70 which collision resulted in injuries to the plaintiff which required medical treatment, the cost of which amounted in excess of $500.00; that at the time of the collision the plaintiff, Arthur Harvey Whisnant, was insured by Nationwide Mutual Insurance Company by Policy No. 61-5-727 and that said policy insured Arthur Harvey Whisnant and members of his family under Coverage G., Medical Payments up to $500.00 per person; that the policy also insures the Insured or Relative member of his household while occupying a non-owned automobile if the bodily injury results from its operating by the Named Insured; that on the occasion complained of, the Named Insured, Arthur Harvey Whisnant, was operating a non-owned vehicle, a truck owned by his Employer, Clark Tire and Auto Supply Company; that he was not at the time of the accident in the employment of Clark Tire and Auto Supply Company, but was on vacation at that time, and that the use of the truck was for a personal mission; that the court finds as a fact that this was the only time that said truck had ever been used by the Insured on a personal mission and that such use was a casual infrequent use of said truck; that the use of the truck on the occasion in question does not come within the meaning of 'an automobile furnished for the regular use of either the Named Insured or any relative' and such use on this isolated occasion does not exclude coverage under Exclusions 1(b) of the policy."

Based on the foregoing findings of fact, the court below concluded as a matter of law that the use of the truck by the insured, Arthur Harvey Whisnant, was an isolated use of the truck which belonged to his employer, Clark Tire & Auto Supply Co., Inc., and that such use does not exclude coverage for medical payments under the provision of the policy of insurance; that the Clark Tire & Auto Supply Co., Inc. truck was not furnished for the regular use of Arthur Harvey Whisnant other than while in the course of his employment and that he was not using said truck in the course of his employment on the occasion in question. Thereupon, the court entered a judgment in favor of the male plaintiff in the sum of $500.00 and one in favor of the *feme* plaintiff in the sum of $265.93.

Defendant appeals, assigning error.

W. Harold Mitchell for plaintiff appellees.

Patton, Ervin & Starnes for defendant appellant.

DENNY, C.J. The question posed for decision on this appeal is simply this: Is a single, personal use of an employer's motor vehicle by an employee, which results in an accident, sufficient cause to exclude the benefits in a Medical Payments provision in an automobile liability insurance policy which excludes a nonowned automobile "furnished for regular use"?

The policy of insurance issued by the defendant included Medical Payments provision which covered the male plaintiff and his relatives, and required the defendant to pay to each such person a maximum of $500.00 in the event of bodily injury "while occupying or through being struck by an automobile * * *."

The additional provision in the policy pertinent to this appeal is as follows:

> "EXCLUSIONS 1. This policy does not apply under Coverage G (Medical Payments) to bodily injury: * * * (b) sustained by the Named Insured or a relative (1) while occupying an automobile owned by or *furnished for the regular use of either the Named Insured* or any relative other than an automobile defined herein as an 'owned automobile.'" (Emphasis added.)

The general rule with respect to coverage in a policy of insurance relating to the use of a nonowned automobile, is discussed in a comprehensive opinion in the case of *Whaley v. Insurance Co.*, 259 N.C. 545, 131 S.E. 2d 491, in which Bobbitt, J., speaking for the Court, said:

> "In our view, coverage depends upon the *availability* of the Ford *for use* by Whaley and the *frequency of its use* by Whaley. *Rodenkirk v. State Farm Mut. Automobile Ins. Co.* (Ill.), 60 N.E. 2d 269; *Vern v. Merchants Mut. Casualty Co.*, 118 N.Y.S. 2d 672. It was 'furnished' to Whaley by Firestone in the sense it was placed and continued under Whaley's authority and control. It was available for use by Whaley over an extended period and was used by him 'on numerous occasions.' The stipulated facts dispel any suggestion that Whaley's use of the Ford 'for his own personal business and pleasure,' was casual, occasional or infrequent. The stipulated facts establish that Whaley regularly used the Ford 'for his own personal business and pleasure' as well as 'in the conduct of the company's business.' It is our opinion, and we so decide, that Firestone's Ford was 'furnished for regular use to' Whaley within the meaning of the policy."

It was clearly pointed out in the *Whaley* case, and in the cases cited therein, that the result in that case would have been different if Whaley's

use of the Firestone automobile for personal business and pleasure had been a casual, infrequent use of said automobile.

The motor vehicle involved in the instant cases, while furnished for the regular use of the male plaintiff, was to be used only in the course of his employment, and was never used otherwise except in this single instance. Therefore, we concur with the finding of the court below to the effect "that the use of the truck was for a personal mission; * * * that this was the only time that said truck had ever been used by the Insured on a personal mission and that such use was a casual infrequent use of said truck; that the use of the truck on the occasion in question does not come within the meaning of 'an automobile furnished for the regular use of either the Named Insured or any relative' and such use on this isolated occasion does not exclude coverage under Exclusions 1(b) of the policy."

In the case of *Pacific Automobile Ins. Co. v. Lewis,* 56 Cal. App. 2d 597, 132 P. 2d 846, cited and quoted with approval in *Whaley v. Insurance Co., supra,* it is said: "It cannot be said, as a matter of law, that such a use on *a particular occasion,* which is a departure from the customary use for which the car is furnished, is a regular use within the meaning of these clauses of the policies. * * *"

In the case of *Schoenknecht v. Prairie State Farmers Ins. Ass'n.,* 27 Ill. App. 2d 83, 169 N.E. 2d 148, likewise cited and quoted with approval in the *Whaley* case, the policy of insurance involved specifically insured the plaintiff's Buick. The accident occurred 2 May 1957, about 11:00 p.m., when plaintiff was driving his employer's Chevrolet. The employer furnished plaintiff the Chevrolet for use in the performance of the duties of his employment. When the accident occurred, plaintiff, in violation of his duty to return the Chevrolet to his employer's shop at the conclusion of the day's work, was using the Chevrolet for personal purposes. It was held the plaintiff's liability was covered by the "use of Other Automobiles" clause in his policy.

The identical question now before us was involved in the *Schoenknecht* case, in which the Court said: "Plaintiff was furnished this car for his sole use in connection with the business of his employer during his working hours. He had never used the car to take him anywhere except upon the business of his employer and during his working hours. The only time he had ever used it was during his working hours and in furtherance of his employer's interest except on the occasion in question. The use of this car at this time was under the authorities, an isolated, casual, unauthorized use of an automobile other than his own and comes within the insuring agreements of this policy designated 'use of other automobiles.'" See *Miller v. Farmers Mutual Automobile Ins. Co.,* 179 Kan. 50, 292 P. 2d 711.

The judgment of the court below is
Affirmed.

ROBERT EDWARD SAUNDERS v. RUFUS GEORGE WARREN AND RADIG VAULT COMPANY, INC., A CORPORATION.

(Filed 7 April, 1965.)

1. Automobiles § 13—

Operation of an automobile in a manner which would be harmless on a clear, dry highway may well be the proximate cause of injuries on an icy highway, and the question of whether such operation is negligent must be judged in view of the circumstances confronting the driver.

2. Automobiles § 41f— Issue of negligence in skidding on snow into vehicle stopped on highway held for jury under the evidence.

Evidence tending to show that as defendant rounded a curve he could see some 285 feet ahead where plaintiff's truck was standing with its left wheels on the hardsurface, with stalled vehicles ahead of him on the highway, that it was snowing, with ice and snow in spots on the highway, and that when defendant applied his brakes his vehicle skidded into the rear of plaintiff's truck, causing the injuries in suit, *held* sufficient to be submitted to the jury on the issue of negligence in permitting the inference that defendant either failed to exercise due care to keep a proper lookout or failed to exercise due care to bring his vehicle under control and stop it before he came in too close proximity to plaintiff's truck.

3. Automobiles § 9—

A temporary or momentary stopping on the highway because of the exigencies of traffic is not parking on the highway within the meaning of G.S. 20-161(a).

4. Automobiles § 42c—

Evidence that plaintiff, driving in light snow on a highway having ice and snow in spots thereon, stopped on his right side with his left wheels on the hardsurface because stalled vehicles blocked his lane of travel, and left his truck so standing for a period of some five minutes while he rendered aid to the operators of the stalled vehicles, there being lights on the truck burning throughout the period, and was hit as he returned to his vehicle and was ready to move forward, *held* not to show that such stopping was a proximate cause of injuries sustained when defendant's vehicle skidded into the rear of plaintiff's vehicle. G.S. 20-161(a).

5. Trial § 22—

Discrepancies and inconsistencies, even in plaintiff's testimony, do not warrant nonsuit.

SAUNDERS *v.* WARREN.

APPEAL by plaintiff from *Armstrong, J.*, October 26, 1964 Session of FORSYTH.

Plaintiff's action is to recover for personal injuries allegedly caused by defendant Warren's negligent operation of the corporate defendant's 1962 Studebaker truck. It was admitted that Warren was driving the truck as agent of the corporate defendant.

On February 26, 1963, about 5:00 p.m., plaintiff was operating a 1961 Ford truck in an easterly direction on N. C. Highway No. 66. The highway was icy and slick. It was snowing. Plaintiff observed stalled vehicles ahead and stopped. Warren, operating said Studebaker truck, was proceeding east on said highway. The front of the Studebaker truck collided with the rear of the Ford truck. The Ford truck was standing still when the collision occurred.

Issues of negligence, contributory negligence and damages were raised by the pleadings.

At the conclusion of plaintiff's evidence, the court, on motion of defendants, entered judgment of involuntary nonsuit.

White, Crumpler, Powell, Pfefferkorn & Green for plaintiff appellant.

Hudson, Ferrell, Petree, Stockton, Stockton & Robinson and J. Robert Elster for defendant appellees.

BOBBITT, J. Uncontroverted evidence tends to show: At the scene of collision, the highway is a tar and gravel road, "approximately 20 feet wide, with approximately 3 to 4 feet of shoulder on the right side headed east, and on the other side the shoulders are approximately the same width." To the right of the shoulder, "on the right side headed east," there is a ditch.

Plaintiff's testimony, when considered in the light most favorable to him, tends to show the facts narrated below.

Plaintiff was driving a 2½-ton flat-bed (Ford) dual-wheel truck. His speed was 35-40 miles per hour. Plaintiff testified: "It wasn't snowing hard . . . it was snow flurries . . . the roadway was wet . . . there was ice in spots and snow in spots." Upon rounding a (level or slightly downgrade) curve to his right, he saw approximately 300 feet ahead two stalled vehicles, a (pickup) truck and a car. The front of the truck was in the ditch to the right, the rear in plaintiff's lane of travel. The car, farther east, was on the highway. Westbound traffic was approaching and passing. Plaintiff stopped his truck. He got out to help those whose vehicles were stalled.

Acting on plaintiff's suggestions, the driver of the stalled car started forward. Then plaintiff, by means of a chain, pulled the stalled pickup truck completely off the highway. To do this, plaintiff "got just as

close over to the ditch as (he) could get without getting in the ditch, and . . . was about two foot from the ditch." After this, plaintiff was in his truck and ready to move forward. At that time, the right wheels of his truck were on the shoulder and the left wheels "were two foot on the pavement, or maybe a little more."

Plaintiff's clearance lights had been on and were burning before he reached the scene of collision. The clearance lights were across the top of the bed of his truck. When he stopped and got out, he turned on other lights, including "a 6-inch tail light that has got 'STOP' on it that blinks off and on." Plaintiff testified: "At the time the collision occurred it was cloudy, but it was daylight." Again: "Before the impact I wasn't there over five minutes."

The front of the Studebaker truck struck the left rear of the Ford truck. There was no visible damage to the steel bed of the Ford truck. The whole front of the Studebaker truck was mashed in.

A State Highway Patrolman, referring to his conversation with Warren at the scene of the collision, testified: "The defendant told me that he had come around that curve, going east. I don't recall him telling me that he saw the plaintiff's truck. He told me, when I asked him what happened, that he was traveling east, approximately 15 miles per hour, and he applied his brakes, and got to skidding on the ice, and he lost control of it. I don't recall him making any statement to me like he saw the plaintiff's truck down there." According to this witness, Warren stated that, after he applied his brakes and lost control, his truck "slid into the other truck." This witness also testified that *the measured distance* from the curve to the scene of collision was 285 feet.

There was evidence tending to show plaintiff, as a result of said collision, sustained personal injuries, principally in the area of his neck.

The rules applicable in the consideration of the evidence when passing on a motion for nonsuit are well settled. 4 Strong, N.C. Index, Trial § 21.

Defendants contend plaintiff's evidence shows only that defendants' truck skidded on an icy road when the driver was confronted with a sudden emergency and fails to show actionable negligence on the part of defendants. This contention is untenable.

In *Hardee v. York*, 262 N.C. 237, 136 S.E. 2d 582, where prior decisions relating to skidding are cited and discussed, the opinion of Moore, J., states: "An act or omission of a motorist which would not be negligent in the absence of the ice on the highway, might well be so if ice were present. And negligence which would be harmless on a clear, dry highway might well be the proximate cause of injury on an icy high-

way. An actor's act or omission is to be judged by the circumstances under which it occurs."

Here, there is ample evidence to support findings that Warren, by the exercise of due care, could and should have seen plaintiff's truck when he was approximately 285 feet therefrom; and that Warren, if he saw what he could and should have seen, had opportunity to bring his truck under control and stop it well before he reached plaintiff's truck. Hence, it may be reasonably inferred that Warren either failed to exercise due care to keep a proper lookout or, observing plaintiff's truck, failed to exercise due care to bring his truck under control and stop it before coming into close proximity to plaintiff's truck. A reasonable inference is that Warren did not attempt to stop until he came into close proximity to plaintiff's truck and that his failure to exercise due care in this respect was the cause of whatever emergency confronted him.

In *Culver v. LaRoach*, 260 N.C. 579, 133 S.E. 2d 167, and *Hall v. Little*, 262 N.C. 618, 138 S.E. 2d 282, cited by defendants, materially different factual situations were considered.

Defendants' contention that the evidence establishes as a matter of law that plaintiff was contributorily negligent is untenable.

Defendants assert, *inter alia*, that plaintiff's conduct was in violation of G.S. 20-161(a) and therefore constituted contributory negligence *per se*. The provisions of G.S. 20-161(a) are set forth and discussed in *Meece v. Dickson*, 252 N.C. 300, 113 S.E. 2d 578, where Winborne, C. J., based on cited cases, states: "To 'park' means something more than a mere temporary or momentary stoppage on the highway for a necessary purpose." (Note: In one respect, not material to decision on the present record, *Meece v. Dickson, supra*, was overruled in *Melton v. Crotts*, 257 N.C. 121, 125, 125 S.E. 2d 396.)

Plaintiff's truck was not disabled. He stopped because his lane of travel was blocked. Having stopped, he rendered aid to the operators of the stalled vehicles that blocked his lane of travel. The interval between the removal of the pickup from the highway and the collision was brief. Suffice to say, the evidence fails to establish as a matter of law that a violation of G.S. 20-161(a), if any, was a proximate cause of the collision. Nor does the evidence establish as a matter of law that plaintiff was contributorily negligent in any other respect. *Pender v. Trucking Co.*, 206 N.C. 266, 173 S.E. 336, and *Chandler v. Bottling Co.*, 257 N.C. 245, 125 S.E. 2d 584, cited by defendants, deal with materially different factual situations.

Conceding there are discrepancies and inconsistences in the evidence, even in the testimony of plaintiff, these are to be resolved by the jury. *Stathopoulos v. Shook*, 251 N.C. 33, 36, 110 S.E. 2d 452.

Our conclusion is that the evidence was sufficient to require determination by the jury under appropriate instructions of the issues raised by the pleadings. Hence, the judgment of involuntary nonsuit is reversed.

Reversed.

IN THE MATTER OF NATHAN FLEISHMAN, 1600 RAEFORD ROAD, FAYETTEVILLE, NORTH CAROLINA, ASSESSMENT OF ADDITIONAL INCOME TAXES FOR THE YEAR 1957.

(Filed 7 April, 1965.)

1. Taxation § 28—

Loans to a taxpayer do not constitute taxable income and should not be included as gross income on his income tax return, G.S. 105-141, and repayment of loans may not be allowed as a deduction from taxable income. G.S. 105-47.

2. Same— Repayment of debt cannot be offset against income for taxable year in which repayment is made.

Where over a number of years a taxpayer withdraws from his account with his employer sums in excess of his salary and bonuses and erroneously enters these amounts as taxable income, he may not offset these amounts against his taxable income for the year in which he is compelled to repay the loan, but must seek an adjustment in his income tax liability for each year in which he overdrew and do so within the time limited by G.S. 105-266 and G.S. 105-266.1, and the State is not required to allow such deduction even though the Federal Government does so, G.S. 105-142(a), there being differences between the Federal and State statutes and it being questionable whether the amount should be allowed under the Federal statute.

APPEAL by petitioner from *Copeland, S. J.*, May 25, 1964 Civil Term of WAKE. This appeal was docketed in the Supreme Court as Case No. 459 and argued at the Fall Term 1964.

Petitioner Fleishman (taxpayer) appeals from a judgment affirming an administrative decision of the Tax Review Board which sustained an assessment by the Commissioner of Revenue (Commissioner) of additional income tax against taxpayer for 1957 and denied his claim for a refund.

The facts are undisputed. Taxpayer is an individual reporting his income on the basis of cash receipts and disbursements. His only exception and assignment of error is to the judgment.

In 1941 taxpayer and his brother-in-law, Oscar Vatz, entered into an employment agreement with taxpayer's father, Morris Fleishman, owner of Fleishman's Big Store in Fayetteville, under which agreement taxpayer would receive a salary of $12,000.00 per year and Oscar Vatz, a salary of $8,000.00 per year. The annual net profits of the business in excess of $21,000.00 were to be split equally between taxpayer and his brother-in-law. This agreement remained in effect until 1952, when the salaries were discontinued and the entire profits were divided equally between taxpayer and his brother-in-law.

During the years 1950-1956 taxpayer withdrew cash from the business in addition to his salary and bonus, a total of $42,065.03. During the same period taxpayer reported and paid income taxes on his salary, his bonus, and, erroneously, on his cash withdrawals from the business. Fleishman's Big Store, taxpayer's employer, deducted as a business expense only that amount paid to taxpayer as salary and bonus and carried the cash withdrawals by taxpayer on its books as loans.

In 1957 Morris Fleishman died. Upon investigation, the administrator determined that taxpayer had withdrawn $42,065.03 in excess of his salary and share of the business profits and that his brother-in-law had withdrawn $28,000 in excess of his share. Both taxpayer and his brother-in-law repaid their excess cash withdrawals to the administrator during 1957. Taxpayer's repayment to his employer was accomplished by deducting the amounts of his excess withdrawals from his distributive share of his father's estate.

On December 30, 1957, taxpayer filed a tentative individual income-tax return for the income year 1957 and remitted therewith a payment in the amount of $5,784.22, which represented taxpayer's estimated income-tax liability for 1957. Thereafter, on April 15, 1958, taxpayer filed a final, or completed, income-tax return for the income year 1957 showing an income-tax liability of $3,205.77. Taxpayer requested a refund of $2,578.45, thereby indicated on the face of the return. Examination of the final return by a representative of the Commissioner revealed that taxpayer had claimed a deduction in the same amount as his income for the year, $38,039.22. This deduction was explained by taxpayer as being a part of the amounts reported as income upon which tax had been paid during years 1950-1956 and which taxpayer was required to repay to his employer during income year 1957, the total being $42,065.03. Taxpayer limited the claimed deduction, however, to the amount of salary and bonus earned and received from his employer during the income year 1957 — $38,039.22. The examining auditor disallowed the deduction and recomputed taxpayer's 1957 tax liability without benefit of the claimed deduction. The resulting tax liability of

taxpayer for the income year 1957 was $5,868.51, or $84.29 in addition to the estimated payment made on December 30, 1957.

A notice of assessment of additional income taxes in the amount of $84.71 ($84.29 plus $ .42 interest) was transmitted to taxpayer on May 15, 1958. Taxpayer protested the proposed assessment on May 28, 1958, and requested a hearing before the Commissioner in accordance with the provisions of G.S. 105-241.1. The Commissioner held the hearing, affirmed the disallowance of the claimed deduction, and sustained the assessment of additional tax.

According to representatives of taxpayer, "federal agents," in an informal conference, agreed to allow the sum of $42,065.03 as a deduction on his 1957 federal income-tax return under the claim-of-right provision of Int. Rev. Code of 1954, § 1341.

Taxpayer gave notice of appeal to the Tax Review Board within the time permitted by statute and filed his petition with the Board on October 16, 1959. The petition was considered by the Board, and on February 24, 1960, it entered its Administrative Decision No. 30, affirming the Commissioner. Within thirty days of the receipt of the Board decision, taxpayer petitioned the Superior Court of Wake County for review of the decision under G.S. 105-241.3 and Gen. Stats. ch. 143, art. 33. From an adverse judgment on review in the Superior Court taxpayer appealed to the Supreme Court.

McCoy, Weaver, Wiggins & Cleveland by John E. Raper, Jr., for petitioner appellant.

Attorney General T. W. Bruton and Assistant Attorney General Charles D. Barham, Jr., for respondent appellee.

SHARP, J. The question presented by this appeal is: May a taxpayer who has in prior years erroneously included in his taxable income the amount of loans made to him offset these amounts against his taxable income for the year in which he repays the loans, or must he seek an adjustment of his income-tax liability for each year in which an erroneous overstatement of income occurred and within the time specified by G.S. 105-266 and G.S. 105-266.1?

Loans to a taxpayer do not constitute taxable income and should not, therefore, be included as gross income on his income-tax return. G.S. 105-141; 1 Mertens, Federal Income Taxation § 5.24 (1942 Ed.) Likewise, amounts expended to repay the principal of a loan are not allowed as deductions from taxable income. G.S. 105-147. The Commissioner concedes that taxpayer erroneously overstated his income on his tax return for the years 1950-1955 and therefore overpaid the correct amount of his taxes during these years. He found that the overstate-

ments were the result of taxpayer's accountant's error. (The Commissioner contends that it appears from tables in taxpayer's brief that he underpaid his 1956 taxes, but no deficiency was ever assessed for that year. Neither party seeks in this action an adjustment for any year but 1957.) Had taxpayer applied for a refund of any overpayment of tax for a given year "at any time within three years after the date set by the statute for the filing of the return . . . or within six months from the date of payment of such tax or additional tax, whichever is later . . . ," G.S. 105-266.1 and G.S. 105-266, clearly he would have been entitled to it. G.S. 105-266 prohibits the refund of any overpayment unless discovery is made by the Commissioner or written demand is made by the taxpayer within the time set out above.

Taxpayer contends (1) that, having included loans as income in his returns for the years 1950-1955, six years, he had established a "method of accounting"; (2) that, having repaid the loans to his employer in 1957 in an amount in excess of his compensation, under his method of accounting, he had no net income that year; and (3) that, since "federal agents" had allowed the loan repayment of $42,065.03 as a deduction from 1957 income under Int. Rev. Code of 1954, § 1341, the State should do likewise because G.S. 105-142(a) requires a taxpayer to compute his income according to a method of accounting which clearly reflects his income and also to "follow as nearly as practicable the federal practice, unless contrary to the context and intent of this article." Gen Stats. ch. 105, art. 4.

Taxpayer is without a leg to stand on. The classification of a loan as income for the year in which the money was borrowed and as a deduction for the year in which the money was repaid not only is not an approved and generally accepted method of accounting but also is a procedure directly contrary to "the context and intent" of Gen. Stats. ch. 105, art. 4. Neither G.S. 105-141, which defines income, nor G.S. 105-147, which specifies deductions, includes loans. G.S. 105-142(a) authorizes no deductions not included in G.S. 105-147. Net income for income-tax purposes is the gross income of a taxpayer less the deductions allowed by Gen. Stats. ch. 105, art. 4.

Notwithstanding that taxpayer's unorthodox method of accounting is "contrary to the context and intent" of Gen. Stats. ch. 105, art. 4, G.S. 105-142(a), we see no way, despite the agreement of "federal agents," in which taxpayer could bring himself within the provisions of Int. Rev. Code of 1954, § 1341. See *Good's Estate v. United States*, 208 F. Supp. 521 (E. D. Mich.), wherein this section was held applicable — no loan involved. This section allows a deduction for repayment of amounts exceeding $3,000.00 "for the taxable year" when the amount repaid "was included in gross income for a prior taxable year (or years)

because it appeared that the taxpayer had an *unrestricted right to such item.*" (Italics ours.) North Carolina has no similar provision. Although a borrower may have the right to use the proceeds of a loan as he sees fit, he has a correlative obligation to repay, and this obligation to repay prevents the right to the money from being *an unrestricted right.* The proceeds of a loan belong to a taxpayer only temporarily. The withdrawals which taxpayer made from his father's business were not made under any claim of right. His contract of employment fixed his compensation, and his withdrawals in excess of his agreed compensation were entered on the books of the business as loans. The fact that taxpayer may never have intended to repay these sums does not alter the true nature of the transaction.

To allow as deductions for the tax year 1957 items which could have been the basis of claims for refunds in prior years would render every return inconclusive far beyond the time intended by the legislature. As regrettable as may be the accounting error which produced this situation for taxpayer, we cannot disregard the provisions of G.S. 105-266 and G.S. 105-266.1 in order to give him relief. The Tax Review Board, having found "that the taxes with respect to which the claim for refund was filed were not paid within the period specified under the provisions of G.S. 105-266 and G.S. 105-266.1," correctly sustained the assessment.

The judgment of the Superior Court, upholding the decision of the Tax Review Board, is

Affirmed.

CASSIE SMITH v. EMMA TROY BRYANT.

(Filed 7 April, 1965.)

1. Attorney and Client § 1—

An attorney occupies a dual relationship as an employee of his client and as an officer of the court.

2. Attorney and Client § 6—

An attorney of record may withdraw from the case only for cause after reasonable notice to the client and with the permission of the court.

3. Same—

While an attorney may be justified in withdrawing from the case upon refusal of the client to pay or to secure payment of proper fees upon reasonable demand, the attorney must still give reasonable notice to the client and, in discharging his duties to the court, perfect his withdrawal in time to obviate a continuance of the case.

4. Same; Trial § 3—

Where defendant's attorney of record announces his withdrawal from the case at the time the case is called for trial, it is error for the court to treat the withdrawal as a *fait accompli* and acquiesce in the withdrawal, refuse a continuance, and set the trial for the following morning.

APPEAL by defendant from *Braswell, J.*, January 1964 Session of COLUMBUS. This appeal was docketed in the Supreme Court as Case No. 597 and argued at the Fall Term 1964.

Plaintiff instituted this action on July 30, 1962, to recover from defendant both actual and punitive damages for trespass. In her complaint plaintiff alleges that defendant unlawfully and wilfully trespassed upon lands in the possession of plaintiff and maliciously cut down one-half acre of growing tobacco and three acres of corn. Defendant, through her counsel of record, Mr. H. O. Rhoe, filed answer to the complaint, and the case was calendared for trial at the October-November 1963 Term. When the case was called for trial on November 6, 1963, Mr. Rhoe moved for a continuance. The motion was based upon the following telegram, which the trial judge had received that day: "Emma Bryan is detained in Wilmington because of the serious condition of her mother who has had a relapse. Dr. S. J. Gray." The presiding judge entered the following order:

"The Court having considered the foregoing matters, determined that it would continue the case until the next succeeding Civil Term of Superior Court of Columbus County, upon the condition that the defendant's Attorney, H. O. Rhoe, would consent that a restraining order be entered in the matter restraining, enjoining and barring the defendant, Emma Troy Bryant, from selling, mortgaging, or in any manner disposing of, alienating or encumbering any of her property, pending the entry of final judgment in this case, and that such restraining order should be spread upon and appropriately indexed on the *Lis Pendens* Docket of Columbus County and that same should have the force and effect of an attachment upon any real property of the defendant, Emma Troy Bryant, or interest therein, in Columbus County and the defendant's Attorneys having so consented in open Court.

"NOW, THEREFORE, it is ORDERED, ADJUDGED and DECREED that the defendant, Emma Troy Bryant, be and she is hereby restrained, barred and enjoined from selling, mortgaging, or otherwise disposing of, alienating, or encumbering any of her property, pending the entry of final judgment herein and it is further ordered and adjudged that this order be spread upon and properly indexed on the *Lis Pendens* Docket in the Clerk of Court's Office

in Columbus County; that a copy of this order be mailed to the defendant, Emma Troy Bryant, at her last known address.

"Entered this 6th day of November 1963.

(s) RAYMOND B. MALLARD
Judge Presiding."

This case was next calendared at the January Term 1964. When it was called for trial on January 9th, Mr. Rhoe announced to the court that he had withdrawn as counsel for defendant because she had not paid him. No order permitting him to withdraw had been theretofore entered; and, if Judge Braswell entered one, the record does not contain it. The record discloses only "that the defendant disputes the question of whether or not she has paid her attorney." Apparently, however, the judge treated Mr. Rhoe's withdrawal as a *fait accompli*. He denied defendant's motion, "made on the afternoon of January 9, 1964, for another continuance" but entered the following order:

"In the discretion of the Court, the Court will allow the defendant until Friday morning at 9:30 a.m., January 10, 1964, to obtain counsel if she chooses to do so, and be present in court and ready for the trial of this action."

Defendant excepted to the denial of her motion for a continuance and to the order requiring her to be ready for trial at 9:30 o'clock the next morning. At the appointed time, however, she appeared for trial without counsel and attempted to represent herself. She cross-examined plaintiff's witnesses and testified in her own behalf.

Plaintiff's evidence tended to show that defendant came upon the land, which plaintiff had rented from defendant's brother, and, with a hoe, cut down 0.55 acre of tobacco which was "ready to crop" and 3 acres of growing corn. Defendant's brother had acquired the land by deed from his mother.

Defendant, as the only witness in her behalf, testified that she is the guardian of her incompetent mother; that the tobacco in question was planted on defendant's allotment and that "the three acres of corn that was cut down . . . was in the soil bank."

The jury's verdict was that defendant had trespassed against the crops of plaintiff, and that plaintiff was entitled to receive $900.00 actual damages and $350.00 punitive damages. From a judgment entered upon the verdict defendant appeals, assigning as error the denial of her motion for a continuance and specified portions of the charge.

Powell & Powell for plaintiff appellee.

Payne and Canoutas and R. M. Kermon for defendant appellant.

SHARP, J. The transcript of the trial below reveals defendant to have been badly in need of legal counsel. She had employed a lawyer, who had entered a formal appearance upon the court record by filing her answer to the complaint. Thereafter he was not at liberty to abandon her case without (1) justifiable cause, (2) reasonable notice to her, and (3) the permission of the court. *Perkins v. Sykes*, 233 N.C. 147, 63 S.E. 2d 133; *Gosnell v. Hilliard*, 205 N.C. 297, 171 S.E. 52.

Whether an attorney is justified in withdrawing from a case will depend upon the particular circumstances, and no all-embracing rule can be formularized. It is generally held, however, "that the client's failure to pay or to secure the payment of proper fees upon reasonable demand will justify the attorney in refusing to proceed with the case." *Gosnell v. Hilliard, supra* at 301, 171 S.E. at 54; 7 C.J.S., Attorney and Client § 110 (1937). Nevertheless, this does not mean that an attorney of record can walk out of the case by announcing to the court on the day of the trial that he has withdrawn because he has not been paid. An attorney not only is an employee of his client but also is an officer of the court. This dual relation imposes a dual obligation. *Roediger v. Sapos*, 217 N.C. 95, 6 S.E. 2d 801. To the client who refuses to pay a fee the attorney must give specific and reasonable notice so that the client may have adequate time to secure other counsel and so that he may be heard if he disputes the charge of nonpayment. To the court, which cannot cope with the ever-increasing volume of litigation unless lawyers are as concerned as is a conscientious judge to utilize completely the time of the term, the lawyer owes the duty to perfect his withdrawal in time to prevent the necessity of a continuance of the case. "An attorney at law is a sworn officer of the court with an obligation to the public, as well as his clients, for the office of attorney at law is indispensable to the administration of justice," Parker, J. in *Baker v. Varser*, 240 N.C. 260, 267, 82 S.E. 2d 90, 95. "The attorney's obligation crystallizes into one of *noblesse oblige*," Comment, Attorney and Client — Withdrawal of Attorney, 18 N.C.L. Rev. 338, 344.

As between the attorney and his client the relationship may ordinarily be dissolved in good faith at any time, but before an attorney of record may be released from litigation he must satisfy the court that he is justified in withdrawing. The first requirement for his withdrawal is proof of timely notice to his client. Obviously, written notice served on the client would be the most satisfactory evidence of compliance with this requirement. G.S. 1-592. Mr. Rhoe's announced withdrawal at the time this case was called for trial was, of course, subject to the court's approval. On the facts disclosed by the record, Judge Braswell should have refused him such permission.

"When defendant's counsel undertook to withdraw from the case at the moment the cause was ordered to trial the court below should have denied him the right to do so. If counsel insisted upon withdrawing or declined to participate in the trial in defense of his client's rights, he being an officer of the court, the judge had ample authority to require him to proceed in good faith." Barnhill, J. (later C.J.) in *Roediger v. Sapos, supra* at 99, 6 S.E. 2d at 803, (quoted with approval in *Perkins v. Sykes, supra* at 153, 63 S.E. 2d at 138).

Having, however, acquiesced in counsel's withdrawal on the afternoon of January 9th, his Honor should have continued the case for a reasonable time. Instead, he set the case for trial at 9:30 the next morning. Defendant contends, no doubt correctly, that Judge Mallard's order at the preceding term, enjoining her from encumbering or disposing of any of her property pending the entry of a final judgment in this case, effectively prevented her from securing other counsel overnight. Even without such a financial handicap, defendant, we apprehend, would have had difficulty in finding a lawyer willing to undertake her defense to this action without more time for investigation and preparation.

It is quite possible that Mr. Rhoe's withdrawal from this case was entirely justified; that he had given defendant adequate notice; and that she had negligently or contumaciously failed to attend to her case. If these are the facts, however, the record fails to show them. It may well be that another trial will not improve defendant's situation; but, since she asks for it, on the record she is entitled to it. The judgment below is vacated, and a new trial is ordered.

New trial.

REBECCA GRIFFIN, B/N/F CHARLEEN GREENE v. HARTFORD ACCIDENT AND INDEMNITY COMPANY.

(Filed 7 April, 1965.)

Insurance § 61— Where loan company advancing premium is agent authorized to cancel, insurer has no right to ignore its direction to cancel.

Insured in an assigned risk policy of automobile liability insurance has the right to cancel his policy (subject to the penalties prescribed by G.S. 20-311 if he operates a motor vehicle without insurance) and he may authorize another to act for him in canceling, and therefore where insured

constitutes the loan company financing the premium insured's attorney in fact with authority to cancel, and the loan company, upon insured's default in payment of an installment of the loan, directs insurer to cancel and refund to it the unearned portion of the premium, the return of the unearned portion of the premium is not prerequisite to cancelation under the terms of the policy, and insurer is not under obligation to ascertain what sums insured still owed the loan company and apply any overage to the continuation of the policy, and evidence relating to the refund is erroneously admitted upon the question of whether the policy had been validly canceled.

APPEAL by defendant from *Pless, J.*, November 9, 1964 Civil Session of GASTON.

On February 27, 1961, defendant issued to Mildred J. Sadler, as an assigned risk, its automobile liability insurance policy. The policy, a standard form, insured Sadler against liability resulting from the negligent operation of a specifically described automobile. It 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 * * * caused by accident arising out of the * * * use of the automobile."

In December 1962, plaintiff obtained a judgment against Sadler for $3,500 for personal injuries caused by the use of the insured automobile on July 15, 1961.

Plaintiff seeks by this action to compel satisfaction of Sadler's liability. Defendant admitted issuing the policy of insurance. It denied liability, asserting the policy of insurance had been canceled, as permitted by the policy, prior to July 15, 1961, the day plaintiff was injured. The jury found that the policy had not been canceled. Thereupon the court entered judgment that plaintiff recover of defendant the sum of $3,500, the amount for which Sadler had been adjudged liable to plaintiff by the Superior Court of Gaston County.

J. Donnell Lassiter; Kennedy, Covington, Lobdell & Hickman for defendant appellant.

Horace M. DuBose, III, for plaintiff appellee.

RODMAN, J. Plaintiff's assignments of error present this question: Did the court commit prejudicial error in admitting evidence offered for the purpose of showing an unauthorized cancelation?

The policy, a standard form, permits cancelation by the insured "by mailing to the company written notice stating when thereafter the cancelation shall become effective." The policy permits cancelation by

the company "by mailing to the named insured at the address shown in this policy written notice stating when not less than ten days thereafter such cancelation shall be effective."

Touching the duty of insurer, upon cancelation to refund unearned premiums, the policy provides: "If the named insured cancels, earned premiums shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premium shall be computed pro rata. Premium adjustment may be made either at the time cancelation is effected or as soon as practicable after cancelation becomes effective, *but payment or tender of unearned premium is not a condition of cancelation.*" (Emphasis supplied.)

The policy afforded protection for a period of one year, from February 27, 1961, unless canceled before that date. When the policy was issued, Sadler did not have sufficient funds to pay the premium in full. She paid $13.50 and contracted with the Insurance Premium Discount Company (IPD) to pay the balance. This balance, with IPD's financing charge, amounted to $27.00. It was payable in monthly installments of $4.50. Defendant received the premium for one year. Sadler appointed IPD her attorney in fact. She authorized it to cancel and "give notice of cancelation of said insurance policy, and said insurance company is hereby authorized and directed to cancel said policy and to pay Insurance Premium Discount Company the unearned or return premiums thereon without proof of default or of the amount owing to the Insurance Premium Discount Company. Said insurance company is hereby authorized to rely upon all statements made by Insurance Premium Discount Company as to the occurrence or continuance of default, the amount owing to it, and as to every other matter pertaining to this contract and said policies."

On June 8, 1961, IPD wrote defendant a letter, which it received on June 9, 1961. The letter stated that Sadler had failed to make the $4.50 monthly payment due it on May 25, 1961. The letter stated: "[W]e request immediate cancellation of the above policy and ask that you forward your check to us for the unearned premium. Enclosed is a copy of the Power of Attorney duly executed by the Insured." Defendant canceled the policy "effective on the 30th day of June 1961, at 12:01 a.m." Notice of this cancelation was given to the Commissioner of Motor Vehicles on July 13, 1961. He mailed notice of cancelation to Sadler. She received the notice on July 14. Additionally, there was evidence that defendant, on June 12, mailed notice to Sadler of the cancelation of her policy "to become effective on the 30th day of June 1961 at 12:01 a.m." On July 18, 1961, defendant paid to IPD $16.69, the unearned portion of the annual premium, as computed by it.

Plaintiff, over defendant's objection, was permitted to offer evidence showing: IPD had not notified Sadler of her failure to make the monthly payments owing it; nor had it notified her that, acting as her agent, it would direct cancelation; the amount refunded to IPD was computed on a pro rata basis and not on a short rate basis; the amount refunded IPD not only paid Sadler's debt to IPD but left a balance of $1.44; this sum was sufficient to have kept the policy in force until July 16 or 17, 1961. Plaintiff argues that it was the duty of the insurance company, notwithstanding the direction of Sadler's duly authorized agent to cancel, to use the balance which would come to her to continue the policy in effect until the balance had been exhausted.

The contention ignores the provisions of the policy issued Sadler by defendant. It expressly provided for cancelation by either the insured or the insurer. There was no limitation on insured's right to cancel. She had the election to cancel at any time she desired. True, the operation of a motor vehicle without "financial responsibility" subjects the owner to penalties, G.S. 20-311, 313, but no statute requires one to own or operate an automobile. If an owner of an automobile expects to operate it, he may provide "financial responsibility" by liability insurance, G.S. 20-309(b). When financial responsibility is terminated by the cancelation of the liability insurance policy, the certificate of registration and registration plates should be surrendered to the Department of Motor Vehicles.

The policy authorized defendant, the insurer, to cancel, but its right to cancel was restricted by statute. It did not have unlimited authority. The right of an insurer to cancel policies issued under the assigned risk plan was restricted by G.S. 20-279.34. The right to cancel policies issued pursuant to the Act of 1957 was limited, as provided in c. 1393, S.L. 1957, codified as Art. 13, c. 20 of the General Statutes.

An insured may personally cancel his automobile liability insurance policy, or he may authorize another to act for him in canceling. *Daniels v. Insurance Co.*, 258 N.C. 660, 129 S.E. 2d 314. When cancelation is made by the insured, the insurer has no obligation to notify the insured that it has acted as directed. *Daniels v. Insurance Co., supra; Underwood v. Liability Co.*, 258 N.C. 211, 128 S.E. 2d 577.

Defendant had no right to ignore the direction given it by Sadler, acting through her duly authorized agent. By the express provisions of the policy, the validity of the cancelation was not dependent upon the return of the unearned portion of the premium. Defendant was not, when directed to cancel, under any obligation to ascertain what sum Sadler owed IPD.

Whether the defendant correctly or incorrectly computed the amount of the unearned premium was foreign to the question at issue. The ad-

mission of evidence relating to the refund was prejudicial error, which necessitates a

New trial.

ELLIS A. SECHREST, TRADING AND DOING BUSINESS AS SECHREST PLYWOOD COMPANY v. FOREST FURNITURE COMPANY, A CORPORATION.

(Filed 7 April, 1965.)

1. Contracts § 21—

Nonperformance of a valid contract is a breach thereof and subjects the party failing to perform to liability unless he carries the burden of showing a legal excuse for nonperformance.

2. Contracts § 20—

Plaintiff manufactured pursuant to contract certain plywood products to defendant's specifications for use in defendant's manufacturing operations. *Held:* The occurrence of a fire destroying defendant's manufacturing plant so that defendant no longer needed the plywood is no defense to plaintiff's action to recover damages for defendant's refusal to pay the account. The doctrine of frustration applies when the subject matter of the contract is destroyed by fire, occurring without fault, rendering performance impossible.

APPEAL by plaintiff from *McConnell, J.*, October, 1964 Session, IREDELL Superior Court.

This civil action was instituted by the plaintiff to recover from the defendant the sum of $10,267.52 due for plywood drawer bottoms manufactured according to the defendant's specifications. The defendant, without denying the contract, entered, as a further defense, a plea of frustration and sought to escape liability for the payment of the account upon its allegations, in substance: (1) The defendant's manufacturing plant was housed in one building which was completely destroyed by fire on April 25, 1963, necessitating the complete abandonment of all its manufacturing activities; (2) the parties contemplated that the drawer bottoms would be used by the defendant in its manufacturing operations; (3) the fire occurred without fault on the part of the defendant; (4) "That the frustration of purpose hereinabove alleged is pleaded . . . as a ground for rescinding any contract which might have been made between the parties." The plaintiff moved that the defendant's further defense be stricken.

Judge McConnell denied the motion to strike, and then granted defendant's demurrer *ore tenus* based on frustration, and dismissed the action. The plaintiff excepted and appealed.

Adams & Dearman by C. H. Dearman for plaintiff appellant.
McElwee & Hall by W. H. McElwee for defendant appellee.

HIGGINS, J. The plaintiff alleged a contract, its performance, defendant's breach, and the amount of plaintiff's damage resulting from the breach. The complaint stated a cause of action. The defendant admitted the contract but by way of defense alleged the factory, in which it intended to use the drawer bottoms, burned without its fault; and that the purposes of the contract were frustrated by the fire; and the defendant should be released from performance for that reason.

"In the obligations assumed by a party to a contract is found his duty, and his failure to comply with the duty constitutes the breach." *Sale v. Highway Commission*, 242 N.C. 612, 89 S.E. 2d 290. "Nonperformance of a valid contract is a breach thereof . . . unless the person charged shows some valid reason which may excuse the non-performance; and the burden of doing so rests upon him." *Blount-Midyette v. Aeroglide Corp.*, 254 N.C. 484, 119 S.E. 2d 225.

In this case the defendant and the court have misconstrued the applicability of the frustration of purpose doctrine as recognized by this Court. The subject of the contract was the special manufacture of plywood drawer bottoms. They were not burned. The doctrine of frustration would be available to the defendant if it had contracted to sell the factory and it burned before the execution of the deed. In that event the defendant properly could plead frustration in a claim for failure to convey the factory. The doctrine of frustration is clearly stated in *Sale v. Highway Comm., supra:* "Where parties contract with reference to specific property and the obligations assumed clearly contemplate its continued existence, if the property is accidentally lost or destroyed by fire or otherwise, rendering performance impossible, the parties are relieved from further obligations concerning it. . . . Before a party can avail himself of such a position, he is required to show that the property was destroyed, and without fault on his part."

In *Steamboat Co. v. Transportation Co.*, 166 N.C. 582, 82 S.E. 956, the contract involved chartering the steamship for Sunday excursion runs. The destruction of the ship by fire rendered further performance impossible and released the parties from obligations thereafter. In *Sale v. Highway Comm., supra,* the contract to remove the building was rendered impossible of performance when the building burned. In *Blount-Midyette v. Aeroglide Corp., supra,* the elevator was destroyed by fire before repairs were completed.

The plaintiff was in nowise responsible for the fire that destroyed defendant's building. The defendant is bound by its contract. The destruction of its factory does not relieve it of liability for its debts. At the

trial the parties will have opportunity to contest the amount due under the contract.

The defendant's factual allegations are insufficient to support its plea of frustration. The plaintiff's motions to strike should have been allowed. The trial court committed error in sustaining the demurrer *ore tenus*. The judgment in the court below is

Reversed.

PARK-N-SHOP, INC., A CORPORATION v. I. L. CLAYTON, ACTING COMMISSIONER OF REVENUE FOR THE STATE OF NORTH CAROLINA.

(Filed 7 April, 1965.)

Taxation § 29—

Where it appears that a taxpayer turning its inventory over once a month on the average, used the "purchase invoice method" over a period of years in computing the amount of sales tax due, and was advised that, because of a change in the tax laws removing exemptions theretofore accorded, the "purchase invoice method" would no longer be permitted, *held*, during the month for which the taxpayer pays the tax on its actual sales, it is entitled to a credit for the tax paid on its entire taxable inventory on hand on the date the change in the method of computation became effective.

APPEAL by plaintiff from *Patton, J.*, December 14, 1964 Schedule "C" Non-Jury Session of MECKLENBURG.

This action was begun against W. A. Johnson, as Commissioner of Revenue, to recover an alleged invalid tax assessment, paid under protest. The parties stipulated the facts summarized in the opinion. The court concluded the facts, as stipulated, established a valid assessment. It thereupon entered judgment that plaintiff take nothing. Plaintiff excepted and appealed. After the appeal was docketed here, I. L. Clayton, acting Commissioner of Revenue, was, on motion of the Attorney General, substituted for defendant Johnson, who had resigned.

Attorney General Bruton and Assistant Attorney General Barham for defendant appellee.

Moore & Van Allen by William K. Van Allen and John T. Allred for plaintiff appellant.

RODMAN, J. The facts stipulated summarily stated are: Plaintiff has, since October 1956, conducted a retail mercantile business in Charlotte. Many of the articles sold by it were exempt from the tax

levied pursuant to Art. 5, c. 105 of the General Statutes. (See G.S. 1943 Ed., 105-169 and c. 1340, S.L. 1957.) Because of the large number of articles exempt from taxation, plaintiff, prior to July 1961, used the "purchase invoice method" to measure its sales tax liability. "This method had been accepted by auditors of the Department of Revenue as a means of establishing tax liability where retail merchants did not maintain sales records adequately segregating taxable sales from non-taxable sales."

Plaintiff, using the purchase invoice method, reported monthly the taxable articles purchased. To its purchase price, it added its markup to ascertain its sale price. On the sale price so ascertained, it computed its tax liability. "Plaintiff's volume of sales are such that its merchandise turns over on the average of once every thirty days." Using the invoice purchase method, plaintiff paid the Department of Revenue the tax on all merchandise purchased prior to July 1, 1961, which would have been subject to the sales tax if sold prior to that date.

C. 826, S.L. 1961, effective July 1, 1961, removed the tax exemptions theretofore accorded many of the articles of merchandise sold by plaintiff. On June 23, 1961, eight days after the ratification of that act, the Commissioner of Revenue gave notice that the "purchase invoice method" of computing the amount of tax liability would not be acceptable with respect to sales made subsequent to July 1, 1961. "Taxpayers were further advised that those merchants who had theretofore employed the 'purchase invoice method' of reporting their sales tax liability would be permitted to take as a tax credit the tax on any increase in its taxable inventory during the three years prior to July 1, 1961."

Plaintiff, in August 1961, reported to the Commissioner the sales actually made by it in July 1961. It computed its tax liability on sales made. It claimed a credit against this liability of $2,567.61. The credit asserted represented the tax theretofore paid on plaintiff's entire taxable inventory of $85,587.05, on hand on June 30, 1961.

In January 1964, the Commissioner, as a result of an audit, assessed plaintiff with an additional tax of $1,259.61. This assessment was based on the Commissioner's refusal to allow full credit for the $2,567.61 claimed in the report filed showing sales in July 1961. Defendant allowed as a credit $1,308.00, "based on an increase of $43,600.00 in plaintiff's taxable inventory between July 1, 1958 and June 30, 1961. The credit claimed by plaintiff for the remaining taxable inventory of $41,987.05, on hand June 30, 1961, was disallowed."

We have sought, without success, to find some logical reason for restricting the credit for taxes prepaid to the increase in inventory between July 1, 1958 and June 30, 1961. The Commissioner of Revenue had plenary authority to promulgate regulations "for the ascertain-

ment, assessment and collection" of sales taxes, G.S. 105-164.43. Pursuant to this statutory provision, he authorized merchants handling large quantities of tax exempt articles to use the "purchase invoice method" to compute their tax liability. This method, as to the goods not sold on the reporting and payment date, resulted in a payment before the tax liability accrued. Defendant does not contend the method plaintiff used would not accurately measure its tax liability when it disposed of its merchandise. This, by stipulation in this case, occurred every month. When, in July 1961, plaintiff reported and paid the tax on articles theretofore purchased, it was merely prepaying the tax which would not accrue until these articles were sold.

The Legislature never contemplated double taxation, once on a purchase for sale and then on the actual sale. The Legislature, in clear, unmistakable language, said a taxpayer who had prepaid his liability was entitled to a refund or credit on subsequently accruing taxes, G.S. 105-164.35. There is nothing in this statute which suggests the merchant is not entitled to full credit for the excess payment made. Plaintiff makes no claim for taxes paid on merchandise purchased prior to July 1, 1958, such merchandise was sold long prior to 1961. That is the necessary implication of the stipulation that stock merchandise is turned over every thirty days.

On the stipulated facts, judgment should have been rendered that plaintiff recover the payment made under protest.

Reversed.

STATE v. BENJAMIN FRANKLIN LAWRENCE.

(Filed 7 April, 1965.)

1. Criminal Law § 134—

The warrant or indictment must allege that defendant had theretofore been convicted of a like offense and the time and place of such conviction in order to support the imposition of a greater punishment under the statute. G.S. 15-147.

2. Same—

Upon a warrant or indictment properly charging a second offense, defendant may be convicted or plead guilty to the specific violation charged or he may be convicted or plead guilty as in case of a second offense.

3. Same; Criminal Law § 26—

Where a warrant for escape contains the words "second offense" without properly charging the felony, the word "feloniously" not being used and the

time and place of the prior offense not being set forth, and 60 day sentence is entered upon defendant's plea of guilty, *held*, the sentence is for the specific misdemeanor of escape charged in the warrant and the doctrine of former jeopardy precludes a subsequent prosecution for the felony of a second escape. G.S. 148-45.

4. Courts § 13—

Where the length of the term of an inferior court is not specifically stated by statute other than it shall continue until the business before it is disposed of, the term cannot last beyond the time fixed for the next succeeding term unless a trial is then actually in progress, and in any event the term terminates when the judge leaves the bench, and therefore where judgment is entered on Christmas Eve the term expires on that day upon the court leaving the bench for the Christmas holidays.

5. Criminal Law § 137—

The court is without authority to vacate or modify a judgment after the expiration of the term, and therefore when sentence for escape is imposed on Christmas Eve the court is without authority thereafter to vacate or modify the judgment, and its action in doing so in order that defendant might be tried on an indictment charging a second offense of escape must be set aside.

ON petition of Benjamin Franklin Lawrence for *certiorari* for review of judgment of *Parker, J.*, entered October 12, 1964, at Session of WAYNE.

Herbert B. Hulse attorney for petitioner.

T. Wade Bruton, Attorney General, and Theodore C. Brown, Jr., Assistant Attorney General for respondent.

PER CURIAM. Petitioner was tried and convicted in the Recorder's Court of Edgecombe County on certain charges of traffic law violations, misdemeanors, and in consequence judgment was entered imposing a one-year prison sentence. On 18 August 1961 he was committed to the State Prison Unit in Nash County. He escaped on 28 August 1961 and was returned to custody on 24 October 1963; he was then transferred to the Wayne County Prison Unit.

Petitioner was tried in Nash County Recorder's Court on 16 December 1963 for said escape and was given a six-months sentence. He escaped from the Wayne County Prison Unit on 17 December 1963 and was apprehended the same day.

Petitioner was put on trial in the County Court of Wayne County on 24 December 1963 upon a warrant, issued by the Clerk of said court, charging:

"On or about the 17th day of December 1963 Benjamin Franklin Lawrence did unlawfully and wilfully escaping *(sic)* North Carolina Prison Department, Second Offense."

He entered a plea of guilty, and the judge imposed a 60-day prison sentence — "This sentence to commence at expiration of sentence now serving." Commitment was issued 30 December 1963. On 31 December 1963 the judge revoked the commitment, vacated the judgment, and made an entry finding probable cause and binding petitioner over to the superior court. Plaintiff was arraigned in the Wayne County Superior Court at the January 1964 Session on the following indictment:

"Benjamin Franklin Lawrence . . . on the 17 day of December in the year of our Lord one thousand nine hundred and sixty-three, with force and arms, at and in the County aforesaid (Wayne), did while in custody of the State Prison System and serving a sentence imposed upon conviction of a misdemeanor, did *(sic)* wilfully and unlawfully escape from the State Prison System, the escape being his second offense, to wit: by having heretofore been convicted of escaping prison while serving a sentence imposed by the Nash County Recorder's Court . . ."

Before pleading, petitioner moved to quash the bill. The motion was overruled, and petitioner entered a plea of guilty. A two-year prison sentence was imposed.

Petitioner thereafter filed an application for writ of *habeas corpus.* Counsel was appointed to represent him. The application was considered as a petition for post-conviction review (G.S., Ch. 15, Art. 22). After a full hearing, Parker, J., found facts in substance as above set out, denied relief and dismissed the petition.

Petitioner contends that his constitutional rights were violated at the trial in Wayne County Superior Court, January 1964 Session, in that he was a second time put in jeopardy. We agree.

If a prisoner, serving a sentence in the State Prison System upon conviction of a misdemeanor, escapes imprisonment, he shall for the first offense be guilty of a misdemeanor. If he escapes a second or subsequent time, he shall be guilty of a felony. G.S. 148-45. However, a felony conviction for such second or subsequent offense is not permissible, and punishment therefor may not be imposed, unless the indictment alleges facts showing that the offense charged is a second offense. *State v. Miller,* 237 N.C. 427, 75 S.E. 2d 242. The warrant or indictment must state the time and place accused was convicted of the prior offense. G.S. 15-147; *State v. Morgan,* 263 N.C. 400, 139 S.E. 2d 708; *State v. Powell,* 254 N.C. 231, 118 S.E. 2d 617. Even if the warrant or indictment is proper, the entire case does not stand or fall on proof

that there was a prior conviction. *State v. Stone*, 245 N.C. 42, 95 S.E. 2d 77. The accused may be convicted of the specific offense charged, or he may be convicted as in case of a second offense. The verdict must spell out (1) whether defendant is guilty of the specific violation charged and, if so, (2) whether he was convicted of a prior violation of such offense charged. *State v. Powell, supra; State v. Cole*, 241 N.C. 576, 86 S.E. 2d 203. In other words, the accused may, on a charge such as that preferred against petitioner, be convicted or plead guilty to the specific violation charged — a misdemeanor — or he may be convicted or plead guilty as in case of a second offense — a felony. Punishment is in accordance with the conviction or plea. *State v. Stone, supra.*

The warrant upon which petitioner was tried in the County Court of Wayne County does not properly charge a felony. The word "feloniously" does not appear in the warrant. *State v. Whaley,* 262 N.C. 536, 138 S.E. 2d 138. Moreover, the mere words "second offense" are not sufficient allegation of facts to charge the felony — time and place of conviction of the prior offense must be alleged. G.S. 15-147; *State v. Morgan, supra.* The warrant could have been amended in the County Court, but it was not. The legal effect of the warrant is to charge a misdemeanor. Defendant's plea was in effect a plea of guilty to the misdemeanor (the offense specifically charged). The court so considered it, for it asserted jurisdiction and imposed a 60-day sentence. The statutory minimum of punishment is three months (G.S. 148-45), but the 60-day sentence was favorable to petitioner, he did not appeal, and the State could not appeal.

The sentence in county court was imposed on Christmas Eve, Tuesday. Commitment was issued the following Monday. The next day, the court revoked the commitment, vacated the judgment, found probable cause and bound petitioner over to superior court. The court was without authority to vacate or modify the judgment. The term of court at which petitioner was tried undoubtedly ended on Christmas Eve. After the term ended the judge was without authority to vacate or modify the judgment. When a judge leaves the bench and the term is left to expire by limitation, the term ends then and there. Where the length of the term of an inferior court is not expressly stated by the statute other than it shall continue until the business before it is disposed of, the term cannot last beyond the time fixed for the next succeeding term, unless perhaps a trial in actual progress should extend it. *State v. McLeod,* 222 N.C. 142, 22 S.E. 2d 223. If the warrant had charged a felony which did not embrace a minor offense or lesser degree of the offense charged, misdemeanors, the court would, of course, have had no jurisdiction. In such case a judgment of the county court purporting to make final disposition of the cause would have been a

nullity, and the county court could thereafter have stricken it from the record or the superior court could have taken jurisdiction without regard to the void judgment.

The bill of indictment in superior court does not contain the word "feloniously," and therefore does not purport to charge a felony. Furthermore, there is a fatal variance between the actual facts and the allegations of the bill purporting to charge a prior conviction. The first escape was not "while serving a sentence imposed by *Nash* County Recorder's Court"; it was while serving a sentence imposed by the Recorder's Court of *Edgecombe* County. The indictment only charged a misdemeanor; the Superior Court could not constitutionally try petitioner on the indictment, for he had already been tried and sentenced on the identical charge in county court, and had not appealed. *State v. Birckhead*, 256 N.C. 494, 124 S.E. 2d 838.

The judgment of Parker, J., entered 12 October 1964 is set aside and the cause is remanded to the Superior Court of Wayne County with directions that an order be entered striking out the bill of indictment and petitioner's plea thereto and vacating the judgment entered at the January 1964 Session of said court, and revoking the commitment issued pursuant thereto, and directing that the County Court of Wayne County reinstate the judgment of 24 December 1963, and issue commitment thereon unless it appears from the records of the State Prison System that petitioner has already served sufficient time (in addition the 12 months sentence imposed in the Recorder's Court of Edgecombe County, and the 6 months sentence imposed for escape in the Recorder's Court of Nash County) to comply with the 60-day sentence.

Error and remanded.

DONNA JEAN REEVES, BY AND THROUGH HER NEXT FRIEND, MRS. FRED REEVES v. GENE KERLEY CAMPBELL AND ROBERT WILLIAM CHEEK.

(Filed 7 April, 1965.)

1. Automobiles § 11—

The lights required by G.S. 20-129 on an automobile operated at night are to enable the operator to see what is ahead of him and to inform others of the approach of his vehicle, and the operation of a vehicle at night without lights or with improper lights is negligence.

2. Automobiles § 41l— Evidence of negligence in hitting pedestrian on highway held for jury.

Evidence tending to show that defendant was operating his vehicle at night without lights, or with improper lights, that he saw a bus which he knew was returning children to their homes after a basketball game stopped to the right of the highway, that defendant continued to travel at a speed of about 45 miles per hour, did not see plaintiff, a fifteen year old girl, who had alighted from the bus and was crossing the highway in front of the bus toward an intersecting rural road, until she was some three car lengths away, and that defendant's car left skid marks some 32 feet before impact and some 90 feet thereafter, *held* sufficient to be submitted to the jury on the issue of defendant's negligence.

3. Automobiles § 42k—

Evidence tending to show that plaintiff pedestrian could see a car approaching from the west for a distance of some 800 feet, that she stopped before attempting to cross the highway toward an intersecting rural road, that she failed to see defendant's car approaching from the west because it did not have lights burning or had improper lights, and that she was struck by defendant's car in the north traffic lane, *held* not to disclose contributory negligence as a matter of law on the part of plaintiff.

APPEAL by defendants from *Johnston, J.*, Regular September 1964 Civil Session of WILKES.

Minor plaintiff (Jean) was, on the night of February 20, 1962, when crossing Highway 268, struck and injured by an automobile owned by defendant Cheek, operated by his agent, defendant Campbell. Jean was then 15 years of age. This action was instituted to recover damages resulting from the alleged negligent operation of the automobile.

Defendants denied plaintiff's allegations of negligence and, as an additional defense, pleaded contributory negligence.

The court overruled defendants' motion to nonsuit. The jury returned a verdict in conformity with plaintiff's contentions. Judgment was entered on the verdict. Defendants excepted and appealed.

Hayes & Hayes for defendant appellants.
McElwee & Hall and Moore & Rousseau for plaintiff appellee.

PER CURIAM. Defendants assign as error the denial of their motion to nonsuit, insisting plaintiff not only failed to offer evidence on which the jury could find negligent operation of the automobile, but all of the evidence establishes, as a matter of law, contributory negligence.

The evidence would permit, but not compel, the jury to find these facts: Jean and Campbell were students at the North Wilkes High School. Jean was a member of the school basketball team. Her school and the Appalachian team met in competition at Boone the night Jean was injured. She, the team coach, and other students went to Boone in

a chartered bus. Campbell drove other students. On the return trip, the bus stopped at a soda shop in North Wilkesboro for refreshments. Campbell did likewise.

The bus left the soda shop to deliver its passengers to their homes. Jean lived on a rural road, which made a "T" intersection with No. 268, in a small community half or three-quarters of a mile east of North Wilkesboro. Highway 268 is 20 feet wide at the intersection. The right, south, shoulder in the area of the intersection is 10 feet wide. Beyond the shoulder is a paved parking area in front of a store. When the bus reached the intersection, it pulled to the right to permit passengers to alight outside of the line of traffic. The bus stopped 8 feet to the right, south of the highway, headed in an easterly direction. It had its lights on. Another car following the bus also pulled off the traveled portion of the highway, and stopped about 100 feet to the rear of the bus. It likewise had its lights burning.

The rural road on which Jean lived intersected No. 268 from the north, hence Jean had to cross the highway to reach her home. When she alighted from the bus, she went east so as to cross in front of the bus. When she reached the highway, she stopped. She testified: "I looked up and down the road and there wasn't anything coming; so I started running across the street. When I got out approximately in the middle of the highway there was car lights pulled on. And when the lights were pulled on, the car started toward me and I knew I wanted to get out of its way and I kept going on towards home, on across the highway, and it kept coming over towards me. The car then struck me." She was struck in the middle of the north lane. When the car lights were pulled on, it was 35 or 40 feet from her.

One standing in front of the bus, looking west, had an unobstructed view for 800 feet or thereabouts. There were skid marks in the highway, beginning 32 feet, 7 inches west of the point where plaintiff was struck. These skid marks continued another 90 feet in a northeastwardly direction to a point where plaintiff fell off the fender of the car Campbell was operating. The maximum permissible speed at the place where plaintiff was injured was 45 m.p.h. Campbell left the soda shop some five minutes after the bus left. He knew it was loaded with school children, who were being taken to their homes. According to Campbell's testimony, he was traveling 45 m.p.h. when he saw the bus stopped on the south side of the highway. When 500 feet away, he recognized it as the bus carrying the school children to their homes. When he saw it, he thought it was stopped to permit a child to alight and go home. He did not reduce his speed, but continued at 45 m.p.h. When he first saw plaintiff, she was at or near the center of the highway. He was then two or three car lengths from her.

Motorists, operating at night, must light their vehicles, G.S. 20-129. The lights required by our statute serve two purposes: first, to enable the operator of the automobile to see what is ahead of him; second, to inform others of the approach of the automobile.

The evidence in the light most favorable to plaintiff would permit a jury to find that Campbell, at night, was driving his automobile without lights; or, if he had lights on, they were not of the kind required by the statute, and were not sufficient to enable him to see what was in the path ahead of him, or to permit others on the highway to be informed of his approach. One who operates a vehicle at night without lights, or with improper lights, is negligent.

"No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing." G.S. 20-141. Would a reasonably prudent person, seeing a bus stopped on the highway, when he knew it was returning children to their homes after a basketball game, continue to travel at a speed of 45 m.p.h? The evidence in this case does not establish a violation of G.S. 20-217, but, accepting plaintiff's version of the facts, the spirit and purpose of the statute was violated. There is ample evidence to justify the jury's finding that Campbell was negligent, which negligence was a proximate cause of plaintiff's injury.

It is equally clear, we think, that the evidence does not establish contributory negligence, as a matter of law. An automobile properly equipped with lights would, with nothing to obstruct the view, be visible for 800 feet. Jean, before attempting to cross the highway, looked for approaching vehicles. None were in view. Could she not reasonably anticipate that she could traverse the 20 feet before a motor vehicle, operated at a lawful speed, would travel 800 feet? Was she obligated to anticipate a violation of the statute requiring motor vehicles to carry lights at night? The answers were for the jury. *Kellogg v. Thomas*, 244 N.C. 722, 94 S.E. 2d 903. Could Campbell ignore the provisions of G.S. 20-173(a) and 20-38(1)? *Griffin v. Pancoast*, 257 N.C. 52, 125 S.E. 2d 310, answers.

We have examined defendants' other assignments of error and discover neither prejudicial error, nor anything requiring discussion.

No error.

STATE OF NORTH CAROLINA v. BLAIR M. GRAHAM.

(Filed 7 April, 1965.)

1. Criminal Law § 71—

Incriminating statements made by defendant are not rendered incompetent because of the fact that at the time of making them defendant was intoxicated, when there is no evidence that defendant's intoxication amounted to mania or that any intoxicants were furnished to him by officers or officials, since defendant's intoxication goes to the weight and credibility to be accorded the statements and not their competency.

2. Automobiles § 72—

Evidence that defendant was alone in an automobile; and was found in the car in a yard in a drunken condition, and that defendant then stated that he had driven the car from a club to the place where it was found, is sufficient to be submitted to the jury in a prosecution for driving on a highway while intoxicated.

APPEAL by defendant from *Armstrong, J.*, 12 October 1964 Session of FORSYTH.

Criminal prosecution on a warrant charging defendant with unlawfully and wilfully driving an automobile upon the public highways within the State while under the influence of intoxicating liquor, G.S. 20-138, heard *de novo* in the superior court upon appeal by defendant from an adverse judgment in the municipal court of the city of Winston-Salem.

Plea: Not guilty. Verdict: Guilty as charged.

From the judgment imposed on him, defendant appeals.

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

James J. Booker for defendant appellant.

PER CURIAM. The State's evidence shows these facts: About 2:30 a.m. on 30 June 1963, Corporal E. D. Young of the North Carolina State Highway Patrol, while on duty on patrol and proceeding north on Reynolds Park Road, a public highway in Forsyth County, saw an automobile with its front bumper up against the opposite side of a house from its driveway, with its motor running and its lights burning. He stopped, backed up, and observed tire tracks leading off Reynolds Park Road, going to and across the lawn and shrubbery on the lawn, and coming up to this automobile. Its rear wheels were buried in the lawn about 2½ or 3 inches. The bumper of the automobile just went up against the house, and there was no damage to the automobile or to the house. He walked up to the automobile, opened the door, and found defendant passed out under the steering wheel. He shut off its motor, and rolled the glass of its window down. The heater fan was on, and it

was real warm in the automobile. He was unable to arouse defendant. When he first opened the door to defendant's automobile, he detected a moderate odor of alcohol. He went to his patrol car, and radioed State Highway Patrolman Upright to come and assist him. Upon Upright's arrival, he and Upright carried defendant to Upright's patrol car, placed him in the front seat, rolled its windows down, and drove to the City Memorial Hospital. Before arriving at the hospital, defendant stirred around and mumbled some words. Upon arrival at the hospital, an intern there came out and examined him. They then carried defendant to the Winston-Salem police station. In the police station defendant walked and talked for about 30 minutes, but he could not walk without assistance, was very unsteady on his feet, and his speech was mumbled and incoherent. Young and Upright testified that from their observation of the defendant and from the smell of the odor of alcohol on his breath, he was in their opinion under the influence of intoxicating liquor.

Defendant assigns as error that Young and Upright were permitted, over his objections, to testify to the following effect: At the police station defendant said he had left the NCO Club at the Air Force Base in Forsyth County about 2:30 or 3:30 that morning, that he had been drinking beer there, but he did not know how many beers he had drunk, and that he had driven the automobile to where it was found up against the house. The evidence of what the defendant said was competent, and the court properly admitted it in evidence. The weight, if any, to be given defendant's incriminating statements, under the attendant circumstances, was exclusively for determination by the jury. *S. v. Isom*, 243 N.C. 164, 90 S.E. 2d 237, 69 A.L.R. 2d 358; *S. v. Stephens*, 262 N.C. 45, 136 S.E. 2d 209; Anno. 69 A.L.R. 2d, § 3, p. 364. The annotation above cited in A.L.R. 2d reads as follows:

> "The courts are agreed that proof that one who has confessed to crime was intoxicated at the time of making a confession goes to the weight and credibility to be accorded to the confession, but does not require (at least where the intoxication does not amount to mania, and the intoxicants were not furnished the accused by the police or other government officials) that the confession be excluded from evidence."

The annotation cites cases from twenty-one states (including our case of *S. v. Isom*), the District of Columbia, England, and Canada, which are authority, either express or clearly implied, for the rule stated. There is no evidence that defendant's intoxication amounted to mania, and there is no evidence that any intoxicants were furnished to him by the police or any government official.

The NCO Club at the Air Force Base in Forsyth County is about four miles from the place where defendant was found sitting in an

automobile up against a house. In order to travel from this club to where the automobile was found against the house, it is necessary to travel on the Reynolds Park Road. There was no indication that defendant, when found sitting in his car, had any injuries.

Considering the State's evidence in the light most favorable to it, it was sufficient to carry the case to the jury. Defendant's assignment of error to the denial of his motion for judgment of compulsory nonsuit is overruled.

Defendant's assignments of error to the charge have been examined, and are overruled. Reading the charge as a composite whole, no prejudicial error has been made to appear. All defendant's assignments of error have been considered, and all are overruled. In the trial below we find

No error.

LILLIE H. PETREA, PLAINTIFF *v.* RYDER TANK LINES, INC., ORIGINAL DEFENDANT, AND OSCAR A. PETREA, ADDITIONAL DEFENDANT.

(Filed 7 April, 1965.)

1. Torts § 4—

An original defendant may bring into the action for the purpose of enforcing contribution only a joint tort-feasor whom plaintiff could have sued originally in the same action. G.S. 1-240.

2. Same; Courts § 20; Husband and Wife § 9—

Where the laws of the state in which the accident occurred do not permit the wife to sue the husband in tort, a defendant sued by the wife for negligent injury in an action instituted in this State may not have the husband joined for contribution under G.S. 1-240.

APPEAL by original defendant from *Olive, E. J.*, December 1964 Civil Session of DAVIDSON.

Plaintiff, a resident of North Carolina, instituted this action against Ryder Tank Lines, Inc. (Ryder), a North Carolina corporation, to recover for personal injuries. In brief summary she alleges: On October 4, 1963, plaintiff was a passenger in the automobile of her husband, Oscar A. Petrea, who was operating it on U. S. Highway No. 460 in West Virginia. As a result of the negligence of the operator of a Ryder tractor-trailer, it collided with the Petrea automobile. In the collision plaintiff sustained serious injuries for which she is entitled to recover damages.

Answering, Ryder denied any negligence on the part of its driver. It alleged that the negligence of plaintiff's husband, Oscar A. Petrea, was the sole proximate cause of plaintiff's injuries. In addition, Ryder set up a cross action against O. A. Petrea for contribution pursuant to the provisions of G.S. 1-240.

Additional defendant Petrea demurred to the cross action for that (1) plaintiff is the wife of additional defendant; (2) under the laws of the state of West Virginia, a wife may not sue her husband; and (3) original defendant, therefore, cannot maintain a cross action against plaintiff's husband for contribution.

Judge Olive sustained the demurrer and dismissed the cross action. Ryder appeals.

Walser, Brinkley, Walser & McGirt for original defendant appellant. fendant appellant.

Hudson, Ferrell, Petrea, Stockton, Stockton & Robinson and J. Lee Wilson for additional defendant appellee.

PER CURIAM. A defendant who has been sued for tort may bring into the action for the purpose of enforcing contribution under G.S. 1-240 only a joint tort-feasor whom plaintiff could have sued originally in the same action. *Jones v. Aircraft Co.*, 253 N.C. 482, 117 S.E. 2d 496; *Wilson v. Massagee*, 224 N.C. 705, 32 S.E. 2d 335, 156 A.L.R. 922. The law of West Virginia does not permit one spouse to sue the other in tort. *Campbell v. Campbell*, 145 W. Va. 245, 114 S.E. 2d 406; *Poling v. Poling*, 116 W. Va. 187, 179 S.E. 604. North Carolina applies the *lex loci delicti.*

> "We have in previous decisions held claimant's right to recover and the amount which may be recovered for personal injuries must be determined by the law of the state where the injuries were sustained; if no right of action exists there, the injured party has none which can be enforced elsewhere." *Shaw v. Lee*, 258 N.C. 609, 610, 129 S.E. 2d 288, 288.

Original defendant concedes in its brief that if the rule which was followed in *Shaw v. Lee, supra,* is applied to this case, the decision of the court below should be affirmed. It argues, however, that we should overrule *Shaw v. Lee, supra,* and thus abandon our well-established conflicts rule, in order to apply the law of the state which has had "the most significant relationship or contacts with the matter in dispute"—in this case, appellant contends, North Carolina. Such an approach is referred to as the "center of gravity" or "grouping of contacts" theory. See Annot., Choice of law in application of automobile guest statutes,

95 A.L.R. 2d 12, 49. Notwithstanding that appellant's counsel in his brief and in his argument presented his case to this court in the best possible light, the same reasons which dictated our decision in *Shaw v. Lee, supra*, constrain us to adhere to it.

The judgment of the court below is

Affirmed.

SUSIE JANE WALLS v. CITY OF WINSTON-SALEM.

(Filed 7 April, 1965.)

Municipal Corporations § 12—

Plaintiff's evidence tending to show that she knew of the existence of a hole in the asphalt in the street adjoining the concrete curb in front of her house and that she stepped into the hole and fell on returning at night from a neighboring house, *is held* to disclose contributory negligence as a matter of law, since if the hole constituted a hazard plaintiff's failure to remember it was inexcusable.

APPEAL by plaintiff from *Olive, E. J.*, August 31, 1964 Nonjury Session, FORSYTH Superior Court.

The plaintiff who lived at 720 Alexander Street in the City of Winston-Salem, instituted this civil action to recover damages for the injury she sustained on the night of October 12, 1963, when she stepped in a hole in the street pavement in front of her home. The sidewalk was unimproved. The street was of asphalt construction with a concrete curb extending 18 inches into the street. The asphalt abutted this curb.

A concrete walk extended 16 feet from the plaintiff's doorstep to the curb. Opposite the end of the walk the asphalt had raveled, leaving a depression about 18 inches long, about the same width, and a maximum depth of six to eight inches at the low point. The depression had existed for approximately two months. The plaintiff testified she gave agents of the city notice of the depression. It was not repaired.

At about 7:30 or 8:00 o'clock the plaintiff, on a visit to her daughter nearby, stepped in the hole and was injured. The light, half a block away, showed dimly on the hole which was filled by falling leaves. The plaintiff bases her claim for damages on the city's alleged negligent failure to keep its streets in proper repair.

From a judgment of compulsory nonsuit entered on defendant's motion, the plaintiff excepted and appealed.

Clyde C. Randolph, Jr., George E. Clayton, Jr., for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice by I. E. Carlyle, and H. Grady Barnhill, Jr., for defendant appellee.

PER CURIAM. The court, sitting in this nonjury case, did not render judgment on the merits; but at the close of plaintiff's evidence entered judgment of nonsuit. The judgment may be sustained only if the evidence is insufficient to make out a case of negligence against the city, or if it discloses that plaintiff's negligence, as a matter of law, caused or contributed to her injury. According to the plaintiff's own evidence, the hole in which she fell had been there, to her knowledge, for two months. Both she and her husband were accustomed to park the family automobile over it. If the hole constituted a hazard, her failure to remember it was certainly inexcusable. The plaintiff's failure to exercise reasonable care for her own safety constitutes negligence as a matter of law. The nonsuit is

Affirmed.

EVERETT McKINLEY MOORE v. PAUL CROCKER.

(Filed 7 April, 1965.)

Automobiles §§ 54f, 55.1—

In the owner's action to recover for damages to his car inflicted in a collision occurring when the owner was absent, nonsuit on the ground that the negligence of the driver of plaintiff's car was a proximate cause of the damage is improper when there is evidence that the driver of plaintiff's car had borrowed it and was on a purely personal mission, since G.S. 20-71.1 merely takes the issue of agency to the jury, the burden of proof thereon remaining on defendant.

APPEAL by plaintiff from *McConnell, J.*, October 1964 Civil Session of DAVIDSON.

This civil action grows out of a collision that occurred December 19, 1962, about 7:30 p.m., on N.C. Highway No. 64 between a 1953 Chevrolet operated by Franklin Small and a 1958 Ford operated by defendant. Both vehicles were proceeding west toward Lexington. When the collision occurred, Small was attempting to turn left into a dirt road and defendant was attempting to overtake and pass the Chevrolet Small was operating.

Plaintiff, the absent owner of said Chevrolet, alleged the collision and the damage to his car were proximately caused by the negligence of defendant. Answering, defendant denied negligence and pleaded, conditionally, the contributory negligence of Small, while acting as agent for plaintiff, in bar of plaintiff's right to recover.

Evidence was offered by both plaintiff and defendant. At the conclusion of all the evidence, the court, on motion of defendant, entered judgment of involuntary nonsuit. Plaintiff excepted and appealed.

Charles F. Lambeth, Jr., for plaintiff appellant.

Walser, Brinkley, Walser & McGirt for defendant appellee.

PER CURIAM. There was plenary evidence that plaintiff was not present when the collision occurred; that Small had borrowed plaintiff's Chevrolet; and that, when the collision occurred, Small was using the car for his own personal purposes.

In our view, there was sufficient evidence to support findings that the collision and plaintiff's damage were proximately caused by the negligence of defendant and also by the negligence of Small. Whether the testimony of Small, plaintiff's witness, discloses as a matter of law that negligence on his part was a proximate cause need not be decided. Assuming Small's negligence was a proximate cause, unless defendant's allegations of agency are established, such negligence of Small is not a bar to plaintiff's right to recover. By reason of G.S. 20-71.1, the agency issue, the burden of proof being on defendant, was for determination by the jury under proper instructions. In this connection, see *Whiteside v. McCarson,* 250 N.C. 673, 110 S.E. 2d 295.

The judgment of nonsuit is reversed and the cause is remanded for trial on all issues raised by the pleadings.

Reversed.

CERTAIN-TEED PRODUCTS CORPORATION v. R. M. SANDERS; J. C. SEDBERRY, TRUSTEE; LYNN S. CHALLIS; T. FRED CHALLIS; HERBERT HOWZE AND WIFE, VIOLA HOWZE; R. E. McDANIEL, TRUSTEE; AND S. A. DOVER, JR.

(Filed 14 April, 1965.)

1. Pleadings § 28—

Plaintiff must make out his case *secundum allegata* and recovery must be predicated upon allegations of the complaint.

2. Mortgages and Deeds of Trust § 19—

Where at the time of foreclosure an installment of the debt was due and in default, the right to foreclose may not be denied for an asserted oral agreement between the trustor and trustee, entered into after the execution of the instrument, that no payment of the debt would be required until after the completion of a contemplated house on the property, since such agreement is not supported by any consideration.

3. Mortgages and Deeds of Trust § 26—

Notice of foreclosure under the deed of trust is sufficient if given by advertisement in compliance with the statute, and no personal notice is required to be given the *cestui* or the holder of a second lien.

4. Mortgages and Deeds of Trust § 39—

The fact that the *cestui* in a purchase money deed of trust knows that the trustor had begun the construction of a house on the property and orally promised the trustor that no payment need be made on the deed of trust until the completion of the house, and then foreclosed prior to the completion of the house, confers no right upon subsequent lienees to attack the foreclosure on the ground of such inequitable conduct, since the promise of forebearance was not for the benefit of subsequent lienees.

5. Contracts § 14—

A stranger to a contract may not assert any rights thereunder unless he is a third party beneficiary, and the test of whether he is the third party beneficiary is whether the parties to the agreement intended he should receive a benefit therefrom which might be enforced in the courts.

6. Mortgages and Deeds of Trust § 31—

Where foreclosure sale is held in accordance with provisions of the deed of trust and preliminary report of the foreclosure is filed in the office of the clerk as required by G.S. 45-21.26 and no upset bid is filed, confirmation of the sale by the clerk is not prerequisite to the execution of a deed by the trustee to the last and highest bidder. G.S. 45, Art. 2A.

7. Mortgages and Deeds of Trust § 39—

Inadequacy of the purchase price alone is insufficient to upset foreclosure under the power contained in a deed of trust, and G.S. 45-21.34, providing the right to enjoin consumation of a foreclosure for inadequacy of the purchase price, does not apply after foreclosure has been consumated in conformity with law.

APPEAL by defendants Sanders, Challis and Dover from *Campbell, J.*, April 6, 1964 Schedule "B" Civil Session of MECKLENBURG, docketed and argued as No. 234 at Fall Term, 1964.

Action instituted August 6, 1963, to declare void (1) a foreclosure sale made by J. C. Sedberry, Trustee; (2) a deed from Sedberry, Trustee, to defendant Sanders; (3) a deed by defendant Sanders to defendant Lynn S. Challis; (4) a deed from defendants Challis to defendant Dover; and (5) a deed of trust executed by defendant Dover securing a balance purchase price note to defendants Challis.

A demurrer filed by defendants Sanders, Challis and Dover was overruled by Bone, J., and thereafter said defendants (appellants) filed a joint answer. An answer was filed by defendant McDaniel, Trustee, which admitted all allegations of the complaint. Defendants Howze did not answer or otherwise plead.

Facts established by the pleadings include the following: Defendant Sanders sold to defendants Howze for $750.00 a vacant lot (50 by 150 feet) fronting on Erie Street, Charlotte Township, Mecklenburg County, N. C. After defendants Howze had paid $155.00 of said purchase price, Sanders in July 1959 conveyed said lot to defendants Howze by deed filed for record on July 30, 1959, and recorded in Book 2070, Page 491, in the Office of the Register of Deeds for Mecklenburg County; and contemporaneously defendants Howze conveyed the lot to J. C. Sedberry, Trustee, as security for their balance purchase price note for $595.00 to Sanders, which deed of trust was filed for record on July 30, 1959, and recorded in Book 2087, Page 22, said Registry. The said note provides for the payment of $595.00, "with interest at the rate of 6% from date . . . payable $20.00 per month beginning on the 6th day of July and a like amount on the 6th day of each and every month thereafter until the entire indebtedness is paid in full."

Pursuant to a notice of (foreclosure) sale under said deed of trust, purportedly signed by Sedberry, Trustee, which Sanders caused to be published in the Mecklenburg Gazette, the property described in said deed of trust was sold at public auction on March 5, 1962, at which time Sanders "became the last and highest bidder for the price of $300.00 subject to unpaid taxes and assessments for paving, if any." On March 27, 1962 Sedberry, Trustee, conveyed said property to Sanders by deed recorded in Book 2320, Page 271, said Registry. The Clerk of the Superior Court of Mecklenburg County made no order confirming said foreclosure sale or directing the execution and delivery of said trustee's deed.

On June 7, 1962 defendant Sanders conveyed said property by (recorded) deed to his daughter, defendant Lynn S. Challis; and defendants Challis conveyed said property by (recorded) deed dated February 1, 1963 to defendant Dover.

Defendant Dover executed and delivered a (recorded) deed of trust as security for the payment to defendants Challis of $6,000.00 plus interest, payable in installments as set forth. (Note: Nothing in the pleadings or evidence purports to identify the trustee in this deed of trust.)

Plaintiff offered in evidence certain documents referred to in its allegations, to wit:

1. Agreement dated December 8, 1961 between Herbert Howze and wife, Viola R. Howze, jointly and severally "called PURCHASER," and Institute for Essential Housing, Inc., a New Jersey corporation with its principal place of business in Wayne, Pennsylvania, "called INSTITUTE." It provides that INSTITUTE will furnish the materials and build for PURCHASER a house of the nature and description therein specified on property of PURCHASER located on Erie Street, Charlotte, North Carolina. It provides that PURCHASER will pay for "materials furnished and construction services" a "total time sale price" of $10,908.84 in monthly installments as set forth in a promissory note to be executed by PURCHASER. It contains this provision: "PURCHASER warrants that he owns the above described property free and clear of all liens and encumbrances . . ." It was executed in behalf of INSTITUTE "BY: DOGGETT LUMBER COMPANY, Authorized Builder (Agent) BY: PAUL J. BOWERS, Sales Mgr."

2. Promissory note dated December 8, 1961 for $10,908.84, executed by Herbert Howze and Viola R. Howze, payable to INSTITUTE or order, in 144 successive monthly installments of $75.86 each, "commencing on the 1st day of February 1962, and on the same day of each month thereafter until fully paid, except that the final payment shall be the balance then due on this note." On the reverse side of this promissory note the following appears:

"WITHOUT RECOURSE
Pay to the Order of
CERTAIN-TEED PRODUCTS CORPORATION
Institute for Essential Housing, Inc.
By
Authorized Signer

WITHOUT RECOURSE
Pay to the Order of
COMMERCIAL INVESTMENT TRUST INCORPORATED
Certain-teed Products Corporation
By
Authorized Signer."

3. Deed of trust dated December 8, 1961 from Herbert Howze and wife, Viola R. Howze, to R. E. McDaniel, Trustee, on the Erie Street property, as security for the payment of said promissory note for $10,908.84. This deed of trust contains full warranties, including specifically a warranty that the premises "are free and clear of all encumbrances."

This deed of trust was recorded December 18, 1961 in Book 2297, Page 289, Mecklenburg Registry.

Allegations of the complaint, *denied* by appellants in their answer, include the following:

1. That plaintiff is a corporation organized and existing under the laws of the State of Maryland.

2. That the Institute for Essential Housing, Inc. was "a wholly owned subsidiary corporation of the plaintiff," and on July 1, 1963 "was merged into the plaintiff"; and that plaintiff "has thus become the owner and holder of" said $10,908.84 note.

3. That the Institute for Essential Housing, Inc. paid to or for the benefit of defendants Howze the sum of $3,604.31, "which sums were advanced under the ($10,908.84) note and deed of trust . . . and were used to start construction of a house" on said property.

4. That defendant Herbert Howze, on or about the time construction was begun on said house, entered into an agreement with Sanders "whereby the defendants Howze would not be required to make their monthly payments to the said Sanders until the construction of said house was completed . . ."

5. When Sanders "instituted" said foreclosure proceedings under the deed of trust to Sedberry, Trustee, he knew "that the said house was under construction and . . . in a stage of partial completion."

6. That "the price of $300.00 received at said foreclosure sale for the . . . property was grossly inadequate, the fair market value thereof at the time of said sale being at least $5,000."

7. That the publication of the notice of (foreclosure) sale in the Mecklenburg Gazette was not calculated to, and did not, bring the sale to the attention of prospective purchasers; that the Mecklenburg Gazette was not a newspaper of general circulation; and that the Mecklenburg Gazette did not meet the minimum requirements set forth in G.S. 45-21.17 and G.S. 1-597. (Note: During the trial, it was stipulated "that the Mecklenburg Gazette is a newspaper duly published in Mecklenburg County, North Carolina, and qualified to carry Legal Notices, including Legal Notices of Foreclosure.")

Appellants' answer alleges, *inter alia,* that defendant Lynn S. Challis was a bona fide purchaser of the property for a valuable consideration from Sanders.

Evidence was offered by plaintiff and by appellants.

The court submitted and the jury answered the following issues:

"1. Did the defendant R. M. Sanders agree with Herbert Howze that no payment of the note from Howze and wife to R. M. Sanders

would be required until the home on the property was completed, as alleged in the complaint? Answer: Yes.

"2. Was the amount of $300.00 paid by R. M. Sanders at the foreclosure sale on March 5, 1962, an inadequate and inequitable price for said property, as alleged in the complaint? Answer: Yes.

"3. Was the defendant Lynn S. Challis a bona fide purchaser for value of the property from the defendant R. M. Sanders, as alleged in the answer? Answer: No.

"4. Was the defendant S. A. Dover, Jr., a bona fide purchaser for value of the property? Answer: No."

The court entered judgment containing the following (summarized except when quoted) provisions:

It ADJUDGES null and void (1) the deed from Sedberry, Trustee, to Sanders; (2) the deed from Sanders to Lynn S. Challis; (3) the deed from defendants Challis to Dover; (4) the deed of trust from Dover to a trustee (unidentified) securing a balance purchase price note to Lynn S. Challis; and (5) the foreclosure sale of March 5, 1962, "which foreclosure sale has been preliminarily reported in Trustee's Sale Book 20, at Page 538 . . ."

It appoints commissioners to conduct a new foreclosure and to disburse the proceeds of sale in the following order of priority:

1. Balance (amount not stated) due Sanders on note secured by the deed of trust to Sedberry, Trustee.

2. "The indebtedness due the plaintiff . . . in the amount of $3,604.31, plus interest . . . , said debt being secured by the deed of trust" to McDaniel, Trustee.

3. "The sum of $605.00 paid by Herbert Howze to R. M. Sanders . . ."

4. "The sum of $2,500 . . . to the defendant Lynn S. Challis for improvements made by her to the property during the fall of 1962."

5. "The balance, if any, to S. A. Dover, Jr."

It orders: (1) that rents from said property be paid to the clerk pending confirmation of such foreclosure sale by commissioners; and (2) that the costs of the action be taxed against Sanders.

Defendants Sanders, Challis and Dover excepted and appealed.

Dockery, Ruff, Perry, Bond & Cobb for plaintiff appellee.

J. C. Sedberry for R. M. Sanders, Lynn S. Challis, T. Fred Challis and S. A. Dover, Jr., defendant appellants.

BOBBITT, J. Before considering directly the questions presented, it seems appropriate to advert to the following uncontroverted matters.

(1) The deed of trust to Sedberry, Trustee, duly recorded since 1959, was a valid first lien on the property described therein.

(2) Plaintiff did not seek a personal judgment against defendants Howze on their $10,908.84 promissory note to Institute. (Note: Defendants Howze made no payment on said $10,908.84 promissory note.)

(3) The foreclosure by Sedberry, Trustee, is attacked solely by plaintiff, allegedly the owner and holder of the $10,908.84 second lien promissory note.

(4) According to the terms of the $595.00 note secured by the deed of trust to Sedberry, Trustee, the entire unpaid balance, $145.00 plus interest, was past due and in default at the time of the alleged agreement between defendant Herbert Howze and Sanders and at the time of the foreclosure proceedings.

We consider first appellants' contention, based on appropriate exception and assignment of error, that plaintiff's action should have been nonsuited. The rules applicable in the consideration of the evidence when passing on a motion for nonsuit are well settled. 4 Strong, N. C. Index, Trial § 21. It is noted that a plaintiff must make out his case *secundum allegata.* His recovery, if any, must be based on the allegations of his complaint. *Nix v. English,* 254 N.C. 414, 421, 119 S.E. 2d 220, and cases cited.

The complaint attacks the foreclosure on the grounds considered below.

Plaintiff, relying on the alleged oral agreement between defendant Herbert Howze and Sanders, contends the debt secured thereby was not in default at the time the deed of trust to Sedberry, Trustee, was foreclosed.

With reference to the alleged agreement, defendant Herbert Howze, a witness for plaintiff, testified in substance as follows:

He had a conversation with Sanders "about (his) plan to build a house through the Institute for Essential Housing, on the lot." On the occasion of such conversation, he offered to pay Sanders $20.00 to apply on the then unpaid balance of $145.00 and interest; that Sanders would not take the $20.00 so offered, stating he (Howze) would "probably . . . need this money for something else" and it would be all right for him to wait until the house was completed and then pay the entire balance. At one time, he referred to the conversation as having taken place "the latter part of 1961" before "they started to build the house." Later, he testified that during the conversation he told Sanders

"they had started the house." Later, he testified the conversation was in December 1961 or in January 1962.

Howze testified further that, after said conversation, Sanders made no demand for payment; that, when construction was in progress, he (Howze) visited the lot about twice a week; and that he had no notice of the foreclosure prior to completion thereof.

Howze on cross-examination testified: His last payment to Sanders was made on October 9, 1961. His conversation with Sanders was "around the early part of February 1962." He testified: "It was in February that I offered (Sanders) $20.00."

While not pertinent in passing upon the motion for judgment of nonsuit, it seems appropriate to say that Sanders' testimony was in direct conflict with that of Howze.

It is noted: Howze testified to *one* conversation with Sanders concerning the matters referred to above. Too, apart from Howze's testimony concerning such conversation, there is no evidence that Sanders, prior to completion of the foreclosure, had knowledge or notice that a house was being built on the lot.

Conceding the sufficiency of the evidence to support a finding that Sanders assured defendant Herbert Howze that he need make no further payments until the house was completed, the evidence discloses no consideration sufficient to support a contract enforceable in law. *Craig v. Price,* 210 N.C. 739, 188 S.E. 321; *Woodell v. Davis,* 261 N.C. 160, 134 S.E. 2d 160. The debt was and had been past due. There is no evidence defendant Herbert Howze made any promise of any kind to Sanders.

There was evidence neither defendants Howze nor the holder of their $10,908.84 note secured by the second lien deed of trust to McDaniel, Trustee, were given personal notice of the foreclosure sale. However, "(i)n the absence of a valid contract so to do, there is no requirement that a creditor shall give personal notice of a foreclosure by sale to a debtor who is in default." *Woodell v. Davis, supra,* p. 163, and cases cited. Nor, under such circumstances, is there any requirement that personal notice of such sale be given to the holder of a second lien deed of trust.

We need not determine whether, under the circumstances, a failure to give personal notice to defendant Howze would constitute inequitable conduct as between Sanders and defendants Howze. Defendants Howze have not attacked the foreclosure. There is no evidence that Doggett Lumber Company (Doggett) or Institute or plaintiff had any dealings of any kind with Sanders prior to completion of the foreclosure.

The agreement, if any, was between Sanders and defendants Howze. Obviously, it was not made for the benefit of Doggett or Institute or

plaintiff. Defendants Howze, in their agreement of December 8, 1961 with Institute and in their deed of trust to McDaniel, Trustee, represented that they owned the lot free and clear of encumbrances. Probably, the disclosure of the alleged (oral) agreement would have resulted either in full payment to Sanders or in immediate discontinuance of negotiations between defendants Howze and Institute. Indeed, *the delay in foreclosure,* coupled with the failure to determine by search of the records that the deed of trust to Sedberry, Trustee, was the first lien, were the primary causes of plaintiff's present plight.

"If the contract was not made for the benefit of the third party, he has no cause of action upon the contract to enforce it, or sue for its breach." *Trust Co. v. Processing Co.,* 242 N.C. 370, 379, 88 S.E. 2d 233; *Land Co. v. Realty Co.,* 207 N.C. 453, 177 S.E. 335. "The real test is said to be whether the contracting parties intended that a third person should receive a benefit which might be enforced in the courts." 17 Am. Jur. 2d, Contracts § 304; 17A C.J.S., Contracts § 519(4)c.

Appellants contend further the foreclosure sale was invalid because the clerk did not confirm the sale or order that Sedberry, Trustee, execute and deliver a deed to Sanders, the purchaser. With reference to said contention, we consider first whether, under the provisions of G.S. Chapter 45, Article 2A, such confirmation or order was required as a prerequisite to consummation of such foreclosure in accordance with law.

It is noted: An allegation in the complaint and a recital in the judgment indicate that a preliminary report of the foreclosure sale (of March 5, 1962) by Sedberry, Trustee, was filed in the office of the clerk as required by G.S. 45-21.26. No upset bid was filed with the clerk. See G.S. 45-21.27.

This Court held "that the powers of supervision and control conferred upon the clerks of the Superior Court" by C.S. 2591, later G.S. 45-28, "did not arise . . . unless and until there had been the advanced bid specified in the statute paid into the hands of said clerk." *Lawrence v. Beck,* 185 N.C. 196, 116 S.E. 424; *Foust v. Loan Asso.,* 233 N.C. 35, 62 S.E. 2d 521, 22 A.L.R. 2d 975; *In re Sermon's Land,* 182 N.C. 122, 108 S.E. 497; *Pringle v. Loan Asso.,* 182 N.C. 316, 108 S.E. 914. G.S. 45-28 was repealed expressly by Chapter 720 (Section 5) of Session Laws of 1949. The 1949 Act is a comprehensive statute relating to sales under a power of sale in a mortgage, deed of trust or conditional sale contract. Its provisions constitute Article 2A of Chapter 45 of the General Statutes, being G.S. 45-21.1 through G.S. 45-21.33. It is expressly provided that Article 2A "does not affect any right to foreclosure by action in court, and is not applicable to any such action." G.S. 45-21.2. (Note: G.S. Chapter 1, Article 29A, relates expressly to "Judicial Sales.") If a

trustee fails to report a foreclosure sale within the five days as directed by G.S. 45-21.26, the clerk is authorized to compel such report. G.S. 45-21.14; *Gallos v. Lucas*, 252 N.C. 480, 113 S.E. 2d 923. Otherwise, Article 2A confers no authority upon the clerk in respect of an initial foreclosure sale. Supervisory authority conferred by G.S. 45-21.27 relates to resales and does not arise until an upset bid has been filed with the clerk as provided therein. G.S. 45-21.29(h) provides: "When *a resale* of real property is had pursuant to an upset bid, such sale may not be consummated until it is confirmed by the clerk of the superior court. No order of confirmation may be made until the time for submitting any further upset bid, pursuant to G.S. 45-21.27, has expired." (Our italics.)

Even so, plaintiff contends that, absent confirmation, the foreclosure is subject to attack on the ground the bid was inadequate and inequitable. G.S. 45-21.34 and G.S. 45-21.35, upon which plaintiff bases this contention, are provisions of Article 2B of Chapter 45. They are codifications of Sections 1 and 2, respectively, of Chapter 275, Public Laws of 1933.

G.S. 45-21.34, in part, provides: "Any owner of real estate, or other person, firm or corporation having a legal or equitable interest therein, may apply to a judge of the superior court, prior to the confirmation of any sale of such real estate by a mortgagee, trustee, commissioner or other person authorized to sell the same, to enjoin such sale or the confirmation thereof, upon the ground that the amount bid or price offered therefor is inadequate and inequitable and will result in irreparable damage to the owner or other interested person, or upon any other legal or equitable ground which the court may deem sufficient."

Actions instituted under G.S. 45-21.34 before the time (ten days) for upset bid had expired to restrain consummation of such foreclosure include *Woltz v. Deposit Co.*, 206 N.C. 239, 173 S.E. 587; *Whitaker v. Chase*, 206 N.C. 335, 174 S.E. 225; *Barringer v. Trust Co.*, 207 N.C. 505, 177 S.E. 795. In *Smith v. Bryant*, 209 N.C. 213, 183 S.E. 276, according to the record on file in this Court, the action was instituted October 31, 1933, to restrain the trustee from executing a deed to the purchaser pursuant to a foreclosure sale he had conducted on October 21, 1933.

In *Whitford v. Bank*, 207 N.C. 229, 176 S.E. 740, the factual situation under consideration was as follows: A foreclosure sale had been conducted by the trustee in accordance with the power of sale conferred in a deed of trust executed by plaintiffs. No upset bid was filed. The trustee consummated the sale by the execution and delivery of a deed to the purchaser. Nothing in the record indicates the clerk confirmed the sale or directed the execution of such deed. Subsequently, the plaintiffs instituted the action to cancel and set aside the trustee's

deed on the ground, *inter alia,* the amount of the purchaser's bid was inadequate and inequitable. This Court, in opinion by Schenck, J., said: "Chapter 275, Public Laws of 1933, has no application to this case, since the sale had been made and confirmed and the deed from the trustee to the purchaser had been of record for approximately three months before the institution of this action . . ." It seems clear this Court considered the word "confirmation," as used in said statutory provision, to mean final consummation in accordance with law.

In *Loan Corporation v. Trust Co.,* 210 N.C. 29, 185 S.E. 482, the action was to recover a deficiency judgment. Section 3 of Chapter 275, Public Laws of 1933, now G.S. 45-21.36, was directly involved. However, the following from the opinion of Connor, J., is in full accord with the decision in *Whitford v. Bank, supra, viz.:* "In sections 1 and 2 of the Act it is provided that where real property has been offered for sale by a mortgagee, or by a trustee under the power of sale contained in a mortgage or deed of trust, and the sum bid at such sale is inadequate, and for that reason *the consummation* of the sale would be inequitable, because it would result in irreparable damage to the mortgagor or grantor in the deed of trust, or to any other person having a legal or equitable interest in the property, the mortgagor, or the grantor, or any other interested person, *at any time before the consummation* of the sale, may apply to a judge of the Superior Court for an order enjoining *the consummation of the sale,* and that in such case the judge of the Superior Court may enjoin *the consummation of the sale,* and may order a resale of the property by the mortgagee, by the trustee, or by a commissioner appointed by him for that purpose, upon such terms as he may deem just and equitable." (Our italics.)

In our view, "confirmation," as used in G.S. 45-21.34 refers only to a foreclosure sale where confirmation is required for consummation in accordance with law. Where a foreclosure sale is conducted in accordance with the provisions of Article 2A of Chapter 45 of the General Statutes, and no upset bid is filed as provided in G.S. 45-21.27, there is no legal requirement that the clerk either confirm the sale or direct the execution of a trustee's deed as a prerequisite to legal consummation of such sale by the trustee.

Evidence relating to the basis of plaintiff's claim and the status and value of the property on March 5, 1962, the date of the foreclosure sale, is summarized below.

Mr. Grier, an officer of Doggett, testified that Doggett, under its arrangements with Institute and with plaintiff, furnished the materials (Certain-teed) and construction services; that the first materials were delivered to the job on January 24, 1962; that construction was stopped "shortly after the first of April 1962" when Doggett first learned

of the Sanders mortgage; and that, at that time, "the outside of the house was completed, the rough plumbing was in and the rough wiring was in." Mr. Grier testified he saw Sanders and offered "to reimburse him his expense, $300.00," if he would deed the house back to Howze; and that Sanders, in reply, stated "that the lot was worth about $1,200 and that's what he wanted." (Note: The complaint alleges that "Sanders offered to sell said property back to the defendants Howze for the price of $1,250.00.")

Mr. Grier testified that the Institute paid Doggett $3,604.31 for the materials and labor it had furnished to the Howze lot; and that ". . . we sent in an estimate of the work completed on the house and were reimbursed for that."

There was testimony that Institute, prior to June 1962, was plaintiff's wholly owned subsidiary, and at that time was absorbed by plaintiff, the parent company.

Referring to his conversation with Mr. Grier, Sanders testified, *inter alia*, as follows: ". . . I asked him why he built a house on a lot that I owned. He said he didn't know I owned it. I said, 'Well, do you not, when you build a house that way, have the record looked up to see whether it's free and clear or not?' He said, 'The company I do business with carries insurance.'" No question was asked Grier as to why construction was commenced without first making a search of the title or obtaining a report thereon.

Concerning values: Grier testified that, when construction stopped around April 1, 1962, the house and lot, in his opinion, "were worth $4,600." "Since that time," he testified, "somebody has increased the value of it by $2,400." (Note: Appellants offered evidence tending to show that, pursuant to work begun on September 7, 1962, the house was completed and made ready for occupancy at a cost to defendant Lynn S. Challis of "around $2500.00.") In Grier's opinion, at the time of trial, the house and lot were worth $7,000.00.

Mr. English, employed by Institute as a supervisor, testified he inspected the Howze lot the latter part of January 1962 and again the latter part of March 1962; that, in his opinion, the fair market value of the lot, including labor and materials, was "around $3,000" at the time of the January inspection and "conservatively $5,000.00" at the time of the March inspection. He testified that in his opinion the fair market value of the house and lot at the time of trial was "approximately $5,500 to $6,500."

The only testimony as to the value of the lot alone at the time of the foreclosure sale was the testimony of Sanders to the effect the fair market value thereof was "$1,250.00." Sanders testified the property

was worth "somewhere around $2500.00" when he sold it to defendant Lynn S. Challis, his daughter.

Plaintiff's allegations and evidence in respect of the inadequacy of the bid must be considered in the light of well established legal principles stated by Barnhill, J. (later C. J.), in *Foust v. Loan Asso., supra,* as follows:

"Mere inadequacy of the purchase price realized at a foreclosure sale, standing alone, is not sufficient to upset a sale, duly and regularly made in strict conformity with the power of sale. *Weir v. Weir,* 196 N.C. 268, 145 S.E. 281; *Roberson v. Matthews,* 200 N.C. 241, 156 S.E. 496; *Hill v. Fertilizer Co.,* 210 N.C. 417, 187 S.E. 577.

"Even so, where there is an irregularity in the sale, gross inadequacy of purchase price may be considered on the question of the materiality of the irregularity. *Hill v. Fertilizer Co., supra,* and cases cited.

"Speaking to the subject in *Weir v. Weir, supra,* Stacy, C.J., says: 'But gross inadequacy of consideration, when coupled with any other inequitable element, even though neither, standing alone, may be sufficient for the purpose, will induce a court of equity to interpose and do justice between the parties. *Worthy v. Caddell,* 76 N.C. 82, 70 A. & E. (2 Ed.) 1003; note: 42 L.R.A. (N.S.) 1198'; *Bundy v. Sutton,* 209 N.C. 571, 183 S.E. 725; *Roberson v. Matthews, supra.*"

Here, no alleged irregularity in the foreclosure is supported by evidence. Moreover, Sanders was under no legal obligation to plaintiff or its predecessors in interest except to conduct and consummate the foreclosure sale in accordance with law.

It should be noted that the complaint does not allege fraudulent conduct or facts sufficient to constitute fraud.

In view of the basis of decision, we do not discuss serious questions as to the sufficiency of the issues and as to whether the verdict supports the judgment. However, it is noteworthy that all issues relate solely to features of plaintiff's attack on appellants' positions and that answers thereto do not establish or relate to whether plaintiff has the status and rights it asserts.

With some reluctance, we reach the conclusion that appellants' motion for nonsuit should have been granted. Under this decision, it appears that Sanders (excluding costs of litigation) will reap where he did not sow. Yet, it appears he was willing to negotiate a settlement of the confused situation caused in large measure by (1) the failure of defendant Herbert Howze to disclose the existence of the Sanders deed of trust to Doggett or Institute and (2) the failure of Doggett or Institute to check the title or obtain a report thereon. Moreover, if plaintiff should prevail, the value of its security would be substantially enhanced by the expenditures made by defendant Lynn S. Challis in com-

pleting the house. (Note: The evidence indicates this action was instituted *after* defendant Lynn S. Challis had completed the house.)

Since the parties decided to "square off" and stand on their asserted legal rights, the decision must be in accord with established legal principles without regard to consequences. For the reasons stated, the verdict and judgment are set aside, and the cause is remanded with direction that judgment of involuntary nonsuit be entered.

Reversed.

OLA R. CLINARD v. SECURITY LIFE & TRUST COMPANY.

(Filed 14 April, 1965.)

1. Insurance § 22—

As a general rule, when failure on the part of the beneficiary to give notice and furnish proof of death of insured within the time specified is due to ignorance of the existence of the policy, and the beneficiary is without negligence or fault in failing to discover the policy, such delay will not warrant avoidance of the policy when notice and proof of death are given within a reasonable time after the discovery of the existence of the policy in the exercise of due diligence.

2. Trial § 22—

Contradictions and discrepancies, even in plaintiff's evidence, are for the jury to resolve and do not justify nonsuit.

3. Trial § 21—

On motion to nonsuit, the evidence must be considered in the light most favorable to plaintiff.

4. Insurance § 22— Evidence held to raise issue of fact whether failure to give notice and proof of death within the time limited was excusable.

Testimony of plaintiff beneficiary was to the effect that her husband, the insured, was unable to communicate very much during his terminal illness but that he stated he had insurance without saying who it was with, that he did say something about a policy being at his employer's, that upon insured's death plaintiff made diligent search without discovering any policy, and that the plaintiff did not directly contact the employer because she did not know anything about what policies he had. There was further evidence that plaintiff thereafter found a certificate of group insurance in the basement while she was "cleaning up some junk", and that notice and proof of insured's death was furnished within a day or so thereafter, but not until some 22 months after the expiration of the time limited in the policy. *Held:* The evidence permits conflicting inferences that the beneficiary was without fault in failing to give notice and proof of death within the time limited, and also that she had knowledge of facts sufficient to put her upon reason-

able inquiry which would have discovered the group certificate, and therefore the conflicting evidence raises an issue of fact, and the entry of judgment as of nonsuit was error.

APPEAL by plaintiff from *Olive, E. J.*, 31 August 1964 Civil Session of FORSYTH.

Civil action to recover upon a certificate of group life insurance, heard in the small claims division of the superior court. Chapter 207 of the 1963 Session Laws of North Carolina provides a procedure for adjudicating small claims in the superior court of Forsyth County. This statute defines a small claim as an action for a money judgment founded in contract or tort in which the sum demanded, exclusive of interest and costs, does not exceed $5,000, and in which no jury trial is demanded. In this action a jury trial was not demanded by either party.

From a judgment of compulsory nonsuit entered at the close of plaintiff's evidence, she appeals.

Richard C. Erwin, Sr., for plaintiff appellant.
Marion J. Davis for defendant appellee.

PARKER, J. Defendant issued to Logan Heating Company its Group Life Insurance Policy No. G-241 to provide life insurance for its employees. Pursuant to the provisions of this policy, defendant on 14 May 1959 issued its certificate of group life insurance, certificate No. 56, to Everette E. Clinard, an employee of Logan Heating Company, in the amount of $2,000, in which certificate his wife Ola R. Clinard was named as beneficiary.

Everette E. Clinard worked for Logan Heating Company until 1 July 1961, when he was taken sick and thereafter until his death on 5 November 1961 he was continuously and totally disabled by reason of disease to engage in any work, business or occupation.

After Everette E. Clinard's death, plaintiff and her daughter "ransacked" their home to find any insurance policies, moneys and property belonging to her husband's estate. They looked everywhere. She found upstairs in her bedroom some old policies, bank books, deeds and things of that nature. Plaintiff testified:

"I looked everywhere. Me and my daughter, we looked everywhere to see what, you know, what he had there because after he got sick he could hardly tell me what he had. Prior to Mr. Clinard's death he stated he had insurance but he didn't say who it was with but I never did see it. Mr. Clinard told me the policy was down with Logan Heating Company and that was all I knew. I

didn't see the policy. I saw one that he had, it was an accidental policy. That is the only one that I saw. I saw that policy after his death. Mr. Clinard said something about the policy with Logan Heating Company . . . he had . . . I believe he said it was straight life, I believe he said it was, but I never did see the policy. I never heard him say what he did with it or where it was at. The day I called you (attorney for plaintiff) is the first time that I saw the policy. I found it that morning and I called you that afternoon. The first time I had knowledge of that policy or the whereabouts of the policy was in September 30, 1963 when I found it in the dresser drawer. My husband had said that he had insurance with Logan Heating Company, but he never did give me the policy. At the time of my husband's death or shortly thereafter I did not make any contact with Logan Heating Company. I didn't but the Security (Local Social Security Office) did when he died because they had to get his record from down there. I didn't call them because one of the men had been over to the house to see Mr. Clinard that worked down there when he was quite ill. I didn't contact them directly concerning whether or not he had insurance policy that they might have on file because I didn't know anything about what he had, I hadn't seen it."

On 30 September 1963 plaintiff was in the basement of her house "cleaning up some junk," and found in an old dresser drawer that had not been used since 1960 the certificate of insurance which is the basis of the action here.

Defendant in its answer admits demand made upon it by plaintiff to pay to her as beneficiary the sum of $2,000, the amount of the insurance specified in its certificate of group life insurance, certificate No. 56, and its refusal to pay.

Defendant contends in its brief that it is not liable because its certificate of group life insurance, certificate No. 56, upon the life of Everette E. Clinard, provides "* * * that no payment shall be made under the provisions of this Benefit unless such notice and proof of such death * * * is submitted to the Insurance Company within ninety (90) days after the date of such death * * *"; that the submission to it of notice and proof of death as required by the above provision of its policy was a condition precedent to liability; that Everette E. Clinard died 5 November 1961, and the requisite proof was not submitted to it until some 24 hours after 30 September 1963, and consequently the judgment of compulsory nonsuit was proper, and should be upheld.

Plaintiff in her complaint alleges she should not be barred from recovery by the above quoted provision of the certificate of group life insurance for the following reasons:

"(a) That the plaintiff did not have any knowledge that the policy had been issued until she found the same on the 30th day of September 1963.

"(b) That as soon as the policy was found, notice was given to the defendant for the claim in question and that there was no delay on the part of the plaintiff, in that, she had no way of complying with the provisions of the policy in this event.

"(c) That the plaintiff had used due diligence and exercised that degree of care that a person in her situation would have in looking for the documents, insurance policies and valuable assets of her deceased husband.

"(d) That at no time has the plaintiff been at fault or negligent as beneficiary in the said certificate."

As a general rule, where the beneficiary of a life insurance policy is ignorant of the existence of the policy and where the lack of knowledge by the beneficiary of the existence of the policy is without negligence or fault on the part of the beneficiary, delay in giving notice and furnishing proof of the death of the assured within a certain period of time after the death to avoid a forfeiture of the policy as provided in the policy is excused, and in such case there is a sufficient compliance with the provisions of the policy if notice and proof of death are made within a reasonable time after the discovery of the existence of the policy. The rationale of the rule is that a beneficiary, absent any negligence on his part, cannot reasonably be expected to submit notice and proof of death under the terms of a policy of which he knew nothing. It would be a harsh rule that would forfeit a life insurance policy because the beneficiary had not given notice within a certain period of time after death as prescribed in the policy, when the beneficiary did not know of the existence of the policy until after the prescribed period had expired, and the beneficiary's ignorance of the existence of the policy is without negligence or fault. *Sanderson v. Postal Life Ins. Co. of New York,* 87 F. 2d 58; *McElroy v. John Hancock Mut. Life Ins. Co.,* 88 Md. 137, 41 A. 112, 71 Am. St. Rep. 400; *Metropolitan Life Ins. Co. v. People's Trust Co.,* 177 Ind. 578, 98 N.E. 513, 41 L.R.A. (N.S.) 285, and annotation thereto; *Munz v. Standard Life & Accident Ins. Co.,* 26 Utah 69, 72 P. 182, 62 L.R.A. 485, 99 Am. St. Rep. 830; *Cady v. Fidelity & Casualty Co.,* 134 Wis. 322, 113 N.W. 967, 17 L.R.A. (N.S.) 260; *Maloney v. Maryland Casualty Co.,* 113 Ark. 174, 167 S.W. 845; *Missouri State Life Ins. Co. v. Barron,* 186 Ark. 46, 52 S.W. 2d 733; *Pacific Mutual Life Ins. Co. v. Adams,* 27 Okl. 496, 112 P. 1026; *Federal Life Ins. Co. v. Holmes, Committee,* 232 Ky. 834, 24 S.W. 2d 906; *Continental Casualty Co. v. Lindsay,* 111 Va. 389, 69 S.E. 344;

Harper v. People's Industrial Life Ins. Co. of Louisiana (Louisiana Court of Appeals, 4th Cir.), 123 So. 2d 667; *Curran v. National Life Ins. Co. of United States,* 251 Pa. 420, 96 A. 1041; *Whitehead v. National Casualty Co. (Texas Court of Civil Appeals),* 273 S.W. 2d 678; *Pilgrim Health & Life Ins. Co. v. Chism,* 49 Ga. App. 121, 174 S.E. 212; *Verelst's Administratrix v. Motor Union Ins. Co., Ltd.,* [1925] 2 K.B. 137, 14 B.R.C. 1019; 29A Am. Jur., Insurance, § 1390; Appleman, Insurance Law and Practice, Vol. 3, p. 47; Couch on Insurance, 2d Ed., Vol. 13, § 49:308, p. 799; Cooley's Briefs on Insurance, 2d Ed., Vol. 7, p. 5919; 45 C.J.S., Insurance, p. 1185; Annot., 75 A.L.R. 1504. See also *Woodmen Accident Assn. v. Pratt,* 62 Neb. 673, 87 N.W. 546, 55 L.R.A. 291, 89 Am. St. Rep. 777, where the question of giving notice and furnishing proof of loss is discussed at length, and where there is an extensive review of the American and English cases on the subject.

Plaintiff assigns as error the entry of the judgment of compulsory nonsuit. There are discrepancies in plaintiff's testimony. However, "discrepancies and contradictions, even in plaintiff's evidence, are for the twelve and not for the Court," *Brafford v. Cook,* 232 N.C. 699, 62 S.E. 2d 327, and do not justify a nonsuit, *Keaton v. Taxi Co.,* 241 N.C. 589, 86 S.E. 2d 93.

Considering plaintiff's evidence in the light most favorable to her, as we are required to do in passing on a motion for judgment of compulsory nonsuit *(Watters v. Parrish,* 252 N.C. 787, 115 S.E. 2d 1), we are of opinion, and so hold, that though there are discrepancies in her own testimony, her own evidence would permit a jury, or a judge sitting without a jury as here, to make the following findings of fact and to draw the following legitimate inferences therefrom: Plaintiff beneficiary's ignorance of the existence of the certificate of insurance sued upon, which was in full force and effect at the time of the assured's death, until its discovery by her on 30 September 1963 in an old dresser drawer in the basement of her house was unmixed with any negligence on her part, that her delay in giving notice and furnishing proof of the death of her assured until after her discovery on 30 September 1963 of the certificate of insurance is excusable, that her giving notice and furnishing proof of the death of the assured to the insurance company within a period of a day or two after the discovery of this certificate of insurance is a sufficient compliance with the provisions of the certificate of insurance, and that plaintiff beneficiary is entitled to recover the amount of the insurance specified in the certificate of insurance. Other parts of her own evidence would also permit, but not compel as a matter of law, a finding of the following facts and the drawing

of the following legitimate inferences therefrom by a jury, or a judge sitting without a jury as here: She knew her husband had insurance, and she believed he said it was "straight life," and she had information of certain extraneous facts which of themselves did not amount to, or tend to show, actual knowledge of the existence of the certificate of insurance here, but which were sufficient to put a reasonably prudent man upon inquiry, and the circumstances were such that an inquiry of Logan Heating Company, if made and followed up with reasonable care and diligence, would have led to the discovery and knowledge by her of the existence of the certificate of insurance here, in time to have submitted notice and proof of death of the assured within 90 days thereafter to defendant, that her failure to do so was due to negligence, is inexcusable, and that she is not entitled to recover in this action. To sustain the judgment of compulsory nonsuit, as defendant contends, would necessitate a consideration by us of plaintiff's evidence not in the light most favorable to her. The judgment of compulsory nonsuit is reversed in order that the issues of fact presented by plaintiff's evidence shall be heard and determined by the judge sitting without a jury, because neither party demanded a jury trial as specified in the statute providing a procedure for adjudicating small claims in the superior court for Forsyth County.

Reversed.

CLYDE W. KEETER v. TOWN OF LAKE LURE, A MUNICIPAL CORPORATION.

(Filed 28 April, 1965.)

1. Appeal and Error § 22—

Where there are no exceptions to the findings of fact they are presumed to be supported by evidence and are binding on appeal.

2. Taxation § 7—

While legislative declarations will be given great weight in determining whether a proposed municipal bond issue is for a public purpose, such declarations are not conclusive, since the question is for judicial determination.

3. Statutes § 1—

Where a statute specifically refers to a prior enactment and stipulates that provisions of such prior statute should be controlling, the prior statute becomes an integral part of the enactment.

4. Taxation §§ 4, 6— Bonds to be paid solely from revenue of facility to be purchased are not a debt of the municipality.

Defendant municipality proposed to issue bonds pursuant to G.S. 160-413 *et seq.* and the provisions of Ch. 437, Session Laws of 1963, to purchase a lake lying within its corporate limits, with a dam and electric power generating plant and a trunk sewerage line running through and under the waters of the lake. The municipal resolution provided that there should appear on the face of the bonds a stipulation that they should be payable solely from the revenues derived from the facilities to be purchased, and made provision to take care of emergency repairs and replacements and necessary insurance, all solely from funds derived from the operation of the facilities. *Held:* The bonds will not constitute a debt of the municipality within the purview of the Constitutional requirement for a vote, Art. VII, § 6, or the limitation on the amount of debt, Art. V, § 4.

5. Municipal Corporations § 4—

A municipal corporation has only those powers prescribed by statute and those necessarily implied by law therefrom, and any power conferred upon it must be exercised for a public purpose and it may not be authorized even by statute to engage in an enterprise solely for the benefit of private interests.

6. Same—

A purpose is a public purpose of a municipality if it has a reasonable connection with the convenience and necessity of the public within the particular municipality, but it is not required that the purpose be for the use and benefit of every citizen in the community or confer upon each an equal benefit, it being sufficient if it be for the use and benefit of the citizens of the municipality in common.

7. Same; Taxation § 7— Purchase of recreational lake by municipality held for public purpose under facts of this case.

The findings were to the effect that defendant municipality contained within its boundaries a lake used for recreational purposes and a dam and generating plant used in the manufacture of electricity sold to a private power company under a long-term contract. The facts were further to the effect that the town and surrounding areas are primarily resort and recreational in nature, that many houses located on the shores of the lake had docks and boathouses usable only by permission of the private owner of the lake, and that the regulation of the level of the water of the lake solely in the interest of the generation of electricity might result in impairment or destruction of the use of the lake for recreational purposes. *Held:* The municipality is *sui generis*, and under the facts of the particular case the acquisition by the municipality of the lake with the dam and electric generating plant is for a public purpose, and the fact that the purchase of the property may result in incidental benefit to private persons does not alter this result. Constitution of North Carolina Art. I, § 1, Art. I, § 17.

8. Municipal Corporations § 36—

It appearing that defendant municipality had obtained a certificate of convenience and necessity from the Utilities Commission for the operation

of the electric generating plant it proposed to purchase, whether G.S. 160-421, requiring such certificate, is applicable to the facts of this case need not be decided.

APPEAL by plaintiff from *Froneberger, J.,* September 1964 Civil Session of RUTHERFORD. This case was docketed as case No. 36 Fall Term 1964, and submitted to the Court under Rule 10, Rules of Practice in the Supreme Court, 254 N.C. 783, 791. The Court continued the case to the Spring Term 1965 and ordered that oral argument be made, and it was argued as case No. 41, Spring Term 1965.

Suit by plaintiff, a resident of and a taxpayer within the town of Lake Lure, to restrain by permanent injunction the town of Lake Lure, a municipal corporation, from issuing $390,000 of revenue bonds of the town, to be designated as "Lake Lure Electric Power Facility Revenue Bonds," pursuant to the provisions of the Revenue Bond Act of 1938, as amended (G.S. 160-413 *et seq.*), and to the provisions of Chapter 437, 1963 Session Laws, for the purpose of providing funds for the purchase from Carolina Mountain Power Corporation of Lake Lure, a large lake situate within the corporate boundaries of the town, of a dam across the lake, of an electric power generating plant and allied facilities generating hydroelectric power by the use of the waters of the lake, together with a trunk sewerage line running through and under the waters of the lake used by residents of the town. He alleges the funds to be derived from the sale of the revenue bonds will not be used by the town for a public purpose, in that they will be used by the town to generate and sell hydroelectric power to a private utility and to operate a private recreational and tourist business.

At the August 1964 Session of Rutherford Superior Court, Judge Patton denied a motion by plaintiff for a temporary injunction until the final hearing of the suit. At the final hearing before Judge Froneberger, the parties waived a jury trial. He made what he terms findings of fact, but what in reality are to a large extent conclusions of law. These we summarize:

Carolina Mountain Power Corporation owns Lake Lure, a dam across the lake, an electric power generating plant and allied facilities generating hydroelectric power by the use of the waters of the lake, together with a trunk sewerage line running through and under the waters of the lake. Carolina Mountain Power Corporation and Duke Power Company heretofore entered into a contract which requires Carolina to sell and Duke to buy all the power produced by Carolina's electric power plant at Lake Lure, and the town will become subject to the terms of said agreement during the remaining years it is in force. (Judge Froneberger made no finding of fact as to when this contract was entered into by and between Carolina and Duke and as to when it

will terminate. Plaintiff has attached to his complaint, and made a part thereof, a resolution adopted by the governing board of the town of Lake Lure entitled as follows:

> "A RESOLUTION AUTHORIZING THE ACQUISITION OF THE LAKE KNOWN AS LAKE LURE, TOGETHER WITH A TRUNK SEWERAGE LINE, DAM AND ELECTRIC POWER GENERATING PLANT AND ANCILLARY FACILITIES, BY THE TOWN OF LAKE LURE, NORTH CAROLINA: AUTHORIZING THE ISSUANCE, UNDER THE PROVISIONS OF THE REVENUE BOND ACT OF 1938 AND CHAPTER 437 OF THE 1963 SESSION LAWS OF NORTH CAROLINA, OF REVENUE BONDS OF THE TOWN PAYABLE SOLELY FROM REVENUES, TO PROVIDE FUNDS FOR PAYING THE COST OF SUCH ACQUISITION; PROVIDING FOR THE COLLECTION OF RATES, FEES AND CHARGES AND FOR THE CREATION OF CERTAIN SPECIAL FUNDS; PLEDGING TO THE PAYMENT OF THE PRINCIPAL OF AND THE INTEREST ON SUCH REVENUE BONDS CERTAIN NET REVENUES OF SAID PROPERTY HEREIN AUTHORIZED TO BE ACQUIRED; AND SETTING FORTH THE RIGHTS AND REMEDIES OF THE HOLDERS OF SUCH BONDS."

This resolution is set forth in the record, pp. 8 through 56. The contract between Carolina and Duke is set forth in its entirety in this resolution, and it states that it was entered into on 26 May 1958, and that "This contract shall continue in force for a term of twenty-five (25) years from and after the 26th day of May 1958.")

All of Lake Lure is situate within the corporate boundaries of the town of Lake Lure, a municipal corporation. Many houses are located on the shores of the lake, and the houses have docks and boathouses. The deeds to these houses convey no right to use Lake Lure, and the docks and boathouses of these houses are subject to removal upon the request of the private owner of Lake Lure. The ownership of Lake Lure carries with it the right to regulate the level of the waters of the lake, and also the right to operate the lake as a resort area. The town of Lake Lure does not own or maintain a sewerage system. By permission of Carolina Mountain Power Corporation, many homes situated on the shores of Lake Lure and within the corporate limits of the town are connected with the trunk sewerage line owned by Carolina Mountain Power Corporation. The North Carolina Stream Sanitation Committee has ordered the town of Lake Lure to construct and provide adequate treatment facilities to take care of the sewerage carried in the trunk sewerage line under the waters of Lake Lure, now owned by the Carolina Mountain Power Corporation.

The town of Lake Lure is centered around Lake Lure, and the town and surrounding areas are primarily resort and recreational in nature.

Carolina Mountain Power Corporation has offered to sell to the town of Lake Lure the lake called Lake Lure, its dam across the lake, its electric power generating plant and allied facilities generating hydroelectric power by the use of the waters of the lake, together with its trunk sewerage line running through and under the waters of the lake. (William C. Rommel, president of Carolina Mountain Power Corporation and a witness for defendant, testified that the sale price was $375,000.)

On 27 March 1964 the board of commissioners of the town of Lake Lure duly and regularly adopted a resolution authorizing the purchase by the town of the properties of Carolina Mountain Power Corporation as above specified. This resolution authorizes the issuance by the town of Lake Lure, under the provisions of the Revenue Bond Act of 1938, and its amendments, and Chapter 437 of the 1963 Session Laws of North Carolina, of $390,000 of revenue bonds of the town of Lake Lure, payable solely from revenues derived from the undertaking for which the bonds were issued, in order to provide for paying the cost of acquisition of such properties; and further provides for the collection of rates, fees and charges, and for the creation of certain special funds; pledges to the payment of the principal of and the interest on such revenue bonds certain net revenues of the property authorized to be acquired; sets forth the rights and remedies of the holders of such bonds; and authorizes the operation by the town of the electric generating plant, and the sale by the town, pursuant to the contract between Carolina and Duke above mentioned, of all hydroelectric power produced by the electric power generating plant.

The proposed Lake Lure Electric Power Facility Revenue Bonds will be issued and sold by the town of Lake Lure, unless the defendant town is permanently restrained from so doing, and the funds to be derived from the sale of said bonds will be used for the purchase of said specified property from Carolina Mountain Power Corporation and for the purpose of paying all expenses incident to the cost of the purchase of said such property.

By the adoption of this resolution the town of Lake Lure does not assume the obligation of operating and maintaining the property of Carolina Mountain Power Corporation authorized by said resolution to be purchased, except to the extent that any or all of said facilities are employed in and are necessary to the generation of electric power, and that said resolution does not provide for the levying of taxes for any purpose.

Based upon these findings of fact and conclusions of law, Judge Froneberger made additional conclusions of law, which we summarize:

The resolution adopted by the board of commissioners of the town of Lake Lure on 27 March 1964 was in all respects regular and within the purview of applicable North Carolina statutes.

The Revenue Bond Act of 1938, as amended (G.S. 160-413 *et seq.*), and Chapter 437 of the 1963 Session Laws of North Carolina are valid legislative enactments and do not violate Sections 1 or 17 of Article I of the Constitution of North Carolina, or of any other provision of said Constitution.

The issuance of $390,000 of revenue bonds of the town of Lake Lure by it under the provisions of the Revenue Bond Act of 1938, as amended, and Chapter 437 of the 1963 Session Laws of North Carolina, for the purpose of purchasing the above specified property from Carolina Mountain Power Corporation, and the operation by the town of Lake Lure of the electric power generating plant and the sale by the town, pursuant to a long-term agreement, of all power produced by said plant to a private utility are for public purposes, and not primarily for the benefit of private interests in violation of Sections 1 or 17 of Article I of the North Carolina Constitution, and the acquisition of this property by the town and its sale of all power produced by the plant to Duke Power Company are for proper municipal purposes of the town.

That the resolution adopted by the board of commissioners of the town of Lake Lure on 27 March 1964 does not exceed the legislative grant of powers to municipal corporations, and does not violate Section 6 of Article VII of the North Carolina Constitution.

Based upon his findings of fact and conclusions of law, Judge Froneberger adjudged and decreed that the plaintiff be denied a permanent injunction as prayed for in his complaint and that he be taxed with the cost of this action.

From this judgment plaintiff appealed to the Supreme Court.

J. S. Dockery for plaintiff appellant.
Hollis M. Owens, Jr., for defendant appellee.

PARKER, J. Plaintiff has no exception to the judge's findings of fact. Consequently, the judge's findings of fact are presumed to be supported by competent evidence, and are binding on appeal. *Insurance Co. v. Trucking Co.*, 256 N.C. 721, 125 S.E. 2d 25.

Plaintiff has four assignments of error. He first assigns as error the denial of his written request by Judge Froneberger to make conclusions of law based upon his findings of fact to the following effect: (1) The proposed issuance of $390,000 of revenue producing bonds by the town of Lake Lure to purchase the properties of Carolina Mountain

Power Corporation, and the sale by the town, pursuant to a long-term contract, of all power produced by the electric power generating plant to Duke Power Company, are not for public purposes and are not proper municipal purposes of the town, but are primarily for the benefit of private interests in violation of sections 1 and 17 of Article I of the North Carolina Constitution. (2) Since the resolution by the governing body of the town of Lake Lure to issue revenue producing bonds to acquire this property contains no provisions for reserves for extraordinary maintenance or repairs, the resolution exceeds the legislative grant of power to municipal corporations, "to the extent that tax revenues shall be expended or pledged for the operation and maintenance of the lake and sewerage facilities violates Article VII, section 6, of the State Constitution, in the absence of approval by the voters."

His second assignment of error is broadside: "The court erred in its conclusions of law and signing of the judgment." His third and last assignments of error are: (1) The court erred in denying his "motion to set the judgment aside for errors of law," and (2) the court erred in denying his "motion for a new trial."

Defendant is proceeding under the provisions of the Revenue Bond Act of 1938, as amended, codified as G.S. Ch. 160, Art. 34 (G.S. 160-413 through G.S. 160-424), and under the provisions of Ch. 437, 1963 Session Laws of North Carolina.

England and Scotland used revenue producing bonds much earlier than did the United States. Municipal ownership of gas plants, street tramways, electric lighting systems, etc., was accomplished by means of revenue bond financing. The first municipal gas works in England was established at Salford in 1817. Its original cost was paid by taxation, but subsequent authority was granted to incur indebtedness secured by the gas works and its rates and profits. 12 Indiana Law Journal 266, "Indiana Municipal Revenue Bond Financing" (April 1937). A comprehensive discussion of revenue bond financing is found in 35 Michigan Law Review, pp. 1-43.

Perhaps the first decision upon the validity of revenue obligations in the United States by a Court of last resort was by the Supreme Court of Washington in the case of *Winston v. City of Spokane*, 12 Wash. 524, 41 P. 888 (1895). The bonds were to be paid out of 60% of the receipts of the waterworks system, and the Court held the obligations were not debts of the municipality.

In 15 McQuillin, Municipal Corporations, 3d Ed., § 43.34, it is said: "As has been seen, municipal utilities frequently are self-supporting undertakings, which are financed by bonds payable from the plant's revenue only. Inasmuch as it is a legitimate delegation of legislative power to permit municipalities to issue bonds for self-liquidating mu-

nicipal projects, the constitutionality of laws providing for revenue bonds generally is sustained, and such instruments are enforceable if they conform to applicable laws. An essential prerequisite to the practical validity or enforceability of revenue bonds secured by an encumbrance of the revenue of a 'system' is the ownership of the system by the municipal authority issuing the bonds." See also 43 Am. Jur., Public Securities and Obligations, § 285.

"The very purpose of the Revenue Bond Act, General Statutes Ch. 160, Art. 33 [now codified as Art. 34], is to permit municipalities to engage in nongovernmental activities of a public nature by pledging the revenue derived from such undertakings to the payment of bonds issued in connection therewith. Thus it avoids pledging the credit of the municipality to the payment of a debt, for by such arrangements no debt is incurred within the meaning of the Constitution." *Britt v. Wilmington,* 236 N.C. 446, 450, 73 S.E. 2d 289, 292.

G.S. 160-419 provides (1) "Revenue bonds issued under this article shall not be payable from or charged upon any funds other than the revenue pledged to the payment thereof, nor shall the municipality issuing the same be subject to any pecuniary liability thereon"; and (2) that "No holder or holders of any such bonds shall ever have the right to compel any exercise of the taxing power of the municipality to pay any such bonds or the interest thereon; nor to enforce payment thereof against any property of the municipality; nor shall any such bonds constitute a charge, lien, or encumbrance, legal or equitable, upon any property of the municipality"; and (3) "Every bond issued under this article shall contain a statement on its face that 'this bond is not a debt of . . ., but is payable solely from the revenues of the undertaking for which it is issued, as provided by law and the proceedings in accordance therewith, and the holder hereof has no right to compel the levy of any tax for the payment of this bond or the interest to accrue hereon and has no charge, lien, or encumbrance legal or equitable upon any property of said . . .' "

G.S. 160-415 grants to a municipality additional power to that it now has in respect to revenue producing undertakings, and provides in subsection (5) that by an issuance and sale by it of revenue producing bonds "no encumbrance, mortgage, or other pledge of property of the municipality is created thereby," and that "no property of the municipality is liable to be forfeited or taken in payment of said bonds"; and that "no debt on the credit of the municipality is thereby incurred in any manner for any purpose."

G.S. 160-422 provides "The General Assembly hereby declares its intention that the limitations of the amount or percentage of, and the restrictions relating to indebtedness of a municipality and the incurring

thereof contained in the Constitution of the State and in any general, special or local law shall not apply to bonds or interim receipts and the issuance thereof under this article."

Ch. 437, 1963 Session Laws of North Carolina, is entitled:

"AN ACT TO AUTHORIZE THE TOWN OF LAKE LURE TO ISSUE REVENUE BONDS UNDER THE REVENUE BOND ACT OF ONE THOUSAND NINE HUNDRED AND THIRTY-EIGHT TO ACQUIRE THE LAKE, TRUNK SEWERAGE LINE, DAM AND ELECTRIC POWER GENERATING PLANT AND ANCILLARY FACILITIES LOCATED NEAR SAID TOWN, DECLARING SUCH FACILITIES TO BE UNDERTAKINGS WITHIN SAID ACT, GRANTING THE TOWN ALL OF THE POWERS UNDER SAID ACT WITH RESPECT TO SUCH UNDERTAKINGS AND DECLARING ANY SUCH ACQUISITION AND BOND ISSUANCE TO BE FOR PROPER PUBLIC AND MUNICIPAL PURPOSES."

Section 1 of this Act is: "It is hereby determined and declared:

"(a) That the Town of Lake Lure, a municipal corporation in Rutherford County, is centered around the privately owned lake known as Lake Lure and that the town and surrounding area are primarily resort and recreational in nature.

"(b) That the very existence of the town depends upon the continued availability of the lake and its advantages to the residents of the town and to those who come to the town as temporary residents for recreational purposes.

"(c) That many homes are located on the shores of the lake and have docks and boathouses but the deeds to such homes convey no right to use Lake Lure and the docks and boathouses are subject to removal upon the request of the private owner of the lake.

"(d) That the owner of the lake also owns a trunk sewerage line, dam and electric power generating plant and ancillary facilities, all of the power produced by said plant being sold under a long-term contract to a single utility.

"(e) That as a practical matter the ownership of the lake, trunk sewerage line, dam and electric power generating plant and ancillary facilities must remain in the same party since the spilling of the lake waters over the dam supplies the power to operate the generating plant.

"(f) That for many years the private owner of the lake has leased it to the town on a year to year basis but has now indicated a desire to sell the lake, trunk sewerage line, dam and electric power generating plant and ancillary facilities.

"(g) That the ownership of Lake Lure by any private party having the right to regulate the level of the lake in order to increase the energy output of the generating plant or to operate the lake as a private resort area to the exclusion of the present home owners in the town poses a threat to the continued existence of the town and its orderly growth as a resort area."

Section 2 of this Act authorizes the town of Lake Lure to issue revenue bonds under and pursuant to the provisions of the Revenue Bond Act of 1938 to acquire the property above specifically enumerated, or any one or more thereof.

Section 3 of this Act states these specifically enumerated properties are hereby declared to be, jointly and severally, undertakings within the meaning of the Revenue Bond Act of 1938, and "as to any such undertaking, the Town of Lake Lure shall have all of the powers provided for in said Revenue Bond Act including but without limitation the power to operate said electric power generating plant and sell all of the power produced thereby to a single utility, to lease said plant to any private person, firm or corporation under such terms and conditions and for such period or periods as the governing body of the town shall deem to be in the best interests of the town and to pledge the proceeds of any such lease to the payment of revenue bonds."

Section 4 of this Act states the acquisition by the town of Lake Lure of these specifically enumerated properties and the issuance of revenue bonds therefor "are hereby declared to be proper public and municipal purposes."

Section 5 of this Act states the powers here granted are in addition to and not in substitution for any other powers heretofore or hereafter granted to the town of Lake Lure.

The General Assembly by this Act has declared that the acquisition by the town of Lake Lure of the properties specifically enumerated in the Act and the issuance of revenue bonds therefor "are hereby declared to be proper public and municipal purposes." This legislative declaration is entitled to great weight, but it is not conclusive. Final decision as to whether the acquisition of these properties and the issuance of revenue bonds therefor are for proper public and municipal purposes is for judicial determination. *Dennis v. Raleigh*, 253 N.C. 400, 116 S.E. 2d 923; *Turner v. Reidsville*, 224 N.C. 42, 29 S.E. 2d 211; *Briggs v. Raleigh*, 195 N.C. 223, 141 S.E. 597.

It is clear that the General Assembly has by general enactment of the Revenue Bond Act of 1938 authorized municipalities "to acquire by * * * purchase" (G.S. 160-415(1)) revenue producing properties

of various kinds, including hydroelectric plants or systems or works or properties (G.S. 160-414(5)(b)(3)) and to finance such purchase with funds derived from the sale of revenue bonds, payable solely out of the revenues from the undertaking. The General Assembly by the enactment of Ch. 437, 1963 Session Laws, has authorized the town of Lake Lure "to issue revenue bonds under and pursuant to the provisions of the Revenue Bond Act of 1938" for the purpose of acquiring by purchase the properties specifically enumerated in the Act. In consequence, the provisions of the Revenue Bond Act of 1938 above quoted are an integral part of Ch. 437, 1963 Session Laws of North Carolina. By reason of the provisions of the Revenue Bond Act of 1938 above quoted, and by reason of the specific provisions of Ch. 437, 1963 Session Laws, which make the provisions of the Revenue Bond Act of 1938 apply to the revenue producing bonds which the town of Lake Lure is authorized by Ch. 437, 1963 Session Laws, to issue, compulsory exercise of the taxing power of the town of Lake Lure is specifically withheld as a means of enforcing liability on any covenant or bond of the town of Lake Lure given or issued and sold in connection with the undertaking authorized for the purchase of the properties from Carolina Mountain Power Corporation here, and the Revenue Bond Act of 1938, G.S. 160-419, requires that this shall be stated on the face of each bond issued and sold by the municipality in connection with the undertaking. The resolution to acquire this property adopted by the governing board of the town of Lake Lure is attached to plaintiff's complaint, and made a part thereof. This resolution contains a form of the bonds to be issued by the town of Lake Lure to be designated as Lake Lure Electric Power Facility Revenue Bonds, and on its face contains verbatim the language set forth in G.S. 160-419 stating there is no municipal liability on these bonds. Consequently, by reason of the specific provisions of the Revenue Bond Act of 1938 and by reason of the specific provisions of Ch. 437, 1963 Session Laws, the issuance and sale of such revenue producing bonds by the town of Lake Lure do not constitute a debt of the town of Lake Lure, a pledge of its faith, or a lending of its credit within the meaning of Article VII, section 6 (prior to 1962 this was Article VII, section 7) of the Constitution of North Carolina; and do not give rise to an indebtedness of the town of Lake Lure within the meaning of an organic debt limitation within the meaning of Article V, section 4, of the North Carolina Constitution. *Britt v. Wilmington, supra; McGuinn v. High Point,* 217 N.C. 449, 8 S.E. 2d 462, 128 A.L.R. 608; *Williamson v. High Point,* 213 N.C. 96, 195 S.E. 90; Anno. 146 A.L.R. 328. The above quoted provisions of the Revenue Bond Act of 1938 are a substantial affirmation of the decision in *Brock-*

enbrough v. Board of Water Commissioners, 134 N.C. 1, 46 S.E. 28; 17 N.C.L.R. 370.

There is no merit to plaintiff's assignment of error that the trial court denied his written request to conclude as a matter of law that since the resolution by the governing body of the town of Lake Lure to issue revenue producing bonds to acquire this property contains no provisions for reserves for extraordinary maintenance or repairs, the resolution exceeds the legislative grant of power to municipal corporations "to the extent that tax revenues shall be expended or pledged for the operation and maintenance of the lake and sewerage facilities violates Article VII, section 6, of the State Constitution, in the absence of approval by the voters," for two reasons: (1) The resolution adopted by the governing board of the town of Lake Lure does not authorize or permit the expenditure or pledging of money derived from taxation by the town in respect to this undertaking, and further the Revenue Bond Act of 1938, under which the revenue producing bonds are authorized by Ch. 437, 1963 Session Laws, provides in G.S. 160-419 that the bonds to be issued and sold in connection with this undertaking by the town of Lake Lure are not a debt of the town of Lake Lure, but are payable solely from the revenues of the undertaking for which they are issued, and the holders thereof have no right to compel the levy of any tax for the payment of these bonds, or any of them, or the interest to accrue thereon on any of them, and have no charge, lien or encumbrance, legal or equitable, upon any property of the town of Lake Lure, and that every bond issued by the town of Lake Lure in connection with the acquisition of this undertaking shall contain a statement on its face to this effect. (2) An examination of the resolution adopted by the governing board of the town of Lake Lure to purchase the properties of Carolina Mountain Power Corporation, which is attached to plaintiff's complaint, and made a part thereof, shows that it contains in sections 408 and 604 provisions to take care of an emergency caused by some extraordinary occurrence from the "Repairs, Equipment, and Replacement Fund," and also provisions for the carrying of insurance in respect to the properties acquired by such acquisition.

A municipal corporation has "the powers prescribed by statute, and those necessarily implied by law, and no other." G.S. 160-1. "But it is also true that a municipal corporation may exercise all the powers within the fair intent and purpose of its creation which are reasonably necessary to give effect to the powers expressly granted, and in doing this it may exercise discretion as to the means to the end." *Riddle v. Ledbetter,* 216 N.C. 491, 5 S.E. 2d 542.

In 2 McQuillin, Municipal Corporations, 3d Ed., § 10.31, it is written: "Any power conferred on a municipality must be exercised for a public

use or purpose as distinguished from a private purpose, unless authorized by the legislature and not forbidden by the constitution of the state. A municipal corporation is a public institution created to promote public, as distinguished from private, objects."

In *Britt v. Wilmington, supra,* the Court said: "A municipal corporation cannot, even with express legislative sanction, engage in any private enterprise or assume any function which is not in a legal sense public in nature, the word 'private' as used in opinions discussing the powers of a municipality being used to designate proprietary, as distinguished from governmental, functions."

What is a public use or purpose has given rise to much judicial determination. The concept of public purpose has considerably expanded since the 19th century. For instance, *Fawcett v. Mt. Airy,* 134 N.C. 125, 45 S.E. 1029 (1903), overruled *Mayo v. Commissioners,* 122 N.C. 5, 29 S.E. 343, and held that an expense incurred by a municipality for the purpose of building and operating plants to furnish water and lights to sell to its inhabitants was a necessary expense, and therefore was for a public purpose. The courts, as a rule, have attempted no precise judicial definition of a public, as distinguished from a private, purpose, but have left each case to be determined by its own peculiar circumstances as from time to time it arises. 2 McQuillen, *ibid,* § 10.31; Rhyne, Municipal Law, p. 343.

In *Airport Authority v. Johnson,* 226 N.C. 1, 36 S.E. 2d 803, the Court said: " 'Public Purpose' as we conceive the term to imply, when used in connection with the expenditure of municipal funds from the public treasury, refers to such public purpose within the frame of governmental and proprietary power given to the particular municipality, to be exercised for the benefit, welfare and protection of its inhabitants and others coming within the municipal care. It involves reasonable connection with the convenience and necessity of the particular municipality whose aid is extended in its promotion."

In *Briggs v. Raleigh, supra,* the Court said: "However, the term 'public purpose' is not to be construed too narrowly. [Citing authority.] It is not necessary, in order that a use may be regarded as public, that it should be for the use and benefit of every citizen in the community. It may be for the inhabitants of a restricted locality, but the use and benefit must be in common, and not for particular persons, interests or estates."

The Court said in *Greensboro v. Smith,* 241 N.C. 363, 85 S.E. 2d 292: "The acquisition, establishment and operation of an auditorium, G.S. 160-283, *Adams v. Durham,* 189 N.C. 232, 126 S.E. 611, and of playground and recreation centers, G.S. 160-155 *et seq., Purser v. Ledbetter,* 227 N.C. 1, 40 S.E. 2d 702; *Greensboro v. Smith,* 239 N.C. 138, 79 S.E.

2d 486, are not 'necessary expenses' within the meaning of Art. VII, sec. 7, of the Constitution of North Carolina, for which a municipal corporation may borrow money or levy and collect taxes, without an approving vote of the people, but are public purposes for which a municipal corporation may appropriate available surplus funds not derived from taxes or a pledge of its credit. *Brumley v. Baxter,* 225 N.C. 691, 36 S.E. 2d 281."

In *Dennis v. Raleigh, supra,* the Court held that the expenditure of funds by a municipality for the purpose of advertising to promote the public interest and general welfare of the municipality is for a public purpose for which, under legislative authority, it may without a vote appropriate funds not derived from taxation.

From the unchallenged findings of fact by the trial judge, and from the declarations by the General Assembly in Ch. 437, 1963 Session Laws, it is shown that the town of Lake Lure is a *sui generis* municipality. The judge's findings of fact are to this effect: A privately owned lake known as Lake Lure is situate within its corporate boundaries. The town and surrounding area are primarily resort and recreational in nature. Many houses are located on the shores of the lake with docks and boathouses which are located there by permission of the private owner of the lake, and are subject to removal upon request by the private owner of the lake. The ownership of the lake carries with it the right to regulate the level of the waters of the lake, and it seems by an appreciable lowering of the waters of the lake the docks and boathouses could be left some distance from the waters of the lake, and their use and the recreational use of the houses on the shores of the lake could be gravely impaired, if not destroyed. It is a reasonable inference from the judge's findings of fact that when Lake Lure was created, the town of Lake Lure grew up and developed around it because of its resort and recreational facilities, and that the existence of the town, and the general and economic welfare of all its residents, depends upon the continued and full availability of Lake Lure and its resort and recreational facilities to all the residents of the town and to those who come to the town as temporary residents, whether they own houses there or not, for recreational purposes. The General Assembly in Ch. 437, 1963 Session Laws, has made a declaration substantially to this effect. It is also a reasonable inference from the findings of fact that the ownership of Lake Lure by any private person having the right to regulate and lower the level of the waters of the lake to increase the energy output of the generating plant poses a threat to the continued existence of the town and the general and economic welfare of all its residents, and the General Assembly in Ch. 437, 1963 Session Laws, has made a declaration to this effect: It seems manifest that if

the town is to acquire Lake Lure, it must also acquire the electric generating plant, which uses its waters spilling over the dam to generate hydroelectric power, and honor the contract the private owner of the lake has with Duke Power Company. (William C. Rommel, president of the Carolina Mountain Power Corporation, testified: "Carolina Mountain Power Corporation would not consent or consider to selling any one of the facilities separate. They would sell all or nothing.") *Salus populi suprema lex est* was a maxim with the Roman people, and is a maxim with all nations. Surely, the acquisition of properties by revenue bond financing to preserve the very existence of the town of Lake Lure is a proper municipal public purpose. It seems clear that the acquisition of these properties by the town of Lake Lure by the issuance of revenue producing bonds will be essentially public and primarily for the general good of all the inhabitants of the town of Lake Lure, and in line with the recreational development of the town as a resort area, though there may be incidental benefit to private individuals, but incidental benefit to private individuals would not in itself prevent a determination that the acquisition of this property is for a public purpose and a proper municipal purpose. Rhyne, Municipal Law, p. 344; 2 McQuillen, Municipal Corporations, 3d Ed., p. 648; 64 C.J.S., Municipal Corporations, p. 334; *State v. Cotney*, 104 So. 2d 346 (Fla. 1958); *Courtesy Sandwich Shop v. Port of New York Auth.*, 12 N.Y. 2d 379, 240 N.Y.S. 2d 1, 190 N.E. 2d 402. It is plain that the acquisition of this property by the town of Lake Lure and the payment for it by the use of revenue producing bonds (no tax money being used) is not a violation of section 1 (the equality and rights of persons), and not a violation of section 17 of Article I of the North Carolina Constitution. The General Assembly has declared, and the trial court has found and concluded, that the acquisition of the above specified properties and the payment therefor by the issuance of revenue producing bonds are for a proper public and proper municipal purpose, and we agree. The trial court properly denied plaintiff's request to conclude as a matter of law that the acquisition of these specified properties by the town was not a proper public and proper municipal purpose, but primarily for the benefit of private interests in violation of sections 1 and 17 of Article I of the State Constitution. We also agree with the trial judge's conclusions of law.

Williamson v. High Point, supra, is distinguishable, *inter alia*, in that High Point was proposing to issue and sell revenue producing bonds for the purpose of constructing a municipal power plant to be located outside of its corporate limits, with transmission lines running through three counties, that would generate more than three times the amount of electricity then used by the entire city, and that the purpose of the

project was to engage in the power business generally and to sell electricity to municipalities, industries, and individuals generally.

G.S. 160-421 provides that all revenue bonds issued pursuant to the Revenue Bond Act of 1938 shall be approved and sold by the Local Government Commission. This statute also provides "no municipality shall construct any systems, plants, works, instrumentalities, and properties used or useful in connection with the generation, production, transmission, and distribution of * * * electric energy for lighting, heating, and power for public and private usage without having first obtained a certificate of convenience and necessity from the North Carolina Utilities Commission." Without deciding whether this provision has any application here, the record, but not the findings of fact, shows that the town of Lake Lure, under the provisions of G.S. 160-421, brought a proceeding before the North Carolina Utilities Commission to obtain from it a certificate of public convenience and necessity authorizing the town of Lake Lure to acquire from Carolina Mountain Power Corporation its properties above specifically enumerated, by the issuance of revenue producing bonds, and to operate them. The Utilities Commission, after a public hearing, made exhaustive findings of fact on 21 July 1964 and issued to the town of Lake Lure a certificate of public convenience and necessity as requested by the town.

It is to be emphasized that here we are concerned with the acquisition of properties by purchase by the town of Lake Lure by the issuance of revenue producing bonds, and not in any aspect with funds derived or to be derived from taxation. All of plaintiff's assignments of error are overruled. The unchallenged findings of fact by the trial judge, and the declarations by the General Assembly in Ch. 437, 1963 Session Laws of North Carolina, support the judge's conclusions of law, and they in turn support his judgment declining to issue a permanent injunction as requested by plaintiff and taxing him with the costs. The judgment below is

Affirmed.

J. G. FOX AND WIFE, ELLA C. FOX v. SOUTHERN APPLIANCES, INC., AND C. D. MITCHELL.

(Filed 28 April, 1965.)

1. Evidence § 27—

All prior and contemporaneous negotiations will be presumed to be merged in the written contract, and evidence of such parol negotiations is incompetent to vary or contradict the terms of the writing.

2. Same; Fraud § 10—

Parol evidence to show that a written contract was procured by fraud is competent and does not come within the purview of the rule that parol evidence is not competent to vary or contradict the terms of a writing, since the evidence of fraud does not challenge the accuracy of the terms of the writing but the validity of the writing itself.

3. Fraud § 10—Mere reference in a contract to source of information cannot preclude as a matter of law right to rely upon representation.

Provisions in a contract for the sale of realty that the property was to be conveyed "subject to such conditions, reservations and restrictions as appear in the instruments constituting the chain of title", *held* not to preclude the contention that the seller's agent made a fraudulent representation that the only business restrictions binding on the property were zoning regulations of the municipality restricting its use to office and institutional use, since the contract does not specify what restrictions should apply but merely refers to the source from which information could be had as to what restrictions were applicable, and therefore the contract and the representation do not deal with precisely the same matter within the provisions of the parol evidence rule.

4. Fraud § 5—

Whether the purchaser of realty has the right to rely upon the representation of the seller's agent that the only business restrictions applicable to the property were municipal zoning regulations limiting it to office and institutional use, without investigating the chain of title which would disclose that the property was subject to residential restrictions, must be determined upon the facts upon the basis of whether the representation was of such character as to induce a person of ordinary prudence to rely thereon, and ordinarily the question may not be determined on demurrer prior to the introduction of evidence.

5. Fraud § 8—

Allegations that the purchaser desired to purchase property for business purposes, that the seller's agent knew or pretended to know what restrictions on the use of the property were applicable, and for the purpose of inducing the purchase, represented that the only restrictions were zoning regulations restricting use of the property to office and institutional purposes, and that the purchaser executed the contract of purchase in reliance upon such representation, which was material and false in fact, *held* sufficient to allege all the elements essential to constitute actionable fraud.

6. Pleadings § 2—

A pleading should allege the ultimate and not the evidentiary facts.

7. Pleadings § 12—

A demurrer admits for its purposes the truth of the facts well pleaded.

8. Pleadings § 19—

A pleading will be liberally construed upon demurrer, and where the facts pleaded include all of the essential elements of the purported cause of action, the courts are not permitted to draw inferences contrary thereto.

BOBBITT, J., concurring.

HIGGINS, J., dissenting.

RODMAN, J., dissenting.

APPEAL by defendant Southern Appliances, Inc., from *Patton, J.*, January 4, 1965, "D" Non-jury Session of MECKLENBURG.

Action for specific performance of contract for the purchase of land.

The complaint alleges: On 16 January 1964 plaintiff J. O. Fox and defendant C. D. Mitchell, as agent of corporate defendant, executed in writing a Contract of "Sale of Real Estate" reciting that "Mr. J. O. Fox has this day sold to Southern Appliances, Inc., . . . who has this day purchased that certain parcel of property known as house and lots 12 and 13, block 4, Shenandoah Park, Charlotte," at the price of $24,-500, terms cash; that "It is understood that the property will be conveyed subject to such conditions, reservations and restrictions as appear in instruments constituting the chain of title"; that seller agrees to execute and deliver deed "conveying an indefeasible fee simple title to the land . . . with full covenants and warranties"; and that the transaction is "to be closed 90 days from execution of sales contract." Defendants advised plaintiffs that they desired possession of the premises as early as possible. The premises were being used by plaintiffs as a residence. Plaintiffs vacated the property on 4 March 1964. Defendants refuse to comply with the contract, pay the purchase price and accept deed "because the property is subject to residential restrictions." Plaintiffs are ready, able and willing to make conveyance in accordance with the contract.

Corporate defendant answered, admitted the execution of the sales contract, and for "A Further Answer and Defense" alleged: Plaintiffs, through their exclusive sales agent, represented that the property "had no restrictions that would prohibit its use for business purposes except zoning restrictions of the City of Charlotte, North Carolina, which restricted its use to office and institutional use." In fact, the property was subject to covenants appearing in the record title restricting it to residential purposes only. The representations were false and were "made with knowledge of their falsity, or recklessly without knowledge of their truth and as a positive assertion; were made with intention that they would be acted upon by this defendant in execution of the Contract of Sale of Real Estate . . . ; and this defendant has suffered damage thereby. The value of the property for residential purposes only is $12,500. This defendant has elected to rescind the contract.

Plaintiffs demurred to corporate defendant's Further Answer and Defense on the ground that the matters alleged therein "rest in parol and contradicts and varies from the terms of the written Contract of Sale

of Real Estate." The demurrer was sustained. Corporate defendant appeals.

Ray Rankin for plaintiffs.
Ervin, Horack, Snepp & McCartha for defendants.

MOORE, J. No verbal agreement between parties to a written contract, made before or at the time of the execution of such contract, is admissible to vary its terms or to contradict its provisions. *Insurance Co. v. Morehead,* 209 N.C. 174, 183 S.E. 606. It will be presumed that the writing merged therein all prior and contemporaneous negotiations. *Neal v. Marrone,* 239 N.C. 73, 79 S.E. 2d 239. But parol evidence is admissible to show that a written contract was procured by fraud, for the allegations of fraud challenge the validity of the contract itself, not the accuracy of its terms — the instrument itself, on the issue of fraud, is the subject of dispute. *Cotton Mills v. Manufacturing Co.,* 218 N.C. 560, 11 S.E. 2d 550; *Hardware Co. v. Kinion,* 191 N.C. 218, 131 S.E. 579; *Miller v. Howell,* 184 N.C. 119, 113 S.E. 621; *Machine Co. v. Bullock,* 161 N.C. 1., 76 S.E. 634; *Unitype Co. v. Ashcraft Bros.,* 155 N.C. 63, 71 S.E. 61. Fraud alleged as a defense to the enforcement of a written contract is not an attempt to vary or contradict the terms of the contract, for if the fraud be proven it nullifies the contract. *White v. Products Co.,* 185 N.C. 68, 116 S.E. 169; *Machine Co. v. McKay,* 161 N.C. 584, 77 S.E. 848; *Tyson v. Jones,* 150 N.C. 181, 63 S.E. 734. "It is elementary that where a contract or transaction was induced by false representations, the representations and the contract are distinct and separable — that is, the representations are usually not regarded as merged in the contract . . ." 23 Am. Jur., Fraud and Deceit, § 23, p. 775-6.

But plaintiffs stand on the proposition that "where the written instrument itself precludes the representation relied upon, an action on such alleged representations cannot be maintained." 2 Strong: N. C. Index, Fraud, § 10, p. 384; *Wilkins v. Finance Co.,* 237 N.C. 396, 75 S.E. 2d 118. They contend that the *precise* subject matter of the parol representation is dealt with in the written contract. The contract provides "that the property will be conveyed subject to such . . . restrictions as appear in instruments constituting the chain of title." Defendant alleges that it was represented that the property "had no restrictions that would prohibit its use for business purposes except zoning restrictions of the City . . . which restricted its use to office and institutional use." We do not agree that the contract deals with the *precise* matter involved in the representation. Both relate to restrictions, but the representation *expressly* relates to the extent of business

restriction, while the contract merely refers defendant to the source to which he may have resort for information as to what restrictions there are. "Referring a representee to the sources of the speaker's information does not necessarily relieve the representor from liability for false statements, since the representee's right to rely on such statements without an investigation of the sources of information mentioned is not necessarily destroyed by such reference. Whether the representee should have consulted the sources referred to depends on circumstances and is often held to be a question for the jury." 23 Am. Jur., Fraud and Deceit, § 158, p. 965. "It is generally held that fraud may be predicated on false representations or concealments, although the truth could have been ascertained by an examination of public records. As otherwise expressed, the general rule is that the mere fact that public records, if examined, would show the representee that representations of fact are false does not preclude his establishing fraud, because he is under no duty to make such examination. This principle is especially applicable where a representation is knowingly false and is made for the express purpose of deceiving and defrauding another who relies on it, where there is a duty of disclosure of information, where the party to whom the representations are made has no opportunity to examine the records, or where such investigation would not reveal the truth. In some of the older cases the scope of the rule has been limited, making its application depend on prudence. It has been held that to excuse an examination of the records, when accessible, the representation must be such as to induce the party to whom it is made to refrain from making such examination, and that the fact that such an examination would have disclosed the facts, although it does not necessarily destroy the right of reliance, is nevertheless entitled to its weight in determining whether the representations are such as would impose on a person of ordinary prudence." *Ibid*, § 163, pp. 972-974. The law with respect to misrepresentations of matters of public record is discussed in an exhaustive annotation in 33 A.L.R. 853-1161, entitled "Fraud — Matters of Public Record," in which cases from the various jurisdictions of the United States and England are listed and annotated.

A purchaser of property seeking redress on account of loss sustained by reliance upon a false representation of a material fact made by the seller may not be heard to complain if the parties were on equal terms and he had knowledge of the facts or means of information readily available and failed to make use of his knowledge or information, unless prevented by the seller. But the rule is also well established that one to whom a definite representation has been made is entitled to rely on such representation if the representation is of a character to induce action by a person of ordinary prudence, and is reasonably relied upon.

The right to rely on representations is inseparably connected with the correlative problem of a 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, 97 S.E. 2d 881; *Keith v. Wilder,* 241 N.C. 672, 86 S.E. 2d 444; *Pridgen v. Long,* 177 N.C. 189, 98 S.E. 451. For a case involving misrepresentations as to matters of record in the sale of land, see *Whitaker v. Wood,* 258 N.C. 524, 128 S.E. 2d 753, in which it was held that the question whether plaintiffs might reasonably rely on seller's representations was for the jury.

The legal policy in this jurisdiction with respect to the right of a representee to rely on representations made to induce entry into contractual relations has been long established and has been restated in a number of our recent cases. In addition to the opinion, delivered by Bobbitt, J., in *Whitaker v. Wood, supra,* we take note of those in *Johnson v. Owens,* 263 N.C. 754, 140 S.E. 2d 311, and *Cowart v. Honeycutt,* 257 N.C. 136, 125 S.E. 2d 382. In *Johnson,* plaintiff, a prospective purchaser of a house, inspected the house on three occasions. On each occasion there was a fire in the fireplace but the house was cold and the central heating system was not in operation. In response to plaintiff's inquiry, defendant-seller stated that the heating system was in excellent condition but was not operated in the daytime because of defendant's absence at work. The system was in fact so defective that plaintiff had to replace it. Defendant contended that plaintiff could not reasonably rely on the representation since she had full opportunity to inspect and test the system. We held that it was a question for the jury. Sharp, J., speaking for the Court, said: " 'The question is whether it is better to encourage negligence in the foolish or fraud in the deceitful.' . . . 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."

Cowart involved a representation made in procuring the execution of a release. Plaintiff was injured in an automobile accident; she was operating her husband's car at the time. She signed a release upon the representation that it covered repairs to the car and medical expenses

incurred by her husband because of her injuries, but did not affect her claim for damages. She had had limited schooling but was not illiterate; she did not read the release, but relied on the representation — it proved to be false. We held that whether she should have read the release was a question for the jury. Parker, J., delivered the opinion and stated: "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."

In the instant case defendant's Further Answer and Defense alleges all of the factual elements essential to constitute actionable fraud. *Early v. Eley,* 243 N.C. 695, 91 S.E. 2d 919. It alleges in effect that defendant desired to purchase real estate usable for business purposes, plaintiffs' agent knew or pretended to know what restrictions were on the use of the property in question, defendant did not know, said agent as an inducement to the sale represented that the property was not restricted against use for office and institutional purposes, defendant executed the sales contract in reliance on the representation which was in fact false, and defendant was materially damaged as a result of the deception.

The case has not reached the trial stage. We are concerned only with the sufficiency of the pleading. One who tests a pleading by demurrer admits the truth of the facts pleaded, for the purposes of the demurrer. When the case comes to trial and the evidence is in, it may appear, under the circumstances, as a matter of law that defendant could not reasonably rely on the alleged representation, or, on the other hand, it may prove to be a question for the jury. We cannot at this stage determine what the evidence will be. A litigant is not required to allege evidentiary matters and, if he does, such matters will be stricken on motion. As stated by Higgins, J., in *Dowd v. Foundry Co.,* 263 N.C. 101, 139 S.E. 2d 10: ". . . the complaint must give . . . 'a plain and concise statement of the facts constituting a cause of action without unnecessary repetition . . .' 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. . . . embellishments and banjowork inserted for their effect on the jury" should be omitted. Defendant's pleadings are concise and sufficient ultimate facts are alleged to withstand plaintiff's demurrer. "Upon demurrer a pleading will be liberally construed with a view to substantial justice between the parties, giving the pleader the benefit of every reasonable intendment in his favor. And a demurrer will not be sustained unless the pleading is wholly insufficient or fatally defective." 3 Strong: N. C. Index, Pleadings, § 12, pp. 624-5. Where the facts pleaded include all the essential elements of the purported cause of action, we are not permitted to draw inferences contrary to the pleadings.

Reversed.

BOBBITT, J., concurring: The parol evidence rule does not apply when it is alleged and shown that the execution of a written instrument was procured by fraud. Stansbury, North Carolina Evidence, Second Edition, § 257. Here, defendant, on the ground of fraud, seeks to rescind the contract in its entirety.

Defendant, in its further answer and defense, alleges the reasonable market value of plaintiffs' property with its use restricted to "residential" purposes is only $12,500.00 instead of the contract price of $24,500.00; that plaintiffs' agent represented to defendant that plaintiffs' property "had no restrictions that would prohibit its use for business purposes except zoning restrictions of the City of Charlotte, North Carolina, which restricted its use to office and institutional use," when in fact the use of plaintiffs' property is restricted to "residential" purposes only; that said false representations were made with knowledge of their falsity or recklessly without knowledge of their truth and as a positive assertion; that they were made with the intention that they would be relied upon by defendant; that they were in fact relied upon and acted upon by defendant in the execution of the contract; and that defendant has been damaged on account thereof.

Unquestionably, the elements of fraud are sufficiently alleged. The narrow question for decision is whether the fact that the written contract contains the words, "It is understood that the property will be conveyed subject to such conditions, reservations and restrictions as appear in instruments constituting the chain of title," is sufficient to establish *as a matter of law* that defendant could not *reasonably* rely on said false representations. In my view, whether defendant could and did *reasonably* rely on said false representations should not be determined until defendant has had opportunity to bring forward its evidence. Hence, I concur.

HIGGINS, J., dissenting: The parties entered into a written contract that plaintiffs would sell and the defendant would purchase a house and lots No. 12 and 13, in block 4, Shenandoah Park, Charlotte, for $24,500.00. The contract provided: "It is understood that the property will be conveyed subject to such conditions, reservations, and restrictions as appear in instruments constituting the chain of title . . ."

Upon the defendant's refusal to fulfill the contract, the plaintiffs brought suit for specific performance. The defendant, by answer, admitted the execution of the contract but by way of further defense alleged:

> "3. Plaintiffs, through their exclusive sales agent . . . represented . . . that plaintiffs' property 'had no restrictions that would prohibit its use for business purposes except zoning restrictions of the City of Charlotte, North Carolina, which restricted its use to office and institutional use,' when in fact by deed recorded in Book 1185, page 248 of the Mecklenburg Registry and by restrictive covenants recorded in Book 1198, page 495 of the Mecklenburg Registry, the use of plaintiffs' property is restricted to 'residential' purposes only."

The defendant alleged the representations were false and fraudulent, were intended to and did deceive the defendant to its damage.

The record does not indicate the parties contracted otherwise than on equal terms. Regardless of what either's real estate broker said, or thought, or remembers about restrictions (and lawyers often disagree about their meaning) the parties solemnly contracted in writing that the conveyance would be made *subject to such conditions, reservations, and restrictions as appear in the chain of title.* By this vital provision the parties agreed and determined by reference to the public records (which neither could change) exactly what conditions, reservations, and restrictions were embraced within their contract. The writing binds the parties to look to the public records and nowhere else for those conditions.

This decision, to which I cannot agree, strikes one of the fundamentals from contract law. It says that a written instrument may be contradicted by parol. If the further defense, which Judge Patton struck from the answer, is restored, the door is opened to defendant to show by parol evidence conditions, reservations, and restrictions other than those which are disclosed by the chain of title. The jury, according to which party's witnesses swear harder or louder, may make for the parties a contract different from that which they made for themselves.

Heretofore it seems to have been the law that when a contract has been reduced to writing and signed by the parties, their prior negotia-

tions become merged in the written instrument. That written agreement may not be varied, added to, taken from, or contradicted by parol evidence. "As against the recollection of the parties, whose memories may fail them, the written word abides." *Insurance Co. v. Morehead,* 209 N.C. 174, 183 S.E. 606.

The plaintiffs' contentions are that the contract speaks the truth. The defendant contends to the contrary. If its contention is correct, the written word neither abides very long nor with much force.

In order to prevent fraud, the law requires certain contracts — or some memorandum thereof — to be in writing and signed by the party to be charged. Contracts to sell land fall in this category. The purpose of reducing a contract to writing is to avoid any controversy over its terms. *Bank v. Slaughter,* 250 N.C. 355, 108 S.E. 2d 594. "It is a well settled rule of law that when parties have reduced their agreement to writing, parol evidence is not admissible to contradict it for the reason that the written memorial is the best evidence of what the parties have agreed to." *McLawhon v. Briley,* 234 N.C. 394, 67 S.E. 2d 285. I vote to affirm.

RODMAN, J., dissenting: I concur in the dissenting opinion of Higgins, J. I do not understand there is disagreement in the Court as to what must be established to rescind a contract on the ground of fraud. Our disagreement in this case relates to the application of the law to the facts as alleged and admitted by the demurrer.

The legal principle here controlling was aptly stated by Barnhill, J. in *Harding v. Insurance Co.,* 218 N.C. 129, 10 S.E. 2d 599. He said: "Representations concerning the value of real property or its condition and the adaptation to particular uses will not support an action in deceit unless the purchaser has been fraudulently induced to forbear inquiries which he would otherwise have made, and if fraud of this latter description is relied on as an additional ground of action, it must be specifically set forth in the declaration. *Parker v. Moulton,* 14 Mass. 99; 19 Am. Rep. 315. 'It is generally held that one has no right to rely on representations as to the condition, quality or character of property, or its adaptability to certain uses, where the parties stand on an equal footing and have equal means of knowing the truth. The contrary is true, however, where the parties have not equal knowledge and he to whom the representation is made has no opportunity to examine the property or by fraud is prevented from making an examination.' 12 R.C.L. 384. *When the parties deal at arms length and the purchaser has full opportunity to make inquiry but neglects to do so and the seller resorted to no artifice which was reasonably calculated to induce the purchaser to forego investigation action in deceit will not lie.*"

Parker, J. reduced the rule to two terse sentences. He said: "The right to rely on representations is inseparably connected with the correlative problem of the duty of the 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, 97 S.E. 2d 881.

Here, defendant alleges plaintiff's agent represented that the property was not subject to restrictions prohibiting its use for business purposes. He impliedly asserts that he contracted to purchase with the intent to use for business purposes. When the contract was executed, defendant knew he was obligating himself to take the property subject to whatever restrictions appeared in plaintiff's record title. The objectionable restriction appears in plaintiff's record title. Defendant could have ascertained what restrictions appeared in plaintiff's title as easily as the purchaser in *Calloway v. Wyatt, supra,* could have ascertained about the inadequate water supply. In one case the truth could have been ascertained by turning on a water spigot, in the other, by looking at the recorded deeds constituting plaintiff's chain of title.

How simple it would have been to have required a statement in the contract that none of the restrictions would prohibit the use of the property for business purposes. Defendant's allegations that he *reasonably* relied on the statement of plaintiff's agent is not admitted by the demurrer, because it is, in my opinion, not a statement of fact, but on the admitted facts is an erroneous legal conclusion.

STATE v. LEXY LEE HAMILTON, JAMES CALLY HAMILTON, CECIL HAMILTON.

(Filed 28 April, 1965.)

1. Criminal Law § 87—

Where three defendants are charged in separate indictments with larceny of specified personalty from a specified store and with breaking and entering and safe-breaking at said store, the court may properly consolidate the indictments for trial, the offenses charged being of the same class and so connected in time and place that evidence at the trial upon one would be competent and admissible at the trial of the others. G.S. 15-152.

2. Arrest and Bail § 3—

Where police officers have been advised by the proprietor of a store that there had been a robbery at his business and that he had seen at the scene three men, two on foot and one driving an automobile of a specified make

and color with license plates of a specified state, an officer may arrest without a warrant three men apprehended by him in the described vehicle. G.S. 15-41.

3. Searches and Seizures § 1; Criminal Law § 79—

Where an officer making a lawful arrest requests permission to search the car which had been driven by one of the persons arrested, and the officer, in reply to the driver's interrogation as to whether he had a search warrant, states that he did not but that he could obtain one, whereupon the driver consents to the search and hands over the keys to the car, *held* the consent to the search dispenses with the necessity for a search warrant and renders competent evidence obtained in a search of the car.

4. Same—

Passengers in a car may not object to incriminating evidence found in the car upon search without a warrant when the person having possession and control of the car consents to the search.

5. Criminal Law § 21—

Assignment of error that defendants were not permitted to examine the S.B.I. reports and notes prior to trial cannot be sustained when defendants do not contend at any time that access to such reports was necessary for the preparation of their defense.

6. Criminal Law § 159—

Assignment of error in support of which no authority is cited in the brief is deemed abandoned. Rule of Practice in the Supreme Court No. 28.

7. Criminal Law § 86—

The refusal of a continuance more than a month after the indictments were returned against defendants having counsel will not be disturbed.

8. Criminal Law § 93—

Motion to sequester the State's witnesses is addressed to the discretion of the trial court, and the court's refusal of the motion will not be disturbed in the absence of a showing of abuse.

9. Criminal Law § 152—

The setting out of practically all of the evidence in question and answer form is not a compliance with Rule of Practice in the Supreme Court No. 19(4).

10. Criminal Law § 33—

Every circumstance calculated to throw light upon the commission of the offense charged is competent, the weight of such evidence being for the jury.

11. Criminal Law § 101—

Circumstantial evidence establishing by direct evidence facts raising the reasonable inference of defendants' guilt of the offense charged is properly submitted to the jury.

12. Burglary and Unlawful Breakings § 4—

Evidence tending to show that defendants, brothers, were together during the time in question, that they "cased" a particular store on a Saturday morning, that the store was broken and entered that night, a safe therein opened, and certain personalty taken from the store, and also that the property stolen together with a tool, identified by expert testimony as having been used in opening the safe, were found in defendants' car upon their arrest the next day, etc., *held* sufficient to be submitted to the jury as to each defendant on charges of breaking and entering and larceny and safe-breaking.

13. Appeal and Error § 24; Criminal Law § 156—

An assignment of error must present but a single question of law, and exceptions may be gathered under a single assignment only if each relates to the single question sought to be presented, and it is contrary to the Rules to gather under a single assignment of error to the charge a large number of exceptions upon which appellants undertake to raise various and sundry questions.

14. Same—

An exception to a long excerpt from the charge must fail if any portion of the charge excepted to is correct.

THIS case was tried before *Parker, J.*, 1 June 1964 Criminal Session of NASH. Petition for *certiorari* allowed by this Court on 18 December 1964.

These defendants were indicted in separate bills of indictment for three offenses, to wit: each charged in separate bills with breaking, entering, and larceny of two chisels from M. C. Braswell Company, a corporation; each charged in separate bills with safe-breaking at the M. C. Braswell Company; and each charged in separate bills of attempted safe-breaking of another safe at M. C. Braswell Company. These bills of indictment were returned at the March-April Session of the Superior Court of Nash County. The cases were consolidated for trial.

The State's evidence tends to show the following facts.

The three defendants entered the general store of M. C. Braswell Company in Battleboro, North Carolina, on Saturday morning, 22 February 1964, between 6:30 and 7:00 A.M. Oliver Hinton, a clerk, and Mr. Viverette, the general manager, were at work. One of the defendants purchased some cigarettes and talked to Mr. Hinton at the cash register. Another of the defendants said he wanted to use the telephone to make a call to Sharpsburg, and did make a call; and the third one walked to the opposite side of the hardware department, between the hardware department and the dry-goods department. Defendant Cecil Hamilton, who had been talking to Mr. Hinton, walked back to

the office and looked in the office; none of the defendants, however, went into the hardware section of the store.

Evidence was offered to the effect that the Braswell Company had purchased six cold chisels about May 1963. Marvin Gay, employee of the store, had placed a cost mark and price on each of these chisels when they were placed in stock, to wit: "W.S.E. — $1.75." Ernie Brantley, assistant manager of the Company, testified that prior to 22 February 1964 only two of the chisels had been sold, one to R. H. Marriott and one to Old Town Farms, and that there were four chisels on the counter in the hardware section when the store closed on that date.

There were two safes in the store, located in the main office. One safe was a large two-door type, approximately 6 feet by 4 feet. It is opened by a dial nest mechanism on the door. The other safe was a small wall type, referred to as a "nigger-head," which was set in concrete in the wall.

The store was "bugged," a microphone being located near the two safes with wires running to a loud speaker placed in Ernie Brantley's bedroom. Brantley lived about one block from the store. About 3:00 A.M. on Sunday, 23 February 1964, Brantley heard a noise coming from the speaker. A dull metal-to-metal noise. He immediately made telephone calls to the Sheriff and other officers. The noise continued with additional sounds of wood being torn away, the sound of something falling to the concrete floor, a thud, like the dial from the safe.

The officers and Brantley arrived at the store at approximately 3:20 A.M. The front door of the store had been forced or pried open. The dial and tumbler nest on the large safe had been knocked off, the doors were open. The dial, dial ring, knob, *et cetera*, were found on the floor. The safe had been "punched." Various items were kept in the safe, including some cash. The wood had been torn from the small wall safe, and there were some scars on the metal, but this safe had not been opened.

An examination after the officers arrived revealed that two chisels were missing from the hardware section.

In the absence of the jury, the court heard evidence which revealed that there had been a robbery at Minges Beer Company in Rocky Mount at about 10:00 P.M. on Saturday, 22 February 1964. A Mr. Turner had informed the police that he had seen three men, two on foot and one driving a 1963 maroon and cream Cadillac with Maryland license plates, at the beer company. He later identified the defendants as the three men. The police officers had been given this information and were looking for the three men and the Cadillac. The court below found that the officers knew a felony had been committed and

that the officers had reasonable grounds to believe the three defendants were the persons responsible for the commission of the felony.

The Rocky Mount police were looking for the Cadillac and the three men on 23 February 1964. Police Officer Moore, at approximately 7:30 to 8:00 P.M. on Sunday, 23 February 1964, while on patrol duty, saw a 1963 Cadillac, maroon and cream, parked at an Esso station across the street from the Coca-Cola plant in Rocky Mount. The station was closed. The Cadillac had a Maryland license plate. The officer was keeping the car under surveillance when he observed defendant Cecil Hamilton near the automobile. Cecil Hamilton was arrested and placed in the police car. Officer Moore summoned the aid of some other policemen.

When the officers went from the side of the building to the front of the building where the Cadillac was parked, a taxi-cab was parked in front of the building. Thomas Hand was driving the taxicab and James Hamilton was sitting in it. Thomas Hand and James Hamilton went to where the officers were standing. Hamilton said to the officers, "What's the trouble?" Detective James Hoyle told James Hamilton at that time that he was under arrest for safe robbery of the Minges Beer Company.

Detective Hoyle asked James Hamilton if the Cadillac was his. James Hamilton replied that he had driven the car to the Esso station. Hoyle asked James Hamilton for permission to search the car, and Hamilton replied, "Have you got a search warrant?" Hoyle said he did not, but that he could get one. James Hamilton replied, "There's no need of that. You can search." James Hamilton handed the car keys to Detective Hoyle.

A search of the car was made, and the officers found a .38 pistol under the driver's seat, two walkie-talkie radios, a pair of galoshes, several cloth gloves and a plastic money bank in the back on the floorboard of the car. In the trunk there was a brown, olive drab bag which contained an electric hacksaw, electric drill, several drill bits and three or four punches. Also in the trunk was a large electric jackhammer, a chisel and digging tool for the jackhammer, and a crowbar. In the glove compartment the officers found two chisels. Defendant Cecil Hamilton said the chisels were his.

The two chisels taken from the glove compartment of the Cadillac had the very same marking as placed upon them by employee Gay, and they were identified as coming from the Braswell Store.

Cecil Hamilton admitted that he had put the chisels in the glove compartment, but he stated that he had purchased them from an unidentified friend.

Both Cecil Hamilton and James Hamilton were taken to jail where they were questioned further.

About 11:00 P.M. Sunday night, 23 February 1964, Officer Godwin, Sheriff Wood, Lieutenant Tillman and Detective Hoyle went to Hunt's Motel where the Hamiltons were staying, and upon finding Lexy Hamilton in his room the officers entered and placed him under arrest. He was taken to the jail in Nashville.

On Monday, 24 February 1964, each defendant was questioned in the absence of the others. In substance, each stated that all three of them had been together all day Saturday and Sunday. Each stated that they had been drinking beer on Saturday night and had gone to the motel at approximately 12:00 midnight and had gone immediately to bed; that they stopped in Rocky Mount to look up one Albert Farmer; that they left the motel various times, riding around, drinking beer, all of Saturday night; that all three stayed together and no one used the 1963 Cadillac except the three of them. They did not locate Albert Farmer.

Evidence further shows that SBI Agent Thomas assisted in the investigation beginning at approximately 3:20 A.M. on Sunday, 23 February 1964, in the Braswell store. Agent Thomas carried the various items composing the dial of the safe, which he had found on the floor of the store, together with a tapering punch, which had been found in the Cadillac, to the Criminal Laboratory of the FBI in Washington, D. C.

FBI Agent Johnson, who qualified as a tool mark identification expert, examined the dial components and the tapering punch. He testified that he had examined the punch and the markings made on the dial components under a microscope and that, in his opinion, the punch, State's Exhibit No. 10, which was found in the defendants' Cadillac, was used on, and left identifying marks on, the tumbler nest from the safe, State's Exhibit No. 13.

In the trial below, each defendant was represented by counsel of his own choice. I. T. Valentine, Jr., Esquire, represented defendant Lexy Lee Hamilton; Thomas G. Dill, Esquire, represented James Cally Hamilton; and Robert Satterfield, Esquire, represented defendant Cecil Hamilton.

At the close of the State's evidence, each defendant moved for judgment as of nonsuit. Each motion was denied. Each of the defendants, through his counsel announced he would offer no evidence.

The jury returned a verdict of guilty of breaking and entering, larceny and safe-breaking, as charged, against each defendant. Each defendant was acquitted of the charge of attempted safe-breaking.

From the judgments imposed, the defendants gave notice of appeal. They later withdrew their appeal, but due to their inability to obtain a satisfactory agreement with the solicitor and the court below with respect to the disposition of other indictments pending against them in the court below, they employed present counsel to perfect their appeal. Original counsel were permitted to withdraw by consent of the court below on 3 December 1964, which was after the employment of present counsel. We allowed *certiorari* on 18 December 1964.

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

Arthur Vann for defendant appellants.

DENNY, C.J. The defendants' first assignment of error is to the granting of the solicitor's motion to consolidate the cases for trial.

It is provided in G.S. 15-152, in pertinent part, as follows:

> "When there are several charges against any person for the same act or transaction or for two or more acts or transactions connected together, or for two or more transactions of the same class of crimes or offenses, which may be properly joined, instead of several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court will order them to be consolidated * * *."

In *S. v. Combs,* 200 N.C. 671, 158 S.E. 252, in considering the identical question presented by this assignment of error, the Court said:

> "The court is expressly authorized by statute in this State to order the consolidation for trial of two or more indictments in which the defendant or defendants are charged with crimes of the same class, which are so connected in time or place as that evidence at the trial of one of the indictments will be competent and admissible at the trial of the others. C.S. 4622 (now G.S. 15-152). *S. v. Cooper,* 190 N.C. 528, 130 S.E. 180; *S. v. Jarrett,* 189 N.C. 516, 127 S.E. 590; *S. v. Malpass,* 189 N.C. 349, 127 S.E. 248."

The three defendants were charged in separate bills of indictment with identical crimes. Therefore, the offenses charged are of the same class, relate to the same crime, and are so connected in time and place that evidence at the trial upon one of the indictments would be competent and admissible at the trial on the others. In such cases there is statutory authority for a consolidation. *S. v. Morrow,* 262 N.C. 592, 138 S.E. 2d 245; *S. v. Bryant,* 250 N.C. 113, 108 S.E. 2d 128; *S. v. Spencer,*

239 N.C. 604, 80 S.E. 2d 670; *S. v. Truelove,* 224 N.C. 147, 29 S.E. 2d 460; *S. v. Norton,* 222 N.C. 418, 23 S.E. 2d 301.

On the record presented, we hold that the court below committed no error in allowing the motion for the consolidation of these cases for trial. The foregoing assignment of error is overruled.

Were the tools and implements found in James Hamilton's automobile, which was being used by the three defendants, admitted in evidence in violation of G.S. 15-27, Article I, § 11 of the Constitution of North Carolina, and the Fourteenth Amendment to the Constitution of the United States? The defendants assign as error the admission of these tools and implements in evidence on the ground that the defendants were arrested without a warrant and that the automobile was searched without a search warrant. They contend the arrests were unlawful and the evidence found in the car was inadmissible.

There is plenary evidence, and the court below so found, that the Rocky Mount police were looking for three men in a 1963 Cadillac, maroon and cream in color, with a Maryland license plate, in connection with a robbery which had been committed the night before at the Minges Beer Company in Rocky Mount. The officers had reasonable ground to believe that the defendants had committed the felony.

G.S. 15-41 provides:

> "A peace officer may without warrant arrest a person: * * *
> (b) When the officer has reasonable ground to believe that the person to be arrested has committed a felony and will evade arrest if not immediately taken into custody."

In *S. v. McPeak,* 243 N.C. 243, 90 S.E. 2d 501, it is said:

> "It is well settled law that a person may waive his right to be free from unreasonable searches and seizures. A consent to search will constitute such waiver, only if it clearly appears that the person voluntarily consented, or permitted, or expressly invited and agreed to the search. Where the person voluntarily consents to the search, he cannot be heard to complain that his constitutional and statutory rights were violated. *S. v. Moore,* 240 N.C. 749, 83 S.E. 2d 912 (where many cases are cited); *Zap v. U. S.,* 328 U.S. 624, 90 L. Ed. 1477; *People v. Preston,* 341 Ill. 407, 173 N.E. 383; 77 A.L.R. 631; 47 Am. Jur., Searches and Seizures, Sec. 71; 79 C.J.S., Searches and Seizures, Sec. 62."

Defendant James Hamilton, in reply to an inquiry about whether he had driven the Cadillac to the place where the officers took custody of it, answered that he had driven the car to that place. When one of the officers requested permission to search the car, James Hamilton said,

"Have you got a search warrant?" The officer replied that he "did not, but we would get a search warrant." James Hamilton replied, "There's no need of that. You can search." James Hamilton then handed the car keys to Detective Hoyle and the search was made.

It is generally held that the owner or occupant of premises, or one in charge thereof, may consent to a search of such premises, and such consent will render competent evidence thus obtained. Consent to the search dispenses with the necessity of a search warrant altogether. *S. v. Moore,* 240 N.C. 749, 83 S.E. 2d 912. The defendant James Hamilton consented to the search now complained of and thereby waived the necessity for a search warrant.

Cecil and Lexy Hamilton, according to their statements, were passengers in the car, traveling with their brother James Hamilton, and connected themselves with the tools and implements found therein, claiming ownership of some of the articles and stating that a company they operated in Maryland owned the remainder of them. Nevertheless, Cecil and Lexy Hamilton had no right to object to the search of James Hamilton's car. Their rights were not invaded. A guest or passenger in an automobile has no grounds for objection to a search of the car by a peace officer. *S. v. McPeak, supra.*

This assignment of error is overruled.

The defendants' fourth assignment of error is to the overruling of their motion to be permitted to examine the FBI reports and notes prior to the trial. However, the defendants did not assert that access to such reports was necessary for the preparation of their defense. They do not so contend now. It will also be noted that counsel for each defendant declined to cross examine FBI Agent Johnson as to his testimony or his notes. Moreover, the defendants do not cite any authority in support of this assignment of error, and the same is overruled. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 810.

Assignment of error No. 5 relates to defendants' motion for a continuance which was denied.

The defendants were arrested on 23 February 1964. The record reveals that on or before 26 February 1964 each defendant had employed counsel. It is further disclosed by the record that at the session of the Superior Court of Nash County at which the defendants were tried, the three defendants had some eleven cases pending against them. In the meantime, defendants' counsel had had more than three months to prepare for trial; in fact, the only basis for the request for a continuance was the fact that the solicitor did not inform them until 29 May 1964 that probably only the cases involving the breaking and entering, larceny and safe-breaking, *et cetera,* at the M. C. Braswell Company would be tried at the June 1964 Criminal Session of the Nash Superior

Court. Furthermore, the bills of indictment upon which these defendants were tried had been returned at the March-April 1964 Session of the Superior Court of Nash County.

> "A motion for a continuance is addressed to the sound discretion of the trial court and the denial of the motion will not be disturbed in the absence of a showing of abuse of discretion or that defendant has been deprived of a fair trial." Supplement to Vol. I, Strong's North Carolina Index, § 86, page 249; *S. v. Patton,* 260 N.C. 359, 132 S.E. 2d 891; *S. v. Stroud,* 254 N.C. 765, 119 S.E. 2d 907; *S. v. Kirkman,* 252 N.C. 781, 114 S.E. 2d 633.

We hold that this assignment of error is feckless and is, therefore, overruled.

The defendants assign as error the failure of the court below to sustain their motion for sequestration of the State's witnesses.

Under our decisions, the sequestration of witnesses is not a matter of right but of discretion on the part of the trial judge. The exercise of such discretion is not reviewable in the absence of abuse of discretion. No abuse of discretion is shown in this respect on the record before us. *S. v. Spencer,* 239 N.C. 604, 80 S.E. 2d 670, and cited cases.

This assignment of error is likewise overruled.

The defendants set out numerous assignments of error challenging the admissibility of the State's evidence. In fact, the admissibility of practically all of the State's evidence is challenged, a large part of which is set out in question and answer form, contrary to the requirements of Rule 19(4) of the Rules of Practice in the Supreme Court, 254 N.C. at page 800. The objection to the admission of a substantial part of the evidence is based on the contention that the defendants were unlawfully arrested without a warrant and that the evidence obtained in searching the automobile involved was inadmissible because such evidence was obtained without a search warrant. In view of the disposition which we have heretofore made with respect to these objections, we hold that these assignments of error are without merit. Moreover, most of them are broadside and do not conform to the requirements of the Rules of this Court.

Assignments of error Nos. 25 through 35 are directed to the failure of the court below to sustain defendants' respective motions for judgment as of nonsuit. The defendants contend that the evidence offered in the trial below is all circumstantial and raises only conjecture and speculation as to the guilt of the defendants and is, therefore, insufficient to warrant its submission to the jury.

We concede that the State relied on circumstantial evidence in the trial below. However, in criminal cases, every circumstance that is cal-

culated to throw any light upon the supposed crime is admissible. The weight of such evidence is for the jury.

In the case of *S. v. Alston,* 233 N.C. 341, 64 S.E. 2d 3, this Court said:

> "True, the verdicts here rest entirely upon circumstantial evidence, 'but circumstantial evidence is not only a recognized and accepted instrumentality in the ascertainment of truth, but it is essential, and, when properly understood and applied, highly satisfactory in matters of the gravest moment.' *S. v. Brackville,* 106 N.C. 701, 11 S.E. 284; *S. v. Cash,* 219 N.C. 818, 15 S.E. 2d 277. 'In some classes of cases the chain of evidence is said to be no stronger than the weakest link, but this is not always true, for sometimes facts, which seem weak by themselves, may be woven together like twigs in a bundle, or wires in a cable, and so a strong case may be constructed of facts which would be weak by themselves.' Lockhart, North Carolina Handbook of Evidence, 2d Ed., Sec. 266, p. 316."

The three defendants are brothers. The evidence tends to show that they were traveling together and were returning from a trip to Florida; that they "cased" the Braswell store on Saturday morning, 22 February 1964. Two chisels from the Braswell store were found in the glove compartment of defendants' car. The punch found in the defendants' car was identified by the FBI agent as the one used on the tumbler nest from the Braswell safe. Defendants stated to the officers that they were together all during Saturday night; that no one else had used the 1963 Cadillac. The car in which they were traveling contained many tools and implements commonly used by persons for breaking, entering and safe-cracking. Either personal ownership of these tools was claimed or that they belonged to a business operated by them in Maryland.

When all of the evidence adduced in the trial below is considered in the light most favorable to the State, as it must be on motion for judgment as of nonsuit, we hold that it was sufficient to carry the case to the jury against each of these defendants on the charges set out in the respective bills of indictment. *S. v. Alston, supra; S. v. Weinstein,* 224 N.C. 645, 31 S.E. 2d 920; *S. v. Ham,* 224 N.C. 128, 29 S.E. 2d 449.

All these assignments of error are overruled.

Defendants' assignment of error No. 36 purports to challenge the correctness of the court's charge to the jury. Under this one assignment of error the appellants rely upon 49 exceptions upon which they undertake to raise various and sundry questions. Many of these exceptions are to portions of the charge covering several pages of the record. If any por-

tion of the charge within an exception is correct, the exception must fail. *S. v. Atkins,* 242 N.C. 294, 87 S.E. 2d 507. Then, in assignment of error No. 37, the appellants purport to except to the charge in its entirety.

This Court has tried repeatedly to impress upon the members of the Bar that "an assignment of error must present a single question of law for consideration by the court." An assignment which attempts to raise several questions is broadside. *Dobias v. White,* 240 N.C. 680, 83 S.E. 2d 785; *Suits v. Insurance Co.,* 241 N.C. 483, 85 S.E. 2d 602; *Spears v. Randolph,* 241 N.C. 659, 86 S.E. 2d 263; *S. v. Atkins, supra; Rigsbee v. Perkins,* 242 N.C. 502, 87 S.E. 2d 926; *Allen v. Allen,* 244 N.C. 446, 94 S.E. 2d 325; *Weavil v. Trading Post,* 245 N.C. 106, 95 S.E. 2d 533; *Gurganus v. Trust Co.,* 246 N.C. 655, 100 S.E. 2d 81; *Hayes v. Bon Marche,* 247 N.C. 124, 100 S.E. 2d 213; *Bulman v. Baptist Convention,* 248 N.C. 392, 103 S.E. 2d 487; *Hines v. Frink* and *Frink v. Hines,* 257 N.C. 723, 127 S.E. 2d 509; *Horton v. Redevelopment Commission,* 262 N.C. 306, 137 S.E. 2d 115.

An appellant may group a number of exceptions under a single assignment of error when, and only when, such exceptions relate to the single question of law raised by the assignment of error. *Dobias v. White, supra.*

Assignments of error Nos. 36 and 37 are overruled. Even so, we find nothing in the court's charge in the trial below that in our opinion is prejudicial to these defendants or any one of them.

We have had considerable difficulty with the record and defendants' brief in this case. The record consists of 331 pages, and while the evidence covers only 112 pages of the record, the assignments of error, as grouped and set out in the record, cover 129 pages. Moreover, while the defendants' brief consists of 99 pages, many of the 389 exceptions set out in the record and in the assignments of error have not been brought forward and discussed in the brief, as required by the Rules of this Court, and will, therefore, be deemed abandoned. Rules of Practice in the Supreme Court, 254 N.C. 810.

We find no error in the trial below that in our opinion would justify a new trial.

No error.

IN RE B. B. TROUTMAN, SS #237-01-5494, EMPLOYEE, AND DOUGLAS AIRCRAFT COMPANY, INCORPORATED, EMPLOYER, AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA.

(Filed 28 April, 1965.)

1. Master and Servant § 108—

Where the chairman of the Employment Security Commission hears an appeal from an appeals deputy and enters a decision and order in respect to the right of a claimant to recover unemployment benefits, and appeal is taken therefrom directly to the Superior Court, G.S. 96-4(a), the decision and order may be deemed the decision and order of the Commission.

2. Master and Servant § 105— Whether offer of job requiring less skill and paying lower wage is "suitable" depends on circumstances.

Where the work of an employee is terminated by reason of the curtailment of the employer's operations, and the employer immediately offers the employee another job of a substantially lower classification in respect of skill and compensation, the holding of the Commission that the substitute job was not "suitable employment" within the purview of G.S. 96-14(1) cannot be held erroneous as a matter of law, since whether such job was suitable may depend upon the length of time the employee remains unemployed and his prospect of obtaining employment at his prior rating and compensation, and the employee should be given a reasonable time within which to find work at the higher skill.

APPEAL by Douglas Aircraft Company, Incorporated, from *Walker, Special Judge,* November 16, 1964 "D" Session of MECKLENBURG.

This proceeding originated January 27, 1964 when B. B. Troutman filed a claim against Douglas Aircraft Company, Incorporated, of Charlotte, North Carolina, (Douglas) for unemployment benefits under the Employment Security Law, G.S. Chapter 96.

Upon appeal by Douglas from a determination made by a Claims Deputy, an Appeals Deputy determined and declared the claimant eligible to receive benefits beginning January 27, 1964, and continuing through February 23, 1964, and that he "should thereafter be paid or denied benefits in accordance with his claims record." Douglas appealed to the Employment Security Commission. As to procedure, see G.S. 96-15.

Douglas' appeal to the Commission was heard April 1, 1964 by the Chairman of the Commission, who made the following findings of fact:

"1. The claimant filed claim for unemployment insurance benefits on January 27, 1964, having been separated from employment with Douglas Aircraft Company, Incorporated, Charlotte, North Carolina, on January 10, 1964.

"2. The claimant was first employed by Douglas Aircraft Company, Incorporated, on August 27, 1956, and remained continuously in its

employ until July 29, 1960, at which time his employment was terminated by the company by reason of no work available. At that time the claimant was offered a transfer within the same plant or location to another job occupation, but he refused the same. The claimant was earning $3.15 an hour at the time of this separation. He was rehired as a tool and die maker on November 21, 1960, at an hourly rate of $2.60 an hour and remained continuously employed until January 10, 1964. At that time his hourly rate of pay was $2.90 an hour. The job as a tool and die maker was terminated by reason of curtailment of operations. Simultaneously with the termination of his employment as a tool and die maker, the claimant was offered a job as an electrical bench assembler at a rate of pay of $2.25 an hour. The claimant refused to accept this new job, and he was separated by the company. The claimant withdrew his vacation and sick pay earned in the amount of $251.52 which paid him through January 26, 1964. The job offered the claimant as an electrical bench assembler entailed operations working at a bench, soldering electrical wires, and it was a simple operation performed mostly by women. The claimant had never performed this type of work. However, he would have had no trouble in mastering the technique, had he accepted such job. Under the terms of the contract with the bargaining agent, the claimant would have been subject to recall to the job of a tool and die maker, in order of his seniority, if the workload increased and it was necessary for the employer to increase the forces of the tool and die makers.

"3. On or about January 28, 1964, the claimant was offered a job by the Sangamo Electric Company as a tool and die maker paying a wage of $3.50 an hour. The location of this plant is at Walhalla, South Carolina, a distance of approximately one hundred and eighty miles from the claimant's home. The claimant refused the job because of the distance from his residence, and further for the reason that his wife had a job in North Carolina and would be required to separate from that job if they moved their residence to Walhalla, South Carolina.

"4. During the period the claimant has filed claims for benefits he has actively sought work and has been otherwise able to work."

The Chairman's findings of fact and his "Reasons and Conclusions of Law" were set forth in an order, signed and entered in the name of the Commission by the Chairman, in which it was adjudged that "the claimant shall suffer no disqualification" (1) because of his separation from Douglas on January 10, 1964, or (2) because of a work refusal with Douglas on January 10, 1964, or (3) because of a work refusal with Sangamo Electric Company on or about January 28, 1964. It was "further ORDERED, ADJUDGED and DECREED that the claimant is eligible to receive benefits beginning January 27, 1964 and continuing

through February 23, 1964, and shall thereafter be paid or denied benefits in accordance with his claims record."

Douglas excepted and appealed to the superior court where Judge Walker, after hearing, entered judgment affirming the Commission's order and taxing Douglas with the costs. Douglas excepted and appealed.

Bradley, Gebhardt, DeLaney & Millette for appellant Douglas Aircraft Company, Incorporated.

W. D. Holoman, R. B. Overton, R. B. Billings and D. G. Ball for appellee Employment Security Commission of North Carolina.

BOBBITT, J. The record indicates the Commission's order, from which Douglas appealed to the superior court, constitutes the decision of the Chairman. G.S. 96-4(a) contains this provision: "The chairman of said Commission shall, except as otherwise provided by the Commission, be vested with all authority of the Commission, including the authority to conduct hearings and make decisions and determinations, when the Commission is not in session and shall execute all orders, rules and regulations established by said Commission." Douglas appealed directly to the superior court. Under the circumstances, the decision and order are deemed the decision and order of the Commission. *Employment Security Comm. v. Roberts,* 230 N.C. 262, 52 S.E. 2d 890.

The pertinent facts are established by the Commission's unchallenged findings. No evidence appears in the record before us.

Douglas' only specific exception is to "(t)he failure of the Court to conclude *as a matter of law* that the claimant B. B. Troutman should be disqualified for voluntarily leaving his employment with Douglas Aircraft Company as provided by G.S. 96-14(1)." (Our italics.) Its brief asserts: "Douglas did not except to any findings of fact and therefore the only question involved on this appeal is whether the claimant was discharged or whether he voluntarily left his employment at Douglas. If he voluntarily left his employment, did he do so without good cause attributable to the employer?" The appeal presents no question with reference to claimant's refusal on January 28, 1964 to accept the job in Walhalla, South Carolina.

G.S. 96-14(1), on which Douglas relies, provides that "(a)n individual shall be disqualified for benefits" for not less than four nor more than twelve weeks occurring within a benefit year "if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he left work voluntarily without good cause attributable to the employer . . ."

On January 10, 1964, when *it terminated* claimant's employment as a tool and die maker, Douglas offered claimant a job as an electrical

bench assembler. Claimant's refusal to accept Douglas' offer of a substitute job in a substantially lower job classification in respect of skill and compensation is the sole basis of Douglas' contention that claimant left employment by Douglas voluntarily and without good cause attributable to the employer.

G.S. 96-13 prescribes conditions with which an unemployed individual must comply to be eligible for benefits. G.S. 96-14 sets forth conditions upon which an individual "shall be disqualified for benefits." In *In re Miller*, 243 N.C. 509, 91 S.E. 2d 241, it was held that these statutes, being *in pari materia*, are to be construed together. In *Miller*, it was held that claimant, a member of the Seventh Day Adventist Church, was "available for work" within the meaning of G.S. 96-13 notwithstanding, on account of her conscientious and religious beliefs, she was not available for work from sundown Friday until sundown Saturday. Johnson, J., for this Court, said: "The words, 'available for work,' as used in the statute mean 'available for suitable work' in the same sense as the words, 'suitable work,' are used in the cognate statute, 96-14."

G.S. 96-14(3) provides that "(a)n individual shall be disqualified for benefits" for not less than four nor more than twelve weeks occurring within a benefit year "if it is determined by the Commission that such individual has failed without good cause . . . (ii) to accept suitable work when offered him . . ."

G.S. 96-14(3) also provides: "In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence."

Unless the job of electrical bench assembler, offered by Douglas to claimant on January 10, 1964 was "suitable work" within the meaning of G.S. 96-14, claimant did not voluntarily leave his employment without good cause attributable to the employer.

This proceeding relates solely to benefits for the four weeks beginning January 27, 1964 and continuing through February 23, 1964. After reference to the factors to be considered in determining whether a particular job is suitable work for an individual (G.S. 96-14(3)), and after review of the evidence in relation to these factors, the Commission made these determinations: ". . . an individual with the skill of the claimant should be given a reasonable time within which to seek work in his highest vocation. In view of the differential in pay, the differential in skill required, and the length of the unemployment of the claimant, it is concluded that the claimant's refusal to accept the job

as an electrical bench assembler was with good cause and, therefore, no disqualification should be imposed." The import of the Commission's determinations, decision and order is that a reasonable time for claimant to seek work in his highest vocation extended to and included the period beginning January 27, 1964 and continuing through February 23, 1964.

The precise question before us is whether, upon the unchallenged findings of fact, the job of electrical bench assembler offered by Douglas to claimant on January 10, 1964 was "suitable work" within the meaning of G.S. 96-14 *as a matter of law*. While the question is of first impression in this jurisdiction, well-reasoned decisions in other jurisdictions support the Commission's determinations, decision and order.

In *Pacific Mills v. Director of Division of Employ. Sec.*, 77 N.E. 2d 413 (Mass.), decisions of the administrative board awarding unemployment benefits were upheld. With reference to each of two claims, the issue was "whether the employee is barred from benefits by a refusal to accept work offered by the petitioner as a substitute for that previously performed by the employee." The substitute work offered by the employer was of a lower grade at substantially less wages. The court held that the determination as to whether the substitute work offered was "suitable" was to be made by the administrative board; and that the employer's appeal did not disclose error of law or arbitrary conduct. The following is an excerpt from the opinion of Chief Justice Qua: "Under the present wording of the statute we cannot say that there was error of law in taking into account such matters as the skill and capacity of the worker, his accustomed remuneration, his expectancy of obtaining equivalent employment, and the time which he had had to obtain it. It may reasonably be thought that employment which requires a highly trained and skilled worker, who still has a fair prospect of securing work in his own line, to step down into work of a substantially lower grade at substantially less pay before he has had a chance to look about him is not truly 'suitable.' Acceptance of such employment might conceivably condemn the worker permanently to a scale of employment lower than that to which his training, skill, and industry fairly entitle him. Suitability is not a matter of rigid fixation. It depends upon circumstances and may change with changing circumstances. Employment which may not be suitable while there is still a good present expectancy of obtaining other employment more nearly proportionate to the ability of the worker may become suitable if that expectancy is not realized within a reasonable time."

In *Dubkowski v. Administrator, Unemploy. Comp. Act*, 188 A. 2d 658 (Conn.), the decision of the administrator awarding unemployment benefits was upheld. The employer, upon terminating plaintiffs' employ-

ment in skilled jobs, offered them substitute work of a lower grade at substantially less wages. In upholding the decisions of the administrator that the substitute work offered by the employer was "unsuitable," the court, in opinion by Shea, J., said: "Before work calling for less competence and lower remuneration can be found to be suitable, a claimant is entitled to a reasonable length of time within which to find work at his higher skill. . . . The longer a claimant is unemployed, . . . the more he is obligated to take less desirable work and to make himself available to take it."

In *Bayly Manufacturing Co. v. Department of Emp.*, 395 P. 2d 216 (Colo.), the decision of the administrative board awarding unemployment benefits was upheld. In upholding the administrative decision that the substitute work offered by the employer was "unsuitable," the court, in opinion by Pringle, J., said: "Work which may be deemed 'unsuitable' at the inception of the claimant's unemployment, and for a reasonable time thereafter, because it pays less than his prior earning capacity, may thereafter become 'suitable' work when consideration is given to the length of unemployment and the prospects for obtaining customary work at his prior earning capacity. What is a 'reasonable time' is not rigid and inflexible and it must initially be determined as a question of fact under the peculiar circumstances of each individual case by the appropriate agency." The opinion cites *inter alia* the prior *Pacific Mills* and *Dubkowski* decisions.

In *Hallahan v. Riley*, 45 A. 2d 886 (N.H.), cited in *Dubkowski* and in *Bayly*, the plaintiff, separated from her job as a "mender" on March 11, 1945, refused employment as a "burler," a job involving less skill and less compensation. Plaintiff was allowed unemployment benefits "up to the end of the employment week prior to" May 23, 1945, the date of decision by the Appeal Tribunal, a period of approximately ten weeks. However, the Appeal Tribunal ordered that "she should not be considered eligible if subsequently, without good cause, she refuses to accept work which under present conditions would, after her prolonged period of unemployment, be suitable for her, namely, burling, or any other work which she can readily perform, the conditions of which are not substantially less favorable than those prevailing for similar work within the locality." Plaintiff's appeal was dismissed on the ground the Appeal Tribunal had authority to make said determinations.

The statutory provisions considered in *Pacific Mills, Dubkowski, Bayly* and *Hallahan* are in substantial accord with those in our Employment Security law. We adopt as sound the reasoning underlying these decisions.

Here, the Commission determined in substance that the substitute work offered to claimant by Douglas on January 10, 1964, was not

suitable work within the meaning of G.S. 96-14; that after his separation from Douglas' employment on January 10, 1964, claimant actively sought work as a tool and die maker or substantially similar work; and that a reasonable time to find such work at his higher skill and at higher wages had not expired on February 23, 1964. In our opinion, and we so decide, the undisputed facts afford ample basis for such determinations. They do not, as Douglas contends, establish *as a matter of law* that claimant voluntarily left the employment of Douglas "without good cause attributable to the employer." Whether claimant is entitled to unemployment benefits for any period subsequent to February 23, 1964 is not presented. In this connection, see *In re Steelman,* 219 N.C. 306, 13 S.E. 2d 544.

With reference to the three decisions cited in Douglas' brief: In *Dentici v. Industrial Commission,* 58 N.W. 2d 717 (Wis.), and in *Geobelbecker v. State,* 53 N.J. Super. 53, 146 A. 2d 488, administrative decisions to the effect that the claimants had left the employment voluntarily without good cause were upheld. In *Erie Forge & St. Corp. v. Unemployment Comp. Bd. of R.,* 178 Pa. Super. 348, 115 A. 2d 791, where the claim for unemployment benefits was denied, the opinion of Rhodes, President Judge, states: "The suitability of the work was not involved and the board's finding to that effect is not supported by substantial evidence."

Decisions of the Superior Court of Pennsylvania, apparently in accord with the views approved herein, include: *American Bridge Co. v. Unemployment Comp. Bd. of Review,* 46 A. 2d 510; *Haug v. Unemployment Comp. Bd. of Review,* 56 A. 2d 396; *Neff v. Unemployment Compensation Bd. of Review,* 169 A. 2d 338; *Vogel v. Unemployment Compensation Bd. of Review,* 181 A. 2d 885. See also: *Di Re v. Central Livestock Order Buying Company,* 74 N.W. 2d 518 (Minn.); *Hagadone v. Kirkpatrick,* 154 P. 2d 181 (Idaho); *Broadway v. Bolar,* 29 So. 2d 687 (Ala.).

For the reasons indicated, the judgment of the court below is affirmed.

Affirmed.

BOWDEN *v.* BOWDEN.

WILLIAM H. BOWDEN, PETITIONER v. WILLIAM C. BOWDEN, MABEL BOWDEN BELLAMY, HENRY BOWDEN, DAVID BOWDEN, ARTHUR BOWDEN, JR., ELOISE BOWDEN, NELLIE MAE ALTMAN, ORIGINAL DEFENDANTS AND DAISY R. BOWDEN WARD, NELLIE B. BOWDEN BEST, MATTIE T. BOWDEN SUTTON, FRANK JR., BOWDEN, EMMETT L. BOWDEN, WILLIE WRIGHT, HENRY WRIGHT, WILLIS WRIGHT, ARTHUR WRIGHT, EDDIE WRIGHT, JOHN HENRY BOWDEN, HATTIE LEE BOWDEN BONEY, BETTY HICKS DUPREE, GENEVA HICKS MOORE, NANCY HICKS DURFIN, DAISY HICKS WILSON, SWINDELL SPRIGHT AND RENA BOWDEN FUTRELLE, ADDITIONAL DEFENDANTS.

(Filed 28 April, 1965.)

1. Alteration of Instruments—

Words in handwriting in the body of a typewritten instrument are alterations apparent on its face, but an erasure or interlineation is not in law an alteration if made before the instrument is executed, and an alteration in a deed made after its execution and delivery is good if made with the knowledge and consent of grantor, and before registration a deed may be changed in any way that may be agreed upon between the parties thereto, so far as it affects them.

2. Same—

The burden is upon the party attacking a deed on account of erasures or interlineations appearing on its face to prove by the greater weight of the evidence that the interlineations or other alterations were made after execution of the deed.

3. Same—

Where it has been established that alterations were made after execution and delivery of a deed, the burden is upon those claiming under the altered deed to prove that the alterations were made with the knowledge and consent of the grantor.

4. Deeds § 11—

As a general rule where two clauses in a deed are repugnant the first in order will be given effect and the latter rejected.

5. Same—

The granting clause is the very essence of the contract, and in the event of repugnancy between the granting clause and the *habendum* clause and other recitals, the granting clause will prevail.

6. Same; Husband and Wife § 14—

Where the granting clause in a deed is to a person named "and wife" the deed conveys as estate by the entireties notwithstanding the name of the wife nowhere appears in the deed and the habendum is solely to the named person.

7. Registration § 5—

Registration is for the protection of purchasers for value and creditors, and the rights of the original parties or their heirs and devisees are not

dependent upon the terms of the instrument as recorded but upon the terms of the original instrument, and the original deed is admissible to correct mistakes in the recordation, and, as between such parties, the correction of an error of registration neutralizes all presumptions in favor of the prior recordation.

8. Same; Alteration of Instruments—

Where it is apparent from the original typewritten instrument that the granting clause of a deed was to a person named with the words "and wife" added in handwriting, that the handwritten words were added prior to recordation, but that through error in recording the instrument the words "and wife" were added in the recital of consideration and left out of the granting clause, *held*, as between the original parties, their heirs and devisees, the error in recording the instrument may be corrected in accordance with the original instrument or the instrument re-recorded, so as to create an estate by the entireties.

9. Appeal and Error § 40—

Where the facts are stipulated or admitted so that the rights of the parties upon such facts are questions of law, a directed verdict in accordance with the rights of the parties upon such facts cannot be prejudicial, even though the directed verdict is in favor of the parties having the burden of proof and fails to direct the jury to answer to the contrary if they failed to find the facts as all the evidence tended to show.

APPEAL by plaintiff from *Parker, J.*, September 28, 1964, Session of WAYNE.

Suit to remove cloud from title to land.

There appears of record in the office of the Register of Deeds of Wayne County a deed, and the pertinent portions of the record are:

"THIS DEED, Made this 31 day of October, 1917, by B. E. Martin and Maggie Martin, his wife . . ., of the first part, to Henry Bowden and wife . . ., of the second part:

"WITNESSETH, That said B. E. Martin and wife, Maggie Martin in consideration of Three Thousand-Six Hundred Fifty Dollars, to them paid by *Henry Bowden his wife*, . . . do grant, bargain, sell and convey to said *Henry Bowden* his heirs and assigns, a certain tract or parcel of land in Wayne County . . . (there is no controversy concerning quantity, description and identity of the land).

"TO HAVE AND TO HOLD the aforesaid tract or parcel of land and all privileges and appurtenances thereto belonging, to the said Henry Bowden his heirs and assigns, to their only use and behoof forever.

"And the said B. E. Martin and wife Maggie Martin, for themselves and their heirs, executors and administrators, covenant with said Henry Bowden his heirs and assigns, that they are seized

. . ." (the usual covenants of seizin, right to convey, quiet enjoyment and against encumbrances are stated).

This record shows due execution by Martin and wife, proper acknowledgement by them before a notary public on 31 October 1917, probate and order of registration by the Clerk on 7 November 1917, filing for registration on 7 November 1917 and recordation in book 128, at page 391.

It was stipulated by the parties that on 31 October 1917, the date of the deed, Daisy Bowden was the wife of Henry Bowden, and Henry Bowden died intestate and without issue on 5 June 1918, and was survived by Daisy Bowden, his widow. It was further stipulated that Daisy Bowden remained in possession of the land described in the deed (except for a small portion she and Henry Bowden conveyed prior to his death) until her death on 8 January 1961, she left a will, which has been admitted to probate in Wayne County, and it purports to devise said land to the original defendants in this action.

Plaintiff and the additional defendants are the heirs at law of Henry Bowden, the person named in the foregoing record of deed. Plaintiff alleges that he and additional defendants are owners of the land in question as such heirs, by virtue of the provisions of the foregoing record of deed. The additional defendants have filed no pleadings in this action.

At the trial, the original defendants offered in evidence the original deed from Martin and wife. It is identical in content with the recording set out above, except for differences in the consideration recital and the granting clause, which are as follows:

> "WITNESSETH, That said B. E. Martin and wife Maggie Martin, in consideration of Three Thousand-Six Hundred-Fifty Dollars, to them paid by *Henry Bowden* . . . do grant, bargain, sell and convey to said *Henry Bowden,* his *wife* heirs and assigns . . ."

It is observed that in the 1917 recordation it is stated that the consideration was paid by "Henry Bowden his wife" and that the land was granted to "Henry Bowden his heirs and assigns." In the original deed it is stated that the consideration was paid by "Henry Bowden" and that the land was granted to "Henry Bowden, his wife heirs and assigns."

After the institution of this action and before the trial, the original deed (by photographic copy thereof) was re-recorded on 14 September 1962 (about 18 months after the death of Daisy Bowden) in book 577, pages 422-425, Registry of Wayne County.

The original deed is made on a printed form. The form is filled in by typewriter. However, the words "and wife" (following the words

"Henry Bowden") in the naming clause, and the word "wife" (following the words "Henry Bowden, his"), in the granting clause, are in longhand in ink. These words "and wife" and "wife" are the only words written in longhand in the body of the deed, and they do not appear to be in the same handwriting. The form had ample space for interlining these words.

Plaintiff alleges and contends that the "re-recorded purported deed has patent alterations upon its face; the said patent alterations materially change the provisions in the deed which is recorded in Book 128 at page 391; . . . the re-recorded instrument . . . is invalid on account of the patent material alterations thereon."

The original defendants allege and contend "that the deed . . . was originally recorded in Book 128 at page 391 of the Wayne County Registry but, because of a mistake made in the registration, the said deed was filed for re-registration on September 14, 1962 . . . and was re-recorded in Book 577 at page 422 . . ."

Plaintiff asserts that the claim of title by the original defendants, based on the re-recorded deed and the will of Daisy Bowden, is a cloud on his title. On their part, original defendants assert that the claim of plaintiff and additional defendants, based on the erroneous record of the deed in book 128 at page 391, is a cloud on their title.

The verdict of the jury is that the claim of the original defendants is not a cloud on title of plaintiff and the additional defendants, that the claim of plaintiff and additional defendants is a cloud on the title of the original defendants, and that the original defendants are the owners in fee simple and entitled to the possession of the lands in question. Judgment was entered accordingly. Plaintiff appeals.

Sasser and Duke; Whitley and Nowell for plaintiff, appellant.
John S. Peacock and James N. Smith for defendant appellees.

MOORE, J. Plaintiff's assignments of error are based on exceptions to the charge. The crucial question is whether the trial judge erred in instructing the jury peremptorily to answer the issues in favor of the original defendants if they found the facts "to be as all of the evidence tends to show," without instructing them that if they failed to so find they should answer the issues in favor of plaintiff and the additional defendants.

All of the evidence pertinent and material to the issues raised by the pleadings, except documentary evidence, was stipulated by the parties. The admissibility, content and authenticity of the documentary evidence (the will of Daisy Bowden, the deed of Martin and wife and the two recordings thereof) are not in controversy; they are alleged on the

one hand and in effect admitted on the other; their legal effect and the inferences to be drawn from their form and provisions are the matters in controversy.

The original deed, offered in evidence by the original defendants, is unquestionably the identical deed filed for record on 7 November 1917. The entry of the Register of Deeds, of registration in book 128, page 391, on 7 November 1917, appears on the back of the deed; and the genuineness of the entry is not questioned. The interlineations presently appearing on the original deed were made prior to the filing for registration on 7 November 1917. The 1917 recording shows "Henry Bowden *and wife*" in the naming clause — therefore, the interlineation "and wife" had been added before that recording. The 1917 recording shows "Henry Bowden his *wife*" in the consideration recital and "Henry Bowden" in the granting clause; the original deed shows "Henry Bowden" in the consideration recital, and "Henry Bowden his *wife*" in the granting clause. The original deed does not show that any erasure was made following the name "Henry Bowden" in the consideration recital. It is clear therefore that the interlineation "wife" was not shifted from the consideration recital to the granting clause after the 1917 recording. It is patent that the interlineation "wife" was in the granting clause at the time of filing for recordation on 7 November 1917, and by mistake in recording (the recording was made in longhand on a printed form sheet) the copier placed the words "his wife" on the blank line in the consideration recital, when they should have been put in the granting clause.

The original deed (made on a printed form) was prepared on a typewriter as a conveyance from B. E. Martin and wife, Maggie Martin, to Henry Bowden. The words "and wife" in the naming clause, and the word "wife" in the granting clause, were interlined in pen after the deed was typewritten and before it was recorded. The deed was executed and acknowledged on 31 October 1917; it was filed for registration a week later, on 7 November 1917. The alteration of the deed by the interlineation of "and wife" and "wife" is apparent upon the face of the instrument. "An alteration is deemed to be apparent on the face of the instrument in cases of interlineation, erasure, difference of handwriting, changes of figures or words, or other irregularities on the face of the paper." 4 Am. Jur. 2d, Alteration of Instruments, § 80, p. 74. ". . . transfer of title cannot be effected by the device of adding or substituting the name of another person for that of the grantee who was designated in the deed." 16 Am. Jur., Deeds, § 357, p. 644; *Perry v. Hackney,* 142 N.C. 368, 55 S.E. 289. But the alteration of a deed by adding the name of another grantee does not ordinarily divest the title and estate conveyed to the original grantee by the deed in its original

form. 4 Am. Jur. 2d, Alteration of Instruments, § 47, p. 45; 16 Am. Jur., Deeds, § 354, p. 643. See also *McLindon v. Winfree,* 14 N.C. 262.

An erasure or interlineation is not in law an alteration if made before the deed is executed. *Wicker v. Jones,* 159 N.C. 102, 74 S.E. 801. A deed altered after its execution and delivery is good if the alteration is made with the knowledge and consent of the grantor. *Krechel v. Mercer,* 262 N.C. 243, 136 S.E. 2d 608; *Campbell v. McArthur,* 9 N.C. 33. Before registration a deed may be changed in any way that may be agreed upon between the parties thereto, so far as it affects them. *Respass v. Jones,* 102 N.C. 5, 8 S.E. 770. See 67 A.L.R. 367.

When it is apparent that there are interlineations in a deed which materially alter the effect thereof as originally drawn, the question arises whether the burden is on the party claiming under the deed, as altered, to prove that the interlineations were made at the time of or before the execution of the deed, or on the party attacking the altered deed to prove that they were made after execution. On this question the authorities are in irreconcilable conflict. 4 Am. Jur. 2d, Alteration of Instruments, §§ 80-83, pp. 74-78. But the holding in this jurisdiction is that the burden is upon the party attacking the deed to prove by the greater weight of the evidence that the interlineations or other alterations were made after execution of the deed. *Wicker v. Jones, supra; Collins v. Vandiford,* 196 N.C. 237, 145 S.E. 235. In *Wicker* it is said:

> ". . . it would seem to be wise and just to adopt a rule which will tend to preserve and sustain titles acquired by such deeds (showing interlineations and erasures), although under it an injustice may occasionally result, and in our opinion it is safer, and in accord with the better public policy to hold, as we do, that the party claiming under a deed is entitled to introduce it in evidence, upon proof of its execution, and that the burden is upon the party who assails it, on account of erasures or interlineations appearing on its face, to satisfy the jury by the greater weight of the evidence that the erasures and interlineations were made after execution of the deed."

Where it has been established that alterations were made after execution and delivery of a deed, the burden is upon those claiming under the altered deed to prove that the alterations were made with the knowledge and consent of the grantor. *Krechel v. Mercer, supra.*

The interlineations in the subject deed are such as to arouse suspicion of wrongdoing. They are apparently in different handwritings. They were made by a person or persons seemingly unfamiliar with the proper preparation of deeds, for the wife is not included in the *habendum* and warranty clauses. But these circumstances have no

tendency to show that the interlineations were made after the execution of the deed. Furthermore, there is no evidence in the record from which it may be reasonably inferred that the interlineations were made after execution of the deed. The plaintiff has failed to carry the burden which the law casts upon him.

The granting clause fixes the title in Henry Bowden and wife. As a general rule where two clauses in a deed are repugnant, the first in order will be given effect and the later rejected. *Bryant v. Shields,* 220 N.C. 628, 18 S.E. 2d 157. The granting clause is the very essence of the contract, and in the event of repugnancy between the granting clause and the *habendum* clause and other recitals, the granting clause will prevail. And where the granting clause in a deed is to a person named "and wife," the deed conveys an estate by the entireties notwithstanding the fact that the name of the wife nowhere appears in the deed. *Byrd v. Patterson,* 229 N.C. 156, 48 S.E. 2d 45.

Plaintiff contends that the content of the 1917 record of the deed puts him in a favored position by reason of certain presumptions and evidentiary values which flow therefrom, to wit: (1) it is presumed that a public official (Register of Deeds) in the performance of official duty has acted correctly, in good faith and in accordance with law (*Huntley v. Potter,* 255 N.C. 619, 122 S.E. 2d 681), and (2) the record of a deed, in the public registry, is *prima facie* evidence of the correctness of its terms (*Sellers v. Sellers,* 98 N.C. 13). Plaintiff insists that these principles are sufficient to take the case to the jury and to require the judge to correctly instruct the jury as to applicable law, place the burden on the original defendants to overcome the presumption and the *prima facie* showing, and leave the issues to the jury without limiting them by peremptory instructions.

Plaintiff mistakes the effect and importance of registration under the facts in this case. The registration of deeds is primarily for the protection of purchasers for value and creditors; an unregistered deed is good as between the parties and the fact that it is not registered does not affect the equities between the parties. *Patterson v. Bryant,* 216 N.C. 550, 5 S.E. 2d 849; *Glass v. Shoe Co.,* 212 N.C. 70, 192 S.E. 2d 899; *Hargrove v. Adcock,* 111 N.C. 166, 16 S.E. 16. The parties to the present action are not purchasers for value or creditors. Plaintiff and the additional defendants claim title as heirs at law of Henry Bowden; the original defendants claim as devisees of Daisy Bowden. The ultimate inquiry is not what the records show, but what the terms of the original deed are. Moreover, a deed may be registered at any time after probate, and the Register of Deeds may, and has the duty to, correct an error in the record by supplying an omission, striking an erroneous entry or by re-registration of the deed. *Sellers v. Sellers, supra.* Regis-

tration relates back to the date of execution of the deed. Furthermore, an original deed is admissible to correct mistakes in the record. *Brown v. Hutchinson*, 155 N.C. 205, 71 S.E. 302. Once an error in registration is corrected, the presumption arising on, and the evidentiary advantages of, the first record are, at least, neutralized by the corrected record as between the parties to the deed and as between those claiming under the parties to the deed by gift, inheritance or devise.

Where the material facts in a case are not controverted, the rights of the parties upon such facts are questions of law, and the court may enter judgment thereon in accordance with the rights of the parties without intervention of a jury. *Peoples v. Insurance Co.*, 248 N.C. 303, 103 S.E. 2d 381. And where the material evidence bearing upon an issue is not controverted and all of it points in one direction with but one inference to be drawn from it, a peremptory instruction to answer the issue accordingly, if the evidence is found to be true, is proper. Failure of the judge to state the converse is not error where prejudice is not made to appear. *Rhodes v. Raxter*, 242 N.C. 206, 87 S.E. 2d 265. Such failure is not prejudicial where the facts are stipulated by the parties or in effect admitted by the party against whom the instruction is given, though the instruction is favorable to the party having the burden of proof.

No error.

CHARLES LEONARD WHISNANT v. AETNA CASUALTY & SURETY INSURANCE COMPANY.

(Filed 28 April, 1965.)

Insurance § 47— Attempting to push stalled car onto shoulder of road held occupying and using car within coverage of policy.

The policy in suit provided medical payments for the treatment of injuries to insured or any other person while occupying insured's vehicle with permission of the insured, and defined occupying the vehicle as being "in or upon or entering into or alighting from" the vehicle. The evidence tended to show that plaintiff was driving the car with insured's permission, that the motor failed, and that plaintiff was attempting to push the car onto the shoulder of the road and had his right hand on the steering wheel and his feet on the ground when he jumped away from the car in an effort to avoid being hit by a car approaching from his rear at a high rate of speed, and was seriously injured. *Held:* The injuries arose out of the "use of the automobile" within the coverage of the policy.

APPEAL by plaintiff from *Froneberger, J.*, September Session 1964 of RUTHERFORD.

This is a civil action to recover for medical payments in the amount of $1,000.00 which plaintiff alleges defendant is due him pursuant to the terms of a policy of insurance issued by the defendant to one Clyde R. Whisnant.

The defendant through its counsel states that the following facts are not disputed, to wit:

> "* * * (T)hat the suit is brought upon defendant's policy No. 25 FA 172751PC, issued by the defendant to Clyde R. Whisnant, Route 2, Union Mills, North Carolina; that under said policy Clyde R. Whisnant was the insured and the owner of the automobile which plaintiff was operating immediately prior to the time plaintiff was injured, this automobile being a 1951 Studebaker; that plaintiff was operating said Studebaker automobile by and with the consent of the insured owner, Clyde R. Whisnant; that at the time plaintiff was injured he was about 22 years of age, was married and had one child, and that at all times referred to in the complaint, the plaintiff was not a member of the household of Clyde R. Whisnant, did not reside in the household with Clyde R. Whisnant, but resided in his own house with his own wife and child, which said house was a distance of some one and one-half (1½) miles from the home and residence of Clyde R. Whisnant; that the policy was in effect at the time and place complained of and that the premiums thereon had been paid."

The provisions of the policy which the plaintiff alleges cover the situation involved in this case are as follows:

> "COVERAGE C—MEDICAL PAYMENTS. To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, X-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services: * * *
>
> "DIVISION 2. To or for any other person who sustains bodily injury, caused by accident, while occupying (a) the owned automobile, while being used by the named Insured, by any resident of the same household or by any other person with the permission of the named Insured; or * * *.
>
> "DEFINITIONS. The definitions under Part I apply to Part II, and under Part II: *'occupying'* means in or upon or entering into or alighting from; *'an automobile'* includes a trailer of any type."
>
> "DEFINITIONS. Under Part I: *'named Insured'* means the individual named in item I of the declarations and also includes his

spouse, if a resident of the same household; * * * 'relative' means a relative of the named Insured who is a resident of the same household * * *."

On 7 August 1963, about 8:45 p.m., plaintiff was operating the said 1951 Studebaker automobile in a northeasterly direction on U. S. Highway 64, about 15 miles west of the Town of Rutherfordton, North Carolina, near Wade Ensley's Store and Filling Station. The plaintiff testified that he stopped at the filling station, got out of his car and went into the filling station; that he purchased some gasoline and oil; that "* * * I came back out and got into the car, * * * I put the car in low gear and started on out into the road and it went in second gear and the motor died. I cut the car over on the shoulder of the road as far as I could get and got out and I saw that I could not push it by myself. * * * I was standing on the left side of the car at the left door and my feet were out on the highway and I had one hand on the steering wheel, right hand, and my left hand against the door. I was fixing to push the car out of the way. My brother-in-law had gone back up to the store to get help. I saw a vehicle coming each way. One coming up the road, and one coming down the road. * * * (T)he vehicle that was meeting me went by. The one coming up behind me was the one that was on my side of the road. * * * As it got on me, it swerved to the other side, which looked like it was going to hit me * * *. Just before the car got to me I turned loose of my car and jumped as the car rolled on me. * * * (I jumped) to try to avoid being hit. * * *"

Plaintiff was seriously injured, and as a result thereof incurred medical expenses in excess of $1,000.00.

At the close of plaintiff's evidence the defendant moved for judgment as of nonsuit. The motion was allowed. Plaintiff appeals, assigning error.

Hamrick & Hamrick for plaintiff appellant.
Hamrick & Jones for defendant appellee.

DENNY, C.J. The primary question presented for determination is whether or not under the facts in this case the court below committed reversible error in sustaining defendant's motion for judgment as of nonsuit.

In the case of *Katz v. Ocean Acc. & Guarantee Corp., Ltd.,* 112 N.Y.S. 2d 737, the plaintiff's wife had parked the plaintiff's automobile in front of their home. The driver's seat, where the plaintiff's wife had been seated, was toward the center of the roadway. She alighted from the automobile and was in the act of locking the car with her hand upon the door, when suddenly perceiving an oncoming vehicle coming

toward her she ran from the point where she was standing adjacent to the left front door of the vehicle and toward the rear of the car. There was another vehicle parked in the rear of plaintiff's vehicle, and plaintiff's wife, in an effort to avoid the oncoming vehicle, ran between plaintiff's car and the other car parked to the rear of plaintiff's car, as a result of which the oncoming vehicle struck plaintiff's vehicle causing it to be pushed backward and crushing plaintiff's wife between plaintiff's vehicle and the parked car.

The oncoming vehicle which had prevented plaintiff's wife from locking the door of plaintiff's car continued on its way and was not apprehended.

The Court held the medical payments clause in the policy, which was substantially in the same terms as that involved herein, covered the plaintiff's claim.

The Court cited with approval and quoted from the case of *Sherman v. New York Casualty Co.*, 78 R.I. 393, 82 A 2d 839, 39 A.L.R. 2d 947, in which case the plaintiff had parked his automobile and had left it. He observed the car rolling backward toward a stone wall. In an effort to stop it, he placed one hand on the back of the car and his knee on the rear bumper, as a result of which his legs were pinned between the rear bumper and the stone wall.

The trial court found for the defendant. Upon appeal, the Supreme Court of Rhode Island reversed the trial court and held the correct rule of law to be as follows:

> "* * * Judging by his (plaintiff's) injuries and the appearance of the place, and placing the most favorable construction upon what he said, it is the firm conviction of this Court that he was not on that bumper; * * *
>
> "The particular words 'in or upon' should be given a broad and liberal construction consistent with the context of the whole clause in which they appear. The key words in that clause are 'arising out of the use of the automobile' * * *. If the expression 'in or upon' is read in connection with those words we think it will reasonably appear that it was intended to make the policy applicable to injuries sustained by reason of the immediate and substantial contact of a part of plaintiff's body with the car in the course of actively promoting or serving such use. * * *"

The New York Court said:

> "* * * Under the construction placed by the defendant upon the clause in issue, it would follow that it would be necessary for plaintiff's wife to stand where she was at the time she first observed the hit and run vehicle and permit herself to be struck by

it while continuing her efforts to lock the door of the car. Certainly this cannot be the construction by this court of the terms used by the defendant in writing this policy. Such a determination would be repugnant to every principle of common decency. The plaintiff's wife obeying the primary law of nature did what any other reasonable prudent person would under the same circumstances and desperately tried to save herself from being seriously hurt. Unfortunately she was not successful and for the damages resulting by reason of this accident, the defendant should compensate the plaintiff to the stipulated extent of $500. * * *."

Likewise, in *Saint Paul-Mercury Indemnity Co. v. Broyles,* 230 Miss. 45, 92 So. 2d 252, the driver of the car drove the vehicle into the garage at her home. The concrete floor of the garage sloped toward the driveway and street. She turned the engine off and pulled the hand brake out to hold the car. It locked automatically. She got out of the car, closed the door and walked toward the rear of the car, close by it, until she got to the back of it, and as she stepped into the driveway a foot or so to the rear of the car, she heard the brakes slip and saw the car rolling back toward her. She ran three to five yards, and was struck by the car and seriously injured.

The Court upheld a recovery and said:

"Coverage C should not be disassociated from the purpose and intent inherent in the entire clause so as to limit the meaning of the word 'alighting' to simply the physical act of stepping out of the car and on the ground. See *Birmingham Railway Light & Power Co. v. Glenn,* 1912, 179 Ala. 263, 60 So. 111, 113."

In the case of *Madden v. Farm Bureau Mut. Automobile Ins. Co.,* 82 Ohio App. 111, 79 N.E. 2d 586, the plaintiff was on his way from Cincinnati, Ohio, to Columbus, Ohio, in the automobile described in the policy, and while enroute stopped on Montgomery Road in Norwood, Ohio, to change a tire. He had changed the tire and was in the act of placing the tire which he had removed in the trunk compartment in the rear of the automobile, when he was struck and injured by an approaching car going in the same direction. The Court said:

"* * * It is recited in the policy that the injury must arise out of the use of the automobile with the consent of the insured. Now did this injury arise out of the use of the automobile? Appellant's counsel calls attention to the fact that the plaintiff was placing the tire which he had just removed in the rear of the automobile, and urges that this was not a use of the automobile, but was in fact a maintenance of it, in other words, that it was

placing it in condition for use. But at the time he changed these tires the plaintiff was using the automobile to transport him from Cincinnati to Columbus. The changing of the tires was just as much a part of the use of the automobile for that journey as stopping to replenish the gasoline or oil, or for the change of a traffic light, or to remove ice, snow, sleet, or mist from the windshield. By such acts, the journey would not be abandoned. Such adjustments are a part of the use of the automobile — as much as the manipulation of the mechanism by the operator. By the purpose and intent of the appellee, he was on his way to Columbus and the automobile was being used as the means of transportation.

"So we conclude that the injury was inflicted as the result of the risk insured against.

"* * * It seems to us that it was the intent of the insurer, by the language used, to provide for coverage in every case in which the owner was using the automobile and in such a position in relation thereto as to be injured in its use. In reaching a conclusion on this subject, not only the act in which the insured was engaged at the time, but also his purpose and intent must be considered. So construed, the entire paragraph creates a field of coverage broader than a narrow construction of the words considered separately and independent of one another would indicate. * * *

"Without attempting to lay down any general rule, we are of the opinion that under the circumstances of this case and under the rule requiring a construction most favorable to the insured, we must hold that the language of this policy must be construed to cover the risk in favor of the plaintiff."

The plaintiff in the instant case at the time of the accident, according to the evidence, had his right hand on the steering wheel of the car in which he had been riding, and was trying to push the car onto the shoulder of the road, when he jumped away from the car in an effort to avoid being hit by a car approaching from the rear of his car at a very high rate of speed and which he thought was going to run into his car.

We hold that plaintiff's injuries arose out of the "use of the automobile" while being used with the permission of the named insured and that the court below committed error in sustaining defendant's motion for judgment as of nonsuit. Moreover, in addition to the above cited cases, the following authorities support this view: *Lokos v. New Amsterdam Casualty Co.*, 197 Misc. 40, 93 N.Y.S. 2d 825, *affirmed* 197 Misc. 43, 96 N.Y.S. 2d 153; *Christoffer v. Hartford Acc. & Indemnity Co.*, 123 Cal. App. 2d Supp. 979, 267 P. 2d 887; *Wolf v. American Cas. Co. of Reading, Pa.*, 2 Ill. App. 2d 124, 118 N.E. 2d 777. *Contra, Green*

v. Farm Bureau Mut. Automobile Ins. Co., 139 W.Va. 475, 80 S.E. 2d 424; *Carta v. Providence Washington Ins. Co.*, 143 Conn. 372, 122 A. 2d 734.

The facts in the instant case are distinguishable from those in the case of *Jarvis v. Insurance Co.*, 244 N.C. 691, 94 S.E. 2d 843.

The ruling of the court below is

Reversed.

CLAMON W. SANDERS, ADMINISTRATOR OF THE ESTATE OF FRANKLIN BLAINE SANDERS v. MARY GRAY POLK.

(Filed 28 April, 1965.)

Automobiles § 41l—

Evidence tending to show that an hour to an hour and a half prior to the incident in question intestate was seen in a normal condition some three hundred yards away from the scene, that intestate was 35 years old and in good health, and that intestate was lying prostrate on the highway in defendant's lane of travel when his body was run over by the car driven by defendant, *held* insufficient to be submitted to the jury in an action for wrongful death, since the evidence leaves in mere conjecture whether intestate was alive at the time he was struck by defendant's car.

APPEAL by defendant from *Brock, Special Judge*, September 1964 Civil Session of ANSON.

Wrongful death action.

Plaintiff alleged his intestate, Franklin Blaine Sanders, Jr., on June 1, 1963, at approximately 1:30 a.m., was lying prostrate on the eastern side of the public road in Anson County, North Carolina, commonly known as the "Upper White Store Road"; and that defendant, while proceeding in a northerly direction along the eastern (defendant's right) side of said road, carelessly and negligently "ran her automobile into, on and over" Sanders, dragged him "for a distance of approximately 500 feet underneath her car," and thereby caused his death.

Answering, defendant denied all of plaintiff's essential allegations.

The only evidence was that offered by plaintiff.

The court submitted, and the jury answered, two issues, *viz.*: "1. Was the plaintiff's intestate killed by the negligence of the defendant, as alleged in the Complaint? Answer: Yes. 2. What amount of damages, if any, is the plaintiff entitled to recover? Answer: $10,000.00."

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

Taylor & McLendon and F. O'Neil Jones for plaintiff appellee.
Carpenter, Webb & Golding for defendant appellant.

BOBBITT, J. Defendant assigns as error the denial of her motion for judgment of nonsuit. She contends the evidence is insufficient to support a jury finding that negligence on the part of defendant caused her to run over the prostrate form of Sanders or that her conduct, negligent or otherwise, proximately caused Sanders' death. Relevant to proximate cause, defendant contends the evidence is insufficient to support a jury finding that Sanders was living when run over by defendant.

Early on Saturday, June 1, 1963, about 1:30 a.m., defendant, alone in her automobile, was driving along Upper White Store Road, a rural paved road, toward her home. The night was dark. The weather was clear. She was proceeding on the eastern (her right) side of said road. On a portion of said road within the town limits of Peachland, she ran over the prostrate form of Sanders.

Defendant stopped her car. Looking back, she saw the body she had run over. She did not get out of her car. First, she drove to the home of Mr. Hamilton, a rural policeman. Unable to locate him, she drove to the home of Mr. Dutton, a trooper of the State Highway Patrol. Mr. Dutton "got dressed" and proceeded in his patrol car to said portion of Upper White Store Road. Defendant, driving her own car, accompanied him. Shortly after their arrival, Mr. Leavitt, the Coroner of Anson County, came to the scene, "made enough examination of the body (of Sanders) at the scene to determine the fact that he was dead," and removed the body by ambulance to Wadesboro for a more thorough examination. Later, Sheriff Raefield, in response to a call, went to the scene. Before Raefield arrived, defendant, as directed by Dutton, had gone to her home. On Sunday afternoon, June 2, 1963, as requested by Dutton and Raefield, defendant drove her car to a service station in Peachland. It was "jacked up" on a grease rack for examination of the "under portion" of defendant's car. Following such examination, defendant went with Raefield to said portion of Upper White Store Road and there was questioned by Raefield.

We find no material discrepancies or inconsistencies in the evidence pertinent to whether Sanders was alive when run over by defendant. This evidence, in summary, is set out below.

Sanders, 35, was married. He lived with his wife and two children in Peachland. His health was good. He was a carpenter foreman and worked regularly. He had worked on Friday, May 31, 1963.

On June 1, 1963, between 12:00 midnight and 1:00 a.m., the witness Goodman and his brother were sitting on the front steps of the brother's home on Lower White Store Road. Sanders, walking and alone, came

up to the steps, stood there and talked with them a few minutes and then walked off. His condition was normal. In leaving, he did not say where he was going but he was headed "north towards town" in the direction of his home. Lower White Store Road joins Upper White Store Road about 300 yards from said Goodman house. When Sanders left, he was walking along Lower White Store Road toward its junction with Upper White Store Road. The point where the prostrate form of Sanders was lying on the eastern side of Upper White Store Road when run over by defendant's car is approximately 300 yards north of said junction of roads.

Plaintiff offered in evidence the adverse examination of defendant. The portion of her testimony pertinent to the question under consideration is set out below.

Defendant was a car-length away when she "saw an object that subsequently turned out to be Mr. Sanders." Sanders' body, motionless, was "lying crossways"—"straight across in (her) lane"—perpendicular to the center line(s) of the road. There was no movement of the body when she first saw it or thereafter. When approaching the point where the prostrate form of Sanders was lying, defendant saw the lights of another car, traveling in the same direction, a "good ways" ahead of her.

The portion of the testimony of Dutton pertinent to the question under consideration is set out below.

Upon his arrival at the scene, he found the body of Sanders "on the paved portion of the highway on the east, southeast side." He testified: "The head portion of the body (was) lying approximately the center of the highway, the feet and legs extended east, southeastward, the feet being approximately the edge of the pavement." He testified Sanders' clothing consisted "of a pair of . . . overalls, suspenders, apron front, . . . of a bluish material, had light pin stripes." The overalls were torn considerably, partially gone in places. He testified Sanders' "right leg ankle was completely in two except a particle of flesh on the inside." He testified: "At the time of my examination of the body of the deceased, I did not observe any movement. There was no moving at all. I did not test the body for temperature or warmth." Dutton examined defendant's car "that night." He testified: "I checked the front of the automobile in the area of the headlights, the front grille, and the radiator, underneath and the area of the front springs and axle, and I could not find any markings or any dents on the front of the car. I did not find any clothing materials or fibers of any kind at that time." At trial, Dutton testified defendant had made a statement to him about the lights of another car but could not recall whether she said the car was behind her or in front of her. Asked to refresh his recollection,

Dutton stated it was correct he had previously testified as follows: "She stated that a car was in front of her, that she could see lights of another car traveling north, being some distance in front of her, but was unable to say that the car was in the area of the body. She didn't see the car in this area at the time. The last time she saw these lights were approximately a half mile south of where the body was found, but this car, the lights, was traveling in the same direction she was traveling."

Raefield testified: "She (defendant) told me that it (body of Sanders) appeared to be lying face down. Lying face downward. She told me that she recognized it as a white man at about 20 feet before she made contact, that she thought it was a white person laying face downward." Raefield also testified that he "did not find any dents or marks of any kind around the front" of defendant's car.

It is noted that Dutton and Raefield testified that on Sunday afternoon, June 2, 1963, they did observe blood stains and some hair on "the under portion" of defendant's car.

The coroner testified that his further examination of the body in Wadesboro disclosed Sanders "had several skull fractures, his chest was pretty badly crushed, and he had compound fractures of the left forearm and wrist, and left shoulder, left hip and right ankle." He testified further: "He (Sanders) had, of course, various lacerations and bruises over his entire body."

The record shows the body of Sanders was examined by Dr. W. M. Summerville and that, upon Dr. Summerville's failure to appear "as scheduled," defendant stipulated "that the injuries Dr. Summerville found upon the body of the plaintiff's intestate were sufficient to and did cause the death of the plaintiff's intestate."

Decision requires the application of legal principles stated in *Lane v. Bryan*, 246 N.C. 108, 97 S.E. 2d 411, and cases cited therein, to the present factual situation.

All the evidence tends to show that, as defendant approached, Sanders was lying prostrate and motionless "crossways" the lane for northbound travel. The fact there were no dents or marks of any kind on the front of defendant's car tends to show the body of Sanders was lying flat and limp on the paved road. The evidence as to Sanders' work and health tends to dispel speculation that his presence and position on the highway might have been caused by some disabling seizure. If speculation were permissible, it would seem more likely that Sanders had been struck by one or more cars prior to defendant's arrival on the scene. There is positive evidence an (unidentified) car had preceded defendant in the lane for northbound travel.

In *Brownrigg v. Boston & Albany Railroad Co.*, 185 N.Y.S. 2d 977, where a train ran over a body on the track, the court said: ". . . in-

itially, there must be some proof that the body struck was that of a living person. For all that appears in the record before us, the deceased may have met death through some other means before the impact with the train. The presence of the body on the track, at the time and place the engine struck it, is completely unexplained."

Plaintiff contends continuity of life is presumed. He quotes from 16 Am. Jur., Death § 13, the following: "The law presumes that a person shown to be alive at a given time remains alive until the contrary is shown by some sufficient proof, or, in the absence of such proof, until a different presumption arises."

In Stansbury, North Carolina Evidence, § 237, the author states: "There is no genuine, uniform presumption of the continuance of a human life, and certainly no general presumption of continuity that may be relied upon with any reasonable assurance." In accord: 9 Wigmore on Evidence (Third Ed.), § 2531. Presently, we are not concerned with presumptions as to the continuity of life or as to death where a person's whereabouts are unknown and his protracted absence is unexplained.

Here, the evidence tends to show: Sanders, shortly after midnight, was walking along Upper White Store Road toward his home; that his condition was normal; that his health was good; and thereafter, as defendant's car approached, he was lying prostrate and motionless on the paved highway in the position described by defendant. These facts, in our opinion, are insufficient to raise a presumption that Sanders was alive when run over by defendant's car. Moreover, in the absence of such presumption, there is no evidence as to when Sanders was fatally injured. As stated in *Lane v. Bryan, supra:* "The 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." It would be "the irony of fate" if defendant, as a consequence of her prompt report to and cooperation with the officers, should be held responsible for the conduct of one or more "hit and run" drivers.

After consideration of the evidence in the light most favorable to plaintiff, the conclusion reached is that the evidence was insufficient to support a jury finding that the conduct of defendant, negligent or otherwise, proximately caused the death of Sanders, and that defendant's motion for judgment of nonsuit should have been allowed. Decision on this ground renders unnecessary discussion of the very serious question as to whether there was evidence sufficient to support a jury finding that negligence on the part of defendant caused her to run over the prostrate form of Sanders.

For the reasons stated, the verdict and judgment are set aside, and the cause is remanded with direction that judgment of involuntary nonsuit be entered.

Reversed.

GERTRUDE CRISP, ACTING AS THE ADMINISTRATRIX OF THE ESTATE OF JAMES THOMAS LANE, DECEASED v. FRANCES LANE MEDLIN, INDIVIDUAL AND FRANCES LANE MEDLIN, ACTING AS ADMINISTRATRIX OF THE ESTATE OF FRANKLIN ODELL MEDLIN, DECEASED.

(Filed 28 April, 1965.)

1. Automobiles § 41a—

Negligence is not presumed from the mere fact of an accident, nor does the doctrine of *res ipsa loquitur* apply thereto, but it is not necessary that negligence be established by direct or positive evidence, it being sufficient if it be established by circumstantial evidence, either alone or in combination with direct evidence.

2. Automobiles § 41p—

The identity of the driver of a vehicle at the time of an accident may be established by circumstantial evidence.

3. Automobiles § 41a—

In order for circumstantial evidence to be sufficient to be submitted to the jury on the issue of negligence it is required that the facts from which negligence may be inferred be established by direct evidence and not be based upon other inferences or presumptions, and that the evidence be sufficient to raise the legitimate inference of negligence from these established facts and not leave the matter in the realm of conjecture.

4. Automobiles § 41p— Circumstantial evidence held insufficient for jury on question of whether defendant's intestate was driving.

Evidence tending to show that defendant's intestate was seen driving his father's automobile, in which plaintiff's intestate was a passenger, some hour and a half prior to the accident, but that after the accident the body of plaintiff's intestate was found lying on the right shoulder of the highway near the automobile, that the body of defendant's intestate was not at the scene, without competent evidence that defendant's intestate had left the scene or his body taken therefrom, with further evidence that plaintiff's intestate had on occasion operated a car notwithstanding he had no driver's license, etc., *held* insufficient to warrant a finding by the jury that defendant's intestate was driving the automobile at the time of the wreck.

5. Automobiles § 41a— Circumstantial evidence held insufficient to be submitted to jury on issue of negligence.

Evidence tending to show merely that plaintiff's intestate was killed in a wreck, together with physical facts tending to show intestate was thrown

from the car and his body badly mutilated and evidence of other physical facts permitting an inference that the car was traveling at a very rapid rate of speed at the time of the accident, but without evidence of skid marks, the condition of the highway, traffic conditions, or that the scene was in a restricted speed zone, etc., *held* insufficient to be submitted to the jury on the issue of actionable negligence, since grievous injuries to passengers may be expected if a car traveling at a speed of 55 to 65 miles per hour suddenly turns over and wrecks, and the evidence leaves the cause of the wreck in mere speculation and conjecture.

6. Trial § 22—

Evidence which leaves the facts in issue in mere conjecture is insufficient to be submitted to the jury.

APPEAL by plaintiff from *Crissman, J.*, 14 September 1964 Civil Session of MOORE.

Action *ex delicto* to recover damages for an alleged wrongful death.

From a judgment of compulsory nonsuit entered at the close of plaintiff's evidence, she appeals.

W. Lamont Brown for plaintiff appellant.

Leath, Bynum, Blount & Hinson for defendant appellee.

PARKER, J. Defendant Frances Lane Medlin admits in her answer that in November 1962 she owned a 1957 Chevrolet automobile as a family purpose automobile, and that Franklin Odell Medlin was a member of her family.

Plaintiff's evidence shows the following facts: On 12 November 1962 James Thomas Lane, a 15-year old boy, was living with his mother, Gertrude Crisp. About 10:30 p.m. on the night of this day her son left her home in a 1957 Chevrolet automobile driven by Franklin Odell Medlin for the purpose of helping his father, Curtis Medlin, who was a passenger in the automobile, clean out a well. They went to get James Lane because Franklin Medlin had hurt his foot. Gertrude Crisp had never seen her son James operate an automobile, except that she had seen him operate her automobile back and forth in her yard.

On the afternoon of 12 November 1962 Franklin and Curtis Medlin were cleaning out a well for Marvin Campbell. In the early part of the night of that day Franklin Medlin was hurt in doing this work. They left in a 1957 Chevrolet, which Franklin Medlin was driving. After 10:30 p.m. on the night of that same day they came back, Franklin Medlin was driving, and James Lane was in the automobile with them. They stayed at the well about one hour and fifteen minutes cleaning it out. Campbell did not see them leave, but around midnight, just before they left, he saw them in the automobile, and Franklin Medlin was

sitting under the steering wheel. Curtis Medlin had been drinking, but if Franklin Medlin and James Lane had been drinking, Campbell could not tell it.

Curtis Medlin testified to this effect: About midnight, he, Franklin Medlin, and James Lane, with Franklin Medlin driving, left the Campbell home. They rode around for some time looking for somewhere to eat without finding any place open, and then Franklin drove the automobile to the home of one Morrison, so that Curtis could see him about putting a pump in his well. James and Franklin left the Morrison home in the automobile with Franklin driving. He remained in the house, and afterwards walked home. James Lane did not drive the automobile when he was in it, and he did not have an operator's license that he knew of. He used to own a Plymouth automobile, and James Lane drove it a "little bit" when he was drinking.

Nancy Lee Morrison testified to this effect: About 3 a.m. on 13 November 1962 she was asleep in her house. There was a knock on the door. Her husband got up and opened it, and she went to the door and saw Franklin under the steering wheel of the automobile and saw James sitting in the automobile on the right-hand side. Curtis came into her house to talk to her husband about putting a pump in his well. In a few minutes after arrival, Franklin drove the automobile away with James in it as a passenger. Her home is situate on U. S. Highway #1 about 12½ miles north of Southern Pines.

About 4:30 a.m. on 13 November 1962, Robert Samuels, a State highway patrolman, arrived at the scene of an automobile wreck on U. S. Highway #1 about two miles north of the town of Southern Pines. He does not know what time the wreck occurred. There was a left-hand curve in the highway. He saw a 1957 Chevrolet automobile on its left side sitting on the right-hand shoulder of the highway traveling north. James Lane was dead, and his body was lying on the right shoulder of the highway near the automobile. His left arm was missing and was later found up in a tree about 18 feet above the ground. The tree was some distance from the body, but its exact distance he does not know. Franklin Medlin was not at the scene when he arrived. He testified: "I have not been able to determine who was driving or anything about the accident other than what I found when I got there."

Dr. Raymond J. Daugherty, a practicing physician in Southern Pines, on 13 November 1962 performed an autopsy upon the dead body of Franklin Odell Medlin. He testified: "He had a bruising and swelling of the brain; he had blood and spinal fluid about the brain; he had multiple fractures of his ribs; he had blood around his lungs on both sides, swelling of both lungs, and a bruise on the front side of the heart."

Negligence is not presumed from the mere fact that there has been an accident and a person has been injured or killed. *Grant v. Royal,* 250 N.C. 366, 108 S.E. 2d 627; *Mills v. Moore,* 219 N.C. 25, 12 S.E. 2d 661.

The identity of the driver of an automobile at the time of an accident may be established by circumstantial evidence. *Yates v. Chappell,* 263 N.C. 461, 139 S.E. 2d 728; *Bridges v. Graham,* 246 N.C. 371, 98 S.E. 2d 492.

It is also true that negligence need not be established by direct and positive evidence, but may be established by circumstantial evidence, either alone or in combination with direct evidence. *Lane v. Dorney,* 252 N.C. 90, 113 S.E. 2d 33; *Lane v. Bryan,* 246 N.C. 108, 97 S.E. 2d 411.

"A basic requirement of circumstantial evidence is a reasonable inference from established facts. Inference may not be based on inference. Every inference must stand upon some clear and direct evidence, and not upon some other inference or presumption." *Lane v. Bryan, supra.*

The plaintiff, to carry her case to the jury against defendant on the ground of actionable negligence, must offer evidence sufficient to take the case out of the realm of conjecture and into the field of legitimate inference from established facts. *Williamson v. Randall,* 248 N.C. 20, 102 S.E. 2d 381.

The doctrine of *res ipsa loquitur* is not applicable upon a mere showing of the wreck of an automobile on the highway. *Lane v. Dorney, supra.*

There was no eye witness account of the wreck here. In appraising plaintiff's evidence for the purpose of determining whether there is any evidence of negligence on the part of Franklin Odell Medlin to warrant the submission of the case to the jury, if there is sufficient evidence that he was driving the automobile at the time of the fatal wreck, we are driven to a consideration of the physical facts shown by the evidence. "Even so, physical facts are sometimes more convincing than oral testimony." *Yost v. Hall,* 233 N.C. 463, 64 S.E. 2d 554.

A few minutes after 3 a.m. on 13 November 1962 Franklin Medlin and James Lane left the Morrison home, which is situate on U. S. Highway #1 about 12½ miles north of Southern Pines, in a 1957 Chevrolet automobile, with Medlin driving. If they traveled towards the town of Southern Pines on U. S. Highway #1, they traveled south. About 4:30 a.m., or about one hour and twenty minutes after they left the Morrison home, Robert Samuels, a State highway patrolman, arrived at the scene of an automobile wreck on U. S. Highway #1 about two miles north of the town of Southern Pines. He saw there a 1957 Chevrolet automobile on its left side sitting on the right-hand shoulder of the highway traveling north. There is no evidence in the record as to the

direction the front part of the wrecked automobile was pointing. The dead body of James Lane was lying on the right shoulder of the highway near the automobile. The body of Franklin Medlin was not at the scene. Highway patrolman Samuels testified: "The person of Franklin Odell Medlin had been removed to the hospital when I got there." This is bound to be based on hearsay, and not of probative value. There is no competent evidence in the record that Franklin Medlin left the scene of the wrecked automobile or that his body was carried away from the scene of the wrecked automobile after the wreck. If Franklin Medlin was in the automobile when it wrecked, there is no evidence in the record as to where his body was in reference to the wrecked automobile immediately after the wreck, or if it was removed from the scene of the wreck, when it was removed. There is no evidence in the record as to the exact time the wreck occurred. There is evidence that Curtis Medlin used to own a Plymouth automobile, and that James Lane drove it a "little bit" when he, Curtis Medlin, was drinking. James Lane's mother had seen him operate her automobile back and forth in her yard. Plaintiff has not offered sufficient evidence to warrant a finding by the jury that Franklin Medlin was driving the automobile at the time of the fatal wreck.

Near the scene of the wreck there is a left-hand curve on the highway. Whether it was a sharp curve or not the evidence does not show. There is no evidence in the record of any skid marks or tracks on the highway. That the automobile left the highway seems probable by reason of the fact that James Lane's left arm was found in a tree about 18 feet above the ground some distance from where his body was. The record does not disclose where the wrecked automobile was in respect to the curve in the highway when it wrecked. There is no evidence in the record as to whether the highway was slick, wet, or dry at the time of the wreck, or the condition of the highway. Was the Chevrolet automobile forced off the highway to avoid a collision with an approaching automobile suddenly pulling into its lane of traffic, or was it caused to leave the highway by reason of being sideswiped by a passing automobile, or was its wreck due to a tire blowout? The record contains no evidence answering these questions. The grievous injuries received by James Lane and by Franklin Medlin, if he was in the automobile at the time of the wreck, indicate that the automobile was traveling at a very rapid speed when it wrecked. There is no evidence in the record that the automobile was traveling at the time of the wreck in a restricted speed zone. At the time of the wreck was the automobile traveling in a 55-mile speed zone, or a 60-mile speed zone, or a 65-mile speed zone? G.S. 20-141. If an automobile is traveling at a speed of 55 or 60 or 65 miles an hour and suddenly turns over and wrecks, it may be anticipated that

its occupants will receive grievous injuries or be thrown out of the automobile if not held in by safety belts. The evidence of speed of the wrecked automobile here can only be inferred from the physical facts shown by the evidence. In our opinion, and we so hold, the mere fact that it can be reasonably inferred from the evidence that the Chevrolet automobile was traveling at a very rapid speed when it wrecked is not sufficient to permit a jury to find that such speed caused its wreck, and that its driver was guilty of actionable negligence. The headnote of *Fuller v. Fuller* in our Reports, 253 N.C. 288, 116 S.E. 2d 776, states:

> "Evidence tending only to show that the driver of a truck veered gradually to the left and ran off the hard surface at a point where the highway was straight and that the truck continued on until it struck a tree some 150 feet after it had left the highway, resulting in the death of the driver and injury to the two passengers, with further evidence that the day was clear and the road dry and that there was no other traffic at this point, is insufficient to show that the injury to the passengers was the result of the negligence of the driver * * *."

In *Ivey v. Rollins,* 250 N.C. 89, 108 S.E. 2d 63, the Court said:

> "The only established fact is that there was a collision when the automobile in which plaintiff's intestate was riding, traveling in its proper lane, 'suddenly swerved sharply' head-on into the bridge abutment. What caused it nobody knows. The cause of it rests in the realm of conjecture, speculation and guesswork."

"A cause of action must be something more than a guess." *Lane v. Bryan, supra.* "We cannot resort to a choice of possibilities: that is guesswork, not decision." *Hanrahan v. Walgreen Co.,* 243 N.C. 268, 90 S.E. 2d 392.

In *Brown v. Kinsey,* 81 N.C. 245, it is stated: "The rule is well settled that if there be no evidence, or if the evidence be so slight as not reasonably to warrant the inference of the fact in issue or furnish more than materials for a mere conjecture, the Court will not leave the issue to be passed on by the jury." This has been quoted with approval in *Byrd v. Express Co.,* 139 N.C. 273, 51 S.E. 851, and in *Poovey v. Sugar Co.,* 191 N.C. 722, 133 S.E. 12, where Brogden, J., the writer of the opinion, adds in apt and accurate words: "This rule is both just and sound. Any other interpretation of the law would unloose a jury to wander aimlessly in the fields of speculation."

The judgment of compulsory nonsuit below is

Affirmed.

BRUCE R. FREEMAN, T/A BRUCE'S TAVERN, SEABREEZE BEACH, WILMINGTON, NORTH CAROLINA, PETITIONER v. BOARD OF ALCOHOLIC CONTROL, STATE OF NORTH CAROLINA, RESPONDENTS.

(Filed 28 April, 1965.)

1. Intoxicating Liquor § 2—

The State Board of Alcoholic Control is vested with the authority to hear proceedings to revoke a retail beer permit, G.S. 18-78, with right in the licensee, after exhausting his administrative remedies, to appeal to the Superior Court, G.S. 143-309, where review is before the judge, G.S. 143-314, with right of further appeal to the Supreme Court, G.S. 143-316.

2. Same—

In proceedings for the revocation of a retail beer permit, it is the duty of the Board of Alcoholic Control to weigh the evidence and find facts, and its findings are conclusive if supported by material and substantial evidence.

3. Same; Administrative Law § 4—

A court will not substitute its discretion for that vested in an administrative board and will not disturb the discretionary order of such board in the absence of fraud, manifest abuse of discretion, or conduct in excess of lawful authority.

4. Intoxicating Liquor § 2; Criminal Law § 26—Verdict of not guilty in criminal action does not preclude revocation of license for selling whiskey.

Where, in a hearing before the Board of Alcoholic Control, undercover agents testify, without contradiction, that they purchased whiskey on the premises from the licensee and his agent, the testimony is sufficient to sustain findings of the Board that the licensee had allowed whiskey to be sold on the premises and had failed properly to supervise the premises, and the fact that the licensee had been found not guilty of selling whiskey on the occasion in question in a criminal prosecution does not alter this result, the two proceedings being independent of each other with requirements of different degrees of proof.

APPEAL by the State Board of Alcoholic Control from *Bone, J.*, November 16, 1964 Nonjury Civil Session, WAKE Superior Court.

This proceeding originated by notice dated January 29, 1964, to Bruce R. Freeman, T/A Bruce's Tavern, Seabreeze Beach, Wilmington, North Carolina, to appear before the State Board of Alcoholic Control in Raleigh on February 17, 1964, to show cause why his retail beer permit should not be revoked for:

> "1. Possessing and possessing for the purposes of sale and selling and/or allowing the possession and the possession for the purpose of sale and the sale of tax paid whiskey on your retail licensed premises on or about August 4, 1963 at 1:50 a.m. and 10:20 p.m. in violation of G.S. 18-78.1(5).

"2. Failing to give retail licensed premises proper supervision on or about August 4, 1963 at 1:50 a.m. and 10:20 p.m. G.S. 18-78."

At the hearing before Earl L. Weathersby, Assistant Director, Robert Rieves and Cornelius Waddell, officers employed by the Board, were sworn as witnesses. Both testified they bought taxpaid whiskey by the drink at the Seabreeze tavern on two occasions during August 4, 1963. The first three drinks were served by Bruce Freeman from a bottle kept under the counter. The price paid was $1.50. The same evening the officers purchased two drinks for $1.00, also served in cups from the bottle concealed under the counter. These drinks were served by Walter Freeman. At the time of this sale Bruce Freeman was also behind the counter.

The record discloses that Mr. Freeman's permit had been suspended on two prior occasions — once for 180 days and once for 90 days — for allowing the sale of whiskey on the licensed premises. The last suspension order became effective March 7, 1961.

As his only evidence, Mr. Freeman offered: (1) affidavits of two businessmen to the effect that he and his place of business bore good reputations; (2) the court records showing that he and Walter Freeman were charged and convicted in the Recorder's Court of New Hanover County for the two sales on August 4, 1963, but that on appeals to the Superior Court he was acquitted by the jury and a *nolle pros.* was entered in the case against Walter Freeman.

The hearing officer, Mr. Weathersby, made detailed findings of fact in substance as Officers Rieves and Waddell had testified. He concluded that Bruce Freeman had failed to give his licensed premises proper supervision and that he had allowed whiskey to be sold in violation of law. The State Board of Alcoholic Control reviewed the record, adopted as its own the findings made by the hearing officer, and ordered the license revoked. Mr. Freeman appealed to the Superior Court of Wake County. After hearing, the court entered this judgment:

"THIS CAUSE COMING ON TO BE HEARD upon the appeal by the Respondent-Petitioner Bruce R. Freeman from the Order of the State Board of Alcoholic Control revoking the beer license of Respondent-Petitioner which was effective as of May 15, 1964, and also the appeal from the Findings of Fact upon which said Order was allegedly based, and the Court having carefully examined the Findings of Fact of the North Carolina Board of Alcoholic Control and the Order based thereon, and after hearing the argument of counsel and the Affidavit of Addison Hewlett, Jr., and the Court being of the opinion that the Findings of Fact were based on evidence of violation of the law regarding the sale of tax paid whiskey

upon which Bruce R. Freeman was tried and found not guilty in the Superior Court of New Hanover County, and further, upon evidence as to sales by Walter Freeman of tax paid whiskey by Walter Freeman, an employee of Bruce Freeman, and it further appearing that Walter Freeman was tried in the Recorder's Court of New Hanover County on said charges and that he was found guilty, whereupon he appealed to the Superior Court of New Hanover County, where the case was pending at the time of the hearing in this cause, and later a *nol pros* being taken, and the Court finding as a fact that the charges herein made were the same as the incidents upon which Bruce Freeman and Walter Freeman were tried in the New Hanover County Superior Court, the case against Bruce Freeman having been terminated by a not-guilty verdict, and the case against Walter Freeman being pending at the time of the hearing in this cause, and later a *nol pros* being taken and the Court finding that this is in effect placing the Respondent in jeopardy on two occasions in separate forums, and that, therefore, he should not be held accountable herein.

"And the Court being of the opinion and finding as a fact that the decision of the State of North Carolina Board of Alcoholic Control is not supported by competent material and substantial evidence and that said decision was arbitrary.

"IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the order revoking the retail beer permit of Bruce Freeman, the Petitioner-Respondent herein be and is hereby reversed as being contrary to law."

From the foregoing judgment, the State Board of Alcoholic Control appealed.

T. W. Bruton, Attorney General, George A. Goodwyn, Staff Attorney for respondent appellant.

Addison Hewlett, Jr., for petitioner-appellee.

HIGGINS, J. The record of the proceedings before the hearing officer disclosed that two ABC employees (apparently engaged in undercover work) purchased from Bruce Freeman three drinks of whiskey for which they paid $1.50 and later in the evening they purchased two drinks from Walter Freeman, in the presence of Bruce Freeman, for which they paid $1.00. In each instance the drinks were served in cups and from a bottle taken from beneath the counter. There was some discrepancy in the testimony of the officers as to whether Bruce Freeman or Walter Freeman sold the first drinks and the hour of the sales.

On two prior occasions the retail beer license of Bruce Freeman had been suspended for lack of supervision of his premises in that he had permitted whiskey to be sold thereon.

On the foregoing evidence, which was uncontradicted, the hearing officer found the facts to be as testified to by the two undercover men. The State Board of Alcoholic Control reviewed the findings and conclusions, adopted them as its own, and entered the order revoking the permit effective May 15, 1964.

Authority to conduct a hearing and determine whether a State retail beer permit should be revoked is lodged in the State Board of Alcoholic Control by G.S. 18-78. An aggrieved party may appeal to the Superior Court of Wake County after exhausting his administrative remedies. G.S. 143-309. The review is before the judge, G.S. 143-314, and the scope thereof is set forth in the next succeeding section. An aggrieved party may appeal to the Supreme Court for a review of Superior Court judgment. G.S. 143-316.

The duty to weigh the evidence and find the facts is lodged in the agency that hears the witnesses and observes their demeanor as they testify — in this case the Board of Alcoholic Control. Its findings are conclusive if supported by material and substantial evidence. *Campbell v. ABC Board,* 263 N.C. 224, 139 S.E. 2d 197; *Thomas v. ABC Board,* 258 N.C. 513, 128 S.E. 2d 884. "Courts will not undertake to control the exercise of discretion and judgment on the part of members of a commission in performing the functions of a State agency." *Williamston v. R. R.*, 236 N.C. 271, 72 S.E. 2d 609. "When discretionary authority is vested in such commission, the court has no power to substitute its discretion for that of the commission; and in the absence of fraud, manifest abuse of discretion or conduct in excess of lawful authority, the court has no power to intervene." *Pharr v. Garibaldi,* 252 N.C. 803, 115 S.E. 2d 18. "Hence it is that the findings of the board, when made in good faith and supported by evidence, are final." *In re Hastings,* 252 N.C. 327, 113 S.E. 2d 433.

We hold that the evidence before the State Board of Alcoholic Control was sufficient to sustain the findings that Bruce Freeman had allowed whiskey to be sold on his retail licensed premises and had failed properly to supervise them. The findings are based on the positive assertions of two witnesses whose testimony was not contradicted. The criminal trials were independent proceedings in which the results did not bind the Board of Alcoholic Control. The rules of evidence in criminal cases require proof of guilt beyond a reasonable doubt. Sometimes juries have doubts about the testimony of undercover witnesses. At any rate the rule of double jeopardy has no application. The verdict of the jury in a criminal prosecution does not have the effect of reversing the

decision of the Board of Alcoholic Control. The evidence before the Board does not permit the conclusion its action was arbitrary. The judgment of the Superior Court is

Reversed.

TOMMY HUGH RECTOR, ADMINISTRATOR OF THE ESTATE OF DONALD PERRY RECTOR, DECEASED, PLAINTIFF v. CLARENCE CLAUDE ROBERTS, INDIVIDUALLY, CLARENCE CLAUDE ROBERTS, ADMINISTRATOR OF THE ESTATE OF DONALD CLAUDE ROBERTS, DECEASED, AND JETER FORTNER, ADMINISTRATOR OF THE ESTATE OF WILLIAM RALPH BALL, DECEASED, DEFENDANTS.

(Filed 28 April, 1965.)

1. Pleadings § 29—

Admissions in a pleading are judicial admissions binding on the party making them.

2. Automobiles §§ 52, 55—

Where the son is using the automobile provided by his father for family purposes and, being present as a passenger in the car, permits another to drive, the son is liable for the driver's negligence under the doctrine of agency and the father is liable therefor under the family purpose doctrine.

3. Automobiles § 41a—

Evidence tending to show that the wreck occurred immediately after a 9 degree curve to the driver's left, that the road was crooked and rough, that the vehicle was seen some 200 yards from the wreck being driven some 60 to 65 miles per hour, together with evidence of physical facts as to the condition of the vehicle after the wreck and that the passengers were thrown therefrom and fatally injured, *held* sufficient to be submitted to the jury on the issue of the negligence of the driver in driving at an unreasonable and imprudent speed in violation of G.S. 20-141(a).

4. Automobiles § 38—

Opinion evidence that the vehicle in question shortly before the accident was "going about 60 to 65" will not be held to be without probative force because the witness failed to use the phrase "miles per hour," it being apparent from the context that the witness was testifying the vehicle was traveling 60 to 65 miles per hour.

6. Automobiles § 41p—

Testimony that a named person was seen driving the car on five or more occasions during the four hours or so prior to the wreck, the last occasion being within a few minutes of the time of the accident, *held* sufficient to be submitted to the jury on the question of whether the named person was driving at the time of the accident.

RECTOR *v.* ROBERTS.

APPEAL by plaintiff from *Pless, J.*, November 1964 Civil Session of MADISON.

Plaintiff brought this action to recover damages for the asserted negligent killing of his intestate, Donald Perry Rector (hereafter Rector). Plaintiff alleges: The persons named in the caption as administrators have been duly appointed to administer on the respective estates, as indicated in the caption. Rector, Donald Claude Roberts (hereafter Donald) and William Ralph Ball (hereafter Ball) were, on the evening of April 21 and the early morning hours of April 22, 1962, riding in a 1959 Chevrolet owned and maintained by Clarence Claude Roberts (hereafter Roberts) as a family purpose car. All three occupants sustained injuries resulting in death when the Chevrolet, because of negligent operation, ran off the highway and turned over. The vehicle, when it ran off the highway, was being driven by Ball. Donald had, with the knowledge of Roberts, taken the Chevrolet for use as a family purpose vehicle. Ball drove the vehicle at an unreasonable speed. He failed to maintain a proper lookout or to keep the vehicle under control.

Roberts, individually and as administrator, answered. He admitted all material allegations of the complaint, except those charging negligence in the operation of the automobile.

Fortner, administrator of Ball's estate, answered. He denied Ball was driving, and negligent operation by the driver. Upon the death of Fortner, defendant Wallin was named as administrator of Ball's estate. He was made a party defendant and adopted the answer filed by Fortner.

At the conclusion of plaintiff's evidence, defendants severally moved for nonsuit. The motions were allowed. Plaintiff excepted and appealed.

Wade Hall for plaintiff appellant.

Van Winkle, Walton, Buck & Wall by O. E. Starnes, Jr., for defendant Roberts.

Williams, Williams & Morris by William C. Morris, Jr. and James F. Blue, III, for defendant Wallin.

RODMAN, J. The appeal presents these questions: (1) Is the evidence sufficient to permit a finding that the negligence of the driver proximately caused Rector's death? If so, the court should not have allowed Roberts' motion to nonsuit. This is true because Roberts, by his answer, admitted the 1959 Chevrolet was maintained by him as a family purpose car, and was on the night in question being used for that purpose by Donald; Ball was operating the vehicle when the wreck occurred; Donald was an occupant of the vehicle at that time.

These judicial admissions sufficed as to Roberts and Donald's estate to establish the fact that Ball was the operator. *Vinson v. Smith,* 259 N.C. 95, 130 S.E. 2d 45; *Wilson v. Chandler,* 235 N.C. 373, 70 S.E. 2d 179. These admissions would impose liability on Roberts and on Donald's estate if Rector's death was caused by Ball's negligent operation. *Goss v. Williams,* 196 N.C. 213, 145 S.E. 169.

The wreck occurred about one or one and one-half miles south of Stines' Gulf and Madison Grill, located on opposite sides of the highway. The car was traveling south toward Marshall. The highway patrolman who went to the wreck in response to a telephone call testified, "The road from Stines' Gulf and the Madison Grill to where I found this car is very crooked, curvy, bumpy road. It is considered as open country." The operator of Stines' Gulf testified, "The road has quite a few curves in it." The Highway Commission had not posted signs establishing a maximum speed. A civil engineer who surveyed the road and the area where the wreck occurred testified that one traveling south, as the Chevrolet was, would, shortly before reaching the point where the wreck occurred, encounter a curve to the east, or the driver's left. Pictures taken of the scene of the wreck, used by several witnesses to explain their testimony, show an embankment to the left and a decline to the right. This embankment would effectively obstruct the view of vehicles in rounding the curve, which, as indicated by the map, has a curvature of nine degrees or more.

Ball, about 1:30 a.m., purchased gas at Stines' Gulf for use in the Chevrolet. It left, traveling north. A few minutes later, it was seen coming back, traveling in a southward direction. A witness testified, "At the time I observed it there, I had an opinion satisfactory to myself that it was doing about 60 or 65." Robinson's Esso station is about 200 yards north of the place where the wreck occurred. Water Brazil, a witness for the plaintiff, testified that he saw the wrecked vehicle pass Robinson's station headed in a northwardly direction about 1:50 a.m. About ten minutes later, it passed the station again, headed then in a southwardly direction. He testified, "I have an opinion satisfactory to myself that the car was going about 60 or 65 when I observed it." Within four or five minutes after the car passed, he closed the filling station and went to the scene of the wreck. The vehicle was turned over and on its right side. The top was crushed in so that it was pressing on the seats. Brazil observed three persons in the vehicle when it passed the filling station, but he was unable to identify anyone. When he arrived at the scene of the wreck, the automobile was approximately 15-20 feet from the highway in a depression. Ball's body was some 8-12 feet from the automobile. Rector, still breathing, was found some 9-10 feet from the wrecked automobile. Donald's body was found about 70

feet south of the wrecked vehicle. There were skid marks on the highway. The windshield was found on the highway.

Plaintiff relies on the evidence, as summarized above, to show unreasonable and unlawful speed. Our statute, G.S. 20-141(a), makes it a crime to operate a motor vehicle at a speed greater than reasonable and prudent under existing conditions. Subsection (b)4 of that section fixes a maximum speed of 55 miles per hour. If the Chevrolet was driven at a speed greater than 55 miles per hour, or faster than was reasonable and prudent under existing conditions, the operator was negligent. *Cassetta v. Compton,* 256 N.C. 71, 123 S.E. 2d 222; *Bridges v. Jackson,* 255 N.C. 333, 121 S.E. 2d 542; *Krider v. Martello,* 252 N.C. 474, 113 S.E. 2d 924. It is not contended that G.S. 20-141(b)5 has any application to the facts of this case. We think a jury would be justified in finding that the vehicle was, when wrecked, being operated at a speed of 60-65 *miles per hour.* We can not accept defendants' contention that the testimony, "the car was going about 60-65," has no probative value because the witness failed to add "miles per hour." We have no doubt the witness meant, and that everyone who heard the witness understood him to mean, that he estimated the speed of the vehicle at 60-65 *miles per hour.* The oral description of the road, supplemented by the photographs, stated to correctly depict the physical condition, would support a finding that the vehicle was being operated at an unreasonable and imprudent speed, contrary to the provisions of G.S. 20-141(a).

Plaintiff has offered evidence requiring the submission of an issue to determine the alleged actionable negligence of the operator of the Chevrolet. If that question be answered in the affirmative, plaintiff, upon the admissions and the testimony of defendant Roberts, would be entitled to a judgment against him and Donald's estate for such damages as the jury might award. Roberts' motion to nonsuit should have been overruled.

(2) Is the evidence sufficient to require jury determination of the asserted liability of Ball's estate for Rector's death? What has been said above disposes of that part of the question relating to the negligence of the operator of the motor vehicle. But to impose liability on Ball's estate, it was necessary for plaintiff to go further and offer evidence on which the jury could find that Ball was driving the automobile when the wreck occurred.

The evidence is sufficient for a jury to find these facts: Roberts last saw his son alive between 7:40 and 8:00 p.m. They were, at that time, some three miles south of Stines' Gulf. Donald was then driving. He was alone. Between 8:30 and 9:00 p.m., the car came to Stines' Gulf. Ball was driving. He purchased gas for the car. Rector and Donald were with him. They left, headed north. Ball was driving when they left.

About midnight, the three went to the home of Ball's fiancee, about 25 miles from Marshall. Ball was driving when they arrived. They left about 1:00 a.m. The car was next seen at Stines' Gulf; that was between 1:30 and 2:00 a.m. Ball was driving. He purchased more gas. The car headed north when it left Stines' Gulf. Ball was driving. About five minutes later, the car passed Stines' Gulf headed south. Ball was then driving. The car was "doing 60-65." It passed Robinson's Esso shortly thereafter "going 60-65." The witness who last saw it, when it passed Stines' Gulf, left a few minutes after the Chevrolet passed and went to the scene of the wreck. Two of the occupants were then dead. Rector was breathing, but died shortly thereafter.

We hold the evidence sufficient to require jury determination of the issues raised by the answer of the administrator of Ball's estate.

Reversed.

STATE v. DENNIS EDWARD EGERTON, JAMES FRANKLIN SAPP AND JAMES HENRY PERRY.

(Filed 28 April, 1965.)

1. Indictment and Warrant § 8—

Where the evidence indicates that each of three defendants was present and actively participated with the others in the commission of an armed robbery, and the evidence of guilt as to each is exactly the same except as to their confessions, the three defendants are properly charged in one bill, and the defendants' contention that each was entitled to a separate trial is untenable.

2. Criminal Law § 90—

Where the confession of each defendant is admitted solely against the defendant making it, it will not be assumed that the jury ignored the court's instruction in this regard.

3. Arrest and Bail § 3—

Where officers are called and arrived at the scene of the robbery within ten minutes of its commission and are given a description of the men and the peculiar weapon used in committing the offense, and, pursuant to information from a "reliable informer," pay a morning visit to a certain address, where they find one of the suspects in bed with the cover tucked under his chin protesting he did not know another suspect who was then under the cover by his side, and find the third suspect in an adjoining bedroom, the officers are in possession of such facts as to justify them in taking the three into custody for investigation without a warrant. G.S. 15-41.

4. Criminal Law § 71—

Where officers arrest defendants for an investigation of a robbery in response to a description given by the victim and from information received from an informer, and warn each defendant that any admission made by him would be used against him, confessions made by defendants voluntarily within some two hours after arrest are competent against each respectively, notwithstanding defendants were not then represented by counsel, the evidence disclosing that a telephone was available to them and that neither requested that he be represented by counsel.

ON *certiorari* to review trial and judgment of *McKinnon, J.*, August, 1964 Regular Criminal Session, WAKE Superior Court.

This criminal prosecution was founded on a bill of indictment which charged that James Franklin Sapp, Dennis Edward Egerton and James Henry Perry, on May 29, 1964, did feloniously, by the use and threatened use of a firearm, to-wit: a shotgun, robbed and forcibly took from Charles Brooks the sum of $95.00. The indictment was returned at the July, 1964 "A" Session, Wake Superior Court.

Upon a showing of indigency the court appointed separate counsel for each of the defendants. After the trial, conviction, and sentence, and for the purpose of prosecuting the appeal, the court appointed Mr. Hunter to represent all defendants.

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

John V. Hunter, III, for defendant appellants.

HIGGINS, J. The evidence of robbery by the use of a sawed-off shotgun was plenary. The two attendants present and in charge of the place of business positively identified the defendants as being present together and participating in the holdup which took place at the Publix Oil Station in the City of Raleigh between one and two o'clock on May 29, 1964. Both attendants described the shotgun with which one of the participants covered Brooks, forcing him to surrender the keys to the cash register from which the money was taken.

In obedience to the call for help, the police arrived on the scene within 10 minutes of the time the participants left. Police Sergeants Council, Stevenson and Gilbert, on information from a "reliable informer," went to a rooming house at 214 Heck Street in Raleigh at 7:20 on the morning following the holdup. The officers found Perry in the bed with the cover tucked under his chin. In response to their inquiry as to where Dennis Egerton was, he denied that he knew anyone by that name. However, when the officers removed the cover, Dennis Egerton was in the bed beside Perry. Sapp was in bed in an adjoining room. Be-

fore entering, the officers obtained permission from one Barnes who was in charge of the building.

The officers testified they advised each defendant he need not make a statement, but if he did, it might be used against him. Neither was advised that he had a right to counsel. Each defendant, as the court found, made free and voluntary admissions of his involvement. Each, at the preliminary inquiry and again at the trial, denied any participation in or any knowledge of the robbery. Each denied making any admission to the officers. Egerton did admit he signed a blank paper for the police.

The defendants alleged the court committed errors in the trial: (1) by refusing to grant each defendant a separate trial; (2) by admitting their confessions in evidence; (3) by refusing to discharge them because of their illegal arrest and interrogation.

The defendants were not entitled to a severance. They were jointly indicted for a single armed robbery. The evidence identified each as being present and actively participating with the others in the commission of the offense. G.S. 15-152; *State v. Bryant,* 250 N.C. 113, 108 S.E. 2d 128. This is not a case in which the State seeks to consolidate separate charges. It is a one-count bill of indictment alleging a single robbery in which all participated.

The evidence was ample to identify the defendants. True, the State offered the separate admissions of each defendant, involving himself and at the same time the other two. However, the court took pains to instruct the jury that each admission was evidence only against the defendant who made it and should not be considered in anywise to the prejudice of the other two. We cannot assume the jury ignored the instruction. In this case a severance would require three separate trials on exactly the same evidence, except as to the confessions. *State v. Malpass,* 189 N.C. 349, 127 S.E. 248; *State v. Lewis,* 185 N.C. 640, 116 S.E. 259. The law does not require such duplication. The evidence offered would have warranted a charge of conspiracy as well as of the substantive offense. Direct evidence of participation was offered. The confessions strongly corroborated that direct evidence. In *State v. Bonner,* 222 N.C. 344, 23 S.E. 2d 45; *State v. Norton,* 222 N.C. 418, 23 S.E. 2d 301, and *State v. Dyer,* 239 N.C. 713, 80 S.E. 2d 769, separate trials were required. The parties were separately charged. The evidence was not the same against all parties. In *Bonner* the confessions constituted the sole evidence of participation. The line of demarcation between the cases which permit the joint trial and those which require a severance is clearly drawn. A joint trial was required in this case.

We think the information in possession of the officers was sufficient to authorize the arrest without a warrant. The officers were called and arrived at the scene of the crime within ten minutes after its commis-

sion. They had a description of the men and the peculiar weapon used. The stock and barrel of the shotgun had been cut off. A black string around the barrel and fastened to the grip served as a sling. The description of the men and the weapon, and the information from the "reliable informer," resulted in the morning visit of the officers to 214 Heck Street in Raleigh. They found Perry in the bed with the cover tucked under his chin, protesting he did not know Dennis Egerton who was then under the cover by his side. Sapp was in an adjoining bedroom. The officers were in possession of such facts as to justify taking the three into custody until they could be identified by Brooks and Marcom. G.S. 15-41; *State v. Brown, ante* 191.

The officers took the suspects to the police station and placed them in separate cells for interrogation. The officers testified, and the notation on Egerton's written admission disclosed, that he signed the confession at 9:25 a.m. on May 29, 1964, about two hours after his arrest. According to the evidence, Egerton, and perhaps Sapp and Perry, made admissions of guilt before Brooks and Marcom came to the station and identified them.

The evidence on the preliminary inquiry was sufficient to support the court's findings that the officers cautioned the defendants that any admissions made by them could be used against them. Competent evidence supports the court's finding and conclusion that the admissions were free and voluntary. These admissions were received at the time the officers were making their investigation. Proper interrogation, after warning of the right to keep silent, is a necessary step in criminal law investigation. The suspect should have an opportunity to offer his explanation of what appeared to be incriminating circumstances to the end that further investigation may not only remove suspicion from him in case of innocence, but may cause the officers to look elsewhere for guilt. A good officer should be as anxious to clear the innocent as he is to involve the guilty. While the defendants complain that they were without counsel at the time of their interrogation, the evidence discloses that a telephone was available to them and that neither requested that he be represented by counsel.

No error.

WAYNE C. COATS AND J. NORWOOD ADAMS, D/B/A ELECTRIC SALES AND SERVICE v. SAMPSON COUNTY MEMORIAL HOSPITAL, INCORPORATED.

(Filed 28 April, 1965.)

1. Venue § 4—

A county hospital, G.S. 131-126.20, .21(a), .28, comes within the purview of G.S. 1-77, and an action against it for labor and materials furnished arises in the county in which the hospital is located, and when brought in another county is properly removed.

2. Venue § 9—

Where defendant, in an action brought in the recorder's court of the county of plaintiff's residence, moves to dismiss on the ground that the action could be instituted only in the county where the cause of action arose under G.S. 1-77, and, upon refusal of the motion, defendant appeals to the Superior Court, the Superior Court properly treats the motion to dismiss as a motion for change of venue, and properly removes the action, notwithstanding that the recorder's court could not have so removed the action.

3. Appeal and Error § 3—

An appeal from a ruling on a motion for a change of venue under G.S. 1-77 is not premature.

APPEAL by plaintiffs from *Clark, S. J.*, September 14, 1964 Civil Session of HARNETT.

Plaintiffs, residents of Harnett County, brought this action in the Recorder's Court of Harnett County on September 10, 1963, to recover the sum of $3,536.92, the amount allegedly due from defendant for material furnished and labor performed on the Sampson County Memorial Hospital at Clinton. Before time for answering had expired, defendant moved to dismiss the action for the reason that the same "must be maintained in Sampson County." In support of the motion defendant filed an affidavit, by the administrator of the Sampson County Memorial Hospital, in which the affiant averred that defendant is a nonstock, non-profit corporation organized under Chapter 55A of the General Statutes; that it is governed by a board of trustees appointed by the Sampson County Board of Commissioners; that, under a 10-year lease, it occupies premises owned and provided for that purpose by Sampson County under the Municipal Hospital Facilities Act, G.S. 131-126.18 through G.S. 131-126.30; and that, in the event of dissolution, defendant is obligated to transfer all assets, excluding those provided by the Ford Foundation, to Sampson County. Plaintiffs do not controvert the affiant's statements in this affidavit.

The judge of the Recorder's Court held "that the proper venue of this action is Harnett County" and overruled the motion "that this

action be dismissed or removed." Defendant appealed to the Superior Court, where Judge Clark treated the motion to dismiss as a motion for a change of venue. He held (1) that the cause of action arose in Sampson County; (2) that the action was against a public agency of that county; and (3) that under G.S. 1-77 the proper venue is Sampson County. From his order removing the cause to the Superior Court of Sampson County, plaintiffs appeal.

Morgan, Williams and DeBerry for plaintiffs, appellants.
Taylor, Allen & Warren for defendant, appellee.

SHARP, J. G.S. 1-77 provides that actions against a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office, must be tried in the county where the cause, or some part thereof, arose. Any consideration of G.S. 1-77(2) involves two questions: (1) Is defendant a "public officer or person especially appointed to execute his duties"? (2) In what county did the cause of action in suit arise? Here plaintiffs make no contention that the cause of action arose elsewhere than in Sampson County. The crux of their argument is that the venue of this action is determined by G.S. 1-82, not by G.S. 1-77, for that defendant is not "a public officer."

G.S. 1-77 does not expressly include within its provisions municipal or quasi-municipal corporations or their agents.

> "(B)ut these are public agencies, created and recognized by law, and charged with public duties which they execute by and through their officers and agents. Actions against them are inherently local in their nature, in the absence of an express statute to the contrary, and sound public policy forbids that such officers should be required to forsake their civic duties and attend the courts of a distant forum." McIntosh, North Carolina Practice and Procedure § 284 (1st Ed. 1929).

This Court early held that actions against counties must be brought in the county sued, *Johnston v. Commissioners*, 67 N.C. 101, and, since "cities and towns are of the like nature, and should stand upon the same footing," *Jones v. Statesville*, 97 N.C. 86, 88, 2 S.E. 346, 347, the principle was extended to actions against them. *Ibid.; Godfrey v. Power Co.*, 224 N.C. 657, 32 S.E. 2d 27; *Cecil v. High Point*, 165 N.C. 431, 81 S.E. 616. See *Powell v. Housing Authority*, 251 N.C. 812, 112 S.E. 2d 386.

In *Light Co. v. Commissioners*, 151 N.C. 558, 66 S.E. 569, plaintiff Brevard Light and Power Company brought an action in the Superior Court of Transylvania County against the Light and Water Commis-

sioners of Concord, a corporation created by the legislature as an agency of the City of Concord, for a breach of contract to deliver certain machinery. When defendant's motion to remove the action to Cabarrus County was denied, defendant appealed to this Court, which said,

> "(T)he real question is whether the defendant is simply an agency of the city of Concord, charged with important duties, public in their nature. We think that it is . . . . (T)he defendant's motion to remove the action for trial to the county of Cabarrus, in which the city of Concord is situate, ought to have been allowed . . . ."*Id.* at 560, 66 S.E. at 570.

Admittedly defendant is not a municipality in the sense of a political subdivision such as a city or a town or a quasi-municipality like a county. *State ex rel. O'Neal v. Jennette,* 190 N.C. 96, 98, 129 S.E. 184, 185. G.S. 131-126.28 does, however, declare the establishment, construction, maintenance and operation of hospital facilities to be public and governmental functions; and, under the provisions of G.S. 131-126.20 and G.S. 131-126.21(a), Sampson County has delegated to defendant its authority to exercise these functions. Defendant is, therefore, an agency of Sampson County; and, under the facts here disclosed, if the cause of action arose in Sampson County, defendant is entitled to have the case tried there, G.S. 1-77; otherwise it must be tried in the county where the cause of action did arise, *Murphy v. High Point,* 218 N.C. 597, 12 S.E. 2d 1; *McFadden v. Maxwell,* 198 N.C. 223, 151 S.E. 250; *Watson v. Mitchell,* 108 N.C. 364, 12 S.E. 836.

Patently, this cause of action arose in Sampson County. Plaintiffs furnished to defendant there all the material and labor the value of which they now seek to recover in *quantum valebant* and in *quantum meruit.* The debt is the cause of action, and it arose where the debt originated. *Steele v. Commissioners,* 70 N.C. 137, 139. "A broad, general rule applied or stated in many cases is that the cause of action arises in the county where the acts or omissions constituting the basis of the action occurred." Annot., Venue of actions or proceedings against public officers, 48 A.L.R. 2d 423, 432.

Judge Clark correctly treated defendant's motion to dismiss as a motion for a change of venue. *State ex rel. Cloman v. Staton,* 78 N.C. 235. In the motion defendant had pointed out that Sampson County was the proper venue. Since this cause of action arose in Sampson County, G.S. 1-77 — subject to G.S. 1-83 — requires that the trial be had in Sampson County. Although the Recorder's Court of Harnett County could not have removed the case to Sampson County, *Lovegrove v. Lovegrove,* 237 N.C. 307, 74 S.E. 2d 723, yet, when the action

came to the Superior Court of Harnett County on appeal, the judge properly removed the case to the Superior Court of Sampson County. Upon the facts here disclosed it would have been error had the judge refused to remove the case. *Dixon v. Haar,* 158 N.C. 341, 74 S.E. 1. When an action is instituted in the wrong county, the Superior Court should, upon apt motion, remove the action, not dismiss it. G.S. 1-83; *Wiggins v. Trust Co.,* 232 N.C. 391, 61 S.E. 2d 72; *Godfrey v. Power Co., supra; Dixon v. Haar, supra; State ex rel. Cloman v. Staton, supra;* McIntosh, *op. cit. supra* §§ 294-296. An appeal from a ruling on a motion for a change of venue under G.S. 1-77 is not premature. *Cecil v. High Point, supra* (appeal by plaintiff); *Dixon v. Haar, supra* (appeal by defendant).

Affirmed.

THOMAS ROY HUFFMAN v. OCCIDENTAL LIFE INSURANCE COMPANY OF RALEIGH, NORTH CAROLINA.

(Filed 28 April, 1965.)

1. Insurance § 3—

While ambiguities in a policy of insurance will be construed against insurer, policies, like all other written contracts, must be given a reasonable interpretation, and if the meaning of the parties from the language used is plain and unambiguous such meaning must be given effect.

2. Same—

While punctuation is ineffective to control the construction of a policy as against the plain meaning of its language, when the sense of the contract has been gathered from its words, punctuation may be used more readily to point out the division in the parts of the sentences.

3. Insurance § 36—

Provision of a policy that if insured sustained personal injury "effected solely through external, violent and accidental means . . ., and which results . . . in any of the losses enumerated in the schedule of losses and indemnities, which appears below, within 90 days thereafter, the company will pay . . .," *held* not to cover the loss of a foot suffered more than 90 days after accidental injury, the time limitation being valid and the policy being unambiguous that the loss must occur within the time specified after injury and not that insurer would pay within such time.

RODMAN, J., took no part in the consideration or decision of this case.

APPEAL by defendant from *Johnston, J.,* September 1964 Regular Session of WILKES.

Action to recover insurance benefits.

The complaint alleges these facts: On 29 November 1955 defendant Insurance Company issued to plaintiff a life insurance policy, number 202671, containing a "Supplement" in which "defendant agreed to pay to the plaintiff the sum of $2,500 . . . if plaintiff sustained personal bodily injury effected solely through external, violent and accidental means resulting in the loss of one foot." Plaintiff sustained such injury "resulting in the loss of his right foot on September 5, 1959." Plaintiff gave defendant timely notice, filed proof of loss, and demanded payment of said sum of $2500. Defendant refuses to pay. Plaintiff has paid the premiums, and the policy and supplement are in full force.

Defendant, answering, admits the issuance of the policy, payment of premiums by plaintiff, the policy and supplement are in force, and it has refused to pay the $2500 demanded. Defendant also admits that plaintiff "sustained a personal bodily injury effected solely through external, violent and accidental means, which injury resulted in the loss of plaintiff's right foot on September 5, 1959." But defendant avers that the said injury occurred on 4 March 1959, and the loss does not come within the coverage of the supplement for the reason that the loss of the foot did not result from the injury *within 90 days after the occurrence of the injury.*

After the jury had been impaneled the insurance policy was admitted in evidence by stipulation of the parties. Plaintiff then moved for judgment on the pleadings. The court dismissed the jury and entered judgment, the pertinent portions of which are as follows:

> "It . . . appearing to the Court that defendant contends that the personal bodily injury sustained by plaintiff resulting in the loss of plaintiff's foot occurred on March 4, 1959, which was more than ninety days from the date of the loss of plaintiff's right foot; and it further appearing to the Court that plaintiff contends and stated he had evidence that he sustained personal bodily injury within 90 days of the loss of his right foot.
>
> "The Court being of the opinion that as a matter of law the plaintiff is entitled to recover under said supplement . . . , irrespective of the date of plaintiff's personal bodily injury resulting in the loss of plaintiff's right foot, the Court construing and interpreting said supplement to said policy to the effect that within 90 days after the plaintiff's loss of his right foot, the defendant agreed to pay plaintiff . . . $2,500.00.
>
> "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiff shall have and recover of the defendant the sum of $2,500.00 . . ."

Ferree & Brewer and McElwee & Hall for plaintiff.

Whicker and Whicker and Smith, Leach, Anderson & Dorsett for defendant.

MOORE, J. The sole question for decision is whether the court below properly interpreted the applicable provision of the insurance policy.

The "Supplement" to the insurance policy provides: "It is agreed . . . that if the Insured . . . shall sustain PERSONAL BODILY INJURY which is effected solely through external, violent and accidental means . . . , and which directly and independently of all other causes results in any of the losses enumerated in the schedule of losses and indemnities, which appears below, within 90 days thereafter, the company will pay . . . to the Insured . . . :" (according to the schedule) $2500 for loss of one foot.

Plaintiff contends that there is ambiguity in the language employed, and one of the interpretations of which the supplement is reasonably susceptible is that insurer agrees to pay insured $2500 *within 90 days after loss of a foot.* On the other hand, defendant contends that the meaning is clear and unambiguous, and insurer agrees to pay insured $2500 if the loss of a foot results *within 90 days after the injury.*

The judge adopted plaintiff's interpretation and applied the rule that if the terms of an insurance policy "are susceptible of two interpretations, the one imposing liability, the other excluding it, the former is to be adopted and the latter rejected, because the policies having been prepared by the insurer, or by persons skilled in insurance law and acting in the exclusive interest of the insurance company, it is but meet that such policies should be construed liberally in respect of the persons injured and strictly against the insurance company." *Electric Co. v. Insurance Co.*, 229 N.C. 518, 50 S.E. 2d 295.

But "policies of . . . insurance, like all other written contracts, are to be construed according to their terms. If plain and unambiguous, the meaning thus expressed must be ascribed to them." *Electric Co. v. Insurance Co., supra.* Policies of insurance must be given a reasonable interpretation consonant with the apparent object and plain intent of the policies. *Parker v. Insurance Co.*, 259 N.C. 115, 130 S.E. 2d 36. In our opinion the pertinent terms of the subject policy are plain and unambiguous. From a consideration of the "Supplement" as a whole, it is clear that the intent is to indemnify insured for such specified loss as occurs within 90 days *after the injury* which, directly and independently of all other causes, gives rise to the loss.

We are confirmed in our opinion by the sentence structure and punctuation employed. It is true that punctuation or the absence of punctuation in a contract is ineffectual to control its construction as against

the plain meaning of the language. *Stanback v. Insurance Co.*, 220 N.C. 494, 17 S.E. 2d 666; *Real Estate Company v. Bland*, 152 N.C. 225, 67 S.E. 483. However, after the sense of the contract has been gathered from its words, punctuation may be used more readily to point out the division in the parts of the sentences. 17 Am. Jur. 2d, Contracts, § 279, p. 693. To such as may entertain any doubt as to the meaning of the "Supplement," the comma immediately following the phrase "within 90 days thereafter" should make the meaning crystal clear. The provision in question consists of a sentence containing a principal clause and a subordinate clause. The subordinate clause begins with the words "if the Insured"; the principal clause begins with the words "the Company will pay"; these clauses are separated by a comma. In the proper use of punctuation, subordinate or dependent clauses introduced by "if", "though", "when", "while", etc., are generally set off by commas. In the provision or sentence in question, the expression "which appears below" is a parenthetical phrase which is properly preceded and followed by commas, and the phrase and the commas could be omitted without affecting the meaning of the sentence. The words "within 90 days thereafter" is an adverbial phrase modifying "results." "Thereafter" means "after the injury." Stripping the sentence of parenthetical, limiting and explanatory phrases, it says this: If the insured shall sustain injury which results in loss of a foot within 90 days thereafter, the company will pay the insured $2500. It may also be stated thus: The company will pay to the insured $2500, if the insured shall sustain injury which results in the loss of a foot within 90 days thereafter (after the injury).

Time limitations in insurance policies, of less than 90 days, within which indemnifiable loss must occur from the date of an accident or injury, have been approved as to reasonableness by this Court. *Parker v. Insurance Co., supra; Clark v. Insurance Co.*, 193 N.C. 166, 136 S.E. 291.

The court below erred in construing the meaning of the contract. The cause is remanded to superior court for a determination whether the loss complained of occurred within 90 days after personal bodily injury, and, if so, whether such injury, directly and independently of all other causes, produced the loss.

Error and remanded.

RODMAN, J., took no part in the consideration or decision of this case.

DEWEY R. PARKER, JAY C. PARKER AND BOB PARKER, TRADING AND DOING BUSINESS AS PARKER ELECTRIC COMPANY v. WORCESTER MUTUAL FIRE INSURANCE COMPANY.

(Filed 28 April, 1965.)

Insurance § 73—

A policy covering loss of personal property located in the building "occupied by the insured" insures the property in the building occupied by the insured at the time the policy was issued and nowhere else, and even though the policy stipulates the building was situated on the south side of a named street of a municipality the terms of coverage cannot be enlarged to include also property stored by insured in an additional building on the south side of the named street when insured had no property in the second building at the time the policy was issued.

APPEAL by plaintiffs from *McConnell, J.*, Regular January 1965 Civil Session of WILKES.

Plaintiffs brought this action to recover their loss resulting from a fire on May 9, 1963, which destroyed the contents of a building known as the Welborn Building, located on the south side of Main Street, Wilkesboro. They alleged defendant had insured the contents of that building against damage by fire.

Defendant admitted issuing a policy protecting plaintiffs against loss by fire because of damage to the contents of a building on the south side of Main Street in Wilkesboro. It averred the building described in the policy was the one known as the Smithey Building — not the Welborn Building.

At the conclusion of plaintiffs' evidence, the court allowed defendant's motion for nonsuit. Plaintiffs appealed.

Hayes & Hayes for plaintiff appellants.
Ferree & Brewer for defendant appellee.

RODMAN, J. The uncontradicted evidence establishes these facts: On February 26, 1962, defendant's authorized agent delivered to plaintiffs a policy of insurance. This policy insured plaintiffs "against all DIRECT LOSS BY FIRE, LIGHTNING AND BY REMOVAL FROM PREMISES ENDANGERED BY THE PERILS INSURED AGAINST IN THIS POLICY, EXCEPT AS HEREINAFTER PROVIDED, *to the property described herein while located or contained as described in this policy,* or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from the perils insured against in this policy, *but not elsewhere.*" (Emphasis supplied.) The policy provided protection for five years, beginning March 8, 1962. The claimed loss amounted to $6,852.50. On the face of the policy is the following:

"Item No.	DESCRIPTION AND LOCATION OF PROPERTY COVERED.
Amount Fire or Fire and Extended Coverage, or other Peril:	Show construction, type of roof and occupancy of buildings covered or containing the property covered. If occupied as a dwelling state number of families:
$10,000.00	On all contents in a two-story, masonry, approved roof, *occupied by owner as* PARKER ELECTRIC COMPANY, situated S/S of Main Street in Wilkesboro, N. C."

When the policy was delivered, and on its effective date, Parker Electric Company was engaged in business at 111 and 109 south side of Main Street. That building was a two-story, masonry building with an approved roof. It was known as the Smithey Building. It was not in fact owned by the three individuals trading as Parker Electric Company, but one-half of the building was owned by the members of the partnership and their respective wives, and the other half was owned by Mr. Hubbard. A representative of the North Carolina Fire Insurance Rating Bureau went to Wilkesboro to rate the Smithey Building "in order that we might get this policy of insurance." The only place where plaintiffs stored merchandise in 1962 was 111 and 109 Main Street. Plaintiffs had never stored any merchandise in the Welborn Building until February 1963. It was, when the fire occurred, operating and had merchandise stored in the Smithey Building and in the Welborn Building.

The agent who issued the policy of insurance knew, prior to the fire, that plaintiffs were operating and storing merchandise in both the Smithey Building and in the Welborn Building (the building which was burned). The record is not clear as to whether the Welborn Building could be denominated a "two-story building." For the purpose of the appeal, we assume that the jury could so find.

There is no evidence of any request by plaintiffs to amend the policy so as to specifically include merchandise in the Welborn Building.

Plaintiffs contend the policy afforded protection for loss by fire of the contents of any two-story building on the south side of Main Street in Wilkesboro in which they did business. Defendant contends that the policy, by express language, was limited to the contents of the building occupied by Parker Electric Company in 1962, and could not thereafter be enlarged to cover the contents of other buildings which plaintiffs might occupy, without an agreement of the parties evidenced by an endorsement on the policy.

There is no suggestion that the property which was burned was ever in the Smithey Building. The record does not show the distance between the Smithey and Welborn Buildings. It is, however, stated in one of the briefs that they were in different blocks.

We are not at liberty to disregard the express provisions of the policy. In clear and unmistakable language, defendant insured property located in the building *occupied by the insured.* This language is expressly authorized by statute, G.S. 58-176. It is a material part of the contract; it cannot be ignored. The policy insured the contents of a building damaged by fire. What building? By express language, it was the building occupied by insured when the policy was issued — not elsewhere. *Rosenthal v. Insurance Co. of North America,* 149 N.W. 155; *Iowa Mut. Ins. Co. v. Hayutin,* 201 P 2d 371; *Southern Underwriters v. Williams Lumber Co.,* 38 S.W. 2d 177; *Peony Park v. Security Ins. Co. of New Haven, Conn.,* 289 N.W. 848; *Liverpool & London & Globe Ins. Co. v. Georgia Auto & S. Co.,* 115 S.E. 138; *Cole v. Kansas City Fire & Marine Ins. Co.,* 254 S.W. 2d 304; *Hines v. Home Insurance Company of New York,* 128 A. 2d 447; *English v. Franklin Fire Insurance Company of Philadelphia,* 54 Am. Rep. 377; *Bryce v. Lorillard Fire Insurance Company,* 14 Am. Rep. 249; 29 Am. Jur. 83-84; 45 C.J.S. 234-235; 4 Appleman, Insurance Law and Practice, p. 208.

Affirmed.

CLARA H. BURNETT v. WILLIAM P. CORBETT AND ADRIAN VERZAAL, TRADING AND DOING BUSINESS AS DIXIE BLUE FARMS AND TRADING AND DOING BUSINESS AS HILTON GARDEN CENTER,

AND

RICHARD L. BURNETT v. WILLIAM P. CORBETT AND ADRIAN VERZAAL, TRADING AND DOING BUSINESS AS DIXIE BLUE FARMS AND TRADING AND DOING BUSINESS AS HILTON GARDEN CENTER.

(Filed 28 April, 1965.)

1. Automobiles § 10—

The violation of the statutory requirement that a motorist not follow a preceding vehicle more closely than is reasonable and prudent under the circumstances is negligence *per se,* and ordinarily the mere fact of a collision with the vehicle ahead furnishes some evidence that the motorist to the rear was not keeping a proper lookout or that he was following too closely.

2. Automobiles § 42d—

Evidence tending to show that defendant's truck, approaching from the opposite direction, suddenly ran to its left across the highway in front of

the vehicle preceding plaintiff, that the driver of the vehicle preceding plaintiff was able to stop without hitting the truck, but that plaintiff was unable to stop before hitting the preceding vehicle, *held* sufficient to show that plaintiff was following the preceding vehicle too closely and that she was not keeping a proper lookout, constituting contributory negligence as a matter of law.

APPEAL by plaintiffs from *Bundy, J.,* September 1964 Civil Session of NEW HANOVER.

Consolidated actions for personal injuries and property damages, respectively.

These two cases grow out of an automobile collision which occurred about 2:00 p.m. on September 1, 1962, in a 45 MPH speed zone on Oleander Drive (highways 74 and 76) a mile or less east of the city limits of Wilmington. The weather was clear, and the four-lane highway was dry and straight. Plaintiffs allege and offer evidence tending to establish these facts: Plaintiff Mrs. Burnett, operating the automobile which her husband furnished her, was traveling toward Wilmington in the outside lane for westbound traffic. She was following another automobile, being driven in the same lane by Mrs. Ethel Moore. A pickup truck, operated by defendant Corbett at a speed of 50 MPH, was approaching these two vehicles from the opposite direction, traveling toward Wrightsville Beach. Corbett applied his brakes suddenly. "As a result his brakes caught, and he swerved, and he went across to the north side of Oleander Drive" ahead of Mrs. Moore's car. She was able to stop without hitting the truck, which came to rest on the north shoulder. Mrs. Burnett struck the Moore car in the rear. In the collision Mrs. Burnett received sprains, and Mr. Burnett's car was damaged in the amount of $1,000.00. The truck collided neither with the Moore nor with the Burnett car.

At the conclusion of plaintiffs' evidence, defendants moved for judgment of nonsuit. The court allowed each motion and dismissed both actions as to each defendant. Plaintiffs appeal only from the dismissal of the actions as to defendant Corbett.

Addison Hewlett, Jr., for plaintiffs, appellants.
Hogue, Hill & Rowe for William P. Corbett, defendant, appellee.

SHARP, J. This appeal involves only the question of nonsuit. We may concede, as defendant tacitly does, that plaintiffs offered sufficient evidence of his negligence to repel the motion. Thus the inquiry is confined to this question: Does the evidence establish as a matter of law that negligence on the part of Mrs. Burnett was a proximate cause of her personal injuries and of Mr. Burnett's property damage? *Clontz v.*

Krimminger, 253 N.C. 252, 116 S.E. 2d 804. Defendant contends, in accordance with his plea of contributory negligence, that plaintiffs' evidence discloses (1) that Mrs. Burnett, operating the automobile owned by her husband, was negligent in that (a) she failed to keep a proper lookout and (b) she was following the Moore vehicle closer than was reasonable and prudent under the circumstances; and (2) that Mrs. Burnett's negligence was one of the proximate causes of her collision with the vehicle ahead.

G.S. 20-152(a) provides: "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, with regard for the safety of others and due regard to the speed of such vehicles and the traffic upon and condition of the highway." A violation of this section is negligence *per se*, and ordinarily the mere fact of a collision with the vehicle ahead furnishes some evidence that the motorist to the rear was not keeping a proper lookout or that he was following too closely. *Dunlap v. Lee*, 257 N.C. 447, 126 S.E. 2d 62; *Clontz v. Krimminger, supra; Smith v. Rawlins*, 253 N.C. 67, 116 S.E. 2d 184. See *Jones v. Atkins Co.*, 259 N.C. 655, 658, 131 S.E. 2d 371, 375; Annot., Driver's failure to maintain proper distance from motor vehicle ahead, 85 A.L.R. 2d 613.

Mrs. Burnett testified that she was traveling about 40 MPH some 40 feet behind Mrs. Moore. Under the circumstances this was too close. When Mrs. Burnett first saw the truck, it was coming across the highway west of Mrs. Moore "headed for her car, but she stopped before he got over there." Mrs. Burnett said, "I didn't see her come to a stop; she just stopped suddenly. I first saw her when I hit her." The conclusion is inescapable that Mrs. Burnett was following the Moore car too closely, that she was not keeping a proper lookout, and that these breaches were a proximate cause of the accident. *Black v. Milling Co.*, 257 N.C. 730, 127 S.E. 2d 515; *Crotts v. Transportation Co.*, 246 N.C. 420, 98 S.E. 2d 502.

The judgment of nonsuit is

Affirmed.

STATE v. J. G. UPCHURCH.

(Filed 28 April, 1965.)

1. Indictment and Warrant § 9; Receiving Stolen Goods § 2—

An indictment charging defendant with receiving, with knowledge they had been stolen, a specified number of cartons of cigarettes and cases of

beer and a case of sardines belonging to a named person, *held* sufficiently definite and not subject to arrest of judgment for failure to aver the brand names of the goods.

2. Receiving Stolen Goods § 5—

Evidence tending to show that certain goods were stolen and carried to defendant's place of business by the thieves and that the thieves sold the goods to defendant at about half of the wholesale price, and that defendant knew the goods had been stolen, *held* sufficient to take the issue of defendant's guilt to the jury.

3. Criminal Law § 71—

After officers had served a warrant upon defendant for receiving stolen goods, defendant voluntarily engaged in a conversation with the officers in respect to the merchandise he was charged with receiving, and in the course of the conversation made incriminating admissions, *held* there being evidence that the admissions were freely and voluntarily made without inducement by promises, threats or coercion, the admission of the admissions will not be held for error, notwithstanding defendant was not warned that anything he said might be used against him or that he had a right to employ counsel.

APPEAL by defendant from *McKinnon, J.*, 5 October 1964 Regular Criminal Session of WAKE.

Criminal prosecution on an indictment charging that on 3 August 1963 defendant, 30 cartons of cigarettes, 20 cases of beer, and one case of sardines of the value of $152, of the goods and chattels of James Keith, before then unlawfully, wilfully and feloniously stolen, taken and carried away, did unlawfully, wilfully and feloniously receive and have, the said defendant then and there well knowing said goods and chattels to have been unlawfully, wilfully and feloniously stolen, taken and carried away.

Plea: Not guilty. Verdict: Guilty as charged in the indictment.

From a judgment of imprisonment for 12 months, defendant appeals.

Attorney General T. W. Bruton and Assistant Attorney General Charles W. Barbee, Jr., for the State.

Yarborough, Blanchard & Tucker for defendant appellant.

PER CURIAM. Defendant assigns as error the denial of his motion to arrest judgment. His contention is that the indictment is fatally defective, in that it does not allege the brand names of the cigarettes, beer, and sardines. The indictment alleges the ownership of the 30 cartons of cigarettes, the 20 cases of beer, and the one case of sardines stolen, and their value. This was a sufficient description to apprise defendant as to the property he was charged with having received, and no minute description of the cigarettes, beer, and sardines by brand names is re-

quired. The description of these goods in the indictment is sufficient to support the judgment and precise enough so that a judgment under the indictment could be used as a bar to any subsequent prosecution. If defendant desired a description of the brand names of these goods, he could have requested before trial a bill of particulars. *S. v. Kosky*, 191 Mo. 1, 90 S.W. 2d 454, and cases cited on this question; *S. v. Smith*, 250 Mo. 350, 157 S.W. 319; *Alvarez v. State*, 75 Fla. 286, 78 So. 272; Annot. 99 A.L.R. 2d 813, § 21 Food and Drink, § 22 Chemicals and Drugs, § 23 Tobacco and Tobacco Products; 4 Wharton's Criminal Law and Procedure, Anderson Ed., § 1782, particularly p. 599; 27 Am. Jur., Indictments and Informations, § 83. There is contrary authority as shown in the A.L.R. annotation in the sections here referred to. See also *S. v. Moore*, 129 N.C. 494, 39 S.E. 626, 55 L.R.A. 96, wherein it was held that an indictment which charged the defendant with receiving various types of goods, including "tobacco," was not defective for failing to state the quantity of the various articles, such as the number of boxes of tobacco. This assignment of error is overruled.

Defendant assigns as error the denial of his motion for judgment of compulsory nonsuit made at the close of the State's evidence: defendant offered no evidence. The State's evidence, considered in the light most favorable to it, *S. v. Corl*, 250 N.C. 252, 108 S.E. 2d 608, shows the following facts: In August 1963 James Keith operated Hillcrest Service Station, which was located just beyond the Falls of Neuse on old U. S. Highway #1 in Wake County. On either late Friday night, 2 August 1963, or early on Saturday morning, 3 August 1963, he closed his service station and went home. He returned to it about 8:30 or 9:00 a.m. on Saturday, 3 August 1963, and found that one of its doors had been broken open, or at least its padlock had been prized off, and that 30 cartons of cigarettes of different brands, 23 cases of beer of five different brands, and canned goods, all belonging to him and which were in his service station the night before, had been stolen, taken and carried away.

Russell Wayne Perry, a witness for the State, testified in substance, except when quoted, as follows: About 3:00 a.m. on 3 August 1963 he drove an automobile to James Keith's Hillcrest Service Station. Charles May and Zeb Perry were in the car with him. Upon arrival at the service station, May and Perry got out of the car and he remained in it. They had a crowbar and screwdriver, which they used to get through the garage door at the service station. They brought out of the service station 30 cartons of cigarettes, 23 cases of beer, a case of sardines, and other merchandise, some of which they put in the trunk of the car and some in the back seat. With all three of them in the car, he drove it toward Bunn in Franklin County, and arrived at defendant's home in

Franklin County about 4:30 in the morning. He knocked at defendant's door and told him they had some stuff for him. Defendant told them he would be at his store about 6 a.m., and for them to go there. They went to defendant's store about fifteen minutes of six and the defendant was there. Defendant asked him what he had, and he told him. He testified: "The defendant Upchurch asked if we got it from anywhere close by, and we told him no, not from anywhere close by." Defendant bought from them the 20 cartons of cigarettes at $1 a carton, and 20 cases of beer at $2.50 per case, property which they had stolen from James Keith's service station. He, May, and Perry kept three cases of beer for themselves. The case of sardines and the other merchandise they carried to an old house located between Wake Forest and Youngsville. The cartons of cigarettes they sold to defendant consisted of Winstons, Pall Malls, Camels, Luckies, Salems, and Viceroys, and the cases of beer they sold to defendant consisted of Schlitz, Budweiser, Blue Ribbon, and Pilot. After defendant paid them for the cartons of cigarettes and cases of beer, they unloaded them from the car and carried them into the back room of his store where the defendant wanted them put. Prior to this date he had had other dealings with the defendant. About 15 or 16 June 1963 they sold defendant 65 cartons of cigarettes, which they had stolen from C. N. Robertson's store on the road to Wendell, for $1 a carton. About 24 June 1963 he sold to defendant 65 or 70 cartons of cigarettes and two cases of coffee for about $80 or $85, which he, May, and one Beddingfield had stolen from Windsor Park Super Market in Raleigh. On that occasion he remained in the car and May and one Beddingfield broke in the super market with a crowbar and screwdriver. He, Perry and May divided the money they received from selling to him the stuff they had stolen from Hillcrest Service Station. Heretofore he has pleaded guilty to breaking and entering the Hillcrest Service Station and to the larceny of this property. The retail price of cigarettes is $2 a carton. The cases of beer they stole from Hillcrest Service Station consisted of Blue Ribbon, Schlitz, Budweiser, and High Life. Blue Ribbon beer sells for $3.95 a case retail, and Schlitz, Budweiser and High Life sell for $4.95 a case retail.

On 24 August 1963, L. S. Covert, a deputy sheriff of Wake County and a witness for the State, in company with deputy sheriff Beasley of Franklin County, Charles May, and deputy sheriff Watkins, went to defendant's place of business and served a warrant on defendant for receiving stolen goods. Covert was asked by the prosecuting officer for the State to state what conversation he had with the defendant. Defendant objected, his objection was overruled, and he excepted. Covert testified in substance: He talked with defendant along with other deputies in respect to the merchandise defendant received from Charles May, and

defendant stated that he had bought some cigarettes and had bought some beer from him at $2.50 a case for beer. Upchurch said that he knew that was less than the regular price of the beer. Defendant said he had a beer permit and had been selling beer for ten years. He asked defendant if he did not know that on each and every invoice for beer which he bought that he had to have the permit number on it, and he said that he did. He asked him did he get any invoice like that in this case, and he said no. He said, "Well, you knew this beer was stolen, didn't you?" And he said, "I guess I did." Defendant's motion to strike the answer of the witness was denied, and defendant excepted. The court properly denied defendant's motion for judgment of nonsuit.

Defendant assigns as error the admission in evidence, over his objection, of his conversation with L. S. Covert, a deputy sheriff of Wake County, at defendant's place of business in Franklin County, and the denial of his motion to strike it out. Defendant made no request of the judge for a preliminary inquiry as to the voluntariness of the statements he made; neither did he state to the court that he desired to offer any evidence in respect to them. When this conversation was had, a warrant had been read to defendant by an officer of Franklin County. A reading of the testimony of L. S. Covert, who was the only witness for the State other than James Keith and Russell Wayne Perry, who were not present at the time of the conversation, shows that defendant freely and voluntarily engaged in conversation with Covert, that no promises were made to him, and no threats made or any form of coercion applied. It is true defendant was not warned that anything he said might be used against him, and that he had a right to employ counsel. Defendant does not contend in his brief that any promises were made to him, or any threats or coercion used against him, when he engaged in conversation with Covert. Defendant relies upon *Escobedo v. Illinois*, 378 U.S. 478, 12 L Ed. 2d 977, which was decided by a five to four court on entirely different facts, and which we do not consider as applicable here to the free and voluntary conversation Covert and defendant had. These assignments of error are overruled.

Defendant's other assignments of error are formal. In the trial below we find

No error.

STATE v. RUDOLPH ARNOLD.

(Filed 28 April, 1965.)

1. Criminal Law § 2—

"Intent" and "wilfulness" are mental attitudes which are seldom capable of direct proof but must ordinarily be established by circumstances from which they may be inferred.

2. Same—

"Wilful" as used in criminal statutes means the wrongful doing of an act without justification or excuse.

3. Arson § 4; Criminal Law § 101—

In a prosecution under G.S. 14-67, evidence tending to show that defendant set fire under the sill of the house in question, together with evidence of motive, *held* to make out a *prima facie* case sufficient to take the issue to the jury, notwithstanding defendant's testimony that he was too intoxicated at the time to form the necessary criminal intent, there being testimony of the State that immediately after the act defendant, though intoxicated, was able to walk, although he staggered, and was able to speak sufficiently distinctly to be understood.

4. Criminal Law § 32—

Drunkenness is an affirmative defense upon which defendant has the burden of proof, and a person who drinks after forming the purpose to commit a crime is not excused by voluntary drunkenness.

APPEAL by defendant from *Fountain, J.*, January 1965 Session of WASHINGTON.

Criminal action in which defendant is charged with an attempt to burn a dwelling house, G.S. 14-67.

Plea: Not guilty. Verdict: Guilty. Judgment: Imprisonment for a term of not less than 3 nor more than 5 years.

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

W. L. Whitley for defendant.

PER CURIAM. The State's evidence tends to show these facts: On Friday night, 11 December 1964, defendant went to the home of his father-in-law, Isaiah Clark, where his estranged wife and five of his children resided. He and his wife were on the front porch talking until after midnight. His wife went in the house and left him on the porch. About 30 minutes later, at 1:15 A.M., the occupants of the house discovered smoke in the hallway. Isaiah Clark ran outside and found fire burning on a sill under the house. Defendant ran by the corner of the house and Isaiah struck him and "knocked him out" temporarily. De-

fendant soon got up and left. A burning magazine was removed from the sill and the fire was extinguished; the sill was charred. An officer, who was promptly called, made an investigation and then returned to his home where he found defendant standing on the porch. The officer asked defendant what he was "trying to set the house afire for." Defendant laughed and said he "was just trying to scare his wife." Defendant had two magazines in his pocket, also a bottle containing an alcoholic beverage (defendant said it was vodka). Defendant had taken several drinks from the bottle while at Isaiah Clark's house. Defendant was drunk, but not "down drunk." He staggered some, but could walk. The officer "had no trouble to understand what he was saying."

Defendant testified that when his wife went in the house he remained on the porch for awhile and continued to drink, and became so intoxicated that he did not remember anything until the following morning when he awoke in jail. He denied setting the fire and stated he had no reason to frighten his wife.

Defendant contends that his motion for nonsuit should have been allowed for that there is no evidence he "wilfully" attempted to burn the house and he was so intoxicated he could not form the criminal intent essential to the commission of the offense charged.

"Intent" and "wilfulness" are mental emotions and attitudes and are seldom capable of direct proof; they must ordinarily be proven by circumstances from which they may be inferred, and in determining the presence or absence of these elements the jury may consider the acts and conduct of defendant and the general circumstances existing at the time of the alleged commission of the offense charged. "Wilful" as used in criminal statutes means the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of law. 1 Strong: N.C. Index, Criminal Law, § 2, p. 680. The evidence in the instant case, when considered in the light most favorable to the State, will permit but not compel the jury to find that defendant committed the offense charged intentionally and wilfully. Drunkenness is an affirmative defense and when interposed by the accused the burden is on him to satisfy the jury that at the time of the commission of a crime he was so intoxicated he did not know what he was doing or attempting to do, and was incapable of forming a criminal intent. One who drinks intoxicants for the purpose of giving him courage to commit a crime is not excused by such voluntary drunkenness for a crime committed while thus intoxicated. *State v. Hairston*, 222 N.C. 455, 23 S.E. 2d 885.

The evidence makes out a *prima facie* case against defendant. The case was submitted to the jury on a charge free of prejudicial error.

No error.

STATE v. MINNIE REID BELL.

(Filed 28 April, 1965.)

1. Intoxicating Liquor § 1—

In a county which has not elected to come under the Alcoholic Beverage Control Act, the Turlington Act as modified by the provisions of the Alcoholic Beverage Control Act is applicable.

2. Same—

The Alcoholic Beverage Control Act permits a person, even in a county which has not elected to come under the Act, to possess in his home any quantity of taxpaid whiskey solely for the personal consumption of himself, his family and *bona fide* guests, and therefore an instruction in a prosecution in such county that it is unlawful to transport or *to possess* more than one gallon of taxpaid whiskey, must be held for prejudicial error.

APPEAL by defendant from *Shaw, J.*, October 1964 Session of CABARRUS.

Criminal prosecution on a warrant charging defendant on 10 January 1964 with the unlawful and wilful possession of intoxicating liquor for the purpose of sale, G.S. 18-50, heard *de novo* in the superior court upon appeal by defendant from an adverse judgment in the recorder's court of Cabarrus County.

Plea: Not guilty. Verdict: Guilty as charged.

From a judgment of imprisonment, defendant appeals.

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

J. D. Hurst and Kenneth Cruse for defendant appellant.

PER CURIAM. The State's evidence shows these facts: On 10 January 1964 William F. Martin, Little, and Pageant, police officers of the town of Kannapolis, armed with a search warrant, went to the home of defendant on Fort Worth Street in the town of Kannapolis. Upon their arrival defendant was in her home, and they read the search warrant to her. They searched her house and found in a long closet between two bedrooms 12½ pints of whisky of several different brands and 15 tall cans of beer in her refrigerator. In the kitchen with her were two men, and on a table in the kitchen were a one-half pint bottle of whisky, some drink bottles, and two shot glasses. Officer Martin testified: "By shot glasses I mean little ones, measuring glasses."

Defendant offered one witness, Clara Mae Parks, who testified to the effect that she gave defendant twenty dollars to buy six pints of whisky for her, the witness, who was giving a party that Saturday night.

There is no evidence in the record as to whether the whisky found by the officers in defendant's home was taxpaid whisky or non-taxpaid

whisky. The record shows the whisky was introduced in evidence. The judge in his charge referred to it as taxpaid whisky.

Defendant has no exception to the evidence. All her exceptions, except a formal one, are to the charge of the court.

Possession by a person in his home of intoxicating liquor for the purpose of sale is a criminal offense in North Carolina. G.S. 18-50; *S. v. Simmons,* 256 N.C. 688, 124 S.E. 2d 887.

Cabarrus County has not elected to operate county liquor stores under our Alcoholic Beverage Control Act. In consequence, this case is controlled by the Turlington Act of 1923 as modified by the provisions of our Alcoholic Beverage Control Act applicable to counties not engaged in operating county liquor stores. *S. v. Brady,* 236 N.C. 295, 72 S.E. 2d 675.

In his charge, when read contextually, it is plain that the court instructed the jury that to convict it must find beyond a reasonable doubt from the evidence that the whisky was possessed by defendant for the purpose of sale, and further charged that possession of more than one gallon of whisky upon which the taxes imposed by law have been paid constituted *prima facie* evidence of possession for the purpose of sale. *S. v. Brady, supra.*

G. S. 18-49 permits, with certain provisoes, the transportation by a person of taxpaid whisky not in excess of one gallon from a county in North Carolina which has elected to operate under our Alcoholic Beverage Control Act to another county not coming under its provisions for the use of himself, his family, and his *bona fide* guests. *S. v. Holbrook,* 228 N.C. 582, 46 S.E. 2d 842.

In *S. v. Brady, supra,* the Court said:

> "Under the relevant section of the Turlington Act, *i.e.,* G.S. 18-11, as modified by the applicable provisions of the Alcoholic Beverage Control Act, a person may lawfully have or keep in his private dwelling while the same is occupied and used by him as his dwelling only an unlimited quantity of intoxicating liquor upon which the taxes imposed by law have been paid for use only for the personal consumption of himself, and of his family residing in such dwelling, and of his *bona fide* guests when entertained by him therein."

The court instructed the jury to the effect that it was unlawful for a citizen in a dry county like Cabarrus to transport or to possess more than one gallon of taxpaid whisky from a county in North Carolina coming under the provisions of our Alcoholic Beverage Control Act to or through another county in North Carolina not coming under the provisions of this Act. Defendant assigns this as error. This assignment of error is good because, as the Attorney General correctly states in his

brief, "it is conceded that in explaining that it was unlawful to transport more than one gallon of liquor, the court inadvertently also used the words 'or possess' which might have led the jury to conclude that the defendant was flatly guilty if she possessed more than a gallon of liquor."

The Attorney General further concedes error as follows: "It is also true that the judge's summary of the State's contention as to the evidence of the male guests and the liquor glasses may have been so phrased that the jury mistakenly understood the judge to express that as his own opinion." A reading of the charge shows the correctness of this concession by the Attorney General.

For error in the charge, defendant is entitled to a

New trial.

STATE OF NORTH CAROLINA v. ROBERT LEE MITCHELL, JR.

(Filed 28 April, 1965.)

1. Larceny § 7—

Evidence *held* sufficient to be submitted to the jury on the issue of defendant's guilt of larceny.

2. Criminal Law § 71—

Findings of fact upon conflicting evidence as to whether a confession was voluntary are conclusive, there being competent evidence to support the findings.

APPEAL by defendant from *Carr, J.*, Second January 1965 Criminal Session of WAKE.

Defendant was tried on a bill charging: (1) breaking and entering a building occupied by Brentwood Estates, Inc., with the intent to commit the crime of larceny; and (2) larceny of a typewriter and two adding machines, having a value of $711.00. The jury found defendant guilty on each count. Prison sentence was imposed. Defendant appealed.

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

Robert L. McMillan, Jr., for defendant appellant.

PER CURIAM. Defendant moved for nonsuit. His motion was denied. He assigns this ruling as error, because, as he says, the State failed "to identify the stolen property." The contention is lacking in merit. A

single sentence was imposed. Even if the State had failed to prove ownership of the adding machines and typewriter, that failure would not prevent a conviction on the charge of breaking and entering; but here the office manager gave the serial numbers of each machine to a deputy sheriff. Machines of the makes and serial numbers listed in the bill of indictment, as furnished the sheriff, were a day or two thereafter returned to Brentwood Estates, Inc. by the sheriff. He had gotten them in Washington, D. C., where they were pawned by defendant. A witness for the State testified he had participated in the commission of the crime. They had taken the adding machines and typewriter, and pistols stolen from another store, to Washington, D. C., where the defendant had pawned the stolen articles.

Defendant complains because the court permitted a deputy sheriff to relate a confession made by defendant. The assignment of error does not properly present the question of competency. Even so, we have examined the record and concur in the conclusion reached by the trial court that the confession was competent because freely and voluntarily made. The testimony on which the court based its ruling is to this effect: Between 5:30 p.m., June 24, 1964, and 7:00 a.m. the following morning, the office of Brentwood Estates, Inc., was broken into. Two adding machines and a typewriter were taken. The same night Hill's, a sporting goods store, was entered and a number of pistols were taken. On June 25, defendant pawned the adding machines, typewriter, and several of the pistols in Washington, D. C. A deputy sheriff went to Washington, got the typewriter and adding machines and returned them to Brentwood Estates, Inc. on June 26. Defendant, on June 25, while attempting to pawn a pistol, was arrested by police officers in Washington, charged with carrying a concealed weapon. He was there tried and convicted and given a six months' sentence. On November 28, 1964, the Washington authorities released defendant to the custody of a Wake County deputy sheriff, who brought defendant to Raleigh by automobile. The trip took about four hours. The two were alone in the car during the trip. Defendant was not handcuffed. A few minutes after they reached Raleigh, another deputy sheriff swore out a warrant charging defendant with breaking, entering and larceny. A committing magistrate was called to fix bond for defendant. The deputy informed the prisoner that he had a right to counsel, or to communicate with friends or relatives. He was asked if he desired to do so. He answered "no." Defendant was also informed by the deputy that he was not compelled to answer any questions, and any statement he made could be used against him when his case was tried. In the presence of the committing magistrate, the prisoner confessed his part in the commission of the crimes charged.

The confession accorded with the testimony of the State's witness, Chance. Chance had, prior to the offering of the confession, testified that he, defendant and a third person broke into Brentwood's, stole the typewriter and adding machines, and stole the pistols from Hill's. When the confession was offered, defendant objected; but he did not, when the court, in the absence of the jury, heard evidence to determine the competency of the testimony, seek to impeach the testimony of the witness with respect to the voluntariness of the confession by cross examination or by other evidence. In fact, when defendant took the stand in his own defense, he denied making any confession. The only evidence which in any way challenges the finding that the confession was voluntary is the defendant's statement that "Mr. Turner [the deputy] said that he had two boys who would testify against me who had already been tried and been given probation, and he said if I pleaded guilty he might get the same thing for me." This testimony would have been relevant when the court was called upon to pass on the voluntariness of the confession. It would have then presented a simple question: Which of two witnesses should the court believe? When the court determined that question, it settled the question of competency.

The findings made by the court, supported as they are by competent evidence, are conclusive. *State v. Egerton, ante* 328; *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572.

No error.

STATE v. WILLIAM ROGER HARPER.

(Filed 28 April, 1965.)

1. Escape § 1—

A warrant charging that the defendant named did unlawfully escape from a named prison in charge of a named official while the defendant was serving a sentence for a specified crime upon conviction at a specified term of the Superior Court of a named county, *held* sufficient and not subject to objection on the ground that the warrant failed to state the length of the sentence defendant was serving, the number of the defendant's commitment, or the trial docket number of the case in which the commitment was issued.

2. Criminal Law § 133—

The trial judge has no discretion to make the sentence for escape run concurrently with the prisoner's other sentences, it being mandatory under the statute that the sentence for escape begin at the expiration of any and all of the sentences theretofore imposed upon the defendant. G.S. 148-45, and

the sequence of sentences is a matter for the Prison Department, it not being required that the court show in the judgment the docket number.

APPEAL by defendant from *Carr, J.*, January 1965 Session of WAKE.

Defendant was originally tried in the City Court of Raleigh upon a warrant charging him with a violation of G.S. 148-45. From conviction and sentence, he appealed to the Superior Court, where he was again convicted. Defendant moved in arrest of judgment. The motion was overruled, and the court imposed a prison sentence of 90 days to begin at the expiration of the two-year sentence which defendant "is now serving" and which was imposed in Craven County "at the April 1963 Term, Case No. 6157." Defendant appeals, assigning as error the denial of his motion in arrest of judgment.

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

Lester V. Chalmers, Jr., for defendant.

PER CURIAM. This appeal presents only the question whether the warrant charged defendant with the crime of escape as defined in G.S. 148-45, the pertinent portions of which statute are as follows:

> "(a) Any prisoner serving a sentence imposed upon conviction of a misdemeanor who escapes or attempts to escape from the State prison system shall for the first such offense be guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment for not less than three months nor more than one year . . ."

The warrant, sworn to on November 18, 1963, alleges:

> "(O)n or about the 2nd day of November 1963, in the City of Raleigh, and in Raleigh Township, Wake County, William Roger Harper did unlawfully and wilfully escape from the N. C. State Prison System and the lawful custody of the State Prison Dept. K. B. Bailey being the Superintendent of State Prison at Central Prison, Raleigh, N. C., the particular camp in which the said William Roger Harper was then and there confined while then and there serving a sentence after having been convicted and sentenced for the crime of Breaking and Entering which is a Misdemeanor under the laws of the State of N. C. imposed at the April Term Superior Court, Craven County, . . . contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

Defendant contends that the warrant is defective in that it does not allege: (1) the year of defendant's conviction in Craven County; (2) the length of the sentence imposed; (3) the number of defendant's commitment from Craven County; and (4) the trial docket number of the case in which the commitment was issued. Such detailed information is not required to charge an offense under G.S. 148-45. The inclusion of any unnecessary numbers would tend more to proliferate than to repress confusion.

In *State v. Jordan*, 247 N.C. 253, 100 S.E. 2d 497, this Court considered, and held fatally defective, an indictment which merely charged that the prisoner "did unlawfully, wilfully and feloniously escape and attempt to escape from the State Prison System, said prisoner having been previously convicted of escape, against the form of the statute in such case made and provided and against the peace and dignity of the State." Bobbitt, J., writing for the Court, posed these questions:

> "Who had custody of defendant when the alleged escape on January 9, 1957, occurred? Was defendant then serving a sentence imposed upon conviction of a criminal offense? If so, by what court, and on what charge, had defendant been convicted and sentenced? Was the charge a misdemeanor or a felony?" *Id.* at 254, 100 S.E. 2d at 498.

No averment in the indictment purported to answer these inquiries.

The warrant *sub judice* answers all of the above questions. It alleges the following facts, which are sufficient to constitute the offense prohibited by G.S. 148-45: On November 2, 1963, while serving a sentence imposed upon him by the Superior Court of Craven County at the April Term upon his conviction of the misdemeanor of breaking and entering, defendant escaped from the lawful custody of the State prison system, specifically from the custody of K. B. Bailey, the superintendent of the State's Prison (Central Prison) at Raleigh. Although it would have been better for the year of the "April Term" at which the sentence was imposed to have been stated, this omission does not invalidate the warrant. This warrant was verified on November 18, 1963. Obviously, the draughtsman meant the same year, 1963, when he omitted to state the year of the "April Term" referred to therein. The judgment from which defendant appeals verifies this conclusion.

Defendant is likewise without merit in his contention that, in order for the sentence imposed in this case to begin at the expiration of the sentence imposed by the Craven County Superior Court, the docket number of that case is required. The law specifically provides, G.S. 148-45, that any term of imprisonment imposed for an escape, commences "at the termination of any and all sentences to be served in

the State prison system under which the prisoner is held at the time an offense defined by this statute is committed . . ." Therefore, any sentence imposed upon a prisoner for an escape from the State prison system commences at the termination of any and all sentences to be served in the State prison system which sentences have theretofore been imposed upon him. This requirement is mandatory, and in this connection the trial judge has no discretion to make the sentence run concurrently with the prisoner's other sentences. The proper alignment of *escape* sentences, *i.e.*, when they are to begin, is a matter for the Prison Department.

Affirmed.

RUTH KESLER v. J. C. STOKES AND WORTH T. KESLER.

(Filed 28 April, 1965.)

1. Trial § 48—

The court has the discretionary power to set aside the verdict as against one defendant while refusing to set it aside against the other defendant, and its orders doing so are not subject to review.

2. Appeal and Error § 20—

One defendant is not prejudiced by the order of the court staying execution against the other defendant pending retrial of the issues against the first defendant, and the first defendant has no standing to challenge the stay of execution.

APPEAL by defendants from *Clark, S. J.*, November, 1964 Session, ROWAN Superior Court.

The plaintiff instituted this civil action to recover damages for personal injury sustained as the result of an automobile collision between a Chevrolet owned and operated by H. C. Stokes and a Plymouth owned and operated by Worth T. Kesler, in which the plaintiff, wife of Kesler, was riding as a passenger. The jury found the defendant Kesler was negligent; that the defendant Stokes was not negligent; and fixed plaintiff's damages at $2,600.00. The court, in its discretion, set aside the jury's finding that Stokes was not negligent and ordered a new trial on that issue. From a judgment that the plaintiff recover of the defendant Kesler the sum of $2,600.00, but that execution be stayed pending trial on the issue of Stokes' negligence, both defendants appealed.

George R. Uzzell, Robert M. Davis, for plaintiff appellee.

Woodson, Hudson & Busby, by Nelson Woodson, Max Busby, for defendant Kesler, appellant.

Kluttz & Hamlin by Lewis P. Hamlin, Jr., for defendant Stokes, appellant.

PER CURIAM. The pleadings and the evidence were sufficient to require the submission of a separate issue of negligence against each defendant. The judge, in setting aside the jury's finding that Stokes was not negligent, and in refusing to set aside the finding that Kesler was negligent, acted within the discretionary power vested in him. The decisions are not subject to review.

Stokes alone assigns as error that part of the judgment which stays the execution until the issue of his negligence is resolved. The plaintiff, the judgment creditor, did not appeal. The appellant Kesler does not assign the stay as error. Stokes, while still a party to the action, is not a party to, nor prejudiced by, the judgment. Hence he is not in a position to challenge the stay of execution.

No error.

STATE v. RONALD FRED MANESS.

(Filed 28 April, 1965.)

1. Criminal Law § 99—

Where the State introduces evidence tending to establish each essential element of the offense charged, the fact that defendant introduces evidence at variance therewith cannot justify nonsuit.

2. Criminal Law § 154—

An assignment of error not supported by an exception will not be considered.

3. Arrest and Bail § 6—

The failure of a warrant for resisting arrest to aver, even in a general way, the manner in which defendant resisted or obstructed the officer, is fatal.

APPEAL by defendant from *Burgwyn, E.J.*, November 1964 Special Session of RANDOLPH.

Defendant was tried in the Recorder's Court of Randolph County on a warrant containing two counts, charging (1) he "unlawfully and wilfully made an assault on one C. R. Joyce, by striking him with his fist, and kicking him in his private parts," and (2) did "unlawfully

and wilfully resist, delay, and obstruct a public officer, to wit C. R. Joyce a duly qualified Deputy Sheriff of Randolph County, while he the said C. R. Joyce was attempting to discharge and discharging a duty of his office, to wit attempting to make an arrest on the said Ronald Maness, in violation of G.S. 14-223." The Recorder found defendant guilty on each charge. Prison sentence was imposed. Defendant appealed to the Superior Court. Trial was had there on the warrant. The jury found defendant guilty as charged. Prison sentence of 30 days was imposed on the first count, and six months on the second count. Defendant excepted and appealed.

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

H. F. Seawell, Jr., for defendant appellant.

PER CURIAM. Defendant assigns as error the court's refusal to allow his motion to nonsuit. C. R. Joyce testified: "As I approached Econo Service Station someone whistled loud and I pulled into the station between the gas tank and the station itself. I saw Maness come walking toward my car. He pulled off his coat and threw it on the ground and walked up to the car and I saw he was drinking some and he told me he was going to whip me and I told him the best thing he could do was to go home and stay out of trouble. He shoved me back against the car."

Defendant's denial of guilt, and his testimony painting a picture at variance with the State's evidence, did not entitle him to a judgment of nonsuit. The court properly submitted the question of guilt of an assault to the jury.

The assignment of error asserting failure to adequately define "assault" is not supported by an exception. This failure is fatal. *Holden v. Holden,* 245 N.C. 1, 95 S.E. 2d 118.

The second count charging a violation of G.S. 14-223 is, as the Attorney General admits, fatally defective because of the failure to allege essential facts. *State v. Fenner,* 263 N.C. 694, 140 S.E. 2d 349.

The judgment imposing a prison sentence on the insufficient charge of resisting an officer is arrested. *State v. Banks,* 263 N.C. 784, 140 S.E. 2d 318.

On the charge of assault. No error.

On the charge of resisting an officer. Judgment arrested.

LUCILLE WIGGINS SEIBOLD v. KINSTON-LENOIR COUNTY PUBLIC LIBRARY AND THOMAS HEWITT, W. A. ALLEN, ALEX HOWARD, T. J. TURNER, MRS. WOOTEN MOSELEY AND MRS. JOHN ROWLAND, TRUSTEES OF THE KINSTON-LENOIR COUNTY PUBLIC LIBRARY.

(Filed 28 April, 1965.)

Municipal Corporations § 10—

The operation of a public library is a governmental function, and governmental agencies and their officers are protected against liability in tort for alleged negligence in the maintenance of such library. Constitution of North Carolina, Art. IX, § 1.

APPEAL by plaintiff from *Parker, J.*, September 1964 Session of LENOIR.

Plaintiff seeks compensation for personal injuries sustained in a fall. To justify her right to compensation, she alleged: Kinston and Lenoir County, acting pursuant to the authority given in Art. 8, c. 160 of the General Statutes, had established and were operating a public library in Kinston. Individual defendants are the officials responsible for the operation of the library. "[E]ntrance to and egress from the said public library is obtained by ascending a series of steps which reach from the ground level to a front porch and then traversing the front porch and into the front door of the library." Plaintiff, a resident of Lenoir County, went to the library to borrow and return books. After she had completed her mission, and when "descending the steps, the heel of her shoe became lodged in a crack in one of the steps." This caused her to fall.

Defendants demurred because, as they allege, it affirmatively appears that the library is a governmental agency, and individual defendants are public officials performing a governmental duty.

The demurrer was sustained. Plaintiff excepted and appealed.

Turner and Harrison for plaintiff appellant.
White & Aycock for defendant appellees.

PER CURIAM. Our forefathers, drafting our first Constitution, declared the essentials of good government and happiness of mankind are religion, morality and knowledge, § 41, Constitution of 1776; now Art. IX, § 1, of our Constitution, G.S. 4A, p. 114.

The Constitutional declaration of 1776 was not a new concept to North Carolina. More than a half century prior thereto, the provincial legislature had enacted a statute captioned: "An Act for Appointing a Town in the County of Bath and for Securing the Publick Library belonging to St. Thomas's Parish in Pamptecough," c. LII, Laws of 1715, State Records of North Carolina, Vol. XXIII, p. 73.

An adequate library is essential for the dissemination of knowledge. Recognizing this fact, the State established a State public library in 1840. The librarian was required to keep the library open for the accomodation of the public every day, except on Sundays and the Fourth of July, see c. 92, Revised Code of 1854.

The operation of a public library meets the test of "governmental function," as stated in repeated decisions rendered by this Court. *Clark v. Scheld,* 253 N.C. 732, 117 S.E. 2d 838; *Jamison v. Charlotte,* 239 N.C. 682, 80 S.E. 2d 904; *Britt v. Wilmington,* 236 N.C. 446, 73 S.E. 2d 289; *Green v. Kitchin,* 229 N.C. 450, 50 S.E. 2d 545; *Millar v. Wilson,* 222 N.C. 340, 23 S.E. 2d 42. The Court of Appeals of Kentucky, in *Alvey v. Brigham,* 150 S.W. 2d 935, held that the operation of a free public library was the performance of a governmental function. The courts of New Jersey reached a similar conclusion in *Trustees, Free Public Library v. Civil Service Commission,* 83 Atl. 980. The Supreme Court of Illinois reached a different conclusion in *Johnston v. City of Chicago,* decided in 1913, 101 N.E. 960, Ann. Cas. 1914B 339.

Appellant relies on the *Johnston* case to support her assertion that the operation of a public library is a proprietary, rather than a governmental function, when operated by a municipality. We have examined the case carefully. We do not concur in the conclusion there reached. The argument there advanced would apply with equal force to the operation of a fire department, the operation of a fogging machine to eradicate insects, the maintenance of a police force, or the operation of public schools.

Having reached the conclusion that the service rendered was a governmental function, it follows that the governmental agency and its officers are protected against plaintiff's claim of tort liability. *Clark v. Scheld, supra; Britt v. Wilmington, supra; Stephenson v. Raleigh,* 232 N.C. 42, 59 S.E. 2d 195; *Klassette v. Drug Co.,* 227 N.C. 353, 42 S.E. 2d 411.

The judgment sustaining the demurrer is

Affirmed.

MRS. ESTELLE JORDAN, ADMINISTRATRIX OF THE ESTATE OF JIMMY RAY JORDAN, DECEASED v. JOHN DAVID FLAKE, MAYNARD FLAKE, AND MRS. MARGARET R. FLAKE.

(Filed 28 April, 1965.)

1. Negligence § 30; Trial § 45—

It is error for the court to refuse to accept a verdict answering the issues of negligence and contributory negligence in the affirmative and awarding damages to plaintiff, and the refusal to accept such verdict invalidates all subsequent proceedings.

2. Trial § 48—

The lower court erroneously refused to accept a permissible verdict and declared a mistrial upon the jury's inability to reach a verdict after redeliberation. *Held:* The cause must be remanded for the lower court to accept the verdict, but the parties are relegated to their rights as of that time, so that the parties against whom the verdict is rendered may move the court to set the verdict aside in its discretion, notwithstanding such motion must ordinarily be made at the trial term.

APPEAL by defendants from *Crissman, J.*, November 1964 Civil Session of ANSON.

Action for wrongful death.

On April 24, 1964, about 11:00 p.m., the minor defendant, John David Flake, was operating the family-purpose automobile of his parents, defendants Maynard and Margaret Flake, in an easterly direction on Highway No. 74, a two-lane roadway, at a speed of about 60 MPH, the posted maximum. In passing another vehicle going in the same direction he struck and killed plaintiff's intestate, Jimmy Ray Jordan, who was standing in the traveled portion of the highway about one foot from the north edge of the pavement at a point about one mile west of Wadesboro. The pleadings and the evidence raised issues of John David Flake's negligence, Jimmy Ray Jordan's contributory negligence, and damages. The judge submitted the usual three issues to the jury with instructions that if it answered each of the first two issues Yes, it would not answer the third issue with reference to damages.

After the jurors had deliberated for some time, "they returned their verdict into the courtroom." The issues relating to negligence and contributory negligence had each been answered Yes; the issue of damages, $7,500.00. Judge Crissman, without revealing the verdict, informed the jurors that their answers to the issues were not in compliance with his instructions. He reinstructed them, in the same manner as before, and directed them to consider the issues again. An hour later the jurors returned to the courtroom, and the foreman told the court the jury would be unable to reach a verdict. The judge instructed the jury in

general terms on actionable negligence and again repeated his previous instructions that if the second issue were answered Yes, it would not award plaintiff damages. The jurors retired once more, but returned a few minutes later to announce that they were "just locked." Judge Crissman then declared a mistrial and, for the first time, permitted counsel to see how the jury had answered the issues. Defendants excepted to the failure of the court to accept the verdict, and appealed.

Enos T. Edwards for plaintiff, appellee.
Taylor and McLendon by F. O'Neil Jones for defendants, appellants.

PER CURIAM. G.S. 1-224 provides: "In actions where a verdict passes against the plaintiff, judgment shall be entered against him."

> "(A) verdict 'passes,' when it has been accepted by the trial judge for record . . . A verdict is accepted by the judge when he has inspected it and finds, *or should as a matter of law find,* that it is determinative of the issues involved." *Insurance Co. v. Walton,* 256 N.C. 345, 349, 123 S.E. 2d 780, 784. (Italics ours.)

It has long been settled by the decisions of this Court that, in actions such as this, when the jury finds that the plaintiff was injured by the negligence of the defendant and that the plaintiff by his own negligence contributed to his injury, and then assesses damages, the plaintiff is not entitled to recover. On the contrary, the defendant is entitled to judgment on the verdict, for such a verdict is not essentially inconsistent. *Brown v. Bass,* 261 N.C. 739, 136 S.E. 2d 36; *Bullard v. Ross,* 205 N.C. 495, 171 S.E. 789; *Allen v. Yarborough,* 201 N.C. 568, 160 S.E. 833; *Sasser v. Lumber Co.,* 165 N.C. 242, 81 S.E. 320.

When the jury first returned its verdict, Judge Crissman could, in his discretion, have set it aside. He could not, however, legally have refused to accept it. His rejection of the verdict was error which invalidated all subsequent proceedings. The disposition of this case is controlled by *Edwards v. Motor Co.,* 235 N.C. 269, 69 S.E. 2d 550. We follow the course it chartered:

> "The verdict will be treated as having been received, and the cause will be remanded for further proceedings, with the parties being relegated to their rights as of the coming in of the verdict to the extent (1) that the plaintiff may move the court to set aside the verdict in the exercise of its discretion, and (2) that the defendants may move for judgment on the verdict. Ordinarily, a motion to set aside a verdict in the discretion of the court must be made and decided at the trial term. *Fowler v. Murdock,* 172 N.C. 349, 90 S.E. 301; McIntosh, N. C. Practice and Procedure, p. 671. How-

ever, this rule is subject to exception where, as here, an erroneous ruling of the trial court deprives a litigant of the opportunity to invoke this inherent discretionary power of the court." *Id.* at 272, 69 S.E. 2d at 553.

Error and remanded.

STATE v. JOHN BLEASE STEVENS.

(Filed 28 April, 1965.)

Criminal Law § 18—

Where the statute establishing a county court so provides, an appeal to the Superior Court by a defendant charged with forcible trespass and assault with a deadly weapon, misdemeanors beyond the final jurisdiction of a magistrate or a mayor, must be tried upon a bill of indictment. Constitution of North Carolina, Art. I, § 12; Chapter 425 Public-Local Laws of 1913.

APPEAL by defendant from *Crissman, J.*, November 30, 1964 Mixed Session of STANLY.

Defendant was tried and convicted on November 13, 1964, in Stanly County Court, upon warrants charging forcible trespass and assault with a deadly weapon. From the prison sentence imposed, he appealed to the Superior Court, where he was again tried and convicted on the original warrants. Defendant moved in arrest of judgment for that, by express provision of the public-local law establishing Stanly County Court, the Superior Court was empowered to try defendant only upon a bill of indictment. Judge Crissman overruled the motion and imposed sentences, from which defendant appeals.

T. W. Bruton, Attorney General, and Richard T. Sanders, Assistant Attorney General, and Andrew A. Vanore, Jr., Staff Attorney, for the State.

Blackwell M. Brogden for defendant.

PER CURIAM. Stanly County Court was established by Chapter 425, Public-Local Laws of 1913, which, with certain exceptions not pertinent here, conferred upon it exclusive original jurisdiction of all criminal offenses committed in Stanly County, which offenses are above the jurisdiction of justices of the peace and mayors and are below the grade of felony. Such offenses are declared to be petty misdemeanors by Section 2(c) of the Act. Section 7 of the Act provides:

"In all cases there shall be the right of appeal from the judgment of said court to the Superior Court of Stanly County, and upon such appeal the trial in the Superior Court shall be *de novo.* Proceedings on appeal shall conform to the procedure now obtaining in the courts of justices of the peace, as far as practicable: *Provided,* that in all cases of appeal, except in cases where a magistrate or a mayor would have final jurisdiction, the defendant shall be tried only upon a bill found by the grand jury."

The constitutional requirement that criminal trials must be upon a bill of indictment, N. C. Const., Art. I, § 12, is subject to two exceptions: (1) the legislature may provide means other than indictments by grand juries for the trial of petty misdemeanors; and (2) when represented by counsel, an accused may, in all except capital cases, waive indictment under rules prescribed by the legislature. N. C. Const., Art. I, § 12. *State v. Thomas,* 236 N.C. 454, 73 S.E. 2d 283.

The legislature may or may not exercise its constitutional power to provide means of trial for petty misdemeanors other than upon a bill of indictment. Prior to the general election held November 2, 1962, when the people of the State adopted an amendment rewriting Article IV, the State Constitution contemplated a diversity of procedure in the lower courts throughout the State and, upon appeal from their judgments, in the Superior Courts of the different counties. *State v. Lytle,* 138 N.C. 738, 51 S.E. 66. As a result of the 1962 amendment, Stanly County Court and all other courts inferior to the Superior Court will cease to exist on January 1, 1971.

The legislature has not provided, on appeal from Stanly County Court to the Superior Court in cases beyond the jurisdiction of a justice of the peace or a mayor, means of trial other than upon a bill of indictment. On the contrary, in such cases it has specifically provided that the defendant shall be tried only upon a bill found by the grand jury. Forcible trespass and assault with a deadly weapon, the charges contained in the two warrants upon which defendant was tried, are both crimes beyond the jurisdiction of a justice of the peace or a mayor. Without a bill of indictment, therefore, the Superior Court had no jurisdiction to try defendant upon the charges contained in the original warrants. The motion in arrest of judgment, as the Attorney General concedes, should have been allowed. *State v. Doughtie,* 238 N.C. 228, 77 S.E. 2d 642. Defendant's appeal is, however, still pending in the Superior Court, and the solicitor may yet send bills of indictment to the grand jury.

The judgment is arrested and the case remanded to the court below.

Error and remanded.

JOHNNY D. BENSON, BY HIS NEXT FRIEND, J. L. BENSON, PLAINTIFF v. THOMAS C. DARK AND JOEY CHALIFOUR, ORIGINAL DEFENDANTS, AND FREDDIE L. BENSON AND DAYTON BARBOUR, ADDITIONAL DEFENDANTS.

(Filed 28 April, 1965.)

APPEAL by original defendants Thomas C. Dark and Joey Chalifour from *McKinnon, J.*, January, 1964 Session, JOHNSTON Superior Court.

Johnny D. Benson, by his Next Friend, instituted this civil action against the original defendants, Thomas C. Dark, driver, and Joey Chalifour, owner, of a Ford station wagon which crashed into the Chevrolet station wagon owned by defendant Dayton Barbour and being driven by Freddie Lewis Benson, in which the plaintiff was a passenger. According to the evidence, the collision occurred on N. C. Highway No. 50 near Benson as both vehicles were proceeding north at 7:15 p.m. on February 6, 1963. The evidence of both parties disclosed that the Chevrolet slowed down, giving a mechanical turn signal indicating the driver intended to leave the highway. Thus far the evidence is free from conflict.

The plaintiff's witnesses testified the driver of the Chevrolet gave a left turn signal and was in the act of executing the indicated movement into a private driveway when Dark, attempting to pass on the left, crashed into the side of the Chevrolet, injuring the plaintiff.

The defendants' witness testified the driver of the Chevrolet slowed down, gave a right turn signal, but instead turned left in front of Dark who was attempting to pass on the left, thus causing the crash.

The original defendants interpleaded the additional defendants, owner and driver of the Chevrolet, who counterclaimed against defendant Dark for personal injury to Freddie Benson and damage to Barbour's Chevrolet. The original defendants denied negligence and filed a cross action against the additional defendants.

The jury found the plaintiff was injured by the negligence of the original defendants; that the plaintiff was not contributorily negligent; that the negligence of the additional defendants did not concur in causing the plaintiff's injury, for which the jury awarded $3,500.00. The jury found Chalifour was not damaged by the negligence of Freddie L. Benson but that Benson was damaged by the negligence of Thomas C. Dark, for which Freddie L. Benson was entitled to recover $2,500.00 for his personal injury and Dayton L. Barbour was entitled to recover $250.00 damages to the Chevrolet station wagon. From a judgment in accordance with the verdict, the original defendants appealed.

Smith, Leach, Anderson & Dorsett by Willis Smith, Jr., for Original Defendants Thomas C. Dark and Joey Chalifour, appellants.

Albert A. Corbett, for additional defendants Freddie L. Benson and Dayton Barbour, appellees.

PER CURIAM. The original defendants assign as error (1) the refusal of the court to enter judgment of compulsory nonsuit in the plaintiff's action at the close of the evidence, (2) the refusal to enter nonsuit on the cross action of the additional defendants against the original defendants. The appellants abandoned their first assignment but insist that the evidence was insufficient to make out a case of negligence against the original defendants and was sufficient to show contributory negligence on their part as a matter of law.

With respect to the collision and the resulting injuries, there was little dispute. The crux of the controversy involved the question whether the driver of the Chevrolet gave a mechanical signal of his intention to turn left as he claimed, or whether he gave a right turn signal and violated it by turning left. At the time there was no other traffic involved. The jury resolved the disputed issues of fact in favor of the plaintiff and the additional defendants. Error in the trial does not appear.

No error.

MAX MICHAEL RICHARDSON, BY NEXT FRIEND, MAX B. RICHARDSON, PLAINTIFF V. ROCKINGHAM RAILROAD COMPANY AND JOHN ARTHUR McKENZIE, DEFENDANTS.

(Filed 28 April, 1965.)

APPEAL by defendant, John Arthur McKenzie, from *Brock, S.J.*, November 1964 "A" Civil Session of RICHMOND.

Action for damages for personal injuries.

On 6 October 1961 plaintiff, a minor 8 years of age, was riding as a guest passenger in an automobile owned and operated by defendant McKenzie. The automobile was proceeding northwardly on North Lee Street in the town of Rockingham at the intersection of said street with the tracks of Rockingham Railroad Company. The automobile collided with a train engine which was proceeding eastwardly. Plaintiff was injured; he instituted this action against McKenzie and the Railroad Company, alleging that their concurrent negligence caused his injury.

At the close of the evidence the motion of the Railroad Company for nonsuit was allowed. The trial proceeded against defendant McKenzie and resulted in a verdict of $10,000 for plaintiff. From judgment entered on the verdict, defendant McKenzie appeals.

Webb, Lee and Davis for plaintiff.
Henry & Henry for defendant McKenzie.

PER CURIAM. Appellant complains of the admission, over his objection, of evidence of medical expenses incurred on account of plaintiff's injuries, and of the judge's charge permitting recovery of such expenses by infant plaintiff. Plaintiff's father had a separate cause of action for such expenses. *Ellington v. Bradford,* 242 N.C. 159, 86 S.E. 2d 925. His father served as Next Friend in the prosecution of this action. The allegations of the complaint respecting medical expenses are in general terms, but are sufficient to support a recovery for such expenses. *Kizer v. Bowman,* 256 N.C. 565, 124 S.E. 2d 543. Where the father, in whom the cause of action for medical expenses exists, is Next Friend and participates in the trial in which an award is made to the infant for medical expenses, the participation is a waiver of the father's right to recover such expenses. *Doss v. Sewell,* 257 N.C. 404, 125 S.E. 2d 899. According to the decided cases it is error under certain circumstances for the court to permit recovery of medical expenses by an unemancipated infant, over the objection of defendant made in apt time and form. Upon consideration of the entire record, we are of the opinion that if it was error in the instant case, the error was not sufficiently prejudicial to warrant a new trial.

Appellant assigns as error the charge of the court that the jury might award damages for future or permanent injury. He contends that there is no evidence to support such instruction. The assignment is overruled. The record contains some evidence of permanent injury.

No error.

STATE v. MARY M. DOBBINS.

(Filed 28 April, 1965.)

APPEAL by defendant from *Johnston, J.,* October Session 1964 of WILKES.

This is a criminal action. The defendant was tried upon a bill of indictment charging her with murder in the first degree, but upon calling the case the solicitor announced that he would not ask for a conviction of murder in the first degree but for murder in the second degree or manslaughter.

The State's evidence tends to show that on 24 August 1964, defendant, Mary M. Dobbins, and Cranford Holcomb went to the house of

Geraldine Ward at Mountain Valley in Wilkes County. Another man, Davis Brannon, was already at Geraldine Ward's house.

The four persons above mentioned sat at the kitchen table in the Ward house. According to the evidence, the males made some improper advances on the defendant and Geraldine Ward and were talking about sex. Cranford Holcomb threatened to hit Geraldine Ward. Brannon and Holcomb were requested to leave; Brannon left, but Holcomb remained. Geraldine Ward and the defendant managed to push Holcomb out of the house and to lock the door.

The evidence further tends to show that Cranford Holcomb, while he was on the front porch of the Ward house, told Mary Dobbins, "if she would give him back his money he would go on and leave," and that was all Holcomb said to the defendant or to Geraldine Ward after he was locked out of the house. After that, Holcomb went around the house several times, came back up on the porch and began pecking on the window. The defendant told the Sheriff of Wilkes County that she walked to the kitchen, picked up a chair, took it into the living room and stepped up on it and got the shotgun, stepped back on the floor and shot through the window. She further stated that "she didn't see anyone when she shot, that she purely shot out of the window from where the noise was coming."

The Sheriff testified that he examined the house and that there were plastic curtains over the window, hanging on each side of the window with a space about ten to twelve inches between the two curtains. The curtain on the left side of the window had been shot through.

The top of Cranford Holcomb's head was shot off and he was found lying on the porch floor in front of the window through which the defendant shot.

At the close of the State's evidence, the State rested, and without putting on evidence the defense rested. The jury returned a verdict of guilty of murder in the second degree. From the judgment imposed the defendant appeals, assigning error.

Attorney General Bruton; Deputy Attorney General Ralph Moody for the State.

Hayes & Hayes; Porter & Conner for defendant.

PER CURIAM. After a careful review of the evidence adduced in the trial below, and upon an examination of the exceptions and assignments of error, we have concluded that no reversible error was committed in the trial below.

No error.

STATE v. DANIEL LONNIE BRITT.

(Filed 28 April, 1965.)

APPEAL by defendant from *Shaw, J.*, December, 1964 Session, ROWAN Superior Court.

This criminal prosecution was based on a two-count bill of indictment charging that on May 26, 1964, the defendant feloniously broke and entered a certain building occupied by Paul Yates for the purpose of committing the crime of larceny. The second count charged the larceny of two pistols and Ten Dollars in United States currency, of the total value of One Hundred Dollars.

The evidence disclosed the building was broken into and the pistols and the money were taken from the cash register on the night of May 26, 1964. The defendant was at the building at closing time, around ten o'clock at night. He admitted to Mr. Richardson, SBI Agent, that he had gone into the building, taken some money and the pistols which he had pawned in Charlotte for $10.00. He gave the agent the address of the pawn shop where the pistols were recovered.

The defendant testified, denying that he took the pistols or the money from the cash register. He claimed he was drinking and "I was a quarter of a mile away . . . when I realized I had the pistols . . . Both of them were in one pocket. I took them on home . . . and the next morning I went to Charlotte and pawned them . . . I do not know how they got in my pocket."

The jury returned a verdict of guilty. From a prison sentence of two and one-half to five years, the defendant appealed.

T. W. Bruton, Attorney General, Ralph Moody, Deputy Attorney General for the State.

Graham M. Carlton for defendant appellant.

PER CURIAM. Defendant's counsel took a number of exceptions to the charge. However, in view of the defendant's own evidence, the charge is more favorable to him than he had any right to expect. He admitted taking the pistols to a Charlotte loan office. His denial was that he didn't steal them from the cash register. A new trial, under the circumstances, is not warranted.

No error.

VERNON JOHNSON v. T. W. LEE.

(Filed 28 April, 1965.)

APPEAL by defendant from *McKinnon, J.,* September, 1964 Session, WAKE Superior Court.

The plaintiff instituted this civil action to recover $555.00 for moving a frame building from one of defendant's lots to another. The plaintiff alleged the parties had an agreement that plaintiff would furnish all heavy equipment and operators and that the defendant would provide at his own expense other labor necessary to complete the job. The parties agreed that the plaintiff should be paid $15.00 per hour for the moving operation. The evidence disclosed that the plaintiff furnished equipment and operators for 30 hours for which he was entitled to recover $450.00. He alleged, further, that the defendant failed to furnish the other labor necessary to finish the work, and that plaintiff had to pay for such other labor the sum of $105.00.

The defendant admitted making a contract but contended he was due a credit of $350.00 because of the damage to the building caused by the plaintiff's negligence in removing it. He also alleged that the defendant was due him a credit of $80.47 on an old account.

After hearing the evidence of both parties, the jury found the defendant was due the plaintiff $555.00 for moving the building; that the defendant was due a credit of $22.29 on the old account. From a judgment in favor of the plaintiff for $532.71, the defendant appealed.

Basil L. Sherrill, for plaintiff appellee.
Stanley L. Seligson for defendant appellant.

PER CURIAM. The dispute between the parties involved issues of fact. After hearing both parties, the jury resolved the dispute and the judgment was entered in accordance with the findings, which are supported by the evidence.

No error.

DONALD BULLARD, ADMINISTRATOR OF THE ESTATE OF J. W. BULLARD, DECEASED v. BRYANT JOHNSON.

(Filed 28 April, 1965.)

APPEAL by plaintiff from *May, S. J.,* October 12, 1964, Civil Session of LEE.

Action to recover on a promissory note.

Plaintiff, administrator of the estate of J. W. Bullard, alleges that as such administrator he is the holder and owner of a promissory note in the face amount of $7340, dated 10 October 1950, made by defendant and payable to S. D. Brafford or order; the note was endorsed in blank and was in possession of J. W. Bullard at the time of his death; defendant made payments, the last on 8 August 1962, totalling $4165; plaintiff has demanded payment of the balance due and defendant has refused to pay the same.

Defendant defends on the ground that the note "was given by defendant to the payee in sole consideration of amount lost to payee by defendant in wagers on World Series baseball games."

The jury found that the note was given in consideration of a gaming transaction and obligation. Judgment was entered dismissing the action. Plaintiff appeals.

Teague, Williams & Love for plaintiff.
Hoyle & Hoyle for defendant.

PER CURIAM. A note given for a gambling debt is void and no action thereon can be maintained. G.S. 16-1; *Bank v. Crafton,* 181 N.C. 404, 107 S.E. 316. Plaintiff makes numerous assignments of error based on 21 exceptions. The record has been carefully examined and each of the exceptions fully considered. They present no unusual or novel question of law, and point to no error warranting a new trial.

No error.

MARVIN E. MEADOWS v. PERDRIX MACHINERY & SALES COMPANY.

(Filed 28 April, 1965.)

APPEAL by defendant from *Hobgood, J.,* November 30, 1964 Session of LEE.

Plaintiff instituted this action to recover the sum of $3,737.00, down payment plus incidental charges on the purchase price of a dry-cleaning plant in Sanford, the sale of which, he alleges, defendant refused to consummate according to the agreement.

In its answer, defendant alleged that it was plaintiff who refused to comply with the contract, and it prayed for "a complete accounting" and a monetary judgment against plaintiff based thereon. Each party

offered evidence tending to sustain the respective allegations. Upon sharply conflicting evidence the jury, answering stipulated issues, found that defendant was indebted to plaintiff in the amount of $3,000.00, and that plaintiff owed defendant nothing. From judgment entered on the verdict defendant appeals.

Pittman, Staton & Betts for plaintiff appellee.
Clawson L. Williams, Jr., for defendant appellant.

PER CURIAM. An examination of the record reveals no error which would warrant a new trial. This case involved only issues of fact. It was fairly submitted to the jury, which seems to have attempted to do equity. If, as defendant stressfully contends, incompetent evidence was admitted over its objection, the exception taken was worthless because the same testimony had been theretofore or was thereafter given by the witness in other parts of his examination without objection. *Dunes Club v. Insurance Co.*, 259 N.C. 293, 130 S.E. 2d 625.

No error.

STATE v. JAMES EARL WILSON.

(Filed 5 May, 1965.)

1. Criminal Law §§ 85, 101—

The fact that the State introduces exculpatory statements of the defendant does not preclude the State from showing the facts to be otherwise, and when the State does so and introduces evidence that defendant is guilty of each essential element of the offense, the exculpatory statements do not warrant nonsuit.

2. Automobiles § 76—

In a prosecution on an indictment charging that defendant was the driver of a car involved in a collision resulting in injury and death to six named persons, and failed to stop at the scene of the accident in violation of G.S. 20-166(a), and failed to give his name and address and license number to the six persons injured and killed, G.S. 20-166(c), *held*, the fact that none of the persons injured in the accident died as a result thereof does not disclose a fatal variance, it being sufficient to sustain conviction on both counts if the State introduces evidence that the persons named were injured.

3. Indictment and Warrant § 17—

Even though defendant in this case relied upon an alibi, the variance of one day in the indictment and proof as to the date the offense was com-

mitted *held* not prejudicial upon the facts of the particular case, it being apparent that the defendant was not ensnared or deprived of an opportunity to adequately present his defense, and that the court gave a full, complete and correct charge upon his defense of alibi.

4. Automobiles § 76— Evidence of defendant's identity as driver of "hit and run" car held for jury.

Testimony of a patrolman that defendant's car stopped some 200 feet after the accident in question, that defendant got out of the vehicle from the driver's side and walked away, together with evidence that the officer examined the car immediately thereafter and found that its ignition key was gone and that it had not been "straight-wired," and that four days later, when defendant was apprehended, he had the ignition key to the car in his pocket and related that as far as he knew there were no other keys to the car, *held* sufficient to be submitted to the jury on the question of the identity of defendant as the driver of the car involved in the accident.

5. Criminal Law § 154—

An assignment of error must disclose the question sought to be presented without the necessity of going beyond the assignment itself. Rule of Practice in the Supreme Court No. 21.

6. Same—

While several exceptions may be grouped under a single assignment of error when all relate to but a single question of law, exceptions presenting different questions of law may not be grouped under a single assignment, since the assignment of error must present but a single question for consideration by the appellate court.

7. Criminal Law § 156—

An assignment of error to a portion of the charge containing several separate propositions must fail if the charge is correct as to any one or more of them.

APPEAL by defendant from *McKinnon, J.,* Second Week November Regular Criminal Session 1964 of WAKE.

Criminal prosecution on an indictment containing two counts: the first count charges that defendant on 22 September 1963, at and in Wake County, North Carolina, was the driver of an automobile involved in an accident and collision resulting in injuries to and deaths of James Grere, Joel Norris, Jimmie Roy Kent, Clifton Rogers, Oma Hunt, Jr., and Walter Manning Johnson, and did unlawfully, wilfully and feloniously fail immediately to stop such vehicle at the scene of the accident and collision, a violation of G.S. 20-166(a); the second count charges that defendant at the same time and place was the driver of an automobile involved in an accident and collision resulting in injuries to and deaths of the six persons named in the first count, and did unlawfully, wilfully, and feloniously fail to give his name, address, operator's license number and registration number of his automobile to

the driver and occupants of the automobiles collided with, and did unlawfully, wilfully, and feloniously fail to render to the persons injured in such accident and collision reasonable assistance, a violation of G.S. 20-166(c).

Plea: Not guilty. Verdict: Guilty as charged.

From a single judgment of imprisonment for twelve months, defendant appeals.

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

Robert L. McMillan, Jr., for defendant appellant.

PARKER, J. Defendant assigns as error the denial of his motion for judgment of compulsory nonsuit made at the close of all the evidence.

The State's evidence consists of the testimony of one witness, George Lessard, a State highway patrolman. His evidence shows the following facts: About 2:20 a.m. on 22 September 1963 he was driving south on Highway #401 near its intersection with McCullers Road. An approaching Mercury automobile traveling north on the highway forced him off its hard-surfaced part. After the Mercury passed him, it sideswiped a Ford automobile knocking it into the path of a Pontiac automobile, causing a collision between the Ford and Pontiac. He immediately turned around and saw the Pontiac and the Ford had the highway completely blocked, and heard and saw "that there was bleeding and crying and smoke and debris." James Grere, Joel Norris, Jimmie Roy Kent, Clifton Rogers, Oma Hunt, Jr., and Walter Manning Johnson were injured in various degrees in the collision between the Ford and the Pontiac. He then looked north, and saw the Mercury, which had passed him, stopped at the Lewis Fruit Stand about 200 feet away. Lewis Fruit Stand was not open, but there was an all-night area light on its front. He saw the defendant and another person get out of the automobile, and proceed to the rear. Defendant, who was wearing a white shirt, dark pants, and a cap, got out of the automobile from the driver's side. His companion was wearing dark clothes and was bareheaded. They stayed at the rear of the Mercury for about a minute, and then left on foot toward McCullers. Neither the defendant nor his companion came back to the scene of the collision to see or to offer to give any assistance to the people who were injured in the collision between the Ford and the Pontiac. He did not see the defendant again that night. Later that night he examined the Mercury at the Lewis Fruit Stand. Its ignition key was gone, and it had not been straight-wired. The Mercury had been damaged in the left rear, and there was no license plate. Three or four days after the collision he saw the de-

fendant. He asked him if he had been driving his automobile on the night of 22 September 1963, and defendant stated that he had not, that his automobile had been stolen. Defendant said that he had been off with his wife and children and had returned home about midnight the previous night; that the automobile was parked in front of his house in Raleigh, and upon returning home he did not notice his car was missing until sometime later; and that he had reported the theft to the Raleigh police station. Defendant had the key to the Mercury in his pocket at the time he talked to him, and told him that so far as he knew there were no other keys to the car. On recross-examination Lessard testified to the effect that the occurrence took place on Saturday, 21 September 1963, at 2:15 a.m., notwithstanding the fact that the indictment alleges the occurrence took place on 22 September 1963.

Defendant's testimony is to this effect: On 22 September 1963 he owned a 1956 Mercury automobile, which he had purchased from Evans' place on Blount Street about two days previously. Evans drove this automobile to his residence with a "dealer's tag," and left it in a driveway beside his house. Evans took off the "dealer's tag." He had no driver's license, and did not have a license plate for the Mercury. On Friday night, 20 September 1963, he, his wife, and children went to visit relatives in rural Wake County and returned home late at night. When he left for this visit his Mercury was at his home, and when he returned he did not notice it was missing. The next morning, 21 September 1963, around 9 a.m. he saw his Mercury was not at his home, and he went to the police station about 10:30 a.m. and reported that it was stolen. He later received word that his Mercury was at Stroud Pontiac Company in Fuquay Springs. He went there to pick it up and was asked to wait to see the patrolman, who asked him questions and arrested him. He told the patrolman that he had only one key to the Mercury, and no one else had a key so far as he knew. He was not driving this Mercury or any other automobile at the intersection of Highway #401 and McCullers Road on 21 September 1963.

Defendant's wife, who was a witness in his behalf, testified to the effect that the morning after the trip to visit relatives in rural Wake County the Mercury was missing from their home.

Defendant introduced, without objection, an official record of a complaint filed with the police department of the city of Raleigh, dated 21 September 1963, containing information that James Earl Wilson of 313 Idlewild Avenue, Raleigh, filed a complaint concerning a stolen car on that occasion.

The State offered in evidence exculpatory statements of defendant, but that does not prevent the State from showing the facts were different. *S. v. Phelps,* 242 N.C. 540, 89 S.E. 2d 132; *S. v. Simmons,* 240

N.C. 780, 83 S.E. 2d 904. Defendant's statements offered by the State exculpate defendant, but the State's case does not rest entirely on such statements.

Defendant contends, *inter alia*, that there is a fatal variance between the allegations in both counts in the indictment and the State's evidence, in that the indictment in both counts charges injuries to and deaths of the six persons named in both counts in the indictment, and that the State's evidence shows none of the six named persons were killed, but all six were injured in various degrees. G.S. 20-166(a) makes it a criminal offense for the driver of an automobile involved in an accident "resulting in injury or death" to any person to fail immediately to stop such automobile at the scene of the accident. G.S. 20-166(c) contains the words "resulting in injuries or death to any person." The State's evidence shows a lack of proper diligence on the part of the person who drafted the indictment in alleging that the six persons therein named were killed in the accident, when none were killed. However, if the State satisfied the jury beyond a reasonable doubt that defendant was the driver of an automobile involved in an accident resulting in injuries to the six named persons in the indictment, and did unlawfully, wilfully, and feloniously fail to stop such automobile at the scene of the accident, it would be sufficient to justify the conviction of the defendant on the first count in the indictment, and it was not necessary for the State to prove that all of the six named persons were killed, as alleged in the indictment. *S. v. Locklear*, 44 N.C. 205; *S. v. Van Doran*, 109 N.C. 864, 14 S.E. 32; *S. v. O'Keefe*, 263 N.C. 53, 138 S.E. 2d 767. In respect to the second count in the indictment, if the State proved that the six named persons were injured in the collision, it was not necessary for the State to prove that all of them were killed. This contention of defendant is without merit.

Defendant further contends that the indictment alleges the offenses charged in its two counts occurred on 22 September 1963; that the patrolman testified on recross-examination that the offenses occurred on Saturday, 21 September 1963, at 2:15 a.m., notwithstanding the fact that the indictment alleges the offenses took place on 22 September 1963; that his defense was an alibi, and consequently the time charged in the indictment was an essential element of the offenses charged, and because of this variance between allegation and proof, he is entitled to a nonsuit. The time alleged in an indictment is not usually an essential ingredient of the offense charged, and the State ordinarily may prove that it was committed on some other date. G.S. 15-155; *S. v. Tessnear*, 254 N.C. 211, 118 S.E. 2d 393. "But this salutary rule, preventing a defendant who does not rely on time as a defense from using a discrepancy between the time named in the bill and the time

shown by the evidence for the State, cannot be used to ensnare a defendant and thereby deprive him of an opportunity to adequately present his defense." *S. v. Whittemore,* 255 N.C. 583, 592, 122 S.E. 2d 396, 403. It may be difficult to conceive of a case where the time of the commission of a crime is not material to the defense of alibi. However, under the facts of this particular case as presented by the State showing the offenses charged in the indictment occurred on Saturday, 21 September 1963, at 2:15 a.m. instead of on 22 September 1963 as charged in the indictment, the defendant was not ensnared and thereby deprived of an opportunity to present adequately his defense of an alibi as shown by his evidence, and this mere variance between allegations in the indictment and evidence of the State does not entitle him to a judgment of nonsuit. A reading of the trial judge's charge here shows that he did not fall into error, as the trial judge did in *S. v. Whittemore, supra,* when he in his charge "in effect told them [the jury] that the date charged was immaterial."

Considering the State's evidence in the light most favorable to it, and considering defendant's evidence favorable to it, *S. v. Avent,* 253 N.C. 580, 594, 118 S.E. 2d 47, 57, it would permit a jury to find these facts: On 20 and 21 September 1963, and later, defendant owned a Mercury automobile. About 2:15 a.m. on 21 September 1963 this Mercury was involved in an accident resulting in injuries to the six persons named in the indictment, and the driver of the Mercury did not immediately stop it at the scene of the accident. The Mercury stopped some 200 feet away at the Lewis Fruit Stand, which at the time had an all-night area light on its front. When it stopped, defendant got out of it from the driver's side, stayed there about a minute, and left on foot toward McCullers. He never went to the scene where the six persons were injured. Later that night the State highway patrolman, who saw the accident, went to the Mercury, examined it, and found that its ignition key was gone, and that it had not been straight-wired. Three or four days later the patrolman talked to defendant, and at that time defendant had the ignition key to the Mercury in his pocket, and said, so far as he knew, there were no other keys to the Mercury. That it is a fair inference from this evidence that the defendant was the driver of the Mercury at the time it was involved in an accident resulting in injuries to the six persons named in the indictment. Defendant reported to the police in Raleigh some eight hours after the accident that his Mercury had been stolen. The trial court properly denied defendant's motion for judgment of compulsory nonsuit.

Defendant has no exceptions to the evidence. He assigns as error "Exceptions 3 through 6 (R. pp. 21-24, 26, 27) inclusive, all relating to the judge's charge." This assignment of error does not comply with

our rules, in that it does not disclose the questions sought to be presented without the necessity of going beyond the assignment of error itself. Rule 21, Rules of Practice in the Supreme Court, 254 N.C. 785; *Lowie & Co. v. Atkins,* 245 N.C. 98, 95 S.E. 2d 271. It is elementary learning that an assignment of error must present a single question of law for consideration by an appellate court. But it is entirely proper to group more than one exception under one assignment, when all the exceptions relate to a single question of law. *S. v. Atkins,* 242 N.C. 294, 87 S.E. 2d 507. In the charge here, exception 3 relates to the court's charge in respect to an alibi, and the variance in time between the time of the offenses alleged in the indictment and the State's proof; exception 4 relates to the court's charge to the effect that the State is not required to prove that both injuries and deaths of the six persons named in the indictment ensued from the accident and collision; exception 5 relates to the court's charge in respect to an alibi; and exception 6 relates to the court's charge in respect to the definition of what constitutes reasonable doubt. "Where there is a single assignment of error based upon several exceptions to several distinct parts of the judge's charge, and one of the parts excepted to is correct, the assignment must fail." *S. v. Atkins, supra,* and cases cited therein. It is manifest from a reading of the judge's charge that his definition of reasonable doubt as given to the jury is in strict accord with decision after decision of this Court. The part of the charge challenged by defendant's exception 4 is correct, as set forth above. The parts of his charge challenged by defendant's exceptions 3 and 5 are a fair and accurate statement of the law in respect to an alibi, as set forth in *S. v. Spencer,* 256 N.C. 487, 124 S.E. 2d 175, and are comprehensive and long instructions in respect to the variance between the time of the commission of the offenses as alleged in the indictment and as shown by the State highway patrolman's testimony on recross-examination, where defendant's defense and evidence is an alibi, and where the exact time of the commission of the offenses was material and essential to defendant's defense. A careful study of these comprehensive and long instructions shows that the jury was carefully instructed that defendant's evidence of an alibi was not to be disregarded, that they did not deprive him of his defense of an alibi, and that no error prejudicial to defendant appears under the factual situation here. A careful reading of the judge's charge in its entirety shows no error that would justify a new trial.

Defendant's last and third assignment of error is as follows: (1) The court erred in denying his motion to set aside the verdict; (2) the court erred in denying his motion for a new trial; and (3) the court erred in denying his motion in arrest of judgment. These exceptions are without merit and are overruled.

In the trial below we find
No error.

BESSIE F. CRADDOCK v. QUEEN CITY COACH COMPANY.

(Filed 5 May, 1965.)

1. Carriers § 18; Bill of Discovery § 1—

In an action by a passenger against the carrier to recover for injuries in an accident, the passenger is not entitled to compel an agent of the carrier in an adverse examination prior to trial, G.S. 8-89, to disclose information on the driver's report of the accident upon which the carrier based its report to the I.C.C., since to do so would render meaningless the provisions of 49 U.S.C.A. § 320(f), providing that the I.C.C. report should not be admitted in evidence in any suit or action for damages.

2. Same—

In an action by a passenger against the carrier to recover for injuries in an accident, the passenger is entitled to require the carrier to disclose the names of other passengers on the bus at the time of the accident.

CERTIORARI allowed to review an order of *Patton, J.*, 4 January 1965 Schedule "D" Civil Session of MECKLENBURG.

Plaintiff instituted this action on 25 March 1963, in which she seeks to recover damages for personal injuries sustained as a result of a collision between the defendant's bus and an automobile at the intersection of Elizabeth Avenue and King's Drive in the City of Charlotte, North Carolina, on 14 July 1961, at which time plaintiff was a passenger on defendant's bus.

On 28 May 1963 the defendant filed answer admitting that its bus had been involved in a collision with an automobile on 14 July 1961, and admitting that plaintiff had been a passenger on that bus. The defendant, however, denied that its driver had been negligent.

On 2 October 1963, pursuant to the provisions of G.S. 8-89, plaintiff filed a motion requesting that defendant be required to produce for plaintiff's inspection (1) the accident report submitted to the defendant by the defendant's driver of the bus which was involved in the aforesaid accident on 14 July 1961; (2) the original or copy of a list of the names and addresses of all passengers on defendant's bus on which plaintiff was injured in the collision on 14 July 1961; and (3) the name and address of the driver of defendant's bus on the occasion complained of, including the time the driver began work and the time

said driver stopped work on said date. This motion was withdrawn with the approval of the court on 21 November 1963.

On 17 December 1963, a petition for an adverse party examination of defendant's agent, Hal J. Love, was made, and an Assistant Clerk of the Superior Court of Mecklenburg County issued an order authorizing the adverse party examination and in addition thereto the Assistant Clerk issued a subpoena *duces tecum* directing Hal J. Love, Vice President and Assistant General Manager of defendant, Queen City Coach Company, to bring with him to the adverse party examination a copy of the accident report filed with the defendant company by its driver.

The adverse party examination of Hal J. Love was held on 30 December 1963. Mr. Love testified at the examination, but refused to allow the plaintiff to inspect the accident report and refused to testify, orally, with respect thereto.

Because Mr. Love refused to answer the questions put to him at the adverse party examination, and because Mr. Love refused to allow plaintiff's counsel to inspect the accident report made by defendant's driver, the hearing was adjourned.

An order to show cause why Hal J. Love should not be held in contempt for refusing to answer the questions put to him was issued by the Honorable George B. Patton on 21 January 1964.

This matter came on for hearing before Patton, J., on 6 January 1965, and Judge Patton entered an order directing Hal J. Love to "appear before the Commissioner heretofore appointed to make his adverse examination and to have then and there with him the original or copy of the written report, if there is one, of the driver of the defendant's bus involved in an accident on July 14, 1961, at the intersection of Elizabeth Avenue and King's Drive, Charlotte, North Carolina, and the names and addresses of all passengers on the defendant's bus at said time when the adverse examination heretofore continued is resumed."

From the entry of the above order, the defendant petitioned this Court for *certiorari* which was allowed on 2 February 1965.

Charles M. Welling for plaintiff appellee.
John Ray; Myers & Rush for defendant appellant.

DENNY, C.J. The primary question involved on this appeal is whether or not the plaintiff is entitled to the information directed to be given in the order entered in the court below.

According to the evidence adduced in the hearing below, the only statement or report made by defendant's driver was the statement

taken by counsel for defendant for use in making up the report required by the Interstate Commerce Commission (I.C.C.), on a specific form furnished by the I.C.C. Parts of the accident report were reproduced verbatim in the report to the I.C.C.

It further appears from the evidence that the defendant has no list, as such, of the names and addresses of the passengers, but counsel for defendant does have in his file cards given by passengers to the driver, commonly called "passenger cards." If the order entered below is upheld, a list of passengers may be compiled from these cards.

In pertinent part, Title 49 of the Code of Federal Regulations, § 194.4, requires:

> "(a) Every motor carrier, except private carriers of property, shall file a report prepared on the form prescribed in this section for such carrier's use, for each recordable accident * * * which occurs in the operations of such carrier."

Reports filed pursuant to the foregoing Regulations must be filed with the I.C.C.

It is provided in 49 U.S.C.A. § 320(f), as follows:

> "No report by any motor carrier of any accident arising in the course of the operations of such carrier, made pursuant to any requirement of the Commission, and no report by the Commission of any investigation of any such accident, shall be admitted as evidence, or used for any other purpose, in any suit or action for damages growing out of any matter mentioned in such report or investigation."

Based on the foregoing statute, the Court, in *LaChance v. Service Trucking Co.*, 215 F. Supp. 159, denied plaintiff's motion for contempt citation when the custodian of the records at the time his deposition was taken, refused to permit counsel for plaintiff to inspect and copy the report of the accident made to the I.C.C. The Court further intimated that even if a motion were made pursuant to Rule 34, and even if good cause were shown as to why the plaintiff was entitled to inspect the documents, " * * * they are faced with the provisions of 49 U.S.C.A. § 320(f), * * *."

In our opinion, since the above statute prohibits the introduction in evidence, or use for any other purpose, of any report made to the I.C.C. in any suit or action for damages growing out of any matter mentioned in such report, it would be violative of the spirit and purpose of the I.C.C. Act to require the defendant to give plaintiff the data upon which the I.C.C. report was based. To do so would make the protective provisions of the statute worthless.

On the other hand, in our opinion the plaintiff is entitled to a copy of the list of passengers requested and their addresses.

In the case of *Reynolds v. Boston & Maine Transp. Co.*, 98 N.H. 251, 98 A. 2d 157, 37 A.L.R. 2d 1149, the Court held that the plaintiff, a bus passenger who brought an action to recover damages for personal injuries sustained when she was thrown to the floor of the bus by reason of the negligence of defendant's bus driver, was entitled to the names and addresses of other passengers obtained on cards passed out and collected by the driver following the accident. The Court said:

> "* * * These passengers as witnesses to this accident are not the exclusive property of either party. In the interest of justice both parties are entitled to have their testimony introduced in this action for whatever help it may furnish in arriving at a just determination. Plaintiff is not endeavoring to ascertain what defense the defendant contemplates making nor facts that exclusively relate to its case but is seeking discovery of facts which will enable her to prove her case. * * *"

Similar orders were upheld in *Evtush v. Hudson Bus Transp. Co.*, 10 N.J. Super 45, 76 A. 2d 263, *affd.* 7 N.J. 167, 81 A. 2d 6, 27 A.L.R. 2d 731; *Belding v. St. Louis Pub. Serv. Co.*, 358 Mo. 491, 215 S.W. 2d 506; *McMahon v. Hayes-73rd Corp.*, 197 Misc. 318, 98 N.Y.S. 2d 84; *Furman v. Central Park Plaza Corp. (Ohio)*, 102 N.E. 2d 622. See also 37 A.L.R. 2d Anno: Discovery-Names of Witnesses, page 1152, *et seq.*

We hold that the list of names and addresses of the passengers on defendant's bus at the time of the accident complained of herein, is not privileged by reason of the attorney-client relationship. 139 A.L.R. Anno: Attorney-Privileged Communications, page 1250, *et seq.*

On the record before us, in light of the conclusions we have reached based on the statutes, Federal Regulations, and cases cited, we deem it unnecessary to determine whether or not the report made to defendant's counsel for the purpose of making the report required by law to the I.C.C., is privileged by reason of the attorney-client relationship.

The plaintiff is entitled to the names and addresses of the other passengers who were on defendant's bus at the time plaintiff was injured on 14 July 1961, but she is not entitled to a copy of the report made by defendant's bus driver to defendant's counsel for the purpose of making the report required by law to the I.C.C.

The order entered below is modified to the extent indicated; otherwise, it is affirmed.

Modified and affirmed.

HUBERT THYRONE BREWER v. OLDEN DONNELL GARNER AND MAGDALENE H. GARNER.

(Filed 5 May, 1965.)

1. Evidence § 58—

Where a patrolman testifies that when he arrived at the scene some thirty minutes after the accident he detected an odor of some type of whiskey in plaintiff's automobile, it is error for the court to exclude evidence that twenty-eight days after the accident the patrolman signed a statement that he could not say whether any of the parties had been drinking, since plaintiff's right to destroy or weaken a witness' testimony by a proper cross-examination is an absolute right.

2. Evidence § 15; Automobiles § 37—

Defendant contended that plaintiff driver was attempting to light a cigarette at the time of the accident. Testimony that some two days after plaintiff's vehicle had been moved to a town some ten miles from the accident, a lightly burned cigarette was found on the floorboard of plaintiff's vehicle is too removed in time and place to have any probative value and should have been excluded.

APPEAL by plaintiff from *Shaw, J.,* October 26, 1964 Civil Session, RANDOLPH Superior Court.

This civil action was instituted by Hubert Thyrone Brewer to recover damages for personal injuries he sustained in an automobile collision on Highway No. 49 near Denton. The collision occurred at 2:15 a.m. on December 16, 1962, between the plaintiff's 1959 Oldsmobile in which he was riding alone, and a 1956 Ford owned by the defendant Magdalene H. Garner and driven by her son, Olden Donnell Garner. By their pleadings the parties raised against each other a number of issues, all of which were settled prior to trial except those involving the defendants' negligence and the plaintiff's contributory negligence.

The plaintiff alleged the defendant Olden Donnell Garner was negligent in that he failed to keep his vehicle under proper control, to dim his lights, and to yield one-half the travel portion of the highway. The defendants alleged the plaintiff was contributorily negligent in that he failed to keep his vehicle under proper control, failed to yield one-half the highway, and at the time of the collision was driving under the influence of intoxicating liquor.

The jury gave affirmative answers to the issues of negligence and contributory negligence. From the judgment dismissing the action, the plaintiff appealed.

Ottway Burton for plaintiff appellant.

Jordan, Wright, Henson & Nichols by G. Marlin Evans for defendant appellees.

HIGGINS, J. The plaintiff's appeal presents a single question of law: Did the court commit prejudicial error on the issue of contributory negligence? The defendants, by vigorous cross-examination, sought to force from the plaintiff the admissions that he was driving under the influence of liquor and, at the time of the accident, was attempting to light a cigarette.

In support of the charge the plaintiff was driving under the influence of liquor, the defendants offered the evidence of Mr. Bolick of the State Highway Patrol, who arrived on the scene thirty minutes after the collision but before the plaintiff, who was unconscious, had been removed from the Oldsmobile. The patrolman testified he detected the odor of some type of whisky in plaintiff's automobile. Plaintiff's counsel sought on cross-examination to have Mr. Bolick admit he had made an inconsistent statement and produced what purported to be a photostatic copy of a paper writing dated January 14, 1963, which the witness admitted, "This photostat is an exact copy of what I signed." The copy contained this statement: "I could not say whether any of the parties had been drinking." The court, on defendants' objection, excluded the question and answer. The exclusion is the subject of Assignment of Error No. 1, based on Exception No. 15.

The plaintiff offered the evidence of Mr. Hundley who was present when Mr. Bolick examined plaintiff's automobile. He testified: "I did not see any evidence of alcohol in the car." The surgeon who treated plaintiff's injuries one hour after he received them, testified: "I did not detect any evidence of alcohol on plaintiff's breath when I sewed him up."

With respect to the defendants' allegations that plaintiff was intoxicated, the court charged:

> "And then, finally, the defendants have alleged that the plaintiff was driving his motor vehicle under the influence of intoxicating beverages. That is contained in G.S. 20-138, and it provides that, 'It shall be unlawful and punishable as provided in Section 20-179 when any person, whether licensed or not, who is an habitual user of narcotic drugs, or any person who is under the influence of intoxicating liquor or narcotic drugs, to drive any vehicle upon the highways within this State.'"

Assuming, without deciding, the odor of some type of whisky in plaintiff's vehicle some thirty minutes after the wreck would be sufficient to permit an inference the plaintiff was driving under the influ-

ence, then certainly it would be proper by way of impeachment for the plaintiff's counsel on cross-examination to show that on January 14, 1963, twenty-eight days after the accident, the witness had signed a statement saying, "I could not say whether any of the parties had been drinking."

"The right to have an opportunity for a fair and full cross-examination of a witness upon every phase of his examination-in-chief, is an absolute right and not a mere privilege." *Templeton v. Highway Comm.*, 254 N.C. 337, 118 S.E. 2d 918; *Milling Co. v. Highway Comm.*, 190 N.C. 692, 130 S.E. 724; *State v. Hightower*, 187 N.C. 300, 121 S.E. 616. After permitting the evidence of intoxication to go to the jury, it was error to exclude the cross-examination which weakened, if it did not destroy its effect altogether.

The charge underscored the importance of plaintiff's intoxication on the issue of contributory negligence. There was no evidence of intoxication except the odor of some type of whisky in and around the plaintiff's automobile thirty minutes after the collision. That odor, Mr. Bolick alone detected. The instruction on intoxication based on such equivocal evidence magnified the effect of the court's error in excluding Mr. Bolick's signed statement, "I could not say whether any of the parties had been drinking."

By cross-examination, the defendants' counsel sought unsuccessfully to have the plaintiff admit that at the time of the collision he was in the act of lighting a cigarette. This the plaintiff categorically denied. However, Mrs. Garner, one of the defendants, over objection, was permitted to testify that two days after the accident and after the "demolished vehicle" had been removed to Asheboro, (ten miles from the scene of the accident) she found a slightly burned cigarette in the floorboard of the vehicle. By what means the automobile was taken from the scene to Asheboro, who took it, and how many people had been around it in the meantime, were left to conjecture. The evidence that a slightly burned cigarette was found on the floor of the Oldsmobile, so removed in time and place, was too remote to have probative value and should have been excluded.

For the reasons assigned, there should be a new trial on the issues of negligence, contributory negligence, and if the plaintiff prevails on both, then on the issue of damages. To that end the judgment dismissing the action is

Reversed.

LONNIE R. SPIVEY v. THE BABCOCK & WILCOX COMPANY.

(Filed 5 May, 1965.)

1. Negligence § 37—

An employee of an independent contractor on the premises in the performance of his duties is an invitee of the contractee.

2. Master and Servant § 18— Issues of negligence and contributory negligence held for jury in this action by employee of independent contractor.

Plaintiff was an employee of an independent contractor sent to perform plumbing work in defendant's plant. The evidence disclosed that he was unfamiliar with the part of the plant in which he was to work, that he found the floor covered with debris and rubble where the concrete floor had been broken with a pneumatic hammer, that a manhole in the floor had been covered with cardboard which in turn was covered by a platform made from slats an inch thick nailed to a frame of 2 x 4's, that, in clearing the floor to work, plaintiff moved the platform, stepped forward onto the cardboard, which gave way, causing plaintiff to fall to his injury. *Held:* The evidence does not disclose that defendant, as a matter of law, had taken reasonable precaution to warn plaintiff, or that plaintiff, as a matter of law, had failed to exercise due care for his own safety. The fact that plaintiff had a blueprint showing the location of the manhole, to which blueprint plaintiff had had no occasion to refer in order to determine where to locate the pipes, does not alter this result.

3. Negligence § 22; Master and Servant § 86—

In an action by an employee against a third person tort-feasor to recover for negligent injury, any reference to workmen's compensation benefits received by the plaintiff is incompetent, G.S. 97-10.2(e).

4. Damages § 3—

The party injured by the negligence of another is entitled to recover the amount which will fairly compensate him for his injuries, without considering payments received by the injured person under the provisions of the Workmen's Compensation Act or insurance procured by himself or his employer.

APPEAL by plaintiff from *Bundy, J.*, September 1964 Civil Session of NEW HANOVER.

Civil action to recover for personal injuries.

Plaintiff's evidence, which his allegations are effective to support, tends to show the following facts: On April 18, 1960, the date of the accident in suit, plaintiff was a journeyman plumber who had been licensed for two years. He was in the employ of H. G. Herring Plumbing Company, which had a contract to install certain plumbing and heating facilities in defendant's plant in Wilmington. Although plaintiff had worked in the opposite end of the plant, he was unfamiliar with the particular location to which his employer sent him on the morning of

the accident. When plaintiff arrived, he found in rubble the concrete floor in the area in which he was to work. In order that plaintiff might lay pipes, defendant's employees had broken the floor with a pneumatic hammer, and it was covered with broken cement and wiring, "rock and stuff that was in (the) way and pieces of wood." Plaintiff was cleaning up this rubble before laying pipes when he fell into an 8-foot manhole and tore the cartilage in his left knee. As a result of this injury he has a 5% permanent disability of his left leg. An operation on his knee was required, and he was out of work for three months. Squatting and crawling, positions he is required to take in the performance of his work, are now difficult and painful.

The manhole had been covered with a piece of cardboard, which, in turn, was covered by a rough-and-ready platform which had been made by nailing "inch boards," or slats, onto a frame of 2 x 4's. "It was just lying there on the dirt like the rest of the stuff. It was in my way and I picked it up." No sign or flag gave any warning that this cover concealed a manhole, nor had any person told plaintiff that the manhole was there. In his truck, plaintiff had a blueprint showing the location of the manhole, but, prior to his injury, plaintiff had had no occasion to refer to it. He testified "I did not need the blueprint to clear the trash out." In clearing away the rubble plaintiff moved the platform aside, stepped forward onto the cardboard which he did not see, and fell into the manhold. The cardboard fell in with him.

At the close of plaintiff's evidence defendant's motion for a judgment of nonsuit was sustained. Plaintiff appeals.

Aaron Goldberg for plaintiff appellant.
Marshall & Williams for defendant appellee.

SHARP, J. Plaintiff, an employee of an independent contractor who had undertaken to install plumbing fixtures on defendant's premises, was an invitee of defendant. *Pafford v. Construction Co.*, 217 N.C. 730, 9 S.E. 2d 408; 2 Harper & James, Torts § 27.12 at p. 1481 (1956 Ed.). Defendant's duty to plaintiff, therefore, was one of due care under all the circumstances. The general rule is stated in *Deaton v. Elon College*, 226 N.C. 433, 438, 38 S.E. 2d 561, 565:

> "The owner is not responsible to an independent contractor for injuries from defects or dangers of which the contractor knew or should have known, 'but if the defect or danger is hidden and known to the owner, and neither known to the contractor, nor such as he ought to know, it is the duty of the owner to warn the contractor, and if he does not do this he is liable for resultant injury.' "

Accord, Williams v. McSwain, 248 N.C. 13, 102 S.E. 2d 464; *Lee v. Green & Co.,* 236 N.C. 83, 72 S.E. 2d 33; *Revis v. Orr,* 234 N.C. 158, 66 S.E. 2d 652.

A manhole, 8 feet deep, in an area covered with broken concrete and other debris is, without any doubt, a latent danger. Taking plaintiff's evidence as true, and giving him the benefit of every reasonable inference to be drawn therefrom, as we are required to do in passing upon a judgment of nonsuit, *Pridgen v. Uzzell,* 254 N.C. 292, 118 S.E. 2d 755, two questions arise: (1) Is the evidence sufficient to establish that defendant failed to provide devices adequate to give warning of the hole to a reasonably prudent workman? (2) If it is, does it establish plaintiff's contributory negligence so clearly that no other conclusion can be reasonably drawn from it? *Peeden v. Tait,* 254 N.C. 489, 119 S.E. 2d 450.

The covering which defendant had provided for the manhole was made with "inch boards" nailed to 2 x 4's. Between each of these slats was a space an inch and a half wide. This is not the type of cover one would ordinarily expect to find over an 8-foot manhole. Furthermore, it is a fair inference that dust from the broken concrete had sifted through the slats onto the cardboard cover over the hole sufficient to camouflage it and defeat the purpose of the wooden covering. We cannot say, as a matter of law, that defendant had taken reasonably adequate precautions to warn the workmen who, it knew, would be on the floor and who might fall into the hole unless they knew of its presence. Hence, an issue of defendant's actionable negligence arises for the determination of the jury unless plaintiff has proved himself out of court on the issue of contributory negligence.

In its First Further Answer and Defense defendant alleges that plaintiff was contributorily negligent in that (1) before going upon the premises upon which he was to work, plaintiff failed to examine the blueprint which he had in his possession and which disclosed the presence of the manhole, and (2) "he removed a plywood covering and frame which had been placed over the hole and stepped on the cardboard without undertaking to discover what was thereunder or for what purpose it was there."

Plaintiff argues that the slatted covering, at most only 4 inches high, appeared to him to be just another "piece of stuff," *i.e.,* debris, covering the area; that the dusty cardboard did not stand out sufficiently on the rubble-covered floor to attract his attention; that the cardboard itself both constituted and concealed a trap rather than warned of one; and that, as a result, it fell into the hole with him. He further contends that the primary purpose of the blueprint was to show him where to locate the fixtures he had come to install and not to warn of hazards; that at

the time he fell into the hole he had had no need to examine the blueprint.

We can no more say with reference to the issue of contributory negligence than we could as to the issue of negligence that only one conclusion can reasonably be drawn. The determination of both issues must be for the jury.

Since the case goes back for a complete trial we note that in the trial below the court, over objection, permitted defendant's counsel on cross-examination to elicit from plaintiff testimony that he had received Workmen's Compensation benefits. This was error. By statute, G.S. 97-10.2(e), the amount of compensation and other benefits paid to or for the employee on account of the injury for which he is seeking damages is not admissible in evidence in his suit against a third party. *Redding v. Braddy*, 258 N.C. 154, 128 S.E. 2d 147; *Lovette v. Lloyd*, 236 N.C. 663, 73 S.E. 2d 886; *Penny v. Stone*, 228 N.C. 295, 45 S.E. 2d 362. In his cross-examination of plaintiff's doctor, counsel also brought out, over plaintiff's objections, that the doctor had handled plaintiff's case "as a Workmen's Compensation matter" and that plaintiff himself was not at the present time indebted to the doctor for any services rendered. This, too, was error. The obvious purpose of these references to Workmen's Compensation benefits was to reduce the amount of the verdict in the event the case went to the jury.

If the jury should reach the issue of damages, plaintiff will be entitled to recover the amount which will fairly compensate him for his injuries as if he had received no payments under the Workmen's Compensation Act. *Lovette v. Lloyd, supra; Rogers v. Construction Co.*, 214 N.C. 269, 199 S.E. 41. When an injured employee sues a third person in tort for personal injuries, the measure of his damages is unaffected by any Workmen's Compensation benefits he may have received, and any reference to them is ordinarily as improper as would be a reference to the presence or absence of liability coverage for defendant. Evidence both as to liability-insurance coverage, *Electric Co. v. Dennis*, 259 N.C. 354, 130 S.E. 2d 547; *Lytton v. Manufacturing Co.*, 157 N.C. 331, 72 S.E. 1055, Ann. Cas. 1913C, 358, and as to Workmen's Compensation benefits is inadmissible because it is not only irrelevant but also incompetent. This does not, however, mean a double recovery for a plaintiff-employee. The distribution of any recovery is a matter for the Industrial Commission under G.S. 97-10.2(f).

Reversed.

STATE v. JAMES WILLIAM DUNN.

(Filed 5 May, 1965.)

1. Evidence § 24—

An original instrument may be introduced in evidence whether recorded or not, and where it is introduced in evidence with a certificate of the register of deeds appearing thereon G.S. 8-18 has no application, and the contention that the instrument is not admissible until properly identified by the register of deeds is without foundation.

2. Evidence § 25—

A ledger account sheet identified by the creditor as containing entries made in the regular course of business by his secretary, is competent.

3. Appeal and Error § 24—

Assignments of error to the charge based upon exceptions appearing nowhere in the record but under the assignments of error are ineffective.

APPEAL by defendant from *Carr, J.*, January 1965 Regular Criminal Session of WAKE.

On 6 August 1964 the defendant, James William Dunn, was charged in a warrant issued by the Clerk of the Recorder's Court of Wake Forest with having wilfully and feloniously disposed of mortgaged property in violation of G.S. 14-114. Upon conviction in the Recorder's Court, the defendant appealed to the Superior Court of Wake County.

The State's evidence tends to show that on 15 February 1964, F. J. Williams, a licensed automobile dealer, sold to defendant a 1957 Ford station wagon for $650.00, with no down payment. Defendant executed his note to Williams in the amount of $650.00, payable in 52 equal installments of $12.50 per week, the first installment to be due and payable 22 February 1964, secured by a chattel mortgage executed by the defendant and his wife on the 1957 Ford, a bedroom suit, a dining room suit, a living room suit, a refrigerator, a deep freeze, a television set and an electric stove. This chattel mortgage was filed for registration in the office of the Register of Deeds of Wake County on 6 March 1964 and recorded in Book 1297, at page 646 on 9 March 1964.

Williams testified that defendant defaulted in his payments as provided for in the note secured by the chattel mortgage, and refused upon demand to surrender the property to Williams, admitting that he had moved practically all the items described in the chattel mortgage to Virginia where he planned to move later. He refused to surrender the property or any of it to the mortgagee, and informed Williams that if he wanted to get his money he would have to collect it from a third party. It developed that the party to whom he was trying to sell the 1957 Ford was not a satisfactory credit risk and Williams refused to

release the defendant. Williams caused claim and delivery papers to be issued, and he repossessed the 1957 Ford.

The testimony tends to show that the motor and other parts of the Ford station wagon had been seriously damaged. In the meantime the defendant had bought and was using a Cadillac car. No other personal property described in the chattel mortgage was recovered.

At the close of the State's evidence, the defendant moved for judgment as of nonsuit. Motion denied. Defendant announced that he would offer no evidence, and renewed his motion for nonsuit. Motion again denied. The jury returned a verdict of guilty, and from the judgment imposed the defendant appeals, assigning error.

Attorney General Bruton, Asst. Attorney General Charles W. Barbee, Jr., for the State.

Hubert H. Senter for defendant appellant.

DENNY, C.J. The defendant's first assignment of error is to the ruling of the court below in allowing the introduction in evidence of the recorded chattel mortgage which is referred to as State's Exhibit No. 1. The defendant contends that such instrument is not admissible until it has been properly identified by the register of deeds in the manner set forth in G.S. 8-18. This statute is not applicable when the original instrument is offered in evidence with the certificate of the register of deeds appearing thereon with respect to the time filed for registration and the book and page where it has been registered and the date of such registration. *S. v. Voight,* 90 N.C. 741; *Iron Co. v. Abernathy,* 94 N.C. 545; *Riley v. Carter,* 165 N.C. 334, 81 S.E. 414. Moreover, there is nothing in the record to indicate that the chattel mortgage introduced in evidence was not the identical chattel mortgage executed by the defendant and his wife, which original instrument could have been properly introduced in evidence whether it had been recorded or not. This assignment of error is overruled.

The defendant's second assignment of error is to the admission in evidence of the ledger account sheet on the ground that it was not sufficiently identified. The witness Williams testified that the ledger contained entries made in the regular course of business by his secretary. Furthermore, there was evidence to the effect that the defendant defaulted after making only thirteen payments out of the 52 weekly payments he had contracted to make; that he was in default in his payments when Williams caused claim and delivery proceedings to be instituted for the purpose of obtaining possession of the items described in the chattel mortgage for the purpose of sale in an effort to obtain

payment of the balance due him from defendant. This assignment of error is also overruled.

The defendant purports to assign as error numerous parts of the court's charge. However, no exception appears with respect thereto except under the purported assignments of error. Such assignments are ineffective to challenge the correctness of the charge. *Holden v. Holden,* 245 N.C. 1, 95 S.E. 2d 118; *Bulman v. Baptist Convention,* 248 N.C. 392, 103 S.E. 2d 487; *Benton v. Willis, Inc.,* 252 N.C. 166, 113 S.E. 2d 288; *Cratch v. Taylor,* 256 N.C. 462, 124 S.E. 2d 124; *Massey v. Smith,* 262 N.C. 611, 138 S.E. 2d 237.

Other assignments of error have been examined and we find them without merit and they are overruled.

In the trial below we find no error that would justify disturbing the verdict and judgment entered below.

No error.

ROBERT WILLIAM SAMUEL v. NICK EVANS.

AND

JOHN C. COOPER v. NICK EVANS, ORIGINAL DEFENDANT AND ROBERT WILLIAM SAMUEL, ADDITIONAL DEFENDANT.

(Filed 5 May, 1965.)

1. Automobiles § 41g—

Testimony of the driver on a dominant highway that he entered an intersection at 40 miles per hour after seeing the driver on a servient highway stop before the intersection, and that he traveled 100 feet without again observing the car stopped at the intersection, is held sufficient to be submitted to the jury on the issue of the negligence of the driver along the dominant highway in an action to recover for injuries resulting from a collision of the cars in the intersection.

2. Appeal and Error § 24—

It is not sufficient that an assignment of error to the charge refer merely to the exception number and the page number of the record where the exception appears, but it is required by mandatory rule of practice which must be observed to present the matter on appeal that the assignment of error set forth the portion of the charge to which the exception relates.

APPEAL by plaintiffs from *Brock, S. J.,* September 21, 1964 Civil Session of GUILFORD (High Point Division).

These two actions arise from an automobile collision which occurred during a light rain in High Point about 3:00 p.m. on February 26, 1963. Westchester Drive, the dominant highway, intersects Country Club

Drive at right angles in a 55 MPH zone. South of the intersection Westchester Drive contains three lanes, the easternmost lane being for northbound traffic. Plaintiff Cooper was a passenger in plaintiff Samuel's Valiant automobile, which Samuel was operating in a northerly direction on Westchester Drive. Defendant Evans was operating his Chevrolet automobile in an easterly direction on Country Club Drive. The two vehicles collided in the intersection in the lane for northbound traffic on Westchester. Plaintiff Samuel brought his action for personal injuries and property damage in the Municipal Court of High Point, where he obtained a judgment. Defendant Evans appealed therefrom to the Superior Court. Plaintiff Cooper brought his action for damages for personal injuries in the Superior Court, where both cases were consolidated for trial. In Cooper's case defendant Evans had plaintiff Samuel made an additional defendant for contribution under G.S. 1-240.

Plaintiffs' evidence tended to establish these facts: Samuel approached and entered the intersection at 40 MPH. When he was approximately 200 feet from the intersection, he had observed the Evans automobile stopped on West Country Club Drive and assumed Evans would remain there until he had passed through. The next time Samuel observed Evans, Samuel was 100 feet from the intersection and Evans was in the intersection coming across the westernmost lane in Westchester. Samuel applied his brakes and slid 62 feet before the front of his vehicle struck the rear door of the Evans car. In the collision both plaintiffs sustained personal injuries, and Samuel's car was damaged. The investigating officer charged Evans with failing to yield the right of way, and Evans pled guilty to the charge in the Municipal Court. At the scene, he said the accident was his fault.

Defendant's evidence tended to show: He pled guilty to the charge of failing to yield the right of way because he did not have a lawyer and "didn't know no better." Immediately before the accident he had stopped his vehicle 5 feet from the line of Westchester, had looked in both directions, had seen no traffic approaching, and had entered the intersection. His sister-in-law, also, had looked and had seen nothing. He was in the westernmost lane of Westchester, traveling at 3 MPH when she "hollered, 'Lookout'." He stepped down on the gas, and the engine and front wheels of his car had cleared the intersection when the Samuel car hit his back wheel. Evans never saw the Samuel car before the impact.

The court submitted six issues to the jury. The first three related, respectively, to negligence, contributory negligence, and damages in the Samuel case; the fourth and fifth issues, to negligence and damages in the Cooper case; the sixth issue, to the concurring negligence of Samuel in Cooper's case. The jury answered only the first and the fourth issues,

finding that neither Samuel nor Cooper was injured by the negligence of Evans. From a judgment that he recover nothing each plaintiff appeals.

Boyan & Wilson for Robert William Samuel, plaintiff appellant.

Morgan, Byerly, Post & Keziah for John C. Cooper, plaintiff appellant.

Haworth, Riggs, Kuhn and Haworth for Nick Evans, defendant appellee.

PER CURIAM. Both plaintiffs assign as error the denial of plaintiff Samuel's motion to dismiss original defendant Evan's cross action for contribution against him as additional defendant. The ruling of the court was obviously correct. Samuel's testimony that he approached and entered the intersection at 40 MPH and that, after seeing Evans stopped at the intersection, he traveled 100 feet without again observing the Evans car tended to establish, on the part of Samuel, concurring negligence which was a proximate cause of the collision. The materiality of this challenged ruling, however, is not apparent, since the jury's answer to the fourth issue exonerated defendant Evans of liability.

Plaintiffs took seven exceptions to his Honor's charge. Only one, however, is assigned as error in compliance with Rule 21 of the Rules of Practice in the Supreme Court. When an exception relates to the charge, that portion to which the exception is taken must be set out in the particular assignment of error. A mere reference to the exception number and the page number of the record where the exception appears — plaintiffs' procedure here — will not present the alleged error for review. *Pratt v. Bishop,* 257 N.C. 486, 499, 126 S.E. 2d 597, 607; *Darden v. Bone,* 254 N.C. 599, 601, 119 S.E. 2d 634, 636; *Lowie & Co. v. Atkins,* 245 N.C. 98, 95 S.E. 2d 271. The requirements of the rules and the reasons therefor have been so often reiterated that the recurring necessity for restatement baffles our understanding. We refer counsel specifically to *State v. Dishman,* 249 N.C. 759, 761, 107 S.E. 2d 750, 751; *accord, State v. Wilson,* 263 N.C. 533, 139 S.E. 2d 736.

In view of the outcome of this case we have examined each exception taken, and we have found each to be without merit. During the course of this examination, however, we have noted that throughout the charge the judge treated the right of plaintiff Cooper to recover from defendant Evans as being synonymous with the right of plaintiff Samuel. The jury was not instructed that, if negligence on the part of both Samuel and Evans concurred in proximately causing the collision and injury to Cooper, he, a guest passenger, was not barred by his

driver's contributory negligence, but was entitled to recover from Evans, the joint tort-feasor whom he had elected to sue. *Caulder v. Gresham,* 224 N.C. 402, 30 S.E. 2d 312. But no exception challenges the omission of the court to charge on this aspect of the case. *Rigsbee v. Perkins,* 242 N.C. 502, 87 S.E. 2d 926, and the jury's verdict has established, in effect, that the negligence of Samuel was the sole proximate cause of the collision. The assignments of error point out no reversible error. The rules of practice in this Court are mandatory. *Walter Corporation v. Gilliam,* 260 N.C. 211, 213, 132 S.E. 2d 313, 315.

No error.

STATE OF NORTH CAROLINA, EX REL JAMES C. BOWMAN, SOLICITOR OF THE EIGHTH SOLICITORIAL DISTRICT v. WILLIAM D. MALLOY AND MOSES McGILL.

(Filed 5 May, 1965.)

1. Nuisance § 10—

The abatement of a public nuisance is not *in rem* but *in personam,* and the party charged with the operation of such nuisance has the right to notice and an opportunity to be heard and, if he traverses the factual allegations of the complaint, to a jury trial, and therefore such person is entitled to have a judgment that the premises be padlocked and the personalty sold set aside when such judgment is entered without personal service. Constitution of North Carolina, Art. I § 19, Art. IV § 12, Art. I § 17, G.S. 19-1.

2. Judgments § 1; Appearance § 2—

Where a person files a motion to vacate a judgment *in personam* entered without service of process and an opportunity for him to plead, he makes a general appearance, and while the judgment should be set aside on his motion, the court acquires jurisdiction and should fix a reasonable time for him to plead.

APPEAL by defendant Malloy from *Bickett, J.,* January 18, 1965 Criminal Session of BRUNSWICK.

On Monday, December 14, 1964, plaintiff filed, in the Superior Court of Brunswick County, a verified complaint, alleging, on information and belief, that defendant McGill was the owner of a tract of land in Brunswick County on which defendant Malloy operated a business known as "Sand Ridge Club," there intoxicating beverages were sold, and carousing, drinking and fighting were commonplace at all hours of the day and night. He prayed for an order abating the alleged nuisance,

padlocking the premises, and a sale of "all furniture, fixtures and other personal property on or about the premises."

On the filing of the complaint, Judge Johnson, presiding over the December 1964 Session of Brunswick Superior Court, issued an order directing the sheriff to padlock the business known as "Sand Ridge Club." Defendants were enjoined from going on the premises or removing any property therefrom. The owner and operator were directed to appear at 4 p.m. on December 16, 1964, and show cause why the order should not be made permanent. Copies of the order and complaint were served on defendant McGill in New Hanover on the day the order was issued. No process was ever issued for, nor was the order of December 14, or the complaint served on defendant Malloy. No service by publication was attempted as to Malloy. On December 14, the Sheriff of Brunswick County returned the order, reporting that he had delivered a copy of the order, and a copy of the complaint, to "William R. Ross, the Defendant William D. Malloy's agent and manager of the premises described in the Complaint." He reported that Malloy was not to be found.

On December 16, Judge Johnson signed an order, reciting he found, from the pleadings and affidavits, that the operation of Sand Ridge Club was a nuisance, as defined by G.S. 19-1, and should be abated. He ordered the premises padlocked for a year, and all of the property of Malloy removed from the premises and sold, the proceeds of the sale to be used in paying the costs, including a fee for the attorney for plaintiff.

On January 8, 1965, Malloy filed a motion to vacate and set aside, so far as it affected him or his property, the order of December 16, 1964. As the basis for his motion, he alleged no process had ever been served on him and he had not had an opportunity to be heard. Copy of the motion was given plaintiff, with notice that Malloy would ask that his motion be heard at the January Session, convening on January 18, 1965.

The motion was heard by Judge Bickett on January 19th. He concluded the action was *in rem*, that Malloy was served when the sheriff delivered a copy of the complaint and order of December 14 to Ross. He not only refused to vacate the judgment of December 16, but expressly affirmed it as to Malloy. Malloy excepted and appealed.

Lisbon C. Berry, Jr. and Samuel S. Mitchell for appellant.
No counsel for appellee.

PER CURIAM. Actions, as authorized by c. 19 of the General Statutes, for the abatement of nuisances are not *in rem* but *in personam*. *Sinclair, Solicitor v. Croom*, 217 N.C. 526, 8 S.E. 2d 834.

A party charged with the maintenance of a public nuisance, as defined by G.S. 19-1, has a right to traverse the factual allegations of the complaint. If he does so, he can not be deprived of his right to a jury trial on the issues raised by the pleadings, N. C. Constitution, Art. I, § 19; Art. IV, § 12 (formerly § 13); *Sparks v. Sparks*, 232 N.C. 492, 61 S. E. 2d 356; *Sinclair, Solicitor v. Croom, supra.* The property owner is entitled to notice of the action, and a reasonable opportunity to be heard. N. C. Constitution, Art. I, § 17. "[A] judgment of a court cannot bind a person unless he is brought before the court in some way sanctioned by law and afforded an opportunity to be heard in defense of his right." *Eason v. Spence*, 232 N.C. 579 (586), 61 S.E. 2d 717. Here, there is no claim that Malloy had in any way sanctioned by law been afforded an opportunity to assert his defense.

The court erred in refusing to vacate the judgment rendered on December 16, 1964, so far as that judgment relates to defendant Malloy. When Malloy filed his motion to vacate the judgment of December 16, he entered a general appearance. The court now has jurisdiction *in personam.* Malloy is entitled to a reasonable period in which to plead. The Superior Court will fix a reasonable time, not less than 30 days, in which defendant Malloy may plead.

No motion has been made with respect to the restraining order issued December 14, 1964. That order will continue in force until there has been a determination of the issues which may be raised by the pleadings, unless the court, on motion of defendant Malloy prior thereto, shall modify or vacate the same.

The cause is remanded for further proceedings not inconsistent with this opinion.

Error and remanded.

STATE OF NORTH CAROLINA v. LENWOOD ALSTON, PETITIONER.

(Filed 5 May, 1965.)

1. Criminal Law § 23—

Where the court finds, upon supporting evidence, that defendant, represented by counsel, signed a plea of guilty voluntarily and understandingly, the findings are conclusive and defendant's contention that his attorney entered the plea without his knowledge or consent and that neither the court nor the attorney informed him of the effect of his signing the paper writing, is untenable.

2. Conspiracy §§ 3, 8—

A conspiracy to commit a felony is a felony, and a conspiracy to murder is an infamous offense subjecting the offender to imprisonment not to exceed ten years. G.S. 14-2.

3. Criminal Law § 131—

A life sentence imposed upon defendant's plea of conspiracy to murder must be vacated, but the vacation of the sentence does not affect the plea, and the cause must be remanded to the Superior Court for proper sentence, which must provide credit for time served by defendant in execution of the vacated sentence.

ON *certiorari* to review judgment of *Carr, J.*, at Chambers December 4, 1964. From FRANKLIN.

Proceedings in Post-Conviction Review (G.S., C. 15, Art. 22) and on writ of *Habeas Corpus*.

Petitioner Lenwood Alston and two other persons were indicted by the grand jury at the October 1962 Term of the Superior Court of Franklin County for conspiracy to murder one Kinchen Williams. At that term petitioner entered a plea of guilty to the charge. The plea was in writing and subscribed by petitioner and his attorney W. M. Jolly. The plea was accepted in writing by the solicitor and the presiding judge. Judgment was entered that petitioner be "imprisoned in State's prison for and during the term of his natural life." He was committed to prison on 18 October 1962.

On 18 May 1964 petitioner filed in the Superior Court of Franklin County an application for post-conviction review, asserting petitioner's innocence of the charge, and alleging that his attorney entered the plea of guilty without his knowledge and consent, neither the court nor his attorney informed him of the effect of signing the paper writing, and, if it should be found that the plea was voluntarily and understandingly signed and entered, the term of imprisonment imposed is excessive. Attorney Thomas F. East was appointed to represent petitioner in the proceeding. The cause came on for hearing before Carr, J., and evidence was presented by petitioner and the State. The judge made findings of fact on all material questions presented; it was found, among other things, that petitioner was represented at the trial by able and competent counsel, he knew and understood the nature of the charge pending against him, and he voluntarily and understandingly entered a written plea of guilty to the indictment after having been advised of the consequences by his counsel and the court. The judge ruled that petitioner is not entitled to a new trial and that the question of excessive punishment would more appropriately be considered on petition for writ of *habeas corpus*. On 17 November 1964 petitioner had filed application for such writ, alleging therein the invalidity of

the judgment of imprisonment. The writ had been issued. With respect to the judgment of imprisonment, Judge Carr was of the opinion there was merit in petitioner's contention that his prison term was excessive. Inasmuch as petitioner had not served the maximum term which could have legally been imposed for the conspiracy charged, and petitioner desired to apply to the Supreme Court for writ of *certiorari* to review the judgment with respect to the post-conviction review, the judge continued the hearing in the *habeas corpus* proceeding "until and after such time as the Supreme Court . . . ruled upon the *Writ of Certiorari.*"

Petition for *certiorari* was filed in Supreme Court and was allowed. The entire record was brought up for review.

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

Thomas F. East for Petitioner.

PER CURIAM. We find no error in the judgment below denying petitioner a new trial. The findings of fact upon which the judgment is based are fully supported by the evidence. From a consideration of all the evidence, it is difficult to perceive how the judge could have arrived at any other conclusion.

The life sentence imposed at the trial is clearly unlawful and excessive. No specific punishment is prescribed by statute for conspiracy to murder. Murder is a felony. A conspiracy to commit a felony is a felony. *State v. Terrell,* 256 N.C. 232, 123 S.E. 2d 469. "Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute shall be imprisoned in the county jail or State prison not exceeding two years . . . , or if the offense be infamous, the person offending shall be imprisoned in the county jail or State prison not less than four months nor more than ten years, or be fined." G.S. 14-2. A conspiracy to murder is an infamous offense. Upon defendant's plea to the indictment, he was subject to a judgment of imprisonment for a term not to exceed ten years.

The life sentence imposed by the court at the October 1962 Term of the Superior Court of Franklin County, in consequence of petitioner's plea of guilty to the indictment for conspiracy to murder Kinchen Williams, cannot be sustained. However, petitioner is not entitled to a discharge or a new trial. The plea stands. The life sentence is vacated and the cause is remanded to the Superior Court of Franklin County with direction that a proper judgment be entered. The court below, in pronouncing sentence, should be careful to so condition its judgment as

to allow petitioner credit for the time he has served in execution of the sentence herein vacated.

The proper officials of the State's prison are directed to deliver the petitioner to the Sheriff of Franklin County prior to the convening of the Session of Superior Court for the trial of criminal cases to be held in said county next after the certification of this opinion.

Error and remanded.

GEORGE W. JONES, EMPLOYEE v. MYRTLE DESK COMPANY, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER.

(Filed 5 May, 1965.)

1. Master and Servant § 93—

Review of an award in the Superior Court is limited to questions of law and legal inference, the findings of fact by the Industrial Commission being conclusive if supported by competent evidence, even though there be evidence that would support findings to the contrary.

2. Master and Servant § 54—

Evidence *held* to sustain findings that the injury occurred while claimant was performing work for his own purposes without permission of the employer, and therefore that the injury did not arise out of and in the course of the employment.

APPEAL by plaintiff from *Latham, S. J.*, January 4, 1965, Session of GUILFORD.

Proceeding pursuant to the Workmen's Compensation Act.

Plaintiff's claim for compensation was first heard before Deputy Commissioner Thomas. Evidence was presented both by plaintiff and defendant Myrtle Desk Company. The Deputy Commissioner found these facts:

Plaintiff was accidentally injured on 12 November 1963. He had been employed by defendant Desk Company for 5½ years as a shaper operator. A shaper is a machine used to shape posts, moulding, legs and other furniture parts. It was the policy of the Desk Company to permit employees to do personal work on company time if they first obtained permission from their foreman. They could make use of cull and waste material for personal purposes provided they presented it to their superior for determination of its value and made payment of the price fixed, if any. About 4:00 P.M. on 12 November 1963 (during working hours), plaintiff got a cull post and was shaping out a picture frame on the machine. The knives in the shaper "grabbed" the post and pulled

plaintiff's right hand into the blades. As a result, parts of the thumb and fingers on his right hand were amputated. Plaintiff's brother, also an employee of Desk Company, had requested him the day before to shape the picture frame for a church. It was not company work; his brother had no authority to give permission for the work. Plaintiff was doing the work without having obtained specific permission from his foreman. The cull material had not been valued. "At the time of his injury by accident plaintiff was performing personal work without permission, from which work defendant employer received no benefit and such work was not incident to plaintiff's employment."

The Deputy Commissioner concluded that plaintiff did not sustain an injury by accident arising out of and in the course of his employment with defendant employer, and denied plaintiff's claim for compensation.

Upon review, the Full Commission adopted as its own the findings of fact and conclusions of law of the Deputy Commissioner, together with the result reached by him. The Superior Court, on appeal, overruled plaintiff's exceptions and affirmed the award of the Commission.

C. T. Kennedy and Haworth, Riggs, Kuhn & Haworth for plaintiff.
Lovelace & Hardin for defendants.

PER CURIAM. Counsel for plaintiff has presented the contentions of his client, both as to the facts and law, with thoroughness, force and competency. These contentions have been fully considered in our review of the record. However, we find nothing which justifies a remand of the cause or a reversal of the judgment below. Review in Supreme Court is limited to questions of law and legal inference. The findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary. The record in this case contains competent supporting evidence for each finding of fact. The findings are positive and cover all crucial facts upon which the right to compensation depends. The facts found support the conclusion that plaintiff's injury did not arise out of and in the course of his employment with defendant employer. *Bell v. Dewey Brothers, Inc.*, 236 N.C. 280, 72 S.E. 2d 680.

Affirmed.

ELIZABETH F. GORRELL, PLAINTIFF v. C. PAUL GORRELL, DEFENDANT.

(Filed 5 May, 1965.)

Contempt of Court § 3—

In order to support a commitment for contempt for failure to pay into court sums directed by prior order, the court must find facts in regard to defendant's assets and liabilities and his ability to pay and work, sufficient to support a finding that the failure to pay was wilful.

APPEAL by defendant from *Gambill, J.*, in chambers in GUILFORD.

Action for alimony without divorce.

On June 26, 1964, Judge Gwyn entered an order requiring, *inter alia*, that defendant pay $20.00 each Monday to the office of the Domestic Relations Court for the use of plaintiff *pendente lite*. He further ordered defendant to pay plaintiff's counsel a fee of $125.00. On August 10, 1964, plaintiff filed an affidavit in which she averred that defendant had made no payment. Pursuant to an order to show cause why he should not be adjudged in contempt, on September 8, 1964, defendant appeared with his counsel before Judge Gambill. Plaintiff did not appear. The record discloses the following proceedings only: "The defendant exhibited to the Court the record of his income, showing that he had not been financially able to make the payments required in the order entered by the Hon. Allen H. Gwyn, and that he had not wilfully violated the court order. No further evidence was presented."

On September 11, 1964, Judge Gambill, acting under G.S. 5-8, found that defendant has refused, and still refuses, to make the payments specified in the order of June 26, 1964, "and has failed to show cause why he should not be cited for contempt." He committed defendant to jail, "there to remain" until the sums due under Judge Gwyn's order and the costs of the contempt proceeding "shall be paid" and "until he be thence discharged according to law." From this "warrant for commitment," defendant appeals.

John F. Comer for plaintiff appellee.
Cahoon & Swisher for defendant appellant.

PER CURIAM. The order attaching defendant for contempt is fatally defective in that it is not supported by a finding of fact that defendant's failure to make the required payments was wilful. "Our decisions uniformly hold that in contempt proceedings it is necessary for the court to find the facts supporting the judgment and especially the facts as to the purpose and object of the contemner, since nothing short of 'willful disobedience' will justify punishment." *Smith v. Smith*, 247 N.C. 223,

225, 100 S.E. 2d 370, 372; *accord, Smith v. Smith,* 248 N.C. 298, 103 S.E. 2d 400; *Yow v. Yow,* 243 N.C. 79, 89 S.E. 2d 867.

Before the court may determine whether a husband's failure to pay is a wilful disobedience of its orders, *i.e.,* done "knowingly and of stubborn purpose," *Lamm v. Lamm,* 229 N.C. 248, 250, 49 S.E. 2d 403, 404, the judge must "find what are his assets and liabilities and his ability to pay and work — an inventory of his financial condition," *Vaughan v. Vaughan,* 213 N.C. 189, 193, 195 S.E. 351, 353.

The order of arrest must be struck. The cause is remanded for further proceedings.

Error and remanded.

STATE v. KEITH LAWSON.

(Filed 5 May, 1965.)

APPEAL by defendant from *Mallard, J.,* November, 1963 Criminal Session, COLUMBUS Superior Court.

The defendant, Keith Lawson, was charged with the felony of murder in the first degree in the killing of Bobby DeLane Hilbourn. The offense is alleged to have occurred on April 20, 1963. The evidence disclosed the deceased died on October 10, 1963. The Solicitor for the State and both defendant and his counsel stipulated that Bobby DeLane Hilbourn died as a direct result of the gunshot wound inflicted on April 20, 1963.

At the trial the solicitor announced the State would not ask for a verdict of guilty of murder in the first degree, but only in the second degree. The defendant entered a plea of not guilty. Both the State and the defendant introduced evidence, including a number of eye-witnesses to the shooting. The defendant, however, did not testify in his own defense.

The evidence of the State's witnesses, if believed, would amply justify a finding the defendant first threatened the deceased with an open knife and then took from the automobile in which the deceased was then sitting a shotgun with which he inflicted the fatal wound at a time when the deceased was unarmed. The evidence favorable to the State made out a case of murder in the second degree.

The defendant's witnesses, if believed, would permit a finding the deceased attempted to assault the defendant with the shotgun, the defendant attempted to disarm the deceased, and in the struggle for pos-

session the gun discharged with the fatal result. The defendant's evidence, if believed, would warrant an acquittal.

The jury returned a verdict finding the defendant guilty of manslaughter. The court imposed a prison sentence of 18 to 20 years. After the verdict the defendant gave notice of appeal but, before it was perfected, withdrew it and entered upon the service of the sentence. In response to a petition we allowed the appeal to be docketed and argued here.

T. W. Bruton, Attorney General, Ralph Moody, Deputy Attorney General for the State.

J. Wilton Hunt for defendant appellant.

PER CURIAM. The defendant's counsel (court-appointed for this appeal) has been diligent in reviewing the record of the trial. By proper exceptions and assignments of error he has challenged, both by brief and by oral argument, the trial court's rulings on matters of law and legal inference of which his client complains, or of which the record furnishes ground for objection. After careful review, we conclude the court's rulings on admissions and exclusions of evidence, as well as in applying the law to the evidentiary facts, were in accordance with the decisions of this Court. We are unable to find in this record any legal reason why the verdict should be disturbed.

No error.

NELLIE REVES BORDEAUX v. EDWARD L. TILTON.

(Filed 5 May, 1965.)

APPEAL by defendant from *Nimocks, E. J.*, November 9, 1964 Civil Session, CUMBERLAND Superior Court.

This civil action grew out of a collision between the plaintiff's 1963 Oldsmobile and the defendant's 1961 Oldsmobile at the intersection of Worth Street and West Russell Street in Fayetteville. The accident occurred near noon on July 19, 1963. Electric traffic control signals were in operation at the intersection.

The claim and counterclaim stated in the pleadings presented issues of negligence, contributory negligence, and damages. The evidence was conflicting with respect to which party entered the intersection with or against the green light, and whether the one first in was permitted to

clear the intersection. The jury answered all issues in favor of the plaintiff and awarded $1,250.00 damages. From the judgment on the verdict, the defendant appealed.

Sol G. Cherry for plaintiff appellee.

Quillan, Russ & Worth, by Walker Y. Worth, Jr., for defendant appellant.

PER CURIAM. The controversy involved issues of fact. Under instructions from the court which accurately explained the rights and duties of each party at the intersection and the burden of proof on the issues, the jury resolved the dispute in favor of the plaintiff. The record discloses

No error.

MARTA MELINDA DOCKERY, BY HER NEXT FRIEND, E. T. PULLEN, III v. WORLD OF MIRTH SHOWS, INC., AND MICHAEL DEMBROSKY, D/B/A M. D. AMUSEMENT COMPANY.

(Filed 19 May, 1965.)

1. Master and Servant § 20—

Where an activity is inherently dangerous unless precautionary measures in regard to the condition of the device and its operation are taken, public policy requires that the employer be held directly liable for injuries proximately resulting from the failure to take the necessary precautions, notwithstanding that the device is under the control of an independent contractor.

2. Games and Exhibitions § 2—

A general concessionaire who invites the public to visit a place of amusement or who shares in the proceeds of the admission fees, or who retains and exercises a measure of control over the premises, is ordinarily under the duty to inspect the premises and devices and to exercise oversight and supervision over their operation, and he will be held directly liable for injuries resulting from the failure to perform such duty, notwithstanding the apparatus causing the injury is operated by a sub-concessionaire.

3. Same—

The owner of a general concession is not an insurer of the safety of his patrons and is not required to guard against unlikely or unknown conditions or unforeseeable conduct of a patron, and ordinarily is not responsible for casual or isolated acts of negligence of a sub-concessionaire, but is under duty to exercise reasonable care commensurate with the perils and likelihood of injury to his patrons.

4. Same— Evidence held for jury in action by patron of amusement ride to recover for injuries from fall.

The evidence tended to show that the general concessionaire of a fair received a part of the admission charges and assumed responsibility for the amusements and agreed to indemnify the fair for any liabilities incurred from the operation of the amusement devices, that the attendant of the amusement ride in question left to the riders the closing and latching of the bars on the seats to secure their safety, that the bars were difficult to fasten, that on the occasion in question plaintiff was unable to fasten the bar when the ride was put in motion, that she rose to her feet in a crouched position with her hands on the wobbling bar and shouted to stop the ride, and that the momentum of the ride threw her therefrom to her injury. *Held:* The evidence is sufficient to be submitted to the jury on the question of the liability of the general concessionaire and does not show contributory negligence as a matter of law on the part of plaintiff.

5. Same; Evidence § 16—

In an action to recover for injuries resulting when plaintiff could not fasten the protective bar over the seat of the amusement ride in question and the machinery was put in motion by the attendant without ascertaining that the bars were fastened and the riders secure, testimony of other patrons to the effect that they rode on the device before and after the accident and that they found it difficult to fasten the protective bars, and that the attendant did not assist them in closing the protective bars, *held* competent as tending to show a prevailing defect in the mechanism and continuing negligence in the method of operation.

APPEAL by defendant, World of Mirth Shows, Inc., from *Hobgood, J.*, October 12, 1964, Session of FORSYTH.

Action to recover damages for personal injuries suffered by plaintiff when she fell from a "ride" operated at the Dixie Classic Fair.

The evidence favorable to plaintiff tends to establish these facts: The Dixie Classic Fair is an unincorporated association, is operated by a commission appointed by the Winston-Salem Foundation and has a manager in charge. The Fair was held in 1961 during the period October 10 to October 14. It entered into a contract with defendant, World of Mirth Shows, Inc. (Mirth), in which it was provided that Mirth should furnish certain amusements, 15 major rides and 15 major shows, from the operation of which the Fair would receive specified percentages of gross receipts and Mirth would indemnify the Fair for any loss or liability which might arise from the operation of the amusements. Mirth provided the amusements in accordance with the contract. One of the rides furnished was the "Scrambler." Mirth contracted with Michael Dembrosky, doing business as M. D. Amusement Company, to provide and operate this ride. Dembrosky, through his employees, "installed and operated the Scrambler and invited the public to ride on it by paying an admission charge." The Manager of the Fair had no contacts with Dembrosky; all of his dealings were with Mr.

Bergen, an official of Mirth. An employee of Mirth took the accounting and receipts of all amusements each day to the Superintendent of Admissions, who handled all the financial matters for the Fair. In the event of any complaints from members of the public, or anyone else, as to the operation of any activity of the Fair, the complaint was taken up with Mr. Bergen. Mirth advertised through the Dixie Classic Fair. The Fair gave out "news releases, pictures of attractions, and so on," through its advertising agents. The Scrambler is a merry-go-round type of ride having a central base with a center post extending upward in a casing from the base. The post and casing support a large metallic frame. The principal features of the frame are three upper arms which extend horizontally at even intervals from the top of the center post, and three lower horizontal arms, directly under the upper arms and only a few feet from the ground. At the ends of the arms are nests or clusters of 4 seats each which are attached to axes extending from the ends of the lower arms to the ends of the corresponding upper arms. When the ride is in operation the frame revolves clockwise about the center post and the seat clusters revolve counterclockwise about their respective axes; the ride is powered by an electric motor. In rotating, the seats do not follow a true circular path; they go outward and then jerk inward toward their center of rotation; they have no up and down motion, the motion is in and out and around. The seats have high backs which come nearly to the shoulders of a rider when seated; the backs extend around so as to encase both ends of the seats. There is a bucket or trough — "sort of a half tube" — for the feet; this provides a fender in front to about the height of a rider's knees; the trough is partially open at the right or outer end to permit entrance to the seat. At the front of the seat is a gate or bar; it is hinged at the left or inner end of the seat and swings horizontally forward and to the left when opened; it has a latch at the outer end somewhat like that of a refrigerator door — you pull a handle "and it opens, or slam it and it closes." The bar is for security of the riders; a rider's legs are under the bar when it is closed; it is 3 or 4 inches above the knees. About 4:30 in the afternoon of October 11, plaintiff, a 12-year old child, and three companions bought tickets and were admitted. They attempted to occupy a single seat but it was too crowded. Plaintiff and one of her companions went to another seat. The ride was about to start and they had to hurry. Plaintiff got in first and was on the left or inside portion of the seat. They tried to close the bar but the latch would not catch and the bar would not close. The attendant did not check the seats to see that the bars were closed. The ride started and plaintiff rose to her feet in a crouched or squatting position to call to the attendant. She shouted, "Stop! The door won't shut." She was shouting in a loud voice; she was

frightened. The attendant paid her no attention. The ride was moving faster and faster. She had her hand on the bar but it was moving back and forth. About the time the ride reached its maximum speed, the centrifugal force of the circular motion threw her across the legs of her companion in the bucket in front of the seat, the seat jerked inward and she was thrown through the open end of the bucket and fell out. The ride made two revolutions before it stopped. She was injured both internally and externally. A kidney was injured to such extent it had to be removed; she has several permanent scars. Other persons who rode the Scrambler at other times during the same day had difficulty in closing the bars; the attendant made no effort to see that the bars were closed and the riders were secure.

Defendant Mirth's evidence tends to show that plaintiff stood erect when the ride started, she appeared at first to be "just carrying on" and nothing seemed to be wrong, she later seemed frightened, the force of the ride would have forced her back in the seat and against her companion if she had remained seated, and the bars on the seats were examined after the accident and found to be in good condition — the latches caught and held when the bars were slammed shut.

Plaintiff alleges that defendant Mirth "assumed responsibility for the operation of all . . . rides at the fair" and exercised "supervision and control over them," the Scrambler "was an inherently dangerous device capable of inflicting serious injury . . . unless maintained in good operating condition, and unless operated with care and caution," Mirth well knew the Scrambler was inherently dangerous and it had the "obligation to inspect and maintain the Scrambler in good and safe operating condition for the protection of the . . . public," the duties and obligations of Mirth "in these respects were nondelegable to concessionaires and others," and Mirth was negligent "in failing to have the bar across the front of the 'Scrambler' seat in which the plaintiff was riding securely fastened and in failing to inspect the same and to see that it was securely fastened, in failing to inspect the same and to maintain it in good safe working condition in view of the hazardous nature of the ride, and such negligence . . . was the proximate cause of" plaintiff's injuries.

Defendant Mirth, answering, avers that the bar attached to the seat in which plaintiff was riding and the latch on the bar were not defective and were "more than adequate to secure the plaintiff in her seat and remained latched and secured" during her ride, the attendant "checked all seats including plaintiff's seat and after seeing that plaintiff was safely seated and that the bar was latched and secured, started the ride," plaintiff "continued to stand up in the face of obvious . . . danger to herself and negligently and carelessly disregarded the warn-

ings and appeals made to her to sit down," plaintiff's fall and injury were solely caused by her negligence, if defendant was negligent in any manner the negligence of plaintiff was a contributing cause of her injury, and Dembrosky, owner and operator of the Scrambler, was an independent contractor and not an agent of Mirth, and Mirth is not responsible for negligence on the part of Dembrosky.

Dembrosky could not be located and no process was served on him. The action proceeded against Mirth as the sole defendant.

The jury found that Dembrosky was not an agent of Mirth, that plaintiff was injured by the negligence of Mirth, and that plaintiff was not contributorily negligent. Damages were awarded. Judgment was entered in favor of plaintiff and against defendant Mirth for the amount stated in the verdict.

J. F. Motsinger and Deal, Hutchins and Minor for plaintiff.

R. M. Stockton, Jr., and W. F. Maready, attorneys for World of Mirth Shows, Inc. Of counsel: Hudson, Ferrell, Petree, Stockton, Stockton & Robinson.

MOORE, J. Defendant Mirth asserts that the negligence, if any, giving rise to plaintiff's fall and injuries consisted of acts and omissions of Dembrosky, an independent contractor, and the conduct of plaintiff in standing while the Scrambler was in motion.

In response to an issue submitted by the court, the jury determined that Dembrosky was not an agent or employee of Mirth. An employer is not ordinarily liable for injury resulting from dangerous conditions collaterally created by the negligence of an independent contractor. But where it is reasonably foreseeable that harmful consequences will arise from the activity of the contractor unless precautionary methods are adopted, the duty rests upon the employer to see that these precautionary measures are adopted, and he cannot escape liability by entrusting this duty to the independent contractor. The contractor may be liable for the same want of due care in not taking the necessary precautions, for the omission of which the employer is liable; but as to the employer, the liability is direct, and not derivative, since public policy fixes him with a nondelegable duty to see that the precautions are taken. *Evans v. Rockingham Homes, Inc.*, 220 N.C. 253, 17 S.E. 2d 125.

The presiding judge was of the opinion that the alleged relationship of employer and independent contractor between Mirth and Dembrosky did not necessarily absolve Mirth from liability under the facts and circumstances of the instant case, and he instructed the jury as follows with respect to the issue (third issue) of Mirth's negligence:

"If you find from the evidence and by its greater weight the Scrambler was such a ride as was likely to cause injury to passengers unless due care was exercised in its maintenance and operation, in view of the nature of the device, then it would be the duty of the defendant, World of Mirth Shows, to inspect the Scrambler in order to see that it was maintained in a reasonably safe condition, to supervise the operation of the Scrambler to such an extent as to see that it was operated with due care, and to see that the operator would check the gates or bars to the seats to see that they were securely latched and fastened and that the plaintiff was safely seated before starting it, and . . . these duties of inspection and supervision by World of Mirth, the defendant, could not be delegated to Dembrosky, his agents or employees, whether or not he was a concessionaire or an independent contractor; that such duties of supervision would remain the responsibility of the defendant, World of Mirth Shows, Incorporated, and such failure by Dembrosky would be attributed as a matter of law to World of Mirth, Incorporated, the defendant, and that such failure of World of Mirth to inspect and supervise was a proximate cause of plaintiff's injuries, then in that event the jury would answer the third issue 'Yes.'"

Defendant Mirth questions the applicability of the principles set out in the charge to the evidence presented. Whether the principle of nondelegable duty is applicable to the facts and circumstances, is an important consideration also in passing on Mirth's motion for nonsuit.

It is generally held that the owner of a place of amusement having a variety of attractions and devices or a general concessionaire actually engaged in the conduct of such place of amusement cannot avoid liability for injuries to patrons resulting from the defective or dangerous condition of the premises or from defective amusement apparatus or devices on the ground that such premises or devices are under the control of and used by a sub-concessionaire. Liability of such owner or general concessionaire is predicated either upon his nondelegable duty to maintain a reasonably safe place for the patrons, in accord with which he must answer for the negligence of the sub-concessionaire or the latter's employees in rendering the premises and devices unsafe, or merely upon the general ground that such owner or general concessionaire is responsible for his breach of duty to keep the premises, including the devices, reasonably safe, without reference to any separate act or omission of the sub-concessionaire. While there are some decisions to the contrary, the greater weight of authority is that such owner or general concessionaire will not be relieved from responsibility because the amusement or device is provided and conducted by the sub-con-

cessionaire, provided it is of a character that would probably cause injury unless due precautions are taken to guard against it; and this duty applies not only to the condition of the premises and device, but also to the management and operation where the device is of a character likely to produce injury unless due care is observed in its operation. The duty is a continuing one. 4 Am. Jur. 2d, Amusements and Exhibitions, § 64, pp. 186-8; 145 A.L.R., Anno. — Amusement — Negligence of Concessionaire, pp. 962-980; Restatement of the Law, Torts (1934), Vol. II, § 415, pp. 1122-6; *Richmond & M. Ry. Co. v. Moore's Adm'r.*, 27 S.E. 70 (Va. 1897); *Hollis v. Kansas City, Mo., Retail Merchants Ass'n.*, 103 S.W. 32 (Mo. 1907); *Stickel v. Riverview Sharpshooters' Park Co.*, 95 N.E. 445 (Ill. 1911); *Turgeon v. Connecticut Co.*, 80 A. 714 (Conn. 1911); *Hartman v. Tennessee State Fair Association*, 183 S.W. 733 (Tenn. 1916); *Johnstone v. Panama-Pacific International Exposition Co.*, 202 P. 34 (Cal. 1921); *Szasz v. Joyland Co.*, 257 P. 871 (Cal. 1927); *Birmingham Amusements v. Turner*, 128 S. 211 (Ala. 1930); *Engstrom v. Huntley*, 26 A. 2d 461 (Pa. 1942); *McCordic v. Crawford*, 142 P. 2d 7 (Cal. 1943); *Bauer v. Saginaw County Agricultural Society*, 84 N.W. 2d 827 (Mich. 1957); *Priebe v. Kossuth County Agricultural Ass'n, Inc.*, 99 N.W. 2d 292 (Iowa 1959). The cases here cited are only a few of the many cases found in the reports.

Matters of importance in determining existence and extent of the duty of such owner or general concessionaire to inspect premises and devices and to exercise oversight and supervision of operation of amusements are: Invitation to the public to attend — one, who expressly or by implication invites others to come upon the premises, has the duty to be reasonably sure that he is not inviting them into danger and to that end must exercise reasonable care for their safety. *Richmond & M. Ry. Co. v. Moore's Adm'r., supra; Engstrom v. Huntley, supra.* Failure to advertise does not relieve them of duty if they share in the proceeds. *McCordic v. Crawford, supra.* The duty is assumed by them when they retain and exercise a measure of control. *Hollis v. Kansas City, Mo., Retail Merchants Ass'n., supra; Lakeside Park Co. v. Wein*, 141 P. 2d 171 (Colo. 1943). Where the general operation of the place of amusement is admitted by the owner or general concessionaire, the injured patron is not required to show the precise arrangement between the owner or general concessionaire and the subconcessionaire. *Engstrom v. Huntley, supra.* There is responsibility only for perils discoverable by ordinary and reasonable inspection and oversight. *Hiatt v. Ritter*, 223 N.C. 262, 25 S.E. 2d 756; *Kuhn v. Carlin*, 76 A. 2d 345 (Md. 1950). As to the duty with respect to the methods of operation of apparatus and devices, the owner or general concessionaire

need not provide against unlikely or unforeseeable conduct of a patron *(Hiatt v. Ritter, supra)*, and ordinarily is not responsible for casual or isolated acts of negligence of sub-concessionaire or his employee. *Kuhn v. Carlin, supra; Tuggle v. Anderson*, 263 P. 2d 822 (Wash. 1953).

An owner or general concessionaire is not an insurer of the safety of invitees. His duty is that of reasonable care under the circumstances. Where, for instance, the instrumentality or device is inherently dangerous and the patrons are children of tender years, the care exercised must be commensurate with the peril and the likelihood of injury. *Engstrom v. Huntley, supra.*

In this jurisdiction there seems to be only one case factually comparable to the case at bar — *Smith v. Agricultural Society*, 163 N.C. 346, 79 S.E. 632. Plaintiff paid admission to the county fair and was looking at preparations for a balloon ascension, a "free attraction." He was requested by one in charge to assist in holding the ropes attached to the balloon, and after doing so, and as he was leaving, the balloon suddenly ascended, and, his foot having caught in a loop of one of the ropes, he was carried aloft by the balloon. The evidence was conflicting as to whether the place was properly guarded or enclosed or the crowd was warned of the danger of going close to the balloon. Plaintiff sued the Agricultural Society which was conducting the fair; the Society defended on the ground, *inter alia*, that the balloonist was an independent contractor. The trial judge allowed defendant's motion for nonsuit. In reversing the nonsuit, this Court said (quoting 38 Cyc. 248): " 'The owner of a place of entertainment is charged with an affirmative, positive obligation to know that the premises are safe for the public use, and to furnish adequate appliances for the prevention of injuries which might be anticipated from the nature of the performance, and he impliedly warrants the premises to be reasonably safe for the purpose for which they are designed.' " The Court states that the defenses of independent contractor does not arise on the motion for nonsuit, it being an affirmative defense, but comments that "the owner 'is not exonerated because the exhibition where the injury was received was provided and conducted by an independent contractor.' " Citations of authority are meager and discussion is brief, but the opinion indicates that this Court follows the majority view in this field. It is noted that the acts and omissions, alleged to constitute negligence, involve the operation of the attraction or device.

Davis v. City of Atlanta, 66 S.E. 2d 188 (Ga. 1951), arose because of an injury suffered by plaintiff while riding on a "Scrambler." Plaintiff sued the City, owner of the fair grounds, the Fair Association and the concessionaire, operator of the Scrambler. Plaintiff alleged defen-

dants failed to inspect the Scrambler. The City had leased the grounds to the Fair Association which, in turn, leased a part of the grounds to the concessionaire. The City and the Association each received a percentage of the proceeds from the operation of the Scrambler, which was specified in the leases as "ground rent"; concessionaire, according to his lease, assumed absolute control of the ride and carried liability insurance. The City and the Fair Association defended on the ground that their liability was limited to the ordinary liability of a lessor. The Court held that because these parties advertised the fair and its attractions and thereby invited the public, and did not surrender the right of general control, they had the duty to inspect. It would seem that this case, in the legal aspects, is less favorable for a recovery by the injured patron than the case at bar.

The evidence in the instant case is sufficient to permit the jury to find these facts: Mirth, general concessionaire, agreed to provide rides and shows for the Dixie Classic Fair. It provided these amusements, among them the Scrambler which was operated by an attendant, an employee of the owner thereof, Dembrosky, sub-concessionaire. Mirth by contract assumed responsibility for the amusements and agreed to indemnify the Fair for any liability incurred by reason of the operation thereof. As per contract between Mirth and the Fair, the attractions were advertised by the Fair and the public was invited to attend. Mirth gave attention to all complaints, and daily reported and delivered all admission receipts of the amusements to the Superintendent of Admissions, an agent of the Fair. The Fair received a percentage of receipts; Mirth looked to the amusements for its compensation. Many, if not most, of the patrons of the Scrambler were children. The Scrambler was inherently dangerous if precautions were not taken to assure the safety of the riders. The bars on the seats of the Scrambler, designed to secure the safety of riders, were difficult to fasten. The procedure of the attendant was to leave to the riders the closing and latching of the bars and to start the motor and operate the ride without ascertaining that the bars were closed and latched and the riders secure. Reasonable inspection and oversight of the Scrambler while in operation would have disclosed the condition of the bars and the attendant's method of operation. Mirth failed to perform its duty of inspection and supervision, or, if it performed the duty, it failed to take precautions for the safety of riders. The difficulty in closing the bars and the neglect of the attendant to see that riders were secure proximately caused the injury to plaintiff.

In the operation of an amusement "ride," it is the duty of the operator to be alert and to see that the riders are safe during the operation. *Brown v. Columbia Amusement Co.*, 6 P. 2d 874 (Mont. 1931);

Linthicum v. Truitt, 80 A. 245 (Del. 1911). For a case involving a loose bar on a roller-coaster, see *Kahalili v. Rosecliff Realty, Inc.*, 141 A. 2d 301, 66 A.L.R. 2d 680 (N.J. 1958).

In our opinion the evidence is sufficient to withstand defendant Mirth's motion for nonsuit, and the trial judge applied appropriate legal principles in his consideration of the motion. The question of contributory negligence on the part of plaintiff was for the jury, and the jury resolved that question in favor of plaintiff. The principles of law applied by the court to the evidence in the excerpt from the charge set out above are substantially correct and proper.

Several witnesses were allowed to testify, over the objection of defendant, to the effect that they rode on the Scrambler both before and after the accident in which plaintiff was injured, they found it difficult to fasten the protective bars, the attendant did not assist them in closing the bars, he made no effort before or during the ride to ascertain that the bars were fastened and the riders secure, and he left it to the riders to close and latch the bars as best they could without any attention from him. This evidence was competent and essential in that it tends to show a prevailing defect in the mechanisms and a continuously negligent method of operation which a reasonably attentive inspection and supervision would have disclosed to defendant Mirth.

We have carefully considered all assignments of error and we find nothing sufficiently prejudicial in the conduct of the trial and the charge of the court to warrant a new trial.

No error.

STATE OF NORTH CAROLINA, EX REL. NORTH CAROLINA UTILITIES COMMISSION v. OLD FORT FINISHING PLANT, A DIVISION OF UNITED MERCHANTS AND MANUFACTURERS, INC.; McDOWELL CHAMBER OF COMMERCE, INC.; AMERICAN THREAD COMPANY; OTIS L. BROYHILL FURNITURE CO.; DREXEL FURNITURE COMPANY; CLINCHFIELD MANUFACTURING COMPANY, A DIVISION OF BURLINGTON INDUSTRIES, INC.; MARION MANUFACTURING COMPANY; CROSS COTTON MILLS COMPANY; MARION-McDOWELL MERCHANTS ASSOCIATION; TOWN OF MARION; MACON COUNTY BOARD OF COMMISSIONERS; TOWN OF WEAVERVILLE, N. C.; WESTERN AUTO STORES; DRYMAN'S CLOTHING STORE; BURRELL MOTOR CO., INC.; MACON COUNTY SUPPLY CO.; CRISP STUDIO; TOWN MOTEL; WAYAH INSURANCE AGENCY; DR. ERNEST FISHER; BANK OF FRANKLIN; CAROLINA PHARMACY, AND FRANKLIN PRESS.

AND

STATE OF NORTH CAROLINA, EX REL. NORTH CAROLINA UTILITIES COMMISSION v. THE ATTORNEY GENERAL OF NORTH CAROLINA, INTERVENOR.

(Filed 19 May, 1965.)

1. Utilities Commission § 1—

The Utilities Commission is an administrative agency of the State and as such is *ex vi termini* distinguished from courts within the purview of Section 3, Article IV of the Constitution of North Carolina.

2. Constitutional Law § 5; Appeal and Error § 1; Utilities Commission § 9; Administrative Law § 4—

The jurisdiction of the Supreme Court is conferred and defined by the Constitution, and G.S. 62-99, providing that an appeal from an order of the Utilities Commission approving an increase in the rates and charges of a public utility should be direct to the Supreme Court, is unconstitutional as being in conflict with the provisions of Article IV of the Constitution of North Carolina, both before and after the 1962 Amendment.

3. Appeal and Error § 2—

In dismissing an attempted appeal direct from the Utilities Commission, the Supreme Court, in the exercise of its supervisory jurisdiction, may order that the appeal be entered in the Superior Court in the same manner as though it were filed originally in that Court in apt time, subject to the right of any party to appeal from the judgment of the Superior Court to the Supreme Court as provided in G.S. 62-96.

APPEAL by the Attorney General of North Carolina, Intervenor, and by Protestants, as provided in G.S. 62-99, from an order entitled, "Order Allowing Adjustment of Rates," entered April 8, 1964, by the North Carolina Utilities Commission, docketed and argued as No. 474 at Fall Term 1964.

This proceeding originated before the North Carolina Utilities Commission (Commission) upon the filing on August 30, 1963 by Western Carolina Telephone Company (Western) of an application for ap-

proval of proposed increases in its rates and charges. On November 7, 1963, the Attorney General, as authorized by G.S. 62-20, intervened "on behalf of the using and consuming public." On November 12, 1963, the parties named in the caption as protestants, who are customers of Western, filed a joint "Protest." After extended hearings in November 1963, the Commission (two Commissioners dissenting) approved a new schedule of rates and charges allowing in part the increases sought by Western. The Attorney General and the protestants filed "exceptions" to said order and gave notice of appeal therefrom to the Supreme Court.

Edward B. Hipp for appellee Utilities Commission.

Van Winkle, Walton, Buck & Wall and Lake, Boyce & Lake for appellee Western Carolina Telephone Company.

Attorney General Bruton, Assistant Attorney General Barbee and F. Kent Burns for Intervenor and Protestants, appellants.

BOBBITT, J. The first question confronting us is whether this Court has jurisdiction to review decisions of the Utilities Commission on direct appeal "without intermediate review in the superior court." Western contends G.S. 62-99, which purports to authorize such direct appeal and review, is in conflict with Article IV of the Constitution of North Carolina, as amended by the voters in the General Election held November 6, 1962, specifically Sections 2, 3, 5 and 10 thereof.

The General Assembly, by enactment of Chapter 1165, Session Laws of 1963, "Amended, revised, and recodified" Chapters 56, 60 and 62 of the General Statutes by rewriting said chapters as one new chapter, to wit, "Chapter 62, Public Utilities."

A provision of the 1963 Act, designated therein and in G.S. Vol. 2B Replacement, 1965, as G.S. 62-99, provides: "Appeals from an order or decision of the Commission approving or authorizing an increase in the rates or charges of a public utility shall be made directly from the Commission to the Supreme Court without intermediate review in the superior court. The Commission shall transmit the entire record in all such appeals direct to the Supreme Court for hearing and review in accordance with the extent of review set out in this article for review of Commission cases, and the rules and regulations as are prescribed by law for appeals."

Decisions based on the provisions of Article IV of the Constitution of North Carolina prior to the 1962 amendment thereof established that the appellate jurisdiction of the Supreme Court related solely to appeals from the Superior Courts.

An 1895 Act (Public Laws of 1895, c. 75) provided for the establishment of "The Criminal Circuit Court of Buncombe, Madison, Haywood

and Henderson counties." Section 5 thereof provided: "That appeals to the supreme court and writs of error may be prosecuted from the judgments of said criminal courts in the same manner as they may be from the superior courts." The 1895 Act was amended in 1897 (Public Laws of 1897, c. 6) by changing the name of said court to "The Circuit Court" of said counties, and by providing that the judge thereof, "in addition to the criminal jurisdiction he now has, shall have also as to all civil actions and special proceedings and all civil business originating or pending in said four counties, or either of them, concurrent, equal jurisdiction, power and authority with the Judges of the Superior Courts of this State, to be exercised at chambers or elsewhere in said counties, in all respects as the Judges of the Superior Courts of this State have such power, jurisdiction and authority."

Provisions of said 1895 and 1897 Acts were considered in *Rhyne v. Lipscombe,* 122 N.C. 650, 29 S.E. 57; *S. v. Ray,* 122 N.C. 1097, 29 S.E. 61; and *Tate v. Commissioners,* 122 N.C. 661, 29 S.E. 60.

In *Rhyne,* the defendant appealed directly to the Supreme Court from an adverse verdict and judgment in said Circuit Court. In holding the quoted provisions of the 1897 Act unconstitutional and void, Clark, J. (later C. J.), said: ". . . the Superior Court is at the head of the court system below the Supreme Court, and . . . from it alone appeals can come up to this Court. From the inferior courts, therefore, appeals must go to the Superior Court of the county and not direct to this Court." The judgment of the Circuit Court was "quashed" and the cause was remanded to the Superior Court.

In *Ray,* the defendant appealed directly to the Supreme Court from an adverse verdict and judgment in the Circuit Court. In holding Section 5 of the 1895 Act unconstitutional and void, Clark, J. (later C. J.), said: "Section 5 of said chapter 75 provides that appeals lie from said criminal court direct to this Court, but in the case just cited *(Rhyne v. Lipscombe, supra)* we have felt constrained to hold that this is in derogation of the constitutional provisions in regard to the Superior Courts from which alone appeals lie to this Court. . . . The appeal having been improvidently taken, must be dismissed. The appellant will take his appeal by *certiorari* or otherwise, as he may be advised, to the Superior Court of Buncombe County, and from the judgment of that court, should it be adverse to him, an appeal can be prosecuted, should he so desire, to this Court."

In *Tate,* the action for *mandamus* was dismissed on the ground the Circuit Court had not acquired jurisdiction. The opinion of Clark, J. (later C. J.), contains the following: "It is competent for the General Assembly to give to said Circuit Court, or any other court it may erect, original jurisdiction, either exclusive or concurrent with the Superior

Court, civil as well as criminal, of all matters which may originate in said counties, *subject to the right of appeal therefrom to the Superior Courts created by the Constitution . . .*" (Our italics.)

Decisions in accord with *Rhyne, Ray* and *Tate* include the following: *S. v. Hanna,* 122 N.C. 1076, 29 S.E. 353; *S. v. Hinson,* 123 N.C. 755, 31 S.E. 854; *Mott v. Commissioners,* 126 N.C. 866, 36 S.E. 330; *Cook v. Bailey,* 190 N.C. 599, 601, 130 S.E. 498; *Jones v. Oil Company,* 202 N.C. 328, 332, 162 S.E. 741; *In re Parker,* 209 N.C. 693, 696, 184 S.E. 532.

In *Allen v. Insurance Co.,* 213 N.C. 586, 588, 197 S.E. 200, Winborne, J. (later C. J.), quotes with approval the following: "For all courts established by special or general laws, whether the jurisdiction is exclusive or concurrent with the Superior Court, the appellate jurisdiction lies in the Superior Court, as the head of the judicial system below the Supreme Court." McIntosh, North Carolina Practice and Procedure, § 67. See also *Taylor v. Johnson,* 171 N.C. 84, 87 S.E. 981.

In *Pate v. R. R.,* 122 N.C. 877, 29 S.E. 334, the petitioners appealed directly to the Supreme Court from an order of the Railroad Commission established pursuant to Public Laws of 1891, Chapter 320. Section 7 of the 1891 Act provided for appeals from the Commission to the Superior Court and from the Superior Court to the Supreme Court. However, Section 29, as amended in 1893 (Public Laws of 1893, c. 113), provided: ". . . and when no exception is made to the facts as found by the railroad commission, then the appeal shall be taken direct to the Supreme court." In accord with *Rhyne, Ray* and *Tate,* and based on the grounds set forth therein, the quoted statutory provision purporting to authorize such direct appeal was held unconstitutional and void. In dismissing the appeal, Clark, J. (later C. J.), said: ". . . the appeal (from the Railroad Commission) will lie in the first instance to the Superior Court, and thence the party cast has his appeal, if he so elect, to this Court."

In *Corporation Com. v. Mfg. Co.,* 185 N.C. 17, 116 S.E. 178, Hoke, J. (later C. J.), in a general discussion of statutory provisions relating to the Corporation Commission, said: "And in reference to the sections providing for and regulating appeals, our decisions hold that no appeal lies from the orders and rulings of the commission directly to the Supreme Court, but that any such appeal must be taken in the first instance to the Superior Court, and only from the judgments of the Superior Court will an appeal lie to this Court under the same rules and regulations as are prescribed by the general law appertaining to appeals." *Rhyne v. Lipscombe, supra,* and *Pate v. R. R., supra,* are cited in support of the quoted statement.

"The North Carolina Utilities Commission, a creature of the General Assembly, is an administrative agency of the State with such powers and duties as are given to it by statute. . . . These powers and duties are of a dual nature — supervisory or regulatory and judicial." *Utilities Com. v. Greyhound Corp.*, 224 N.C. 293, 29 S.E. 2d 909.

Statutes in effect prior to Chapter 1165, Session Laws of 1963, provided for appeal to the Superior Court from *all* decisions of the Utilities Commission and for appeal to the Supreme Court from the judgment of the Superior Court. G.S. Vol. 2B Replacement, 1960, Chapter 62, Article 2. (Note: Present statutes provide that appeals from the Utilities Commission shall be to the Superior Court, and that appeals to the Supreme Court shall be from the judgments of the Superior Court, with reference to all decisions except those approving or authorizing an increase in the rates and charges of a public utility. G.S. 62-90 through G.S. 62-99, G.S. Vol. 2B Replacement, 1965.)

Statutes relating to other administrative agencies vested with judicial or quasi-judicial powers provide for appeal from their decisions to the Superior Court. With reference to certain agencies, specific provision is made for such appeal: North Carolina Industrial Commission, G.S. 97-86; Employment Security Commission, G.S. 96-4(m); Commissioner of Insurance, G.S. 58-9.3. Absent adequate procedure for judicial review by some other statute, decisions of administrative agencies are subject to review in the Superior Court as provided in G.S. Chapter 143, Article 33, which is applicable, *inter alia,* to decisions of the State Banking Commission, G.S. 53-188; the Commissioner of Motor Vehicles, G.S. 20-300; and the Tax Review Board, G.S. 105-241.3. G.S. Chapter 150 provides for appeal to the Superior Court from decisions of the numerous licensing boards referred to therein.

Notwithstanding said decisions based on the provisions of Article IV of the Constitution of North Carolina prior to the 1962 amendment thereof, counsel for protestants and for the Utilities Commission contend the present provisions of Article IV authorize the General Assembly to provide for direct appeals to the Supreme Court from decisions of administrative agencies.

It is noted that Article IV contains no specific reference to the Utilities Commission. Section 3 thereof, quoted below, refers generally to administrative agencies.

By virtue of the amendment adopted at the General Election held November 6, 1962 "(t)he Constitution of North Carolina (was) amended by rewriting Article IV thereof to read" as set forth in Session Laws of 1961, Chapter 313. Nothing indicates the question for decision was considered either by the General Assembly or by the electorate. The answer to the question must be found in the present

provisions of Article IV. Further references are to the (present) provisions of Article IV as set forth in said 1961 Act.

We quote below Sections 1, 2, 3, 5 and 10 of Article IV as set forth in said 1961 Act.

"Section 1. Division of judicial power. The judicial power of the State shall, except as provided in Section 3 of this Article, be vested in a court for the Trial of Impeachments and in a General Court of Justice. The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article.

"Sec. 2. General Court of Justice. The General Court of Justice shall constitute a unified judicial system for purposes of jurisdiction, operation, and administration; and shall consist of an appellate division, a Superior Court division, and a District Court division.

"Sec. 3. Judicial powers of administrative agencies. The General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created. Appeals from administrative agencies shall be to the General Court of Justice.

". . .

"Sec. 5. Appellate Division. The appellate division of the General Court of Justice shall consist of the Supreme Court.

". . .

"Sec. 10. Jurisdiction of the General Court of Justice.

"(1) Supreme Court. The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference. The jurisdiction of the Supreme Court over 'issues of fact' and 'questions of fact' shall be the same exercised by it prior to the adoption of this Article, and the Court shall have the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the other courts. The Supreme Court shall have original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; the decisions shall be reported to the next Session of the General Assembly for its action.

"(2) Superior Court. Except as otherwise provided by the General Assembly, the Superior Court shall have original general jurisdiction throughout the State. The Clerks of the Superior Court shall have

such jurisdiction and powers as the General Assembly shall provide by general law uniformly applicable in every county of the State.

"(3) District Courts; Magistrates. The General Assembly shall, by general law uniformly applicable in every local court district of the State, prescribe the jurisdiction and powers of the District Courts and Magistrates.

"(4) Waiver. The General Assembly may by general law provide that the jurisdictional limits may be waived in civil cases.

"(5) Appeals. The General Assembly shall, by general law, provide a proper system of appeals: Provided, that appeals from Magistrates shall be heard *de novo*, with the right of trial by jury as defined in this Constitution and the laws of this State."

Administrative agencies referred to in Section 3 of Article IV *ex vi termini* are distinguished from courts. They are not constituent parts of the General Court of Justice. Section 1 of Article IV provides expressly that the General Assembly shall have no power to establish or authorize "any courts other than as permitted by this Article." It is provided in Section 3 of Article IV that appeals from such *administrative agencies* "shall be to the General Court of Justice."

The General Court of Justice consists exclusively of *the courts* constituting the appellate, superior court and district court divisions thereof. The jurisdiction of the Supreme Court is conferred and defined by the Constitution, not by the General Assembly. Under Section 10 of Article IV, the jurisdiction of the Supreme Court is to review on appeal decisions "of the courts below." This does not include jurisdiction to review on direct appeal the decisions of administrative agencies.

Section 10 of Article IV, which defines the jurisdiction of each of the courts in the General Court of Justice, provides in Sub-section (5) that "(t)he General Assembly shall, by general law, provide a proper system of appeals." Obviously, this refers to a system of appeals from a lower court to a higher court within the General Court of Justice.

The conclusion reached is that, under the present provisions of Article IV, the appellate jurisdiction of the Supreme Court relates solely to appeals from decisions of "the courts below," and that the General Assembly has no authority to provide for appeal from decisions of administrative agencies to the Supreme Court without prior appeal to and review by a lower court within the General Court of Justice. Hence, G.S. 62-99 is held unconstitutional and void.

While the present appeal is dismissed, it is Ordered, in the exercise of our general supervisory jurisdiction, Section 10(1) of Article IV, that appellants, not later than sixty days from the date this decision is filed, may file the record on appeal, including their excep-

tions, as originally filed in this Court, in the Superior Court of Wake County; and, if so filed, the proceeding shall be heard in the Superior Court of Wake County in accordance with G.S. 62-90 *et seq.* in like manner as if filed originally in said court in apt time, subject to the right of any party to appeal from the judgment of the Superior Court to the Supreme Court as provided in G.S. 62-96.

Appeal dismissed, with right to file in Wake Superior Court.

STATE OF NORTH CAROLINA, EX REL. NORTH CAROLINA UTILITIES COMMISSION v. WESTCO TELEPHONE COMPANY.

(Filed 19 May, 1965.)

APPEAL from the North Carolina Utilities Commission by the defendant, Westco Telephone Company, pursuant to the provisions of G.S. 62-99, from an order finding and concluding the fair value of the property of the defendant, used and useful in rendering service to the public as of 31 December 1963, to be $4,120,000, and that a fair and reasonable rate of return thereon was 3.80%.

The defendant assigns error.

Edward B. Hipp, Commission Attorney.

Attorney General Bruton, Asst. Attorney General Charles W. Barbee, Jr.

Van Winkle, Walton, Buck & Wall; Herbert L. Hyde for defendant.

PER CURIAM. On authority of the decision in the case of *Utilities Com. v. Finishing Plant, et al, ante,* 416, in which G.S. 62-99 is held unconstitutional, this appeal is dismissed with the right of the appellant to appeal to the Superior Court of Wake County, if so advised, within the time and in the manner set out in the above cited case.

Appeal dismissed.

THEON LATTIMORE COGDELL v. JOSEPHINE TAYLOR.

(Filed 19 May, 1965.)

1. Automobiles §§ 41g, 42g—

Plaintiff's evidence tending to show that the traffic control light facing her was green when she entered the intersection and changed to amber as she proceeded therein, and that defendant's car approached from the left at a speed of 40 miles per hour and collided with plaintiff's car in the intersection, *is held* to take the issue of defendant's negligence to the jury and not to disclose contributory negligence as a matter of law on the part of plaintiff.

2. Trial § 21—

Discrepancies in plaintiff's evidence are for the jury to resolve and do not warrant nonsuit.

3. Automobiles § 6; Municipal Corporations § 28—

A municipality has authority to enact an ordinance relating to automatic traffic control signals at intersections and to the right of way of funeral processions, G.S. 20-169, and when automatic traffic control signals are installed pursuant to an ordinance, the respective rights of motorists depend upon the provisions of the particular ordinance.

4. Municipal Corporations § 24—

Subject to the basic rule that a municipal ordinance must be construed to effectuate the intent of the municipal legislative body, an ordinance will be given a reasonable interpretation and, if possible, its provisions will be reconciled and harmonized with other legislative enactments.

5. Automobiles § 17; Municipal Corporations § 28—

In construing the municipal ordinances in question dealing with automatic traffic control signals at intersections and the right of way of funeral processions, *it is held* the funeral procession ordinance applies to all intersections within the municipality, whether having automatic traffic control signals or not, and supersedes the rules based on traffic lights, so that if a motorist knows or should know that a funeral procession is proceeding through an intersection, the motorist should yield the right of way to vehicles in the funeral procession, notwithstanding that he is faced with a green traffic control light.

6. Automobiles § 17—Fact that vehicles in procession have lights burning is not in itself conclusive that procession is funeral procession.

Where a municipal ordinance gives vehicles in a funeral procession the right of way at intersections, an instruction that if a motorist saw or should have seen a procession of cars traveling through an intersection with their lights on and proceeding in close proximity one to the other, such motorist should have known that a funeral procession was properly passing through the intersection and should yield the right of way, must be held for error, since the fact that the vehicles had their lights burning is not conclusive, but is merely a circumstance for the jury to consider, together with other evidence relative thereto, as to whether the motorist knew or should have

known from the surrounding facts that the procession was a funeral procession.

APPEAL by defendant from *Hubbard, J.,* November 16, 1964 Session of LENOIR.

Plaintiff's action and defendant's cross action grow out of the collision of their automobiles on Sunday, December 30, 1962, at or about 2:00 p.m., within the intersection of Vernon Avenue (an east-west street, part of U. S. 70) and Heritage Street (a north-south street) in the business district of Kinston, N. C.

Plaintiff was operating her Oldsmobile in a westerly direction along Vernon. Defendant's Buick was being operated in a northerly direction along Heritage by defendant's 18-year-old son, Haywood Taylor, Jr., referred to hereafter as Taylor.

Heritage, at its intersection with Vernon, is 31 feet wide. The record is silent as to the width of Vernon. The Bohannon building, located on the southeast corner of Vernon and Heritage, is 11 feet from the southern curb of Vernon and 15 feet from the eastern curb of Heritage. Until arrival at said intersection, plaintiff's view of approaching northbound traffic on Heritage and Taylor's view of approaching westbound traffic on Vernon were obstructed by the Bohannon building.

An electric traffic control signal was suspended over the center of said intersection of Vernon and Heritage. It was stipulated this was "a standard type electrical light system showing colors, green, red and amber, and was the type requiring traffic to stop on red, go on green, and caution on amber, as the City Ordinances, as well as the State Statutes, provide."

Plaintiff pleaded Section 22-33 of the Kinston City Code. It was stipulated the pleaded ordinance reads as follows: "No vehicle shall be driven through a funeral procession except fire department vehicles, police patrols, and ambulances when the same are responding to calls."

The collision occurred "about under the stop light." Plaintiff was on her right side of Vernon. The right front of defendant's car struck the side of plaintiff's car near the left front door and fender. Taylor did not see plaintiff's car "until it was approximately in front of (him)."

There was conflicting evidence as to Taylor's speed as he approached and entered said intersection. Too, there was conflicting evidence as to whether plaintiff or Taylor had the green light as she (he) approached and entered said intersection.

Plaintiff offered evidence tending to show she was in a line of cars, traveling slowly, "maybe 10 or 15 miles per hour," not more "than a (car) length or two apart," in a funeral procession; that a station wagon, the hearse and fifteen or more cars passed through said intersection ahead of her; that there were cars behind her in said funeral

procession; and that the lights on all cars in the funeral procession were burning, which was "the usual procedure," including the lights on plaintiff's car, those on the car a car length or less ahead of plaintiff and those on the car a car length behind plaintiff.

Defendant offered evidence tending to show the lights on plaintiff's car were not burning; that neither Taylor nor his passenger saw any cars proceeding west on Vernon either ahead of or behind plaintiff; that, as they approached said intersection, all they saw was the green traffic signal ahead of them and stopped cars headed east on Vernon at or near the southwest corner of said intersection; and that they had no knowledge or notice of a funeral procession on Vernon.

It was stipulated that the actionable negligence, if any, of Taylor, is imputable to defendant.

Issues of negligence and contributory negligence, arising on the pleadings in plaintiff's action, were answered in favor of plaintiff; and the jury awarded damages for plaintiff's personal injuries ($2,500.00) and for the damage to her car ($500.00). While superfluous, the jury answered adversely to defendant the issues arising on the pleadings in her cross action.

Judgment for plaintiff, in accordance with the verdict, was entered. Upon appeal, all of defendant's assignments of error, except formal assignments, relate (1) to the denial of her motion for nonsuit, and (2) to designated portions of the court's instructions to the jury.

Wallace & Langley for plaintiff appellee.
Whitaker, Jeffress & Morris for defendant appellant.

BOBBITT, J. Plaintiff testified the light facing her was green when she entered the intersection and changed to amber as she proceeded therein to the point of collision; and that, when she first saw defendant's car, it was approximately 75 feet south of the intersection, approaching the intersection at a speed of 40 miles per hour. Without reference to whether plaintiff was in a funeral procession, the evidence was sufficient to require submission to the jury of issues as to Taylor's negligence and as to plaintiff's contributory negligence. It was for the jury to resolve discrepancies in plaintiff's testimony as to her precise position when she first saw defendant's car. Strong, N. C. Index, Trial § 21, p. 318. The court properly denied defendant's motion for judgment of nonsuit.

Defendant assigns as error the court's instructions bearing upon their relative rights if plaintiff was in a funeral procession and Taylor had the green light. While exception was also taken to other portions of the charge, the gist of the challenged instructions is contained in the

following excerpt: "The fact that Mrs. Cogdell was in a funeral procession, if you find that she was, does not relieve her of this duty to obey the red light facing her unless you find that Haywood Taylor, Jr., as he approached and entered the intersection knew or should have known that a funeral procession was in the intersection and passing along Vernon Avenue. In other words, a person, Mrs. Cogdell in this case, who is in a funeral procession with the lights on on her car and on the other cars in the procession burning, must obey a red traffic signal in her line of travel unless the driver, Taylor in this case, approaching on the intersecting highway or street knew, or in the exercise of due care should have known, that a funeral procession was using the intersection where the traffic light facing him was green."

These significant matters should be noted: (1) G.S. 20-158(c) applies only to the regulation of traffic by automatic signal lights at intersections "outside of the corporate limits of a municipality." (2) There is no general statute prescribing rules of the road in respect of funeral or other processions.

On December 30, 1962, when the collision occurred, G.S. 20-169 provided: "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 signalling devices on any portion of the highway where traffic is heavy or continuous* and may prohibit other than one-way traffic upon certain highways, *and may regulate the use of the highways by processions or assemblages* and except that local authorities shall have the power to regulate the speed of vehicles on highways in public parks, but signs shall be erected giving notices of such special limits and regulations." (Our italics.) (Note: G.S. 20-169 was amended by adding two provisos by S.L. 1963, c. 559.)

When automatic traffic control signals are installed pursuant to municipal ordinance authorized by G.S. 20-169, the respective rights of motorists depend upon the provisions of the particular ordinance authorizing such installation. *Cox v. Freight Lines*, 236 N.C. 72, 78, 72 S.E. 2d 25, and cases cited; *Currin v. Williams*, 248 N.C. 32, 34, 102 S.E. 2d 455; *Upchurch v. Funeral Home*, 263 N.C. 560, 140 S.E. 2d 17. G.S. 20-169 also provides that local authorities "may regulate the use of the highways by processions or assemblages . . ."

From the foregoing, these propositions appear: (1) The Kinston ordinance is not in conflict with a general statute; and (2) authority for the enactment of the Kinston ordinances relating (a) to automatic

traffic control signals and (b) to funeral processions rests on G.S. 20-169.

The rules applicable to the construction of statutes are equally applicable to the construction of municipal ordinances. *In re O'Neal,* 243 N.C. 714, 92 S.E. 2d 189; *Perrell v. Service Co.,* 248 N.C. 153, 102 S.E. 2d 785. These rules of construction, stated by Johnson, J., in *Cab Co. v. Charlotte,* 234 N.C. 572, 576, 68 S.E. 2d 433, and in cases cited therein, include the following: "And in respect to related statutes, ordinarily they should be construed, if possible by reasonable interpretation, so as to give full force and effect to each of them . . ., it being a cardinal rule of construction that where it is possible to do so, it is the duty of the courts to reconcile laws and adapt that construction of a statute which harmonizes it with other statutory provisions." See 37 Am. Jur., Municipal Corporations § 187; 62 C.J.S., Municipal Corporations § 442(j), p. 851. Even so, as stated by Sharp, J., in *Bryan v. Wilson,* 259 N.C. 107, 110, 130 S.E. 2d 68: "The basic rule for the construction of ordinances is to ascertain and effectuate the intention of the municipal legislative body."

In *Sloss-Sheffield Steel & Iron Co. v. Allred,* 25 So. 2d 179, the Supreme Court of Alabama, referring to ordinances of the City of Birmingham relating (a) to automatic traffic control signals and (b) to driving through a procession, said: "Such ordinances are *in pari materia,* must be construed together and if possible be interpreted so as to be in harmony with each other." It was held that the driver of the defendant's truck was entitled to rely on the green light if he had no knowledge or notice that the plaintiff's car was in a funeral procession. These excerpts from the opinion of Stakely, J., are pertinent: "If the car of plaintiff was in a funeral procession and this was reasonably apparent to the public, then it had the right to enter the intersection on the red light by virtue of Section 5920 of the City Code dealing with driving through a procession." Again: "So far as the defendant is concerned, the green light did not authorize the driver of its truck to enter the intersection and drive through the funeral procession if the driver either knew or from the surrounding facts and circumstances should have known that a funeral procession was passing through the intersection." In our view, the quoted excerpts constitute a correct statement of the rule applicable to the factual situation now before us. Of course, as Judge Hubbard instructed the jury, the mere fact that plaintiff's car was in a funeral procession would not relieve her of *the general duty* to operate her car with due care for the safety of others.

Defendant contends the Kinston ordinances should be reconciled by applying the funeral procession ordinance only to intersections "uncontrolled" by traffic lights. Ordinarily, when traffic lights are installed

at an intersection, the relative rights of motorists approaching on intersecting streets are determinable with reference thereto rather than by the provisions of G.S. 20-155. Absent such traffic lights, the relative rights of such motorists are determinable with reference to G.S. 20-155. The more reasonable view, in our opinion, is that the municipal legislative body intended that the funeral procession ordinance should supersede the ordinary rules applicable to right of way at intersections irrespective of whether such rules are based on traffic lights or on G.S. 20-155. Reasons underlying the funeral procession ordinance include the following: (1) The respect and consideration funeral processions should receive; and (2) the practical necessity of proceeding as a single unit to avoid delay, confusion and deviation of cars from the proper route.

Decisions cited by defendant are factually distinguishable.

In *Sklar v. Southcomb,* 72 A. 2d 11 (Md.), the decision was not based on the plaintiff's status as a member of a funeral procession. This excerpt from the opinion is self-explanatory: "At the time of the accident the Motor Vehicle law did not authorize funeral processions entering an intersection on a green light to continue through after the light has changed, although such a provision was enacted by chapter 598 of the Acts of 1949, Code, Article 66-½, section 141(f)."

In *Otto v. Whearty,* 27 N.E. 2d 190 (Ohio App.), a Cleveland ordinance which, under prescribed conditions, purported to give the right of way at street intersections to funeral processions was held invalid as in conflict with general statutory law relating to traffic lights at intersections.

In *Brown v. Vigeon,* 367 S.W. 2d 727 (Tex. Civ. App.), and in *Przybyszewski v. Nunes,* 77 A. 2d 703 (Pa. Super.), the opinions contain no reference to any ordinance or statute relating to funeral processions.

In *Merkling v. Ford Motor Co.,* 296 N.Y.S. 393 (App. Div.), and in *Vinci v. Charney,* 80 N.Y.S. 2d 521, it was held that municipal ordinances relating to processions did not apply to intersections regulated by traffic control signals as provided in the general "Vehicle and Traffic Law."

In *Sundene v. Koppenhoefer,* 98 N.E. 2d 538 (Ill. App.), no ordinance relating to processions, funeral or otherwise, was involved, and no street intersection involving traffic lights was involved.

Other cases cited in the Annotation, 85 A.L.R. 2d 692, have been examined. *Sloss-Sheffield Steel & Iron Co. v. Allred, supra,* appears to be the only case in which the construction of two municipal ordinances, one relating to automatic traffic control signals and the other relating to driving through a procession, was involved.

Instructions of Judge Hubbard, substantially in accord with the quoted excerpts from *Sloss-Sheffield Steel & Iron Co. v. Allred, supra,* are approved.

The excerpt from the charge challenged by defendant's Exception #4 includes the following: "The Court charges you that it is the custom in this area for cars in funeral processions to drive with headlights on and the meeting or observation of a procession of cars in the daytime with the lights burning should convey to the driver meeting or seeing such procession information that he is probably meeting or observing a funeral procession, and thereupon he should govern his driving accordingly, and while in the City of Kinston he should not drive through such procession. In the instant case if Taylor, while driving down Heritage Street, saw or should have seen a procession of cars travelling down Vernon Avenue through the Heritage Street intersection with lights on and proceeding in close proximity one to the other as is the custom of funeral processions, then Taylor should have known that a funeral procession probably was using Vernon Avenue, and should have yielded the right of way to such procession, including Mrs. Cogdell if she was a part thereof, even though he was faced with a green light."

The Kinston ordinance does not define a funeral procession or specify any requirements for identifying the cars in such procession. Compare the Ohio statute considered in *Butcher v. Churchill,* 159 N.E. 2d 620, 85 A.L.R. 2d 689, which, in part, provided: "As used in this section 'funeral procession' means two or more vehicles accompanying a body of a deceased person in the daytime when each of such vehicles has its headlights lighted and is displaying a purple and white pennant attached to each vehicle in such a manner as to be clearly visible to traffic approaching from any direction."

The Kinston ordinance refers only to funeral processions, not to processions generally. There is no evidence there was a police escort. Nor is there evidence the cars carried any pennant or other indicia by which they could be identified as part of a funeral procession.

Plaintiff's evidence indicates: The station wagon and hearse were far ahead of plaintiff. Taylor could not see westbound cars as they approached the intersection on account of the Bohannon building. Hence, Taylor, approaching from the south, could see only such cars as were in the intersection and for an undetermined distance west of the intersection. The lights on cars proceeding in a westbound procession, if burning, were shining toward the motorists ahead of and behind such cars.

There is no specific allegation as to custom. Plaintiff did allege she "was traveling in a line of a funeral procession as a member of the

funeral party" and that "the vehicles in the procession each had their headlights burning to signify that it was a funeral procession." The only evidence bearing upon custom was plaintiff's statement that it was "the usual procedure" to have all lights burning.

As indicated, plaintiff's allegations and evidence relating to custom were meager. Assuming it was "the usual procedure" for cars in a funeral procession to proceed with lights burning, was this, according to the prevailing custom in Kinston, the only means by which cars proceeding in a line gave notice they were in a *funeral* procession? Was it also customary for a funeral procession in Kinston to have a police escort or to be identified by pennants or other indicia?

When considered in the light most favorable to plaintiff, her allegations and evidence are to the effect it was customary for cars to have their lights burning when proceeding in a funeral procession. However, the provisions of the Kinston ordinance relating to automatic traffic control signals are not superseded by custom. Allegations and evidence relating to custom are relevant only as they may bear upon whether Taylor knew or from the surrounding facts and circumstances should have known a funeral procession was passing westward through the intersection.

While the charge in many respects merits commendation, we are constrained to hold the court erred in advising the jury categorically as to the custom of cars proceeding in a funeral procession in Kinston, and instructing the jury positively "if Taylor, while driving down Heritage Street, saw or should have seen a procession of cars travelling down Vernon Avenue through the Heritage Street intersection with lights on and proceeding in close proximity one to the other as is the custom of funeral processions, then Taylor should have known that a funeral procession probably was using Vernon Avenue, and should have yielded the right of way to such procession, including Mrs. Cogdell if she was a part thereof, even though he was faced with a green light."

Assuming the sufficiency of the evidence to support a finding that Taylor saw or should have seen cars traveling in a procession within and west of said intersection, and that the lights on said cars were burning, it was for the jury to say, upon consideration of all the evidence, including evidence as to the prevailing custom in Kinston, whether Taylor knew, or from the surrounding facts and circumstances should have known, that a funeral procession was passing westward through the intersection.

In view of the reliance ordinarily placed by motorists upon automatic traffic control signals at street intersections, it seems appropriate to suggest that any ordinance or statute purporting to give priority to funeral processions at intersections otherwise controlled by automatic

traffic signals should require compliance with prescribed conditions with reference to identification of such procession as a funeral procession as a prerequisite to reliance upon such ordinance or statute. Compare *Butcher v. Churchill, supra.*

For the reasons indicated, defendant is entitled to a new trial.

New trial.

SARAH FURR WESTON, F. L. FURR, F. S. FURR, L. W. FURR, JESSIE F. HARTSELL, C. B. FURR, R. H. FURR, SELMA FURR SAME, JULIA FURR FREEMAN, HELEN H. SUTTON, HENRY H. HOWIE, J. ROBERT HOWIE, BRICE G. HOWIE, HILDA HOWIE, LOUELLE H. BIVENS, ELIZABETH HOWIE, ROBERT HUNTLEY AND FRIEDA HUNTLEY v. CLARENCE HASTY AND WIFE, CALLIE LUCILLE HASTY; BRONS HASTY AND WIFE, MARGIE MARIE HASTY, C. W. DRAKE AND WIFE, IRIS ELIZABETH DRAKE, OLIN BYRUM AND WIFE, JANE T. BYRUM, SHERWOOD T. CREEL, BY HIS GUARDIAN AD LITEM, H. B. SMITH, JR.

(Filed 19 May, 1965.)

1. Wills § 27—

The intent of testator, as gathered from a consideration of the four corners of the instrument interpreted in the light of the conditions surrounding him at the time of its execution, must be given effect unless contrary to some rule of law or at variance with public policy.

2. Wills § 39—

Even though the devisee of a life estate is also the donee of a power of disposition, so that the power is one in gross, the power of disposition does not enlarge the life estate into a fee, the life estate being property and the right to dispose of the property in the manner authorized being merely a power.

3. Same—

Where the donee of the power of testamentary disposition conveys the property by deeds and the grantees of the deeds are not beneficiaries under the will of the donor and are strangers to the donor's blood, the deeds do not constitute a release or estoppel, since they are not joined in by, or executed to, any persons who would be adversely affected by the exercise of the power. G.S. 39-33.

4. Same—

Where a will provides that the life tenant should have the right to dispose of the estate in remainder by will, deeds of the life tenant are ineffectual as an exercise of the power of disposition, and, upon the death of the life tenant, the land passes under the clause of her will devising all her real estate of which she died seized or was privileged to dispose of by will.

WESTON *v.* HASTY.

APPEAL by defendants from *Crissman, J.,* October-November 1964 Mixed Session of UNION.

This is a civil action instituted by the plaintiffs, heirs at law of A. J. Furr, deceased, against the defendants who purchased the lands described in the complaint from Lenora Furr (Scott), widow and devisee under the will of A. J. Furr.

This action was tried upon an agreed statement of facts. Trial by jury was waived by consent of the parties. The facts pertinent to this appeal are as follows:

A. J. Furr died testate, a resident of Union County, North Carolina, on 3 November 1906. The pertinent parts of his will insofar as this action is concerned are as follows: The deceased, by his will, devised all of his property, both real and personal, to his wife, Lenora Furr, for her lifetime and with conditional remainder in fee to a boy named Sherwood T. Creel whom he was rearing. Sherwood T. Creel failed to fulfill the obligations imposed upon him by the will of A. J. Furr and was thereby precluded from taking under the will of the deceased. Sherwood T. Creel died as a child, never having married and leaving no lineal issue. Thereupon, the property devised conditionally to him vested in the widow, Lenora Furr, a power of appointment under the will of A. J. Furr as follows: "If Sherwood T. Creel shall die during the lifetime of my wife, Lenora Furr, then my wife shall have the right to dispose of the estate herein devised and bequeathed to him by her Last Will and Testament, as though it were her property."

A. J. Furr died seized of two tracts of land in Union County, one containing 83½ acres and known as the Broom Place, or Tract No. 1, and the other containing 48-65/100 acres, Tract No. 2.

During her lifetime, Lenora Furr, who married G. W. Scott on 13 October 1907, made deeds to the defendants, or some of them, as hereinafter set out: (1) A deed made to Clarence Hasty and wife, Callie Lucille Hasty, said deed being dated 11 September 1946 and recorded in Deed Book 102, page 616, purporting to convey Tract No. 1 of 83½ acres in fee simple. (2) A deed made to C. W. Drake and wife, Iris Elizabeth Cagle Drake, for the second tract of land containing 48-65/100 acres. This deed was dated 23 October 1950 and recorded in Deed Book 114, page 547, and purported to convey the second tract of land described in the complaint, subject to the life estate of the grantor. (3) By deed dated 11 January 1955, Lenora Furr Scott conveyed to Claude W. Drake and wife, Iris Elizabeth Cagle Drake, the second tract of land described in the complaint containing 48-65/100 acres, and it was purported to be a fee simple deed without any life estate being reserved for the grantor.

Lenora Furr Scott died testate 31 May 1957. Her will, which has never been contested, was offered for probate on 25 October 1957 and is recorded in Will Book 8, on pages 582 and 583, in the Clerk's Office of the Superior Court of Union County, North Carolina. The pertinent part of that will is as follows: "I will, devise and bequeath all of my real estate of every kind and description that I may die seized of or privileged to dispose of by will or otherwise to CLAUDE DRAKE, absolutely and in fee simple."

The plaintiffs brought this action as heirs of A. J. Furr to have the conveyance by will and the deeds executed by the widow of A. J. Furr, to wit, Lenora Furr Scott, declared null and void and of no effect, and that they as heirs of A. J. Furr be declared owners in fee simple of said property as their interest may be determined under the law.

The defendants answered and alleged that they are the owners in fee simple to said lands under the deeds and the will set out in the record.

Based on the foregoing findings, the court below entered judgment as follows:

"(1) That the plaintiffs in this action are the sole owners of the fee simple title to the real estate herein set out and more particularly described in Paragraph 6 of the findings of fact above under the designation 'First Tract' and 'Second Tract.'

"(2) That none of the defendants, nor any persons claiming by, through, or under them, have any right, title claim or interest in or to any of the real estate hereinabove referred to.

"(3) That the costs of this action be taxed against the defendants. * * *"

From the foregoing judgment the defendants except and appeal to the Supreme Court, assigning error.

Carswell & Justice; B. Kermit Caldwell for plaintiff appellees.
Richardson & Dawkins; Coble Funderburk for defendant appellants.

DENNY, C.J. The intent of the testator is the polar star that must guide the courts in the interpretation of a will. *VonCannon v. Hudson Belk Co.*, 236 N.C. 709, 73 S.E. 2d 875, and cited cases. This intent is to be gathered from a consideration of the will from its four corners, and such intent should be given effect unless contrary to some rule of law or at variance with public policy. *House v. House*, 231 N.C. 218, 56 S.E. 2d 695; *Williams v. Rand*, 223 N.C. 734, 28 S.E. 2d 247; *Heyer v. Bulluck*, 210 N.C. 321, 186 S.E. 356.

In order to understand conditions as they existed at the time A. J. Furr executed his will, we think it appropriate to note these further

facts: A. J. Furr was born 3 March 1842 and later married Julia E. Furr, to which union the plaintiffs and their ancestors were born. Julia E. Furr died 15 October 1891. On 19 April 1893, A. J. Furr married Lenora Allen. To this union no children were born, but Lenora Allen Furr helped the testator, A. J. Furr, rear the children born of his first marriage. Lenora Furr was born 22 July 1865, and was nearly 23½ years younger than her husband, A. J. Furr. When A. J. Furr executed his will, all his children were grown and had homes of their own. He made a small bequest to each of them, to be paid out of his estate. The primary objects of his bounty were his young wife, who was only 41 years of age at the time of his death, and Sherwood T. Creel, a young orphan boy he and his second wife were rearing. He gave all of his property to his wife for life, subject to the legacies made to his children, and the remainder at her death to Sherwood T. Creel on certain conditions; or, if Sherwood T. Creel should predecease his wife, then he gave to his wife the right to dispose of the estate devised to Sherwood T. Creel "by her Last Will and Testament as though it were her property." Sherwood T. Creel died shortly after the death of A. J. Furr and during the lifetime of the testator's wife. Young Creel having never married, the testator's wife, Lenora Furr, became vested with the power to dispose of the estate involved in the manner set out in the will of A. J. Furr.

Since the holder of the power of appointment held the life estate in the land involved, her power was one in gross, which is defined in 41 Am. Jur., Power, § 5, at page 809, as follows: "* * * A power in gross exists where the person to whom it is given has an estate in the land, but the estate to be created under or by virtue of the power is not to take effect in possession until after the determination of the estate to which it relates. * * *"

Even so, the power to dispose of the estate devised to Sherwood T. Creel did not enlarge the life estate of Lenora Furr so as to give her a fee in the lands involved. Her life estate was property, but her right to dispose of the property in the manner authorized by the will of A. J. Furr was only a power. *Hardee v. Rivers,* 228 N.C. 66, 44 S.E. 2d 476; *Holland v. Smith,* 224 N.C. 255, 29 S.E. 2d 888; *Smith v. Mears,* 218 N.C. 193, 10 S.E. 2d 659.

On 13 October 1907, Lenora Furr married George W. Scott and lived with him as his wife until 26 June 1940, when George W. Scott died.

On 11 June 1946, some years after the death of her last husband, Lenora Furr Scott executed a deed to Clarence Hasty and wife for the 83½ acre tract of land, which deed purported to convey a fee simple title to the premises. Thereafter, on 23 October 1950, she executed a deed to Claude W. Drake and wife for the 48-65/100 acre tract in

which she reserved a life estate. Later, on 11 June 1955, she executed another deed purporting to convey to Claude W. Drake and wife a fee simple title to the 48-65/100 acre tract in which she did not reserve her life estate.

Lenora Furr Scott died on 31 May 1957 at the age of nearly 92, leaving a last will and testament dated 1 May 1952 in which she devised all of her "real estate of every kind and description that I may die seized of or privileged to dispose of by will or otherwise, to CLAUDE DRAKE, absolutely and in fee simple."

The facts in this case raise two questions which must be resolved on this appeal. (1) Did the deeds executed by the donee of the power of appointment constitute a release of the power? (2) If so, were the deeds valid to convey a fee simple title to the property involved? In our opinion, both questions must be answered in the negative.

In this jurisdiction, the donee of a power of appointment exercisable by deed or will, may be released in the manner set out in G.S. 39-33. However, the release of such power is not limited to the manner provided in G.S. 39-33. See G.S. 39-34.

It is stated in American Law of Property, Vol. V, § 23.29, at page 539:

> "* * * The Restatement lists three methods by which a release may be effected but it should be noted that there is no implication that other forms of release may not be utilized. The methods listed are (1) by the donee's delivering, to some person who would be adversely affected by an exercise of the power, an instrument for consideration or under seal, (2) by the donee's joining with some or all of the takers in default in a conveyance of the appointive interest and (3) by the donee's contracting, with some person who would be adversely affected by an exercise of the power, not to exercise it."

None of the deeds executed by the donee herein was joined in by or executed to any person who would have been adversely affected by the exercise of the power. Therefore, we hold there was no release or estoppel as there was in the case of *VonCannon v. Hudson Belk Co., supra.*

It is generally held that where a power is to be executed by will, it cannot be executed by any act to take effect in the lifetime of the donee. *Reid v. Boushall,* 107 N.C. 345, 12 S.E. 324; 4 Kent Com. 331; *Newton v. Bullard,* 181 Ga. 448, 182 S.E. 614; *Green v. Green,* 90 U.S. 486, 23 L. Ed. 75.

In 72 C.J.S., Powers, § 38, page 435, it is said: "A power must be exercised in accordance with the terms of the grant of power, and so,

when a certain mode of executing it is prescribed by the donor, the donee has no authority to execute it in any other mode. * * *"

Likewise, in 96 C.J.S., Wills, § 1070(d), page 727, we find this statement: "A testamentary power may be exercised only in such mode and manner as may be designated or prescribed by the will creating and conferring the power, and an attempt to exercise it in any other mode or manner is ineffectual. * * *" *Lamkin v. Safe Deposit & Trust Co.*, 192 Md. 472, 64 A. 2d 704; *Fidelity Union Trust Co. v. Caldwell*, 137 N.J.Eq. 362, 44 A. 2d 842; *Matter of Kennedy*, 279 N.Y. 255, 18 N.E. 2d 146; *De Charette v. De Charette*, 264 Ky. 525, 94 S.W. 2d 1018.

In *Newton v. Bullard, supra,* the donee was conveyed a life estate in certain lands by deed and the same instrument conferred upon the donee, Julia S. Newton, the power to appoint by will the person or persons to take the remainder. The donee, on 8 November 1894, executed a deed purporting to sell and convey the premises to Otis M. Newton. Thereafter, on 13 June 1902, Otis M. Newton purported to convey the premises by deed to W. H. Bullard. Julia S. Newton died in 1928 leaving a last will and testament in which she devised the property to Otis M. Newton. The Supreme Court of Georgia said:

> "* * * Since the deed from Mary F. Newton conferred the power to make an appointment by will only, Julia F. *(sic)* Newton, the conferee, was limited strictly to this method, and her effort to exercise the power otherwise than by a will was nugatory. *Porter v. Thomas,* 23 Ga. 467 (3); *Fleming v. Fountain,* 73 Ga. 575; *Wilder v. Holland,* 102 Ga. 44, 29 S.E. 134. Accordingly, the deed executed by Julia S. Newton to Otis M. Newton in 1894 was void except as a conveyance of the life estate, and such life estate was all that was conveyed by Otis M. Newton to W. H. Bullard by his deed to Bullard executed in 1902. *Howard v. Henderson,* 142 Ga. 1, 4, 82 S.E. 292. Each of the two instruments last referred to attempted to convey more than a life estate, but each was ineffectual for such purpose; and at the time of the deed to Bullard there was no contingency under which Otis M. Newton, the grantor, could ever acquire an additional interest, except that the power of appointment vested in Julia S. Newton might be exercised in his favor. This was a mere possibility, which could not be conveyed. Code 1933, §§ 96-102, 29-103; *Dailey v. Springfield,* 144 Ga. 395, 87 S.E. 479, Ann. Cas. 1917D, 943. It is true that Julia S. Newton had theretofore attempted to exercise the power in favor of Otis M. Newton by means of a deed, and also that she had executed her will naming him as the appointee in terms of the power; but since the deed was to that extent void, and since the

will was revocable at any time, no legal title or interest in remainder passed to Otis M. Newton by either of these instruments. Some moral duty may have rested upon Julia S. Newton to make an appointment by will in accordance with her previous deed; but this duty was unenforceable in law, and its existence did not inure to Otis M. Newton as an interest in the property.

"Otis M. Newton died in 1915, while the will continued to be subject to change or revocation until the death of Julia S. Newton in 1928. * * * Notwithstanding the will was never revoked and was duly probated after the death of Julia S. Newton, it did not take effect until her death. * * * Since Otis M. Newton was dead at that time, no title or interest ever vested in him by virtue of the appointment as finally made in the will. What, then, became of the remainder interest? 'If a legatee shall die before the testator, or if dead when the will is executed, but shall have issue living at the death of the testator, such legacy, if absolute and without remainder or limitation, shall not lapse, but shall vest in the issue in the same proportions as if inherited directly from their deceased ancestor.' Code 1933, § 113-812. * * *"

The Court further held:

"There is no merit in the contention that since Otis M. Newton would have been estopped to assert an after-acquired title as against his grantee, Bullard, Mary Marlin Newton, as his sole heir at law, should be likewise estopped. * * *"

We hold that the deeds executed by Lenora Furr Scott, purporting to convey the fee simple title to the tracts of land involved, were ineffectual to convey any interest in said tracts of land other than the life estate held by the grantor.

We further hold that the last will and testament of Lenora Furr Scott, in which she devised to Claude Drake in fee simple all the real estate of every kind and description of which she died seized or privileged to dispose of by will or otherwise, vested in Claude Drake the fee simple title to the two tracts of land involved.

The plaintiffs have no right, title or interest in the said lands, and the judgment entered below to the contrary is

Reversed.

JACQUELINE HOLMES WILKERSON, ADMINISTRATRIX OF THE ESTATE OF JOE RADFORD WILKERSON, PLAINTIFF v. LEWIS THOMAS CLARK AND DAVID JUDSON CLARK, T/A CLARK CHEVROLET COMPANY, DEFENDANTS.

(*Filed 19 May, 1965.*)

1. Automobiles § 41a—

Actionable negligence may be established by evidence of facts and circumstances from which negligence may be inferred as the more reasonable probability.

2. Automobiles § 38— Whether speeding car seen by witness was that driven by defendant and whether speed was continued to accident held for jury.

The evidence tended to show that defendant driver and his passenger were riding in a particular make of automobile on a highway which had not been opened to traffic, that the driver passed an exit ramp and then cut right across the median between his lane of travel and the ramp, and lost control, resulting in the injury in suit. Plaintiff offered testimony of a witness that at about 12:05 p.m. he saw a lone vehicle of the particular make travel for a distance of six-tenths of a mile on the unopened highway, and that when he last saw it, some two-tenths of a mile from the scene of the accident, where the wrecked car was found at about 2:45 p.m., it was traveling some 80 miles per hour. *Held:* The testimony as to speed is not so remote in time or place as to be incompetent, and the evidence should have been admitted under instruction of the court that if the jury should find from the greater weight of the evidence that the car which the witness had seen was the car driven by defendant and that the wreck occurred after its uninterrupted travel from where he saw it to the scene of the accident, the jury should consider it upon the question of speed, the weight of the evidence being for the jury.

3. Appeal and Error § 41—

Where the only evidence as to speed of the car driven by defendant is the competent testimony of an eyewitness and the inferences arising from the physical facts at the scene, the exclusion of the testimony of the witness must be held for prejudicial error notwithstanding it was before the jury over a day before the court excluded it, since it cannot be assumed that the jury failed to comply with the court's instruction not to consider the testimony.

APPEAL by plaintiff from *Copeland, Special Judge,* October 1964 Regular Session of WAKE.

Administratrix' action to recover damages for the wrongful death of her intestate.

On Saturday, March 31, 1962, between midnight and 2:45 a.m., a 1962 Corvair, occupied by plaintiff's intestate (Wilkerson) and by defendant Lewis Thomas Clark (Clark) and operated on what is now U. S. Highway No. 1 about five miles south of Raleigh, ran off the road and wrecked, thereby causing the death of Wilkerson.

Plaintiff alleged the negligent operation of the Corvair *by Clark* proximately caused the wreck and Wilkerson's death. Defendants denied all allegations as to their negligence and alleged that Wilkerson, not Clark, was operating the Corvair when the wreck occurred. Conditionally, defendants pleaded Wilkerson's contributory negligence as a bar to recovery herein.

It was stipulated that the actionable negligence of Clark, if any, is imputable to defendant David Judson Clark.

Evidence was offered by plaintiff and by defendants.

Issues as to negligence and damages were submitted. The jury answered the negligence issue, "No," and judgment that plaintiff recover nothing of defendants was entered. Plaintiff excepted and appealed.

Smith, Leach, Anderson & Dorsett for plaintiff appellant.

Teague, Johnson & Patterson and Robert M. Clay for defendant appellees.

BOBBITT, J. Clark, 34 or 35, and Wilkerson, 29, were frequent associates and close friends. Clark was the manager of Clark Chevrolet Company of Apex, N. C., a business owned solely by his father, defendant David Judson Clark. On occasions, Wilkerson did part time work for Clark Chevrolet Company.

Clark Chevrolet Company sold Corvairs. The Corvair involved in the wreck on March 31, 1962 "was a brand new Corvair demonstrator."

On March 31, 1962, the "Beltline," now U. S. 1, was under construction. It had not been "opened for traffic." However, certain lanes thereof had been paved. It was not "opened for traffic" until September 19, 1962.

U. S. 1, a primary north-south highway, runs generally east-west in the area where the wreck occurred. However, the lanes for traffic from Raleigh toward Apex are referred to as lanes for southbound traffic and those for traffic toward Raleigh as lanes for northbound traffic.

U. S. 1, between where it overpasses Western Boulevard and where it underpasses the Cary-Macedonia Road, is a four-lane highway, the two 12-foot lanes for southbound traffic being separated by a median strip from the two lanes for northbound traffic. Southbound traffic, before reaching the Cary-Macedonia underpass, comes to an exit ramp which extends obliquely to the right from U. S. 1 and provides access to the Cary-Macedonia Road. An additional traffic lane is provided for approaching motorists who plan to leave U. S. 1 and enter said exit ramp. Where the highway lanes and the ramp converge, the total width of the pavement is 56 feet. The exit ramp itself is 20 feet wide at said point of convergence and 16 feet wide beyond that point.

The portions of highway referred to above had been paved. The shoulders, consisting of red clay, were under construction.

There was evidence tending to show the following facts: The Clark Corvair, although the "Beltline" had not been "opened for traffic," was proceeding thereon from Raleigh toward Apex. Approaching the Cary-Macedonia exit ramp, it did not travel in the additional lane providing access thereto but traveled in the right lane of said two 12-foot lanes for southbound traffic. It passed a short distance beyond the point of entry to the exit ramp, cut to its right across the "V" dirt median between said lane and said ramp, crossed the ramp and the dirt shoulder thereof, went down the shoulder embankment into a 40-foot deep ravine and finally stopped some sixty feet beyond said embankment. The wrecked Corvair, with Wilkerson's body and Clark *therein*, was discovered prior to 2:45 a.m.

There was sufficient admitted evidence to support a finding that Clark was the driver and that his actionable negligence proximately caused the wreck and Wilkerson's death. A review of this evidence is unnecessary to decision on this appeal. The court properly overruled defendants' motion(s) for judgment of nonsuit.

There was evidence tending to show the "Beltline," then under construction, underpassed the Jones-Franklin Road; and that the Jones-Franklin Road is "almost parallel" with the Cary-Macedonia Road and is "about a half mile towards Raleigh from the Cary-Macedonia Road."

Freeman, plaintiff's witness, testified in substance, except when quoted, as follows: On Friday night, March 30, 1962, he was visiting on Dillard Drive. He left "around 12:00, five minutes after or something like that," to go to Mebane where he then lived. Traveling along the Jones-Franklin Road, he stopped his car on the bridge over the "Beltline" to determine whether the "Beltline" was then open for traffic. While stopped there, he saw only one car. This car approached on the "Beltline" from his right (from the direction of Raleigh) and traveled to his left after passing under the Jones-Franklin bridge. He saw this car as it traveled three-tenths of a mile approaching the underpass and as it traveled three-tenths of a mile beyond the underpass. When he last saw it, this car was headed toward and lacked "approximately two-tenths of a mile" of reaching "the Cary-Macedonia exit." He saw only the headlights, taillights and top of this car. He is familiar with Corvair cars and could and did identify this car as a Corvair. During the time he saw it, this Corvair, in his opinion, "was traveling in excess of 80 miles an hour."

Freeman testified he told Cecil Wilkerson, brother of plaintiff's intestate, substantially what he had testified at the trial, and Cecil Wilkerson so testified.

After plaintiff had offered his evidence and rested, the judge instructed the jury he had come to the conclusion that said testimony of Freeman and of Cecil Wilkerson had been improperly admitted in evidence, and that defendants' objections thereto should have been and were now sustained. Thereupon, the court instructed the jury "not to consider that testimony at all in the trial of this case," and to dismiss it from their minds completely "just as if it were never spoken in this court by anybody." Plaintiff excepted and assigns as error the exclusion of said testimony and the court's said instructions in relation thereto.

If Freeman saw the Clark Corvair, and if the wreck occurred after its uninterrupted travel from where it was when Freeman last saw it to the scene of the wreck, the testimony of Freeman is not inadmissible on account of remoteness or otherwise. Under the facts here, the distance between the point when last observed by Freeman and the scene of the wreck would bear on the weight rather than the competency of Freeman's testimony. *Honeycutt v. Strube,* 261 N.C. 59, 64, 134 S.E. 2d 110, and cases cited.

"Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact does exist." 31A. C.J.S., Evidence § 161.

Under our decisions, actionable negligence may be established by circumstantial evidence; and where there is evidence of facts and circumstances from which it may be inferred that actionable negligence is the more reasonable probability, the issue is for jury determination. *Frazier v. Gas Company,* 247 N.C. 256, 100 S.E. 2d 501; *Drum v. Bisaner,* 252 N.C. 305, 113 S.E. 2d 560; *Patton v. Dail,* 252 N.C. 425, 114 S.E. 2d 87.

In *S. v. Johnson,* 199 N.C. 429, 154 S.E. 730, Stacy, C.J., referring to circumstantial evidence in criminal cases, said: "The general rule is that, if there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury." Since *S. v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431, to which reference is made for a full discussion by Higgins, J., this Court has approved the quoted statement as the established rule in this jurisdiction.

The question here is whether there was evidence of facts and circumstances from which *it may be* inferred as the more reasonable probability (1) that Freeman saw the Clark Corvair *and* (2) that the wreck occurred after its uninterrupted travel from where it was when Freeman last saw it to the scene of the wreck. If so, it was for the jury to determine whether the evidence is sufficient to establish such facts

and circumstances *and* to warrant findings in plaintiff's favor as to both propositions. In this connection, see *Morgan v. Bell Bakeries, Inc.*, 246 N.C. 429, 98 S.E. 2d 464, where circumstantial evidence was held admissible and sufficient to support a finding that a particular bread truck was in fact the motor vehicle involved in the accident; also, see Annotation, "Proof, in absence of direct testimony, of identity of motor vehicle involved in accident." 81 A.L.R. 2d 861-888.

There was evidence tending to show the following facts: In the late afternoon of Friday, May 30, 1962, Clark asked Wilkerson to come by the place of business of Clark Chevrolet Company at or about 9:00 p.m., closing time, just to ride around with him. The car in which they were riding was "a brand new Corvair demonstrator." Clark and Wilkerson "left Raleigh about midnight," Clark driving. They traveled "out of Raleigh on the Western Boulevard and onto the new Beltline," headed back toward Apex. The paved roadway on which they traveled had not been "opened for traffic." At 2:45 a.m., when a Cary police officer arrived, Wilkerson was dead. His neck was broken and his body "felt clammy, cold, or cool." Clark was seriously injured. The Corvair was on its right side. Clark's back was against the top. His feet and legs extended over the legs of Wilkerson. Clark did not know what occurred after the wreck until he heard a car stop and voices of investigating officers.

In addition to the foregoing: When and by whom the wrecked Corvair was discovered does not appear. There is no evidence the "Beltline," then under construction and not "opened for traffic," had been or was being used by unauthorized persons other than Clark. Testimony as to tire marks, course of travel, damage to the Corvair and tragic consequences to the occupants, are consistent with Freeman's testimony as to speed.

Delay in the discovery of the wrecked Corvair, notwithstanding evidence the lights thereon were burning, is consistent with non-use of the "Beltline" by the traveling public. If Clark "left Raleigh about midnight," it may be reasonably inferred that he passed under the Jones-Franklin bridge approximately at the time referred to in Freeman's testimony; and, then headed for Apex, it would seem reasonable to infer it would be improbable he would be traveling the same course at a later hour.

Further discussion of the evidence is deemed inappropriate. In our view, the circumstantial evidence was sufficient *to permit* the jury to find that Freeman saw the Clark Corvair and that the wreck occurred after its uninterrupted travel from where it was when Freeman last saw it to the scene of the collision. If the jury should so find by the greater weight of the evidence, Freeman's testimony as to speed was

competent. Hence, Freeman's testimony should have been admitted and the jury should have been instructed as indicated with reference to the findings prerequisite to its consideration as evidence relating to the speed of the Clark Corvair.

Defendants contend the court's exclusion of Freeman's testimony and of said portion of Cecil Wilkerson's testimony, if error, was not prejudicial to plaintiff. They contend this evidence was first admitted and was before the jury "over a day" before excluded by the court's ruling. However, the court, in substance, instructed the jury there was no evidence Freeman saw the Clark Corvair. We must assume the jury acted in compliance with the court's ruling and positive direction. Thereafter, the evidence for jury consideration as to what occurred in respect of speed and other alleged negligence prior to and at the time of the wreck related solely to physical facts observed at the scene after the wreck occurred. Under the circumstances, we cannot say the erroneous ruling did not substantially prejudice plaintiff.

For the error indicated, a new trial is awarded. Discussion of other assignments of error, relating to matters which may not recur at the next trial, is deemed unnecessary.

New trial.

GREAT AMERICAN INSURANCE COMPANY v. HOLIDAY MOTORS OF HIGH POINT, INC., AND ROBERT BISHOP.

(Filed 19 May, 1965.)

1. Appeal and Error § 49—

Findings of fact, made by the court in a trial by it after waiver of a jury trial by failure to make apt demand therefor, are conclusive on appeal if supported by evidence.

2. Appeal and Error § 21—

An exception to the judgment presents the question whether the facts found are sufficient to support the judgment.

3. Banks and Banking § 10—

A bank paying a forged check may not recover such payment from the payee unless the payee is at fault in taking or negotiating the paper.

4. Same— Evidence held sufficient to show that payee of check was put on inquiry as to whether signature was forgery.

Defendant, after ascertaining that its intoxicated customer had no account at the bank in his own name and after ascertaining that there were sufficient funds under the name which the customer said he carried his ac-

count because of marital difficulties, sold the customer a car upon down payment by check, signed in such other name, and the execution of a chattel mortgage, and had an employee drive the customer to the customer's home in the car after defendant had presented the check to the bank and obtained a cashier's check therefor. *Held:* The bank is entitled to recover from defendant the funds paid out upon the forged instrument, and defendant and not the bank must suffer the loss sustained upon repossession and resale of the vehicle, since the loss was sustained as the result of defendant's gullibility and attempt to negotiate a check it knew to be of questionable authenticity.

APPEAL by defendant Holiday Motors from *Olive, E.J.,* August 31, 1964 Small Claims Civil Session of FORSYTH.

Plaintiff, to recover the sum of $500, instituted this small claims action. To support its claim, it alleged: It insured High Point Savings & Trust Company (Trust Company) against loss resulting from forgeries. Defendant Bishop forged the signature of Logan E. Bishop, Jr. to a check for $500 on Trust Company. This check was payable to and cashed by Holiday Motors of High Point, Inc. (Holiday). Holiday was not a holder in due course. It took the check with notice of the forgery. Plaintiff paid Trust Company its loss, and by reason of its payment became subrogated to the rights of trust Company.

Bishop did not answer.

Holiday answered. It admitted it had cashed the $500 check drawn by defendant Bishop on an account carried with Trust Company under the name of Logan E. Bishop, Jr. It alleged it was a holder for value. It admitted plaintiff had become subrogated to any rights which Trust Company had, but denied Trust Company had any rights.

The following is a summary of the court's findings: Robert Bishop, who had been consuming intoxicants, went to Holiday for the avowed purpose of purchasing a new Mercury automobile. Wells, Holiday's general manager, aware that Bishop had been drinking, quoted a price, payable $500 in cash, the remainder to be paid in installments secured by a mortgage on the Mercury. Bishop agreed to Wells' terms, stating he would make the cash payment by check on his account with Trust Company. He asked Wells for a blank check on Trust Company. Wells phoned Wachovia Bank & Trust Company to inquire if it would purchase Bishop's mortgage, securing the deferred portion of the purchase price. Wachovia replied that Bishop's credit was good and it would finance the unpaid portion of the purchase price. Wells then phoned Trust Company to ascertain if Robert Bishop's check for $500 would be honored. Trust Company informed Wells that Robert Bishop did not have an account with it. Wells reported to Bishop that Trust Company said he did not have an account with it. Bishop then told Wells he, Bishop, had forgotten that his deposit in Trust Company

was not in his real name, but in the name of Logan E. Bishop, Jr., a name he had assumed because of marital difficulties. Wells made no inquiry to ascertain if Robert was in fact married. Instead, he called Trust Company and inquired if Logan E. Bishop, Jr. had an account there, and if a check on that account for $500 would clear. He received an affirmative answer to both questions. Bishop's statement to Wells that he had deposited his money with Trust Company under an assumed name was false. He had no money on deposit with Trust Company either in his own name or in any other name. In Wells' presence, Robert Bishop signed a check drawn on Trust Company payable to Holiday for $500. The check was signed in the name of Logan E. Bishop, Jr., as drawer. An officer of Holiday carried this check to Trust Company. He requested that it be certified. The bank informed him that it only certified checks at the request of a depositor, but it would issue a cashier's check for a charge of 15 cents. Holiday's officer endorsed the check, paid the 15 cents, and received in return Trust Company's cashier's check.

Trust Company, when it received the check signed by Robert Bishop in the name of Logan E. Bishop, Jr., did not refer to its signature card to ascertain if, in fact, the check was signed by its depositor, Logan E. Bishop, Jr. When Holiday presented the check, and received in exchange Trust Company's cashier's check, Trust Company had no knowledge of the facts surrounding the drawing of the check.

After the cashier's check was issued, Robert Bishop was driven by Wells in the Mercury to Bishop's home. Bishop was then intoxicated and was assisted to his room by his mother. The Mercury was left parked in front of Bishop's residence. The automobile was not driven by anyone after Wells, acting for Holiday, parked it in front of Robert Bishop's residence. It was, when the forgery was discovered, repossessed by Wachovia and returned to Holiday.

Based on the findings, the court concluded that Holiday's failure to investigate the genuineness of the story told by Bishop, who had to the knowledge of Holiday's managing officer been consuming intoxicants, and in giving credit to the check by its endorsement, led Trust Company to believe the paper was genuine. The failure to disclose the suspicious circumstances attending the drawing of the check constituted bad faith on the part of defendant Holiday. Such bad faith substantially contributed to the success of the fraud through which payment of the $500 was received by Holiday. It amounted to active participation in the forgery committed by the defendant Robert Bishop.

The court concluded that to permit Holiday to retain the $500, under the facts as found, would constitute "unjust enrichment." It en-

tered judgment in plaintiff's favor against defendants for $500 and costs. Holiday excepted and appealed.

Bencini, Wyatt & Tate for defendant appellant.

Womble, Carlyle, Sandridge & Rice by Allan R. Gitter for plaintiff appellee.

RODMAN, J. Defendant's failure to demand a jury trial, as provided by G.S. 1-539.5, constituted a waiver of that right. The facts found by the court are amply supported by the evidence. They are conclusive and binding on us. *Johnson v. Johnson*, 262 N.C. 39, 136 S.E. 2d 230. The exception to the judgment raises the question: Are the facts found sufficient to support the judgment? The answer is "yes." The rule of law applicable to the facts of this case is well stated in 10 Am. Jur. 2d 573. It is there said:

> "The responsibility of the drawee who pays a forged check, for the genuineness of the drawer's signature, is absolute only in favor of one who has not, by his own fault or negligence, contributed to the success of the fraud or misled the drawee; in other words, the presumption of negligence on the part of the drawee bank paying such forged check is operative to prevent its recovery of the money thus paid only when the one to whom the money is paid is not at fault. To entitle the one to whom payment was made to retain as against the drawee the money received, he must be able to show that the whole responsibility of determining the validity of the signature was upon the drawee, and that the negligence of such drawee was not lessened by any disregard of duty on the part of the holder, or by failure of any precaution which, from his implied assertion in presenting the check as a sufficient voucher, the drawee had the right to believe he had taken. In the absence of actual fault on the part of the drawee bank, its constructive fault in not knowing the signature of the drawer and detecting the forgery will not preclude its recovery from one who took the check under circumstances of suspicion, without proper precaution, where his conduct has been such as to mislead the drawee, or to induce it to pay the check without the usual security against fraud. If it appears that the one to whom payment was made was guilty of negligence in not doing something which plain duty demanded, and which, if done, would have avoided entailing loss on anyone, he is not entitled to retain the moneys paid through a mistake on the part of the drawee bank."

The Supreme Court of Massachusetts, in *Danvers Bank v. Salem Bank*, 151 Mass. 280, 24 N.E. 44, said:

"In the usual course of business, if a check purporting to be signed by one of its depositors is paid by a bank to one who, finding it in circulation or receiving it from the payee by indorsement, took it in good faith for value, the money cannot be recovered back on the discovery that the check is a forgery. It is presumed that the bank knows the signature of its own customers, and therefore is not entitled to the benefit of the rule which in cases of forgery permits a party to recover back money paid under a mistake of fact as to the character of the instrument by which the fraud has been effected. This presumption is conclusive only when the party receiving the money has in no way contributed to the success of the fraud, or the mistake of fact under which the payment has been made. In the absence of actual fault on the part of the drawee, his constructive fault in not knowing the signature of the drawer and detecting the forgery will not preclude his recovery from one who took the check under circumstances of suspicion without proper precaution, or whose conduct has been such as to mislead the drawee or induce him to pay the check without the usual security against fraud. * * * To entitle the holder to retain money obtained by a forgery, he should be able to maintain that the whole responsibility of determining the validity of the signature was placed upon the drawee, and that the vigilance of the drawee was not lessened and that he was not lulled into a false security by any disregard of duty on his own part, or by the failure of any precautions which from his implied assertion in presenting the check as a sufficient voucher the drawee had a right to believe he had taken."

The statement of law by the Supreme Court of Massachusetts, as quoted above, was quoted approvingly by this Court in *Woodward v. Trust Company,* 178 N.C. 184, 100 S.E. 304. The language used in *Danvers Bank v. Salem Bank, supra,* was, in substance, the language of the Supreme Court of Massachusetts in *National Bank of North America v. Bangs,* 106 Mass. 441, 8 Am. Rep. 349. The Supreme Court of South Carolina, in *Newberry Savings Bank v. Bank of Columbia,* 74 S.E. 615, a case remarkably similar to the present case, quoted approvingly the language of the Supreme Court of Massachusetts, and permitted the payee bank to recover. See also *Louisa Nat. Bank v. Kentucky Nat. Bank,* 39 S.W. 2d 497; *American Express Co. v. State Nat. Bank,* 113 P. 711; *First Nat. Bank v. United States Nat. Bank,* 197 P. 547, 14 A.L.R. 479; Annotation: "Right of drawee of forged check or draft to recover money paid thereon." 12 A.L.R. 1089-1116, supplemented in 71 A.L.R. 337-345 and 121 A.L.R. 1056-1062.

Epitomized, the rule is that the failure of a bank to detect a forgery before paying a check drawn on it protects, against a subsequent demand for re-payment, those and only those, who are without fault in taking or negotiating the paper. This rule was stated in *Bank v. Marshburn,* 229 N.C. 104, 47 S.E. 2d 793, although the facts of that case did not call for an application of the rule.

While there is a lack of unanimity in the decisions with respect to what facts suffice to impose on payee the duty of putting drawee on guard, there can, on the facts of this case, be no doubt with respect to Holiday's duty to inform Trust Company of Robert Bishop's explanation for using Logan's name. Payee knew it was dealing with one who had been drinking intoxicating beverages, one who had no account in his own name in the bank on which he proposed to give a check, and when that fact was called to his attention, made the glib explanation: "I deposited money under an assumed name to keep my wife from finding out about my financial condition." As soon as the general manager of Holiday ascertained that Logan E. Bishop, Jr.'s check for $500 would be paid, he had his secretary fill in a check on Trust Company for that amount, handed the check to Robert Bishop, who signed "Logan E. Bishop, Jr." Wells immediately dispatched the company's business manager to Trust Company to get the check certified, or the cash. Wells testified: "It is not clear to me exactly how long it took for this transaction on this afternoon—the check writing part and going to the bank and all of that was not over 15 minutes and there was some delay in putting the mirror on the car. I was standing there with Robert Bishop the whole time." As soon as Holiday got Trust Company's cashier's check and the mortgage securing the balance of the agreed price, Bishop was driven by Wells to Bishop's home in Archdale, a suburb of High Point. When Bishop reached his home, he was so intoxicated he could scarcely walk. It was necessary for his mother to help him into the house. Wells removed the license tags from the Mercury and left. The car had then been driven five miles. It was not thereafter driven until it was repossessed by the mortgagee.

Holiday argues that it ought not to be compelled to reimburse plaintiff because, as it says, it has been prejudiced by Trust Company's acceptance of the check. It sold the car to Bishop for $3,125. After repossessing, it sold the car for $2,750, thereby sustaining a loss of $375. In addition, it claims that it allowed a car salesman, who had nothing to do with the sale, a commission of $125 for making the sale to Bishop. The answer to this contention is that such loss as Holiday has sustained was occasioned by its own gullibility, and willingness to sell an automobile to one who had been consuming alcoholic beverages.

Since the facts found by the court support the judgment, we find No error.

T. W. GRISSOM v. HEAVY DUTY HAULERS, INC.

(Filed 19 May, 1965.)

1. Evidence § 27—

Where a written lease of equipment agreement between carriers has blanks for the date and hour of delivery of equipment to the lessee and a place for the lessee to sign as evidence of delivery, and such blanks are not filled in, the lessee's testimony that he had not leased the truck on the occasion in question does not come under the prohibition of the parol evidence rule, since the writing itself was not to be effective until the blanks had been appropriately filled in.

2. Carriers § 6— Evidence held for jury on question of whether lessor or lessee carrier was operating vehicle at time in question.

Where an interstate carrier has arrangements for the lease of equipment to an intrastate carrier, but it is admitted by the parties that on the occasion in question the interstate carrier collected the entire shipping charges for an intrastate carriage from the shipper, and the intrastate carrier testifies that when he arrived at the point of origin of the shipment it had been loaded on the interstate carrier's vehicle, which was in charge of the interstate carrier's own driver, and it appears that the written lease agreement for the interstate carrier's vehicle had not been filled out and signed by the intrastate carrier, the evidence is sufficient to support the jury's finding that the intrastate carrier had not leased the equipment on the occasion in question, and therefore could not be held liable by the interstate carrier for the penalty assessed by the State for overloading.

APPEAL by defendant from *Hubbard, J.*, September, 1964 Assigned Session, WAKE Superior Court.

The plaintiff, a duly licensed intrastate carrier of freight by truck, instituted this civil action against the defendant, a duly licensed interstate carrier of freight by truck, to recover $457.60, of which $154.25 was due as commissions for soliciting interstate freight as defendant's agent and the remaining $232.35 due for transporting for the defendant part of a shipment for Dickerson, Inc., from Benson, North Carolina, to Madison, North Carolina.

By answer, the defendant admitted it owed $69.00 on the solicitation account. As a further defense and counterclaim, the defendant alleged the parties executed a written agreement by which the defendant leased to the plaintiff a heavy duty Mack truck and driver. The defendant further alleged that it delivered to the plaintiff the heavy duty truck

and driver to use in transporting a crane from Benson, North Carolina, to Madison, North Carolina; that the plaintiff overloaded the truck and the State of North Carolina impounded it and assessed a penalty of $1,567.00 for the overload; that as a result of the loss of the use of the truck and expenses in connection with having it released, the defendant had suffered a loss of $900 in addition to the penalty. The defendant demanded judgment for $2,467.00 and costs.

At the conclusion of the evidence the court submitted a number of issues, of which the three here copied are material. The jury answered the issues as here indicated:

"1. What amount is the plaintiff entitled to under his contract to solicit business for the defendant in interstate transportation?

Answer: $155.25.

"2. Was the tractor and trailer of Heavy Duty Haulers, Inc., being operated by Mr. Grissom under lease when it was overloaded with a portion of the crane as alleged in the answer?

Answer: No.

"5. What amount, if any, is the plaintiff entitled to recover of the defendant for the transportation of the portions of the property from Benson and from Apex to Madison?

Answer: $302.35."

From the judgment in favor of the plaintiff for $457.60, the defendant appealed.

Vaughan S. Winborne, for plaintiff appellee.

Bailey, Dixon & Wooten by Wright T. Dixon, Jr., for defendant appellant.

HIGGINS, J. The plaintiff held authority from the North Carolina Utilities Commission to carry freight by truck wholly within the State of North Carolina. The defendant had authority from the Interstate Commerce Commission to carry freight in interstate commerce. The plaintiff was not authorized to receive or carry interstate shipments. The defendant was without authority to receive or carry intrastate shipments.

The parties, however, entered into an undated written arrangement entitled, "30 Day or more TRIP LEASE and Inter-change of Vehicles by Motor Carriers," by which Heavy Duty Haulers, Inc., agreed to lease to Grissom a 1953 Mack heavy duty truck. Attached to and as a part of the writing was a blank receipt to be signed by the lessee giving the day and hour the truck was delivered. It is obvious the truck and

driver would be available to the plaintiff when needed, in which event the day and hour of delivery was to be entered on the receipt and signed by the plaintiff. The plaintiff denied he received or operated the truck in hauling the Dickerson shipment. The unsigned receipt supports his contention.

In this case Dickerson, Inc., the shipper, made arrangements with the defendant to haul its heavy crane and other equipment from Benson to Madison. After making all the arrangements with the shipper, the defendant called the plaintiff to assist in the operation. When the plaintiff, in obedience to the call, arrived in Benson with his light truck, the defendant had already loaded on its Mack truck the heavy duty crane which it dispatched in charge of its own driver to Madison. The plaintiff, however, at the direction of the defendant, loaded his truck and transported a part of the Dickerson shipment from Benson to Madison.

During the progress of the trial the parties stipulated that Dickerson, Inc., the shipper, paid the defendant, Heavy Duty Haulers, Inc., for the entire shipment. The defendant strenuously contends that the plaintiff's evidence that it did not lease the equipment is an attempt to vary the instrument by parol evidence. However, such is by no means the case for the simple reason that the writing itself required that the date and hour of delivery of the truck to the lessee be entered as a part of the writing to be signed by the plaintiff as evidence of delivery. The controversy, therefore, presented a clear-cut question whether the plaintiff obtained possession or control of the Mack truck. The jury's finding in the negative is amply supported by the evidence. Hence the plaintiff in no sense can be held responsible for overloading the truck. By way of explaining the foundation for the controversy, it may be noted that the plaintiff for his own truck had a special permit to overload. The defendant did not have such permit. The defendant has failed to establish its counterclaim.

The plaintiff offered evidence of the amount of interstate business he had solicited and obtained for the defendant and that he was due as commissions thereon the sum of $155.25. This item is not now challenged by the defendant. In addition, the plaintiff offered evidence that he is due $302.35 for that part of the Dickerson, Inc., shipment which he carried from Benson to Madison on his own truck. The parties stipulated that the defendant collected in full from Dickerson. Hence the plaintiff is entitled to recover on this item $302.35 as found by the jury. These two items make up the total award of the jury and sustain the judgment.

No error.

MARY SIKES YORK v. CLARENCE E. MURPHY AND DOROTHY ROGERS MURPHY.

(Filed 19 May, 1965.)

1. Negligence § 37b—

The proprietor of a business has the duty to persons visiting the premises for business purposes to exercise ordinary care to keep the premises in a reasonably safe condition and to give warning of hidden perils or unsafe conditions insofar as they can be ascertained by reasonable inspection.

2. Same—

While each case must be determined on its own particular facts, the existence of a step on the premises because of a difference between levels, in the absence of some unusual condition, does not violate any duty to invitees.

3. Negligence § 37f—

Evidence tending to show that plaintiff had previously been on the premises on several occasions, that on the occasion in suit she arrived at the premises just before dark, that after a conference she left defendant in his office, walked some eight feet from the door along a concrete walk and fell when she did not see a step from the walk to the parking lot because it had become dark and no lights had been turned on, *held*, insufficient to be submitted to the jury on the issue of defendant's negligence.

APPEAL by defendants from *Hobgood, J.*, October, 1964 Civil Session, BRUNSWICK Superior Court.

The plaintiff instituted this civil action to recover damages for physical injuries she sustained in a fall as she attempted to leave the defendants' office located on the ground floor of the Murphy Ocean Front Hotel. She and her companion parked the automobile in the asphalt parking space a very short distance from the office door. The time, June 5, 1962; the hour, just as it "was beginning to get dark." The purpose of the plaintiff's visit was to confer with Mr. Murphy "on a matter of business related to certain defects in the construction of a beach home that defendants . . . had built for the plaintiff and her husband." The conference lasted 30 to 40 minutes, during which time it became dark. No lights had been turned on to illuminate the cement porch or walk along the outside of the building, between the building and the parking lot. The porch or concrete walk was five feet wide. Parking spaces were marked off abutting this concrete walk.

The plaintiff testified that after parking "in the last space (nearest the office door) we went straight into the office door. . . . When I left the door of his office we turned to the right and went straight on out towards the entrance to the parking lot. When we left the office the only light on was the street light. . . . I don't recall where they were on the street, . . . but they gave just a little bit of light, but not

much . . . at the point where I fell there was about a five and one-half inch step. I stepped down and it throwed me for a loop."

The plaintiff's evidence placed the step eight to twelve feet from the office door. The plaintiff admitted she had been a guest in the hotel on three occasions prior to her injury. About six months before she was injured she had occupied a room on the second floor of the hotel and had used the stairway, the entrance to which was located at the place where she fell. She had been a guest on two later occasions for two or three days each while her beach home was being built.

The plaintiff based her right to recover upon showing serious injuries in consequence of her fall which she alleged was proximately caused by the negligent failure of the defendants "to use due care to provide for their customers, guests, and other invitees, and particularly the plaintiff, a reasonably safe method of entrance and exit to and from the defendants' office."

The defendants, by answer, denied negligence and by way of further defense pleaded contributory negligence on the part of the plaintiff. After overruling motions for nonsuit, the court submitted issues of negligence, contributory negligence, and damages, all of which were answered for the plaintiff. From the judgment entered in accordance with the verdict, the defendants appealed.

James C. Bowman for plaintiff appellee.

Hogue, Hill & Rowe by C. D. Hogue, Jr., Ronald D. Rowe for defendant appellants.

HIGGINS, J. The plaintiff alleged her fall and the resulting injuries were proximately caused by the negligent failure of the defendants to provide for the plaintiff, an invitee, a reasonably safe means by which to enter and leave their business office. Specifically she insists the five and one-half inch step in the concrete walk was insufficiently lighted on the occasion of her injury and hence was unsafe.

The evidence in the record is sufficient to warrant the finding the plaintiff, on the occasion of her injury, was an invitee. The defendants were under the duty, therefore, "to exercise ordinary care to keep the premises in a reasonably safe condition and 'to give warning of hidden perils or unsafe conditions in so far as can be ascertained by reasonable inspection.'" *Jones v. Pinehurst,* 261 N.C. 575, 135 S.E. 2d 580; *Shaw v. Ward,* 260 N.C. 574, 133 S.E. 2d 217; *Garner v. Greyhound,* 250 N.C. 151, 108 S.E. 2d 461.

Each personal injury action must be decided on its own facts. Seldom do we find two cases factually alike. Nevertheless, court decisions serve to locate, with some degree of distinctness, the dividing line separating

the cases in which the facts are sufficient, from those in which they are insufficient, to permit a finding of actionable negligence. This Court has held, "The mere fact that the plaintiff fell and suffered injuries . . . when she stepped from the higher level to the lower level . . . raises no inference of negligence against the defendant. . . . Generally, in the absence of some unusual condition, the employment of a step by an owner of a building because of a difference between levels is not a violation of any duty to invitees. . . . Different floor levels in public and private buildings, connected by steps, are so common that the possibility of their presence is anticipated by prudent persons. The construction is not negligent unless by its character, location, or surrounding circumstances a reasonably prudent person would not be likely to expect a step or see it." *Reese v. Piedmont, Inc.*, 240 N.C. 391, 82 S.E. 2d 365.

The plaintiff entered the defendants' office from her automobile parked a few feet to the left of the door. In leaving she turned right and encountered the step eight feet from the office. She was, or should have been, familiar with her surroundings. She lived one block away. She had been a guest in the hotel on three occasions. On one occasion she had occupied a room on the second floor. The stairway to and from that room joined the concrete walk at the step. "When a person has knowledge of a dangerous condition, a failure to warn him of what he already knows, is without significance." *Jones v. Aircraft Co.*, 253 N.C. 482, 117 S.E. 2d 496; *Petty v. Print Works*, 243 N.C. 292, 90 S.E. 2d 717.

According to plaintiff's evidence, she entered defendants' office "when it was getting dark." The defendant was already there. He was still there when she left after a stay of about 30 minutes. She had moved approximately eight feet from the door before she fell. She was timing the events. The sequence allowed the defendant at most a very few seconds in which to provide additional light on the plaintiff's pathway to her automobile. Apparently the plaintiff's need for more light accurred neither to her nor to Mr. Murphy, the defendant. Failure to turn on more light in so short a time can not serve as a sound basis for actionable negligence in this case.

The motion for nonsuit should have been allowed.

Reversed.

E. J. SHAMBLEY AND WIFE, NEVA C. SHAMBLEY v. JOBE-BLACKLEY PLUMBING AND HEATING COMPANY, TOMLINSON COMPANY, INC., AND REPUBLIC-TRANSCON INDUSTRIES, INC.

(Filed 19 May, 1965.)

1. Insurance § 86; Parties § 2—

An action must be prosecuted by the real party in interest, and where insurer has paid insured the entire loss, an action against the third person tort-feasor cannot be maintained in the name of the insured, regardless of any contractual agreement between insured and insurer.

2. Parties § 6—

Where an action to recover a loss entirely compensated by insurance is brought in the name of insured, the court is without authority to allow an amendment to permit the insurer to be made an additional party plaintiff and be permitted to adopt the complaint, since the court may not allow an amendment effecting a substitution or entire change of parties.

APPEAL by plaintiffs from *May, S. J.*, December, 1964 Civil Session, DURHAM Superior Court.

The plaintiffs, husband and wife, instituted this civil action seeking to recover from the defendants (manufacturer, distributor, and installment contractor) for the damages to their new home resulting from the explosion of a defective water heater which the defendants had warranted to be safe and suitable for home use in heating water. The heater exploded on May 21, 1961, causing extensive damages to the house and furnishings.

The defendants filed answers denying liability and pleading as further defenses:

> "1. That this defendant is informed and believes and therefore alleges upon information and belief that the United States Fidelity and Guaranty Company paid to the plaintiffs, prior to the institution of this action, the full amount sued for in this action; to-wit, Three Thousand Eight Hundred Sixty-three and 32/100 ($3,863.32) Dollars for the damages which the plaintiffs allege in this action that they have sustained. That the plaintiffs, therefore, are not the real parties in interest in this action."

The plaintiffs, on September 14, 1964, moved to strike the further defenses upon the ground, "That the plaintiffs are the assignors of their claims against the defendants, having assigned said claim to United States Fidelity and Guaranty Company, their insurer, and the plaintiffs and the said insurer, contracted between themselves that the action on said claim might be brought in the name of the plaintiffs under said assignment and subrogation.

"THAT the plaintiffs are the real parties in interest in this action as assignors of their claim, and are entitled to institute this action in their name."

At the hearing the court intimated its purpose to dismiss the plaintiffs' suit on the ground they are not the real parties in interest. Thereupon the United States Fidelity and Guaranty Company filed a motion for permission to become an additional party plaintiff, adopting the plaintiffs' complaint as their own. The court entered this order:

> "NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, IN THE DISCRETION OF THE COURT, that the motion of United States Fidelity and Guaranty Company to join in this action as a party plaintiff and to adopt the complaint filed herein by the plaintiffs be and the same is hereby denied.
>
> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the motion of the defendants, and each of them, that this action be dismissed for that the plaintiffs are not the real parties in interest in this action be and the same is hereby allowed, and this action is dismissed at the cost of the plaintiffs."

The plaintiffs excepted and appealed.

Bryant, Lipton, Bryant & Battle by Victor S. Bryant, Jr., for plaintiff appellants and United States Fidelity and Guaranty Company.

Spears, Spears & Barnes by Marshall T. Spears for defendant Jobe-Blackley Plumbing and Heating Company, appellee.

Newsom, Graham, Strayhorn & Hedrick by Josiah S. Murray, III, for defendant Tomlinson Co., Inc., appellee.

Teague, Johnson & Patterson by Robert M. Clay for defendant Republic-Transcon Industries, Inc., appellee.

HIGGINS, J. The plaintiffs' assignments of error present these questions: (1) Did the court commit error by dismissing the plaintiffs' action? (2) Did the court commit error by refusing to permit United States Fidelity and Guaranty Company to make itself an additional party plaintiff, adopt the plaintiffs' complaint, and proceed with the trial?

The plaintiffs' counsel concede their insurer, the United States Fidelity and Guaranty Company, has paid in full the entire loss which the plaintiffs sustained as a result of the exploding water heater. "When the insurance paid the insured covers the loss in full, the insurance company, as a necessary party plaintiff, must sue in its own name to enforce its right of subrogation against the tort-feasor. This is true because the insurance company in such case is entitled to the entire fruits

of the action, and must be regarded as the real party in interest under the statute, codified as G.S. 1-57, which specifies that 'Every action must be prosecuted in the name of the real party in interest.'" *Burgess v. Trevathan,* 236 N.C. 157, 72 S.E. 2d 231; *Insurance Co. v. Spivey,* 259 N.C. 732, 131 S.E. 2d 338; *Herring v. Jackson,* 255 N.C. 537, 122 S.E. 2d 366; *Smith v. Pate,* 246 N.C. 63, 97 S.E. 2d 457; *Cunningham v. R. R.,* 139 N.C. 427, 51 S.E. 1029.

The assignment by plaintiffs to their insurer attempting to authorize the suit in plaintiffs' name neither created nor transferred any new cause of action against the defendants. Without written assignment equity transfers to the insurer the right to sue the tort-feasor whose primary liability the insured had discharged. "'The payment of a total loss by the insurer works an equitable assignment to him of the property and all remedies which the assured had . . . for the recovery of its value.' . . . This right is not dependent upon, nor does it grow out of any privity of contract. . . . 'The rights acquired by subrogation do not depend upon a written assignment of the claim. Upon payment of the insurer, the insurance company is regarded as an assignee in equity.'" *Cunningham v. R. R., supra.*

The defendants have the right to demand that they be sued by the real party in interest and by none other. Upon the admission that plaintiffs have been paid in full, the order dismissing the action as to them was mandatory.

Did the court commit error in refusing the application of United States Fidelity and Guaranty Company that it be made an additional party plaintiff and be permitted to adopt the plaintiffs' complaint? Having decided the plaintiffs cannot maintain this action, the court, even under its broad power to allow amendment, was without power in this case to permit the addition of a new party whose presence before the court might bring back to life a dead cause of action. "The court has no authority, over objection, to convert a pending action which cannot be maintained into a new and independent action by admitting a party who is solely interested as plaintiff." *Graves v. Welborn,* 260 N.C. 688, 133 S.E. 2d 761; *Exterminating Co. v. O'Hanlon,* 243 N.C. 457, 91 S.E. 2d 222. "Ordinarily, an amendment of process and pleading may be allowed in the discretion of the court to correct a misnomer or mistake in the name of a party. . . . But not so where the amendment amounts to a substitution or entire change of parties." *Bailey v. McPherson,* 233 N.C. 231, 63 S.E. 2d 559.

The foregoing, and numerous other authorities, sustain the action of the court in denying permission to the United States Fidelity and Guaranty Company to make itself an additional party plaintiff.

Affirmed.

RANDOLPH J. JEWELL AND ELEANOR K. JEWELL v. E. JACK PRICE.

(Filed 19 May, 1965.)

1. Limitation of Actions §§ 4, 7—

An action to recover loss caused by a fire resulting from the installation of a furnace by defendant, either on the ground of negligence or the failure to perform contractual duties, accrues at the time of the completion of the work of installation, notwithstanding plaintiff has no knowledge of the defects until the accrual of damages, G.S. 1-52(1), G.S. 1-52(5), since statutes of limitation are inflexible and a cause of action accrues at the time legal rights are invaded, even though at such time only nominal damages have been sustained.

2. Limitation of Actions §§ 17, 18—

Where the applicable statute of limitations is pleaded by defendant, the burden is on plaintiffs to prove that they have a live claim, and nonsuit is proper if they fail to offer evidence to this effect.

3. Negligence § 7—

Nominal damages may be recovered in an action based on negligence.

4. Limitation of Actions § 3; Constitutional Law § 23—

If a cause of action has become barred by a statute of limitations, it may not be revived by an act of the legislature, although the legislature may extend the time for bringing actions not already barred.

APPEAL by plaintiffs from *Campbell, J.*, March 30, 1964 Civil B Session of MECKLENBURG. This appeal was docketed in the Supreme Court as Case No. 247 and argued at the Fall Term 1964.

Action for damages for the negligent performance of a building contract.

Pursuant to a written contract including plans and specifications, defendant, a general contractor, built for plaintiffs a residence, which he delivered to them on November 15, 1958. The house was heated by forced hot air from an oil-burning, horizontal York S5-150 furnace, which defendant had caused to be installed in the "crawl space" under the living room.

On January 18, 1959, the house and all its contents were destroyed by fire. The Lumbermen's Mutual Insurance Company, which carried the fire insurance on the property, paid plaintiffs $24,595.42 for the loss of the house and $10,000.00 for the personal property, a total of $34,595.42. Alleging a total loss of $48,851.88, plaintiffs brought this action on January 12, 1962, to recover that sum from defendant. Plaintiffs allege that the fire which destroyed their property resulted, *inter alia*, from the negligent installation of the furnace in that (1) no draft regulator was installed in the flue pipe, (2) insufficient clearance was provided between the flue pipe and the floor joists, and (3) the

warm-air plenum was nailed to the floor joists, a combustible surface. Defendant denies all allegations of his negligence and, as a further defense, pleads that the acts of which plaintiffs complain took place more than three years before the institution of this action and the action is, therefore, barred by G.S. 1-52(1) and (5). At the close of plaintiffs' evidence, defendant's motion for judgment of nonsuit was allowed, and plaintiffs appealed.

Howard B. Arbuckle, Jr., Carswell and Justice by James F. Justice for plaintiffs, appellants.

Helms, Mullis, McMillan & Johnston by James B. McMillan and E. Osborne Ayscue, Jr., for defendant, appellee.

SHARP, J. Plaintiffs' evidence, taken as true, establishes these facts: During the first week in January 1959 the furnace began to operate unsatisfactorily. Some rooms were hot and some cold. In consequence of plaintiffs' complaint to defendant, a representative of Garmon Furnace Company came out on two occasions, inspected the registers, and disappeared under the house for an interval. On January 12, 1959, the date of the second visit, the representative's attention was called to sooty deposits on the rugs and the furniture. Thereafter sometime between January 13th and January 16th, the furnace "backfired" and blew "greasy soot that comes out of an oil furnace" onto "the walls, windows, woodwork, floors, carpets, draperies, furniture and everything" throughout the house. On Friday, January 16th, the Lumbermen's Mutual Insurance Company sent Mr. Manly McWilliams, a professional cleaner, to repair the damage. He observed that the heat ducts were "pretty well clogged up with soot" although Mrs. Jewell told him that "the furnace people had been out and the furnace had been repaired." Lumbermen's Mutual instructed Mr. McWilliams not to proceed until the condition which had caused the damage had been repaired and he had gotten in touch with Mr. Garmon. Neither did anything further because the house was destroyed on Sunday, January 18th, by a fire originating "around the furnace area."

Since the solution to this case does not turn upon the sufficiency of the evidence to establish actionable negligence, we will not detail the testimony of experts and others with reference to the installation of the furnace, and to the cause and the origin of the fire. Suffice it to say, plaintiffs offered plenary, competent evidence tending to establish their allegations that the negligent installation of the furnace was the proximate cause of the destruction of their property.

The period prescribed for the commencement of this action, whether regarded as arising out of contract or of tort, is three years. G.S. 1-52(1) and (5). The critical question is whether plaintiffs have offered

any evidence tending to show that they instituted this action within three years from the date it accrued. If not, the nonsuit was proper. The defendant having properly pled the applicable statute of limitations, *Jennings v. Morehead City,* 226 N.C. 606, 39 S.E. 2d 610; 1 McIntosh, North Carolina Practice and Procedure § 372 (1956 Ed.), the burden devolved upon plaintiffs to show that their action was begun within the time permitted by statute. *Mobley v. Broome,* 248 N.C. 54, 102 S.E. 2d 407; *Shearin v. Lloyd,* 246 N.C. 363, 98 S.E. 2d 508; *Hooper v. Lumber Co.,* 215 N.C. 308, 1 S.E. 2d 818; *Wilkes County v. Forester,* 204 N.C. 163, 167 S.E. 691.

Plaintiffs rightly allow that subsection (5) of G.S. 1-50, enacted in 1963, after the institution of this suit, has no application. If this action was already barred when it was brought on January 12, 1962, it may not be revived by an act of the legislature, although that body may extend at will the time for bringing actions not already barred by an existing statute. *Waldrop v. Hodges,* 230 N.C. 370, 373, 53 S.E. 2d 263, 265; *Wilkes County v. Forester, supra* at 169, 167 S.E. at 694; *Whitehurst v. Dey,* 90 N.C. 542. See *McCrater v. Engineering Corp.,* 248 N.C. 707, 710, 104 S.E. 2d 858, 861; Annot., Power of legislature to revive a right of action barred by limitation or to revive an action which has abated by lapse of time, 133 A.L.R. 384, 387; Annot., Validity, and applicability to causes of action not already barred, of a statute enlarging limitation period, 79 A.L.R. 2d 1080.

For a thoroughgoing analysis of the rules relating to when a cause of action accrues so as to start the statute of limitations running, see the opinion of Bobbitt, J., in *Shearin v. Lloyd, supra.* Where there is either a breach of an agreement or a tortious invasion of a right for which the party aggrieved is entitled to recover even nominal damages, the statute of limitations immediately begins to run against the party aggrieved, unless he is under one of the disabilities specified in G.S. 1-17. *Shearin v. Lloyd, supra; Lewis v. Shaver,* 236 N.C. 510, 73 S.E. 2d 320; *Aydlett v. Major & Loomis Co.,* 211 N.C. 548, 191 S.E. 31; *Peal v. Martin,* 207 N.C. 106, 176 S.E. 282; *Miller v. Eskridge,* 23 N.C. 147; 1 Am. Jur. 2d, Actions § 88 (1962); 54 C.J.S., Limitations of Actions § 109 (1948). Nominal damages may be recovered in actions based on negligence. *Clark v. Emerson,* 245 N.C. 387, 95 S.E. 2d 880; *Lieb v. Mayer,* 244 N.C. 613, 94 S.E. 2d 658. The accrual of the cause of action must therefore be reckoned from the time the first injury, however slight, was sustained. *Mast v. Sapp,* 140 N.C. 533, 53 S.E. 350. It is unimportant that the actual or the substantial damage does not occur until later if the whole injury results from the original tortious act. *Shearin v. Lloyd, supra.* "(P)roof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the

verdict. If so, it is clear the *damage* is not the cause of action," *Wilcox v. Executors of Plummer,* 29 U.S. (4 Pet.) 172, 182, 7 L. Ed. 821, 824. It is likewise unimportant that the harmful consequences of the breach of duty or of contract were not discovered or discoverable at the time the cause of action accrued. *Motor Lines v. General Motors Corp.,* 258 N.C. 323, 128 S.E. 2d 413; *Shearin v. Lloyd, supra; Connor v. Schenck,* 240 N.C. 794, 84 S.E. 2d 175; *Lewis v. Shaver, supra; Powers v. Trust Co.,* 219 N.C. 254, 13 S.E. 2d 431; *Bank v. McKinney,* 209 N.C. 668, 184 S.E. 506; *Gordon v. Fredle,* 206 N.C. 734, 175 S.E. 126; *Daniel v. Grizzard,* 117 N.C. 105, 23 S.E. 93; *Shackelford v. Staton,* 117 N.C. 73, 23 S.E. 101; *Baucum v. Streater,* 50 N.C. 70; 1 Am. Jur. 2d, Actions § 89 (1962); 54 C.J.S., Limitations of Actions § 168 (1948). See Note, 19 N.C.L. Rev. 599.

In this case, defendant's negligent breach of the legal duty arising out of his contractual relation with plaintiffs, *Peele v. Hartsell,* 258 N.C. 680, 129 S.E. 2d 97, occurred on November 15, 1958, when he delivered to them a house with a furnace lacking a draft regulator and, also, having been installed too close to combustible joists. There was no prospective warranty, as was present in *Heath v. Furnace Co.,* 200 N.C. 377, 156 S.E. 920, 75 A.L.R. 1082; nor did defendant, after the furnace began to malfunction, guarantee to "remedy the situation" and to be "entirely responsible" as did the defendant in *Nowell v. Tea Co.,* 250 N.C. 575, 108 S.E. 2d 889. Plaintiffs here sustained an invasion of their rights on November 15, 1958, although they had no knowledge of the invasion until the first week in January 1959. The fire which destroyed their home on January 18, 1959, "the whole injury," resulted proximately from defendant's original breach of duty.

This case is indistinguishable on its facts from *Motor Lines v. General Motors Corp., supra,* instituted September 8, 1958, in which the Court, speaking through Bobbit, J., said:

> "Assuming, as alleged by plaintiff, the truck-tractor was equipped with a faulty and dangerous carburetor, likely to cause said truck-tractor to be 'ignited with fire,' when sold and delivered to plaintiff, and that defendants knew or by the exercise of due care should have known of such defective condition, and failed to warn plaintiff thereof, we are of opinion and hold that plaintiff suffered injury and his rights were invaded in the latter part of June, 1955, immediately upon the sale and delivery of the truck-tractor to plaintiff, and that a cause of action in favor of plaintiff and against defendants then accrued for which plaintiff was entitled to recover nominal damages at least. Hence, the judgment of the court below, based on the ruling that plaintiff's action is

barred by the three-year statute of limitations, is affirmed." *Id.* at 326, 128 S.E. 2d at 416.

On principle this case is likewise indistinguishable from *Shearin v. Lloyd, supra,* upon which the Court relied in *Motor Lines.* In *Shearin,* on July 20, 1951, the defendant surgeon, in performing surgery on the plaintiff, left a lap-pack in his abdomen, which lap-pack was not discovered until November 18, 1952. The plaintiff brought an action for malpractice on November 14, 1955. In holding the action to be barred, the Court, *per* Bobbitt, J., said:

> "Statutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action. They are statutes of repose intended to require that litigation be initiated within the prescribed time or not at all. It is not for us (the judicial branch) to justify the limitation period prescribed for actions such as this." *Id.* at 370, 98 S.E. 2d at 514.

This action was instituted almost two months too late to escape the bar of the statute. *Vigilantibus, non dormientibus, jura subveniunt.*

The judgment of involuntary nonsuit must be sustained.

Affirmed.

STATE v. EDWARD ALEXANDER DUPREE.

(Filed 19 May, 1965.)

1. Criminal Law § 99—

On motion to nonsuit, the evidence for the State together with so much of defendant's evidence as tends to clarify or explain the State's evidence and which is not inconsistent therewith, must be considered in the light most favorable to the State, and defendant's evidence which tends to contradict or impeach the State's evidence must be disregarded.

2. Automobiles § 64—

The violation of G.S. 20-140 either by driving upon a highway without due caution and circumspection, or by driving at a speed or in a manner so as to endanger any person or property, is culpable negligence, but the mere unintentional violation of a statute governing the operation of a motor vehicle, unless accompanied by excessive speed or a heedless disregard of the safety and rights of others, does not constitute reckless driving.

3. Automobiles § 65—

Evidence tending to show merely a collision resulting from defendant's act in veering to the left of the center line of the highway and colliding

with a vehicle traveling in the opposite direction, without evidence of unlawful speed or any other act of negligence except the violation of G.S. 20-148, is insufficient to be submitted to the jury in a prosecution for reckless driving.

APPEAL by defendant from *Latham, S. J.*, 24 November 1964 Special Criminal Session of DURHAM.

Criminal prosecution on an indictment charging the reckless driving of an automobile in violation of G.S. 20-140(b). Defendant had been previously tried in the recorder's court of the county of Durham on a warrant charging him with the identical offense charged in the indictment here, found guilty, and from the sentence imposed he appealed to the superior court.

Plea: Not guilty. Verdict: Guilty as charged.

From the judgment imposed, defendant appealed to the Supreme Court.

Attorney General T. W. Bruton and Staff Attorney L. P. Hornthal, Jr., for the State.

C. C. Malone, Jr., for defendant appellant.

PARKER, J. The indictment charges that defendant on 25 July 1964 did unlawfully and wilfully drive a motor vehicle upon a public highway of the State of North Carolina without due caution and circumspection and at a speed and in a manner so as to endanger and be likely to endanger persons and property. The indictment follows verbatim the definition of reckless driving of an automobile as stated in G.S. 20-140(b). G.S. 20-140(c) provides that any person convicted of reckless driving shall be punished by imprisonment or by a fine, or by both imprisonment and fine in the court's discretion.

Both the State and defendant introduced evidence. Defendant assigns as error the denial of his motion for judgment of compulsory nonsuit made at the close of all the evidence. The State's evidence shows the following facts:

Angier Avenue in the county of Durham runs east and west. Stone Road runs north and south, and intersects Angier Avenue. About 7:30 p.m. on 25 July 1964, Norman Lee Taylor was driving his automobile 35 or 40 miles an hour east on Angier Avenue and approaching its intersection with Stone Road. His headlights were on dim. About 40 feet in front of him he saw an automobile with its headlights on, driven by defendant Dupree west on Angier Avenue, coming out of a curve at the crest of a hill, and approaching him at a high rate of speed "approximately in the center of his part of the lane." He tried to get out of the way of the approaching automobile by pulling over to the

right as far as he could. Taylor testified: "His car was right at the intersection of Stone Road and Angier Avenue just a little over the edge of the pavement on the right-hand side of Angier Avenue when the collision occurred." The point of impact on his automobile was mostly on its left front. After the collision his automobile came to rest about three feet from the center line in the intersection of Stone Road. Defendant's automobile came to rest about 100 yards from his automobile on a railroad track. The left front part of defendant's automobile was damaged in the collision. Taylor's left arm was cut and fractured in the collision.

William F. Brown, a State highway patrolman, arrived at the scene of the collision about 8 p.m. Taylor and defendant were there on his arrival. He testified in substance: Defendant told him he was driving 40 miles an hour, that as he came around the hill Taylor's bright lights blinded him. Taylor told him he met an automobile traveling at a high rate of speed on the approaching automobile's left side of the road, that he began to pull off the road and was struck by the automobile as it went by. Brown talked to two women occupants of defendant's automobile at the emergency room of Duke Hospital, and they said as they came around a curve an approaching automobile had bright lights on, and they collided. The speed limit along Angier Avenue is 45 miles per hour from the city limits to Bethesda.

Defendant's evidence is to this effect: He was driving his automobile at a speed of 40 or 45 miles an hour west on Angier Avenue and approaching the city limits of Durham. He came over a hill, was approaching a curve, and saw an antomobile meeting him whose lights were so bright they impaired his vision. He felt the impact of the collision, and does not remember much else. He could not truthfully say where his automobile was on the road in reference to the center line at the point of collision, but prior to the collision he was on his side of the road. Two women were passengers in defendant's automobile, and their testimony is to the effect that Taylor's approaching automobile had very bright lights. Both were injured in the collision.

In relying upon a motion for judgment of compulsory nonsuit in a criminal case after all the evidence on both sides is in, the court must consider the evidence for the State in the light most favorable to it, and may consider so much of defendant's evidence as is favorable to the State or tends to clarify or explain evidence offered by the State not inconsistent therewith; but it must ignore defendant's evidence which tends to establish another and different state of facts or which tends to contradict or impeach the State's evidence. *S. v. Nall*, 239 N.C. 60, 79 S.E. 2d 354; *S. v. Roop*, 255 N.C. 607, 122 S.E. 2d 363. Applying this rule on the motion here, we consider as true the State's evi-

dence that Taylor's headlights were on dim, and ignore defendant's evidence that Taylor's headlights were very bright, and so bright they impaired his vision.

In *Dunlap v. Lee*, 257 N.C. 447, 126 S.E. 2d 62, the Court, speaking by Moore, J., said: "A person may violate the reckless driving statute [G.S. 20-140] by either one of the two courses of conduct defined in subsections (a) and (b), or in both respects. [Citing authority.] The language of each subsection constitutes culpable negligence. [Citing authority.] * * * A person who drives a vehicle upon a highway without due caution and circumspection *and* at a speed or in a manner so as to endanger or be likely to endanger any person or property is guilty of reckless driving. G.S. 20-140(b). Mere failure to keep a reasonable lookout does not constitute reckless driving. To this must be added dangerous speed or perilous operation."

According to the State's evidence considered in the light most favorable to it, the collision occurred in a 45-mile speed zone. Taylor's automobile, about 7:30 p.m., was traveling east on Angier Avenue at a speed of 35 or 40 miles an hour. Defendant's automobile, at the same time, was traveling west on Angier Avenue at a high rate of speed, but there is no evidence it was going over 45 miles an hour. Both automobiles were approaching the intersection of Angier Avenue and Stone Road. The collision occurred in the intersection by reason of defendant's automobile meeting and colliding with Taylor's automobile on the left of defendant's lane of traffic. The State's evidence shows defendant violated the provisions of G.S. 20-148, which provides, "Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one-half of the main-traveled portion of the roadway as nearly as possible." Taylor first saw defendant's automobile about 40 feet in front of him. There is no evidence defendant's automobile was on its left side of the center line in the road before Taylor saw it. To be guilty of a violation of subsections (a) and (b) of G.S. 20-140, one must be guilty of conduct in the operation of his automobile which evidences a disregard for the rights and safety of others. It is sometimes difficult to draw the line between unintentional or inadvertent violations of statutory regulations governing the operation of motor vehicles, and those instances where the act is done intentionally, heedlessly, and in a manner likely to endanger persons or property. The mere fact that defendant's automobile was on the left of the center line in the direction it was traveling when the collision occurred, without any evidence that it was being operated at a dangerous speed or in a perilous manner, except being on the wrong side of the road some 40 feet before the collision, does not show on defendant's part an intentional or wilful violation of G.S. 20-140(b), or an uninten-

tional violation of this subsection of the statute accompanied by such recklessness or carelessness of probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, amounting to a thoughtless disregard of consequences or a heedless indifference to the safety of others as imports criminal responsibility under the provisions of this subsection of the statute, and does not make out a case of reckless driving as defined in this subsection of the statute sufficient to carry the case to the jury.

The facts in *S. v. Stansell,* 203 N.C. 69, 164 S.E. 580, are distinguishable. In that case the defendant was operating his automobile on the wrong side of the road, at an unlawful rate of speed, while intoxicated.

The trial court erred in denying defendant's motion for judgment of compulsory nonsuit.

Reversed.

ROBERT M. TYNDALL, T/A TREBLE PRODUCTIONS v. TRIANGLE MOBILE HOMES, INC.

(Filed 19 May, 1965.)

1. Appeal and Error § 49; Judgments § 22—

Upon the hearing of a motion to set aside a default judgment for surprise and excusable neglect, controverted facts are to be decided by the court, but the court, in the absence of a specific request therefor, is not required to make specific findings, and in the absence of specific findings it will be presumed that the court found facts supporting its factual conclusions.

2. Appeal and Error § 19—

An assignment of error which is not supported by an exception duly noted will not be considered.

3. Process § 11—

Service of process on a named corporation by delivering a copy of the summons to its managing officer is valid service. G.S. 1-97(1).

4. Process § 4—

The sheriff's return of summons establishes service *prima facie* and places the burden upon defendant to show want of service when relied upon by him.

APPEAL by defendant from *Burgwyn, E.J.,* December 14, 1964 Civil Non-Jury Session of GUILFORD, Greensboro Division.

This is an appeal from a judgment denying defendant's motion to set aside a default judgment rendered against it June 17, 1964 by the Greensboro Civil Division of the Guilford Municipal-County Court.

On May 7, 1964, plaintiff filed a verified complaint in the Municipal-County Court, alleging defendant was, by an express contract, indebted to him in the sum of $650. Thereupon, summons, directed to the Sheriff of Guilford County, issued for defendant. He returned the summons on May 11, showing service on defendant by delivering a copy of the summons with a copy of the complaint to defendant's general manager, L. W. Powell. Defendant filed no pleadings, nor did it enter an appearance. On June 17, 1964, the judge of the Municipal-County Court rendered judgment for the amount demanded. The judgment recited the filing of the verified complaint, the issuance and service of process, and the failure of defendant to plead.

On July 7, 1964, counsel for Triangle Mobile Homes of Greensboro, Inc. gave plaintiff notice that it would move on July 24 to vacate the default judgment, assigning as the reason therefor its asserted excusable neglect. The motion was heard at the appointed time. The court treated the motion as one made by named defendant. It made the factual conclusion that defendant had not shown excusable neglect. It denied the motion. Thereupon, counsel for defendant gave notice of appeal to the Superior Court. The appeal was not perfected.

On August 10, 1964, defendant filed another motion in the Municipal-County Court to vacate the judgment rendered on June 17, 1964. It then based its motion on its assertion that Powell was not, in May 1964, its manager or its employee, but was in truth the manager and employee of Triangle Mobile Homes of Greensboro, Inc.

A hearing was had in the Municipal-County Court on this motion on September 14, 1964. The parties offered evidence to support their respective contentions relating to the validity of the service of process. The court denied the motion to vacate, stating: "It appearing to the Court that proper service was made upon defendant on 11 May 1964, and that the defendant has not shown sufficient cause to have the judgment herein set aside." Defendant excepted and appealed. The appeal was heard at the December 1964 Session of the Superior Court. Judge Burgwyn, after hearing the parties, made the factual conclusion "that the action of the Court below should be approved and affirmed." He denied defendant's motion. Defendant excepted and appealed.

Benjamin D. Haines for defendant appellant.
Hoyle, Boone, Dees & Johnson for plaintiff appellee.

RODMAN, J. The motion to vacate the judgment was based on factual allegations which, if established, would compel the court to grant

defendant an opportunity to be heard on the question of liability to plaintiff. Plaintiff's denial of the facts stated in defendant's motion presented a question of fact to be decided by the court. *Menzel v. Menzel,* 250 N.C. 649, 110 S.E. 2d 333; *Harrington v. Rice,* 245 N.C. 640, 97 S.E. 2d 239; *Banks v. Lane,* 171 N.C. 505, 88 S.E. 754; *Simmons v. Box Co.,* 148 N.C. 344, 62 S.E. 435.

Both the judge presiding over the Municipal-County Court and the judge presiding over the Superior Court made factual conclusions; neither made evidentiary findings to support their conclusions. Defendant assigns as error the failure of the Superior Court to make specific findings of fact. This assignment of error is not supported by an exception. An assignment of error not supported by an exception will not be considered on appeal. *Wilson v. Wilson,* 263 N.C. 88, 138 S.E. 2d 827; *Rice v. Rice,* 259 N.C. 171, 130 S.E. 2d 41; *Cratch v. Taylor,* 256 N.C. 462, 124 S.E. 2d 124; *Holden v. Holden,* 245 N.C. 1, 95 S.E. 2d 118.

Unless requested to do so, a court called upon to decide a controversy is not required to make specific findings of fact. If the parties desire specific factual findings to support factual conclusions, they should make the request and except to the failure to find facts. *Logan v. Sprinkle,* 256 N.C. 41, 123 S.E. 2d 209; *St. George v. Hanson,* 239 N.C. 259, 78 S.E. 2d 885; *Stone v. Comrs. of Stoneville,* 210 N.C. 226, 186 S.E. 342.

In the absence of specific findings, it will be presumed that the court found facts supporting its factual conclusions. *Heating Co. v. Realty Co.,* 263 N.C. 641, 140 S.E. 2d 330.

The general manager of a corporation is within the class named in G.S. 1-97(1). Service of process on a named corporation by delivering a copy of the summons to its managing officer is valid service. Proof of service of process may be established by the return of the sheriff or other proper officer. G.S. 1-102. "[H]is return thereon that the same has been executed is sufficient evidence of its service." G.S. 1-592.

The return on the summons and the recitals in the judgment that process had been served on defendant by delivering a copy to L. W. Powell, its general manager, sufficed *prima facie* to show valid service. *Lumber Co. v. Sewing Machine Corp.,* 233 N.C. 407, 64 S.E. 2d 415; *Sandoval Zink Co. v. Hale,* 133 Ill. App. 196. Defendant had the burden of repelling the *prima facie* case made by the sheriff's return. *Harrington v. Rice, supra; Dunn v. Wilson,* 210 N.C. 493, 187 S.E. 802.

In addition to the statutory presumptions supporting the validity of service, plaintiff's evidence tended to show that defendant owned and listed property for taxation in Greensboro in the spring of 1964, that

this property was seized by the sheriff in the summer of 1964 under an execution issued in this cause. These facts tend to contradict defendant's assertion that it had ceased to do business and had no property in Guilford County subsequent to January 1964. Additionally, there was a sworn statement by plaintiff that it did business with the named defendant, and not with Mobile Homes of Greensboro, Inc., as defendant contends; that it communicated with defendant at the address shown in the telephone directory, and by mail addressed to it at 3005 High Point Road, Greensboro.

The judgment of the Superior Court denying defendant's motion to vacate the judgment rendered by the Municipal-County Court is

Affirmed.

STATE v. JUNIOR NORRIS.

(Filed 19 May, 1965.)

1. Robbery § 1—

Common law robbery is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear, with the felonious intent to deprive the owner of his property permanently, and the commission of this offense by the use or threatened use of firearms or other dangerous weapon whereby the life of a person is endangered or threatened, warrants increase in the punishment under the provisions of G.S. 14-87.

2. Same—

Force as an element of the offense of robbery may be actual or constructive, and if the threatened use of force is sufficient under the circumstances to put a man of reasonable firmness in fear and induce him to give up his property to avoid apprehended injury, there is sufficient constructive force.

3. Robbery § 4—

Evidence that shortly after an affray with the prosecuting witness and after the prosecuting witness had left the scene, defendant sought him out, and, with open pocket knife in his hand, demanded and took from the prosecuting witness money and goods, *held* sufficient to be submitted to the jury on the question of defendant's guilt of armed robbery. G.S. 14-87.

4. Criminal Law § 84—

Statements made by the prosecuting witness shortly after the crime, which statements are substantially in accord with his testimony at the trial, are competent for the purpose of corroboration, and slight variations in the statements go to their weight and not their competency.

STATE *v.* NORRIS.

APPEAL by defendant Junior Norris from *Bickett, J.,* January Criminal Session 1965 of COLUMBUS.

Criminal prosecution on an indictment charging O. B. Reaves, Junior Norris, Clyde Jacobs, and David Reaves on 24 May 1964 with the felony of robbery with a dangerous weapon of Arthur Castleberry, a violation of G.S. 14-87.

All four defendants were represented by counsel, and each one entered a plea of not guilty. At the close of the State's evidence, the court allowed motions for judgment of compulsory nonsuit made by all the defendants, except defendant Norris. Verdict as to defendant Junior Norris: guilty as charged.

From a judgment of imprisonment for a term of not less than eight years nor more than ten years, defendant Junior Norris appeals.

Attorney General T. W. Bruton and Assistant Attorney General James F. Bullock for the State.

D. F. McGougan, Jr., for defendant appellant.

PER CURIAM. The State introduced evidence; defendant Norris did not. He assigns as error the denial of his motion for judgment of compulsory nonsuit made at the close of the State's evidence. The State's evidence shows the following facts:

About 6 p.m. on 24 May 1964, Arthur Castlebury, a member of the U. S. Navy, left his home in Charleston, South Carolina, for the purpose of hitchhiking to his ship at Norfolk, Virginia. He was picked up by drivers of automobiles three times, and arrived in Myrtle Beach, South Carolina, about 9 p.m. While hitchhiking on Highway #17 just north of Myrtle Beach, he was picked up by Junior Norris, who was driving an automobile. O. B. Reaves, Clyde Jacobs, and a man called Raymond were in the automobile with Norris. At that time he did not know Norris and the three men. They arrived in Columbus County about 10:30 p.m. Norris drove along the highway about four miles, and then drove off onto a side road. They opened two bags of beer, and everyone in the automobile, except Raymond, drank three beers. There was a half-quart jar of "white lightning" in the automobile. Raymond got out of the automobile near his home. Then they went to O. B. Reaves' home and picked up David Reaves. They then rode to Dupree Road, a dirt road in Columbus County. Norris stopped the automobile, jumped out, and pulled Castleberry out of the automobile. At that time O. B. Reaves was on the back seat "passed out," and Clyde Jacobs and David Reaves remained in the automobile. Norris hit Castlebury on the head with a "coke" bottle, tore his white jumper and mackintosh, and bit him three times on the back. Norris got back in the auto-

mobile. Castlebury walked back to the paved road. David Reaves, with Norris, Jacobs, and O. B. Reaves in the automobile, drove to where he was on the paved road. When the automobile reached him, Norris, with a pocketknife with the blade opened in his hand, jumped out, pointed it at him, told him what he wanted, and took from him his wallet, a watch of the value of $16, a religious medal, and $6 in money. Castlebury testified: "I did not attempt to run because I was scared of a knife and I gave him a $15 [*sic*] watch, $6.00 in money." Norris got back in the automobile, and they left. When Castlebury got on the road towards Hallsboro, he flagged down State highway patrolman P. T. Allgood. He directed him back to where it happened, and found there his jumper and mackintosh. Allgood carried him to a hospital where they patched up his head.

Patrolman Allgood's testimony is to this effect: On 24 May 1964 he saw Arthur Castlebury with his clothes torn and blood on his face at the intersection of Rural Paved Road #1001 and Highways #74-76, the Hallsboro Road, flagging traffic. He stopped to investigate. Castlebury told him what had happened, which he narrated in detail, and which was admitted in evidence, over defendant's objection and exception, for the sole purpose of corroborating the testimony of Castlebury. Castlebury directed him to the scene, where he found Castlebury's torn jumper and mackintosh. He carried Castlebury to a hospital. Nurses attended him. Castlebury had a small cut on his head, scratches and bruises on his face, chest and shoulders, and teeth marks on his back.

J. R. Hunt, a deputy sheriff of Columbus County, testified in effect: Defendant Norris told him they had been drinking a lot, and they picked up a sailor on the bypass in the town of Whiteville, took him to White Marsh, and put him out on Highway #74-76.

Defendant contends in his brief that his motion for judgment of nonsuit should have been allowed "in that one of the essential elements of the crime charged was missing, in that *no force was shown* to be used nor was the prosecuting witness *put in fear.*" This contention is untenable.

Common-law robbery has been repeatedly and consistently defined by this Court. *S. v. Lawrence,* 262 N.C. 162, 136 S.E. 2d 595, in which it is said: "The phraseology most often employed is, 'Robbery at common law is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear.' * * * An essential element of the offense of common-law robbery is a 'felonious taking,' *i.e.,* a taking with the felonious intent on the part of the taker to deprive the owner of his property permanently and to convert it to the use of the taker."

This Court said in *S. v. Stewart,* 255 N.C. 571, 122 S.E. 2d 355:

"G.S. 14-87, entitled 'Robbery with firearms or other dangerous weapons,' creates no new offense. 'It does not add to or subtract from the common law offense of robbery except to provide that when firearms or other dangerous weapons are used in the commission of the offense, more severe punishment may be imposed.' [Citing authority.] It 'superadds to the minimum essentials of common-law robbery the additional requirement that the robbery must be committed "with the use or threatened use of . . . firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened." ' "

Generally, the element of force in the offense of robbery may be actual or constructive. Actual force implies physical violence. Under constructive force are included "'all demonstrations of force, menaces, and other means by which the person robbed is put in fear sufficient to suspend the free exercise of his will or prevent resistance to the taking . . . No matter how slight the cause creating the fear may be or by what other circumstances the taking may be accomplished, if the transaction is attended with such circumstances of terror, such threatening by word or gesture, as in common experience are likely to create an apprehension of danger and induce a man to part with his property for the sake of his person, the victim is put in fear.' 46 Am. Jur., 146." *S. v. Sawyer,* 224 N.C. 61, 29 S.E. 2d 34.

The State's evidence would permit a jury to find these facts: Defendant assaulted Castlebury with a "coke" bottle, inflicted scratches and bruises on his face, chest and shoulders, and bit him three times on his back. Shortly thereafter, defendant, with a pocketknife with the blade opened in his hand, jumped out of an automobile which had followed Castlebury, who was walking on a highway, pointed the knife at Castlebury and told him what he wanted. This knife, considering its use or threatened use by defendant, under all the attendant circumstances was a dangerous weapon. Defendant's acts constituted such a demonstration of force and menaces by him as was sufficient to put Castlebury in fear and to induce him to part with his property without resistance for the sake of his own safety. Defendant by the use or threatened use of a dangerous weapon whereby Castlebury's life was endangered or threatened, feloniously took a wallet, a watch, a religious medal, and $6 in money from the person of Castlebury, by violence or putting him in fear; that the taking by defendant was with a felonious intent on his part to deprive Castlebury of his property permanently and to convert it to defendant's use; and that defendant is guilty of a violation of G.S. 14-87. If the jury failed to find that defendant was guilty as charged, the State's evidence was sufficient to carry the case to the jury on common-law robbery, a lesser offense charged in the indictment. The

trial court properly denied defendant's motion for a judgment of compulsory nonsuit.

Defendant assigns as error the admission in evidence, over his objection, of the testimony of State highway patrolman Allgood as to what Castlebury told him about what occurred and what defendant did to him. The trial judge carefully instructed the jury that such evidence was admitted only for the purpose of corroborating the testimony of Castlebury, if they found it did. Defendant contends that because of variances in the corroborating testimony of Allgood it was inadmissible. A study of the evidence shows these variations are slight. This assignment of error is overruled on authority of *S. v. Case*, 253 N.C. 130, 116 S.E. 2d 429; *S. v. Walker*, 226 N.C. 458, 38 S.E. 2d 531.

Defendant has two assignments of error to the charge of the court to the jury. These are overruled. The judge instructed the jury that they could return one of five verdicts as they found the facts to be: Guilty as charged, guilty of common-law robbery, guilty of assault with a deadly weapon, guilty of a simple assault, or not guilty. A reading of the charge in its entirety shows that it is clear, fair to the defendant, and is an accurate declaration and explanation of the law arising on the evidence given in the case.

In the trial below we find

No error.

ROGER WEBB, BY HIS NEXT FRIEND, OTIS M. OLIVER v. FOY CLARK, GUARDIAN AD LITEM FOR STEPHEN HOWARD THOMAS.

(Filed 19 May, 1965.)

1. Negligence § 7; Automobiles § 41a—

Evidence that defendant had exceeded the speed limit in a 20 mile per hour zone prior to the accident is irrelevant when the accident does not occur in a 20 mile per hour speed zone and there is no evidence that defendant was exceeding the speed limit in the zone in which the accident occurred, since only negligence which proximately causes or contributes to the injury in suit is of legal import.

2. Automobiles § 13—

When the condition of a road is such that skidding may be reasonably anticipated, the driver of a vehicle must exercise care commensurate with the danger, and while the mere skidding of a vehicle does not imply negligence, if the skidding is due to the fault of the driver amounting to negligence, it may form the basis of recovery.

3. Automobiles § 41j—

Evidence tending to show that the highway in the area of the skidding was dry except at the intersection of a rural road where something had "run across the road" or water had drained from the rural road, and that plaintiff passenger did not see the ice until just before the accident, and that the driver, operating the vehicle at lawful speed, lost control when the vehicle skidded on the ice, resulting in the injury in suit, *held* insufficient, without evidence that the skidding was due to negligent default, to be submitted to the jury on the issue of negligence.

APPEAL by plaintiff from *McLaughlin, J.*, September 1964 Civil Session of SURRY.

Action *ex delicto* to recover damages for permanent personal injuries.

From a judgment of compulsory nonsuit entered at the close of plaintiff's evidence, he appeals.

Barber & Gardner by Wilson Barber for plaintiff appellant.

Hudson, Ferrell, Petree, Stockton, Stockton & Robinson by Ralph M. Stockton, Jr. and J. Robert Elster for defendant appellee.

PER CURIAM. Plaintiff's evidence presents these facts: About noon on 30 December 1963 Roger Webb, a 17-year-old boy, who was driving his father's 1962 Ford automobile with his knowledge and consent and had Leonard Hutchins as a passenger, picked up as a passenger at Epworth Church Stephen Howard Thomas, a 17-year-old boy. It was Sunday and during the afternoon he was driving around generally. About 2:30 p.m. he stopped at a service station about four miles from the scene of the accident. He knew Thomas had received his license to drive an automobile about two weeks before. Thomas asked him to let him drive the Ford. He would not deny that either he or Hutchins suggested to Thomas that he drive the Ford, because Thomas had not had much opportunity to drive his father's car. When they left the service station, Thomas was driving, and plaintiff was beside him on the front seat.

Plaintiff testified as follows:

> "In shady places, the road was wet and icy or appeared icy. The three of us talked about it and 'we mentioned to each other and said we was *(sic)* going to have to be careful about it.' We were on Highway 103 headed toward Mount Airy and east of the town. * * * We were traveling in a westerly direction and the posted speed limit was 35 miles per hour and Steve drove about that speed. Before reaching the scene of the accident there were wet places that looked like ice on the road and it was 'pretty curvy.' As we entered the curve at the scene, something had run across

the road, water or whatever it was, and the car went sideways, hit the bank on the right side and then back across the road into the tree. Just before we run over the water, or whatever it was, I hollered, 'Steve, watch that ice,' I believe, and the next I knew, we hit the tree.

"Just after we ran over the water, or whatever it was, it looked like that after we started going sideways Steve 'just froze or something.' The water, or whatever substance it was, was located on the road where I am now indicating and that is about 150 feet from the curve which the officer has drawn on the board. After hitting the bank beyond the curve the automobile 'shot straight across the road into the tree.'

"I estimate the car was being driven between 30 and 35 miles per hour at the time we ran over the water or ice in the road."

Plaintiff testified on cross-examination:

"While Steve was driving, two or three times Leonard Hutchins and I told Steve how to take the curve. * * * I knew that I needed to show him how to make those two or three curves I just told you about. I did not see any ice in the highway several hundred feet north of the point of the accident and at the point I have indicated on the map I saw water, ice or something in the road. * * * I saw the ice just right before we got to it and at that time Steve was driving between 30 and 35 miles per hour and was reducing his speed at that time. The car went out of control when he hit the ice or whatever it was and it slid on the ice. As Steve drove up to the ice he was driving real well and there was nothing unusual about the way he was driving. * * * I testified in Mr. Barber's and Mr. Gardner's office that Steve was driving on his side of the road and that he was not violating the speed limit. And that is correct. * * * I had seen ice on the highway in spots before I turned the car over to Steve Thomas."

Plaintiff testified on redirect examination:

"The curve which we were approaching going toward Mt. Airy is about a ninety degree angle to our left."

Robert Montgomery, a State highway patrolman and witness for plaintiff, about 3 p.m. arrived at the scene of the accident on Highway 103 approximately one-half mile east of Mt. Airy. He testified in substance, except when quoted: Dirt road 1746 intersects Highway 103 near the scene of the accident. From this intersection, Highway 103 is slightly downgrade to Mt. Airy. Highway 103 is of concrete construction and about 17 feet wide. He saw a 1962 Ford automobile about 18

feet from the edge of the highway on its right-hand side looking away from Mt. Airy wrecked against a tree to the extent that it was a total loss. He saw skid marks in the highway leading to the automobile. Two such marks led from the tree to a bank across the highway. Marks of about 50 feet long on the shoulder of the highway led up to the bank. The total length of the skid marks was approximately 126 feet. It is about 66 feet from the bank to the tree. The weather was clear and cold. In the vicinity of the scene of the accident and from the city limits of Mt. Airy, there are road signs designating a 35-mile-an-hour speed zone. In the curve before reaching the tree, there is a sign that shows a curve ahead and a 20-mile-an-hour sign. It is a very sharp curve—about 90 degrees. The last sign before reaching the intersection shows a 35-mile-an-hour speed limit. In the area of the intersection of Highway 103 and dirt road 1746, he observed water and dampness. Highway 103 generally was dry, but at the intersection it was wet, where water had drained down from road 1746 into the right lane of Highway 103, and had then drained along the highway back onto the shoulder and into the ditch. On that day he had had no reports of any ice. He had patrolled since 9 a.m., and had not seen any ice. He testified: "At the hospital I talked to Stephen Howard Thomas and he stated that he had skidded on ice and lost control saying the ice was located at the intersection of 1746 and 103. In that area I observed water and dampness."

Plaintiff offered no other evidence, except two doctors, who testified as to his injuries, and his father whose testimony was principally about his injuries.

Plaintiff's evidence shows that the accident occurred in a 35-mile-an-hour speed zone. In respect to defendant's driving in this speed zone, plaintiff testified: "I saw the ice just right before we got to it and at that time Steve was driving between 30 and 35 miles per hour and was reducing his speed at that time." Plaintiff also testified: "I testified in Mr. Barber's and Mr. Garner's office that Steve was driving on his side of the road and that he was not violating the speed limit. And that is correct." Plaintiff alleged in his complaint that defendant was negligent in "exceeding the speed limit of 35 miles per hour." His evidence refutes this allegation of negligence.

Plaintiff further alleged in his complaint that defendant was negligent "in exceeding the posted speed limit of 20 miles per hour in entering the sharp curve to his left." Plaintiff has no evidence to support this allegation of negligence, and even if he did have such evidence, it would not benefit him, because the skidding of the automobile resulting in his injuries did not occur in a 20-mile-an-hour speed zone as affirmatively shown by his evidence. It is hornbook 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.

Plaintiff's evidence does not support his allegation that defendant was guilty of reckless driving as defined in G.S. 20-140(b). *Dunlap v. Lee,* 257 N.C. 447, 126 S.E. 2d 62.

G.S. 20-141(c) provides in relevant part that the fact that the speed of a motor vehicle is less than the posted speed limits "shall not relieve the driver from the duty to decrease speed * * * when special hazard exists * * * by reason of weather or highway conditions, and speed shall be decreased as may be necessary * * * to avoid causing injury to any person or property either on or off the highway, in compliance with legal requirements and the duty of all persons to use due care."

"The mere skidding of a motor vehicle is not evidence of, and does not imply, negligence. [Citing authority.] The skidding of a motor vehicle while in operation may or may not be due to the fault of the driver. [Citing authority.] Skidding may be caused or accompanied by negligence on which liability may be predicated. Accordingly, skidding may form the basis of a recovery where it and the resulting damage is caused from some fault of the operator amounting to negligence on his part." *Hardee v. York,* 262 N.C. 237, 136 S.E. 2d 582.

Plaintiff's evidence, considered in the light most favorable to him, shows these facts: It was Sunday afternoon and they were riding around generally. In shady places the road was wet and icy or appeared icy. He testified: "As we entered the curve at the scene, something had run across the road, water or whatever it was, and the car went sideways, hit the bank over on the right side and then back across the road into the tree. Just before we run over the water, or whatever it was, I hollered, 'Steve, watch that ice,' I believe, and the next I knew, we hit the tree. * * * I did not see any ice in the highway several hundred feet north of the point of the accident and at the point I have indicated on the map I saw water, ice or something in the road. * * * I saw the ice just right before we got to it and at that time Steve was driving between 30 and 35 miles per hour and was reducing his speed at that time. The car went out of control when he hit the ice or whatever it was and it slid on the ice."

When the condition of a road is such that skidding may be reasonably anticipated, the driver of a vehicle must exercise care commensurate with the danger, to keep the vehicle under control so as to avoid injury to occupants of the vehicle and others on or off the highway. *Hardee v. York, supra; Wise v. Lodge,* 247 N.C. 250, 100 S.E. 2d 677. Plaintiff's evidence does not show that the condition of Highway 103

in the area where the skidding began and occurred was such that skidding could be reasonably anticipated, and does not show that the skidding of the automobile was caused by any failure of defendant to keep a proper lookout and to exercise reasonable care and precaution to avoid it. Plaintiff's evidence does not support his allegations that defendant was negligent in that he drove the car in violation of G.S. 20-141(c), or that he failed to exercise due care in its operation.

Wise v. Lodge, supra, relied on by plaintiff is factually distinguishable, in that in that case the highway was covered with ice, and snow was falling slightly when the collision occurred. *Hardee v. York, supra,* is also factually distinguishable, in that in that case, *inter alia,* defendant's evidence showed that in the vicinity of the accident there was solid ice in the lane all the way down, a sheet of ice frozen over all the way.

Plaintiff's evidence, considered in the light most favorable to him, fails to show that defendant was guilty of negligence proximately causing his unfortunate injuries. The judgment of compulsory nonsuit entered below is

Affirmed.

CHARLES S. NORBURN AND WIFE, HELEN J. NORBURN v. PAUL E. MACKIE, RUTH M. MACKIE, AND HORACE J. ISENHOWER, SR.

(Filed 19 May, 1965.)

1. Appeal and Error § 60—

Decision on appeal that the evidence is sufficient to be submitted to the jury is the law of the case and precludes nonsuit in a subsequent trial upon substantially the same evidence.

2. Evidence § 19—

Where the parties admit that the transcript of the testimony of a witness at a former trial was correct and it is made to appear on the second trial that the witness lived some distance away, was in ill health, and was at least 65 years old, and the court finds that it would be detrimental to his health to make the witness appear, the ruling of the court admitting the transcript of his testimony will not be disturbed on appeal.

3. Fraud § 12—

While the measure of damages for fraud is the difference between the value of the chose had it been as represented and its value at the time of transfer of title, where the parties admit that the chose, if it had been as represented, would be worth at least the purchase price, a charge that the

measure of damages was the difference between the purchase price and the fair market value at the time of transfer of title cannot be prejudicial.

4. Appeal and Error § 40—

A new trial will not be awarded for mere technical error which could not affect the result.

5. Trial §§ 39, 45—

Where, upon a poll of the jury, it is ascertained that the jury had failed to reach a unanimous verdict as to one issue, the court cannot accept the verdict, but the court, in the exercise of its discretion, properly directs the jury to deliberate further, and, upon the jury's subsequently reaching a unanimous verdict, properly accepts such verdict.

APPEALS by defendants from *Clarkson, J.*, November 9, 1964 Civil Session of BUNCOMBE.

This action for damages is based on fraudulent representations made by defendants to induce plaintiffs to purchase land in Ashe County. It was first tried in September 1963. Plaintiffs then appealed from a judgment of nonsuit, entered at the conclusion of their evidence. That judgment was reversed at the Spring Term 1964 of this Court. See *Norburn v. Mackie,* 262 N.C. 16, 136 S.E. 2d 279.

On the trial had in November 1964, the jury found plaintiffs were induced to purchase by fraudulent representations of defendants. It fixed plaintiffs' damage at $18,000. Judgment was entered on the verdict. Defendants appealed.

Williams and Pannell for defendant appellants Paul E. Mackie and Ruth M. Mackie.

Sigmon and Sigmon for defendant appellant Horace J. Isenhower.

Williams, Williams and Morris for plaintiff appellees.

PER CURIAM. The Court properly overruled the motions for nonsuit. The evidence on the first trial, in support of plaintiffs' claim, is stated in the opinion reported 262 N.C. 16, 136 S.E. 2d 279. The evidence at the second trial was, in all material respects, the same. The conclusion reached on the first appeal that plaintiffs "are entitled to have their case submitted to a jury" is the law of the case. If appellants thought the prior opinion wrong, their remedy was by petition to rehear, not by appeal from a refusal to nonsuit on a second trial with substantially the same evidence.

Lawrence Tyson, a resident of Ashe County, testified at the first trial. He was subpoenaed but was not present when the case was called for trial in November 1964. Plaintiffs offered as evidence Tyson's testimony given at the first trial. To support their right to use this evidence, they relied on these facts: (1) The distance from Jefferson,

Tyson's home, to Asheville is in excess of 100 miles; (2) Tyson testified at the first trial that he had served as a surveyor in France during World War I, hence it could be reasonably inferred that Tyson was at least 65 years of age; (3) an affidavit by Dr. Miller, Tyson's physician, stating in detail Tyson's physical condition. Judge Clarkson found: "Lawrence B. Tyson had a total gastrectomy on February 11, 1964 for a milignancy [*sic*] of the stomach; that he has to have frequent meals about six a day since this time, and has to lie down for awhile after each meal, and that it would be detrimental to his health to have to make the trip to Asheville to appear as a witness."

Based on his findings, Judge Clarkson concluded the testimony given by Tyson at the prior trial, stenographically taken and stipulated to be a correct transcript of his evidence, was competent. His ruling is assigned as error. The Court's findings and conclusions are amply supported by the evidence. These findings, supplemented by the stipulation relating to the accuracy of the testimony, justify the Court's ruling and the admission of the testimony in evidence. *Settee v. Electric Railway,* 171 N.C. 440, 88 S.E. 734. The facts found would permit the use of a deposition, G.S. 8-83(4).

Plaintiffs purchased 696 acres, relying on representations that 500 acres of this area were improved pasture land, growing clover, fescue and blue grass. The parties do not disagree that $65.00 per acre was a fair price for improved pasture of the kind represented. The remaining area had substantially less value per acre than improved pasture land. The crucial question involved in the issue relating to damages was: How much of the land was in fact improved pasture? If, in fact, it contained 500 acres of improved pasture, as defendants represented, it was worth the amount plaintiffs paid, and by defendants' evidence worth more than that amount. If it had less than 500 acres of improved pasture, the value was less than the purchase price. The evidence of plaintiffs tended to show the improved pasture land did not exceed 108 acres. In addition to this, there were 68 acres of unimproved land that could be put to pasture, and 490 acres of so-called "woods land."

The Court charged that the measure of damage was the difference between the contract price and the fair market value of the property conveyed. Defendants assign this charge as error. Normally, the rule to measure damage in fraud cases is, as defendants contend, the difference between the value, as represented, and the value of the property conveyed. *Horne v. Cloninger,* 256 N.C. 102, 123 S.E. 2d 112. Here, the distinction between the rule as given and the rule contended for by defendants is a mere play on words. Defendants did not contend, nor did they offer any evidence to show, that the land would be worth less than the purchase price if it contained the full 500 acres of improved pasture.

To the contrary, their evidence tended to show that the property, if as represented, had a value in excess of the purchase price. New trials are not awarded because of error alone. The error must prejudicially affect the complaining party. 1 Strong's N.C. Index 115.

The trial was completed and the case submitted to the jury in the forenoon. The jury was unable to reach a verdict before the noon recess. When the jury returned for further consideration of the issues, the Court, at the jury's request, restated the rule to measure damages. About an hour and a half thereafter, the jury informed the Court it was ready to report its verdict. The jury was brought in. The issues and answers were read by the Clerk. The issues, as read, were favorable to plaintiffs. Defendants asked for a poll of the jury. When polled, it became apparent the jury was not in agreement with respect to the third issue. Thereupon the Court informed the jury that all the jurors had to agree on the answer to each issue. It directed the jury to return to its room "and see if you can arrive at a unanimous verdict as to Issue No. 3." The jury retired, and thereafter reported that it was in agreement with respect to the issues. The verdict as then announced was accepted by the Court.

The Court could not accept as a verdict the answers to the issues when it affirmatively appeared that there was no agreement with respect to the third issue. *Owens v. R. R.*, 123 N.C. 183, 31 S.E. 383. The Court was empowered, in the exercise of its discretion, to direct the jury to return to its room for further consideration of the issues. *Baird v. Ball,* 204 N.C. 469, 168 S.E. 667. The jury did reach an agreement and reported to the Court. The response which the jury then gave to the issues was accepted as its verdict. There is nothing in the record to indicate an abuse of discretion.

No error.

STATE OF NORTH CAROLINA v. SANDY FLETCHER.

(Filed 19 May, 1965.)

1. Criminal Law § 109; Robbery § 5—

Where all of the evidence shows that property was feloniously taken from the person of the prosecuting witness by the use of a dangerous weapon, with evidence of the identity of defendant as the perpetrator of the offense, the court is not required to submit the question of defendant's guilt of less degrees of the crime.

2. Criminal Law § 71—

Where police officers in booking defendant informed him that he had the right to remain silent and that anything he said might be used against him, a voluntary admission by defendant that on the date the crime was committed he had crossed, at some unidentified point, the street on which the robbery occurred, *held* competent.

APPEAL by defendant from *Johnson, J.*, January-February 1965 Criminal Session of DURHAM.

Defendant was indicted under G.S. 14-87 for robbery with a dangerous weapon. The State offered evidence tending to establish these facts: George Mulchi sells soft goods from his automobile for L. B. Price Mercantile Company. On December 19, 1964, between 9:30 and 10:00 p.m., he was working in the 700 block of Carrington Street in Durham. His car was parked at the entrance of the block. The street light was on. Mulchi had just made a collection and returned to his car when defendant, a man "being stocky built with a large face," wearing a big cowboy hat, and carrying three golf clubs in his hand, approached.

According to Mulchi the following took place:

> "He said to me, 'I want you to take me to deliver these golf clubs,' and I told him, I said, 'Well, look, fellow, I am on my job. I am busy. Even if I could go, I have got my car loaded in the front seat and if I could go I couldn't take you on there because I don't have any room for a passenger, and besides,' I said, 'I don't have time.' He said, 'Take me.' "

Mulchi walked away from defendant, got in his car, and drove down Carrington Street to a customer's home at 705 Carrington. After making a collection at 705, Mulchi returned to the car to get some merchandise the customer had ordered. Mulchi testified to the actual robbery as follows:

> "After I made my collection I went back to the car and reached in for the merchandise. The defendant walked up and I don't recall exactly what he said but anyway he pulled a knife out, and he told me, he said, 'I want to see your pocketbook.' The knife was opened. He pulled the knife out and opened it. It looked like it had a broken blade and had been sharpened around the corner. The blade was approximately two (2) or three (3) inches long. I just stood there and looked at him, and he reached down with — holding the knife with his right hand, and he reached around with his left hand to my right hip pocket and he reached in there and he felt my pocketbook, and he seemed to have some difficulty in getting it out. I reached back there and touched his hand — didn't put up any resistance or anything with that knife being held on me

> —but it seemed to irritate him and he just took—he couldn't get that pocketbook out and he just pushed down on my trousers. They tore. When he reached around with his left hand he couldn't get my pocketbook. I guess it was a little bit too tight — it irritated him, and he just pushed down on it, and it tore, and he could very easily get my pocketbook then."

After defendant took $24.00 from the pocketbook, he told Mulchi, "I want to see your watch." He tapped Mulchi's arms, but because of Mulchi's heavy jacket he missed the watch. He also missed $90.00 Mulchi had in a money pouch on his belt. The dome light on the automobile was on, and defendant was standing in the light so that Mulchi, the prosecuting witness, "could see perfectly." Defendant said, "I want you to walk down the street with me." Mulchi made as though he were going, then turned and ran up the steps of the house at 705 Carrington Street, banged on the door, ran in, and called the police. Defendant followed him as far as the steps.

Mulchi and the police searched that section of town, but were unable to apprehend defendant that night. One afternoon about a week later Mulchi observed defendant walking with a woman on Matthews Street. He immediately went to the police station and returned with two detectives, who arrested defendant. At that time defendant told the officers that he had never seen Mulchi before in his life. In the booking room at the police station Detective Cox of the Durham Police told defendant that he wanted to ask him some questions; that "he didn't have to answer; that he had a perfect right to remain silent; that whatever defendant told him he would have to testify in court whether it was for or against defendant; and that it could be used against him." Defendant made no request for counsel, and Cox did not "know whether he had contacted a lawyer" at that time. Over defendant's objection, the court permitted the officer to testify that defendant then told him that *that day* he had been out to the Hope Valley Country Club caddying and that he had had to cross Carrington Street to get to his home but "he didn't know whether it was the 700 block or where."

Defendant's motion for judgment of nonsuit, made at the close of the State's evidence, was overruled. Defendant offered no evidence. The judge charged the jury that it might return one of three verdicts: "Guilty as charged, guilty of common-law robbery, or not guilty." The jury's verdict was "Guilty, as charged, of armed robbery." From the prison sentence imposed defendant appeals, assigning error in the ruling on the motion to nonsuit, in the admission of Detective Cox's testimony, and in the charge.

T. W. Bruton, Attorney General, and James F. Bullock, Assistant Attorney General, for the State, appellee.

Blackwell M. Brogden and J. Milton Read, Jr., for defendant, appellant.

PER CURIAM. The evidence, detailed above, obviously repelled defendant's motion for judgment of nonsuit. It likewise restricted the jury to two verdicts: guilty of robbery with a dangerous weapon, *i.e.*, a knife, or not guilty. *State v. Parker*, 262 N.C. 679, 138 S.E. 2d 496. Either defendant robbed Mulchi of $24.00 by the threatened use of a knife having a 2-3 inch blade or (a) no robbery occurred or (b) defendant was not the robber. Defendant's contention here that "his Honor should have charged the jury on the guilt or innocence of the defendant as to the crime of larceny from the person" has no substance whatever. There was no evidence of larceny from the person. In charging the jury that it might return a verdict of common-law robbery, the court gave defendant a more favorable charge than the evidence justified.

Defendant, relying upon *Escobedo v. Illinois*, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964), contends that his statement to the officer was inadmissible. The facts in this case bear no similarity to those in *Escobedo*. Here defendant was informed that he had the right to remain silent and that anything he said might be used against him. In our opinion *Escobedo* has no application "to the free and voluntary conversation" which defendant had with Detective Cox. *State v. Upchurch, ante*, 343, 141 S.E. 2d 528. Moreover, defendant here — unlike the petitioner in *Escobedo* — made no confession of crime. On the contrary, he stated that he had never seen Mulchi.

Defendant's other assignments of error either are formal or point to no prejudicial error.

No error.

NELL G. BROWN v. LANDIS G. BROWN.

(Filed 19 May, 1965.)

1. Trial § 33—

Where appellant fails to bring the matter to the court's attention in apt time, a slight inaccuracy of the court in recapitulating the testimony of a witness does not warrant a new trial.

2. Appeal and Error § 19—

An assignment of error must disclose the question sought to be presented without the necessity of going beyond the assignment of error itself.

3. Appeal and Error § 24—

An assignment of error which refers to the exception number and the page of the record at which the exception is noted, and asserts that the court erred in its explanation of the law on the subject, is ineffectual, since it fails to disclose the question sought to be presented within the assignment itself, and since it is a broadside assignment of error in failing to point out any particular part of the charge objected to.

4. Trial § 18—

It is the province of the jury to weigh the credibility of the testimony, with the right to believe any part or none of it, and therefore where the testimony of the wife in her action for alimony without divorce would permit the jury to answer the issue either for or against her as they found the facts to be from her testimony, the verdict against her is conclusive on appeal, notwithstanding the defendant offered no evidence.

APPEAL by plaintiff from *Johnson, J.*, August-September 1964 Session of BRUNSWICK.

Civil action instituted under the provisions of G.S. 50-16 for alimony without divorce.

Plaintiff in her complaint alleged that she and her husband, who are both residents of Southport, North Carolina, were married in San Francisco, California, on 4 November 1943 and lived together as man and wife until 23 June 1957, at which time, as a result of disagreement, it became necessary to their welfare and happiness for them to separate. On 7 June 1958 they began living together again. Because of marital difficulties, they separated again in November 1963. They began to live together again on 20 December 1963, but not on friendly and peaceful terms. On 14 February 1964 defendant left their home, and has continued to live separate and apart from her. That while they were living together the last time defendant, by his verbal abuse of her and assaults upon her continued over a considerable period of time, endangered her life and offered such constant indignities to her person as to render her condition intolerable and life burdensome. That no child was born of the marriage, but they have two adopted children, aged 16 and 12 years. That defendant is a practicing physician and surgeon in Southport, and has an annual income in excess of $25,000 and owns real estate valued at $60,000. Wherefore, she prays for a judgment requiring defendant to pay her a reasonable subsistence for herself and their two adopted children, and for counsel fees for her lawyer.

Defendant filed an answer denying the crucial allegations of the complaint. And for a further answer and defense defendant alleges in 17 pages in minute detail assaults upon him by plaintiff, verbal abuse

of him, harassment of him, interference with the practice of his profession to the degree she made his life burdensome and forced him to leave his home.

So far as the record discloses, plaintiff made no request for a hearing for temporary subsistence *pendente lite.*

Plaintiff offered evidence. Defendant offered no evidence.

The following issues were submitted to the jury, and answered as indicated:

"1. Has the defendant, by cruel or barbarous treatment, endangered the life of plaintiff?

ANSWER: No.

"2. Was such conduct on the part of the defendant brought about by any act or deed of provocation on the part of the plaintiff?

ANSWER: .....

"3. Has the defendant offered such indignities to the person of the plaintiff as to render her condition intolerable and her life burdensome, as alleged in the complaint?

ANSWER: No.

"4. Was such conduct on the part of the defendant brought about by any act or deed of provocation on the part of plaintiff?

ANSWER: ....."

From a judgment entered upon the verdict that plaintiff recover nothing from defendant, and taxing her with the costs, she appeals.

W. K. Rhodes, S. Bunn Frink, and E. J. Prevatte by W. K. Rhodes for plaintiff appellant.

Burney & Burney by John J. Burney, Jr., for defendant appellee.

PER CURIAM. Plaintiff first assigns as error that the court's recapitulation of certain parts of plaintiff's testimony is at variance with her actual testimony in the record. An examination of her testimony and the charge shows that the variance, if any, is slight. The court is not required to give the jury a verbatim recital of the testimony. It must of necessity condense and summarize the essential features thereof. When its recital of the evidence does not correctly reflect the testimony of the witness in any particular respect, it is the duty of counsel to call attention thereto and request a correction. As the trial court's attention was not called thereto, and no exception was entered in apt time,

this assignment of error is not now tenable. *Steelman v. Benfield,* 228 N.C. 651, 46 S.E. 2d 829.

Plaintiff's second assignment of error is: "The court erred in its explanation of the law on the subject to the jury. This assignment of error is based upon plaintiff's exception #2 (R. p. 65)." Her third and last assignment of error is: "The court erred in its explanation of the law on the subject to the jury. This assignment of error is based upon plaintiff's exception #3 (R. p. 67)." We have stated again and again that the error relied upon should be definitely and clearly presented, and the Court not compelled to go beyond the assignment of error itself to learn what the question is. *Balint v. Grayson,* 256 N.C. 490, 124 S.E. 2d 364; Strong's N. C. Index, Vol. 1, Appeal and Error § 19, p. 90 (Supplement p. 31). In addition, these assignments of error are "broadside," in that these assignments of error in themselves do not point out any particular parts of the charge objected to, but require an examination of the charge. However, in spite of the defective and faulty assignments of error, we have examined the charge as a whole, and find no error sufficiently prejudicial to justify disturbing the verdict and judgment entered.

The jurors here were the sole judges of the credibility of the witnesses. They had a right to believe all that a witness testified to, or to believe nothing that a witness testified to, or to believe part of the testimony and to disbelieve part of it. It is manifest from a careful reading of the three pages of plaintiff's testimony on direct examination and of the nine pages of her testimony on cross-examination, and of the testimony of her witnesses, that the plaintiff's and defendant's married life, certainly since their first separation in 1957, has been one of discord and strife, and that her evidence would permit a jury to answer the issues submitted to them either in her favor or against her, as they found the facts to be under a charge free from prejudicial error.

In the trial below plaintiff has shown no prejudicial error.

No error.

STATE OF NORTH CAROLINA v. RUDY CLEGG BRUTON AND WILLIE JUNIOR SMITH.

(Filed 2 June, 1965.)

1. Criminal Law §§ 99, 104—

Upon a motion for judgment as of nonsuit or for a directed verdict at the close of the State's evidence, and renewed by the defendant after the intro-

duction of his own evidence, all the evidence upon the whole record tending to sustain a conviction will be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom.

2. Criminal Law § 101—

Nonsuit is properly denied if there is substantial evidence of defendant's guilt of every essential element of the offense charged, and it is immaterial whether such evidence is direct or circumstantial, or both.

3. Criminal Law § 85—

Where officers take the defendant to the cell of a confederate for the purpose of having defendant repeat certain incriminating statements in the presence of the confederate, and the officers permit defendant to interrogate the confederate, eliciting exculpatory statements, whereupon the officers stop the questioning, defendant is justified in declining to make any further statements in the presence of the confederate, and the State is bound by the exculpatory statements in the absence of evidence of other facts or circumstances tending to show them to be false.

4. Criminal Law § 9—

In order for a person who is present at the scene of the crime to be guilty as an aider and abetter there must be some evidence tending to show that such person, by word or deed, gave active encouragement to the perpetrator, or by his conduct made it known to the perpetrator that he was standing by to render assistance when and if it should be necessary.

5. Criminal Law § 99—

On motion to nonsuit, the court will consider not only defendant's evidence which explains or makes clear that offered by the State but also defendant's evidence which rebuts the inference of guilt when it is not inconsistent with the State's evidence.

6. Homicide § 20— Evidence which fails to show defendant was present at scene until after commission of homicide held insufficient to be submitted to jury.

The State's evidence tended to show that an officer stopped a Chevrolet automobile with four Negro occupants and parked his patrol car back of it, that one of the Negroes ran into the adjacent cornfield, pursued by the officer, who fired shots over his head, whereupon two of the Negroes drove off in the automobile, and that the officer was later found lying in the cornfield with a fractured skull and with four pistol wounds in his head, with expert testimony that the wounds were inflicted while the officer was lying unconscious, and that the blow to the head would render him unconscious. The State further introduced evidence that the patrol car was later driven into the woods and that the shoe print of defendant was found in the cornfield near the body of the officer, but the State introduced testimony of witnesses who passed the scene who testified that they saw defendant or a "light skinned man" talking to the patrolman beside the Chevrolet and later standing beside the patrol car, but none testified that they saw the patrol car parked on the highway with no person near it. The State further introduced testimony of statements of defendant that at the time the shots were fired he was standing beside the patrol car, that his companion came out of the cornfield with a pistol and drove the patrol car

into the woods, and that defendant thereafter went into the cornfield where the officer was lying and then turned and walked away. *Held:* Taking all the evidence as true, it does not place defendant in the cornfield until sometime after the fatal shots were fired, and therefore the evidence is insufficient to be submitted to the jury on the issue of defendant's guilt.

PARKER, J., dissents.

APPEAL by defendant Bruton from *Fountain, J.*, 7 December 1964 Special Criminal Session of HOKE.

Criminal prosecution tried upon indictment charging the defendants with the first degree murder of Highway Patrolman William T. Herbin.

The evidence disclosed by the record is that Rudy Clegg Bruton (Bruton), Albert Reaves (Reaves), Willie Allen (Allen), and Willie Junior Smith (Smith) left Pinehurst Monday afternoon, 31 August 1964, riding in a 1957 black Chevrolet sedan which belonged to Allen. The defendant Bruton had made arrangements with Allen to take him to Fayetteville where Bruton wanted to do some shopping for himself and his children.

At first, defendant Bruton was driving the car and stopped at a filling station where he purchased two dollars worth of gas and three cans of beer. Bruton testified: "I did not drink a whole can; we divided the three cans among the four of us." When the four left the gas station, the defendant Smith was driving; Allen, the owner of the car, sat in the front seat with Smith; Reaves and Bruton were sitting in the rear seat.

The State's evidence tends to show that while traveling on Highway 401, about 8½ miles north of Raeford, North Carolina, Smith saw a Highway Patrolman coming behind him and he pulled over and stopped. Patrolman William T. Herbin drove his patrol car onto the shoulder of the road and parked it behind the Allen car. The Patrolman got out of his patrol car and went to the driver's side of the Chevrolet and asked Smith for his driver's license and registration card. Smith did not have a license but gave the Patrolman an envelope, and Allen began looking in the glove compartment for his registration card. Before the registration card was found, all of the occupants of the Chevrolet, except Allen, had gotten out of the car and the Patrolman indicated he was going to arrest all of them, except Bruton, for public drunkenness.

Reaves testified that before the Patrolman got the contents out of the envelope which Smith had handed him, "Smith ran to the cornfield and the Patrolman was in behind him, hollering 'Halt' and he shot straight up in the air, and I didn't see no more than that. I didn't see Bruton any more * * *. I stepped right back and got in the left-hand side of the car and took off. I told Willie (Allen) they would arrest us. * * *

I just went on the road to where I 'seed' the road turn off, to get out of the way of the Patrolman in case he caught Smith and came back he wouldn't see us." On cross examination, this witness testified: "* * * The only person the Patrolman didn't arrest was Rudy Clegg Bruton; he wasn't drunk. * * * When Willie (Smith) ran to the cornfield and the officer went running after him, shooting over his head, I said to Will (Allen), 'I am gone from here,' and I got right in the car and took off. * * *"

Allen testified: "* * * The Patrolman was talking to Willie Junior Smith at the time. (The Patrolman and Smith at that time were standing near the right side of Allen's car and Allen was sitting on the right side of the front seat.) Rudy Clegg Bruton was in the car, too. He got out and Reaves got out. Well, there was talking there; I don't know what they was talking about out there, but I know all at once, Willie (Smith) taken off; Bruton, he taken off and the Patrolman. Willie took off first into the cornfield; Rudy Clegg Bruton went right behind Willie Junior. The Patrolman, he was running on out there and he just pulled his pistol and shot it and said, 'Halt.' * * * Well, Albert (Reaves) got under the wheel and I said, 'Well, let's go.' I * * * left with Reaves." On cross examination, this witness testified: "The truth about it is, I was drunk * * *. I don't know whether the Patrolman had placed both Reaves and me under arrest for being publicly drunk; I didn't hear nothing about it."

Immediately after Smith ran, Reaves and Allen left the scene in Allen's car with Reaves driving. Reaves drove north on Highway 401 for a quarter of a mile, turned left on a dirt road, and had driven several miles when they had a blowout. Allen was too drunk to walk and stayed in the car, went to sleep and was found asleep in the car sometime during the night by a Patrolman. Reaves walked back to his home near Pinehurst, arriving there about 11:30 P.M.

J. R. McPherson, a witness for the State, testified that between 3:30 and 4:00 P.M. on 31 August 1964 he had occasion to be on Highway 401; that he passed a 1957 black Chevrolet on a dirt road on which he was riding just before he entered the highway. The car was occupied by two men. That he turned into the highway and drove south by the patrol car and saw a "bright skinned man," whom he identified as Bruton, standing in front of the patrol car. That around 5:00 o'clock when he returned he saw Smith walking (south) on the west side of Highway 401, not quite a mile from the cornfield, going toward Raeford. The 1957 Chevrolet was nowhere in the area; the patrol car was parked in the woods on the same side of the road where it was originally parked.

Roy Brock, another witness for the State, testified that between 3:30 and 4:00 P.M. on the day in question he was working near this cornfield, which contained approximately two acres in a triangular shape; that he heard four shots in rapid succession; that he did not recall hearing any other shots.

William Wooten testified: "* * * I was on Highway 401 in the vicinity of the Hoke County line on the afternoon of the 31st of August 1964, headed from Raeford into Fayetteville, something between 3:30 and 4:00 o'clock. Paul Butler, who I work with, was the driver and I was sitting on the right-hand side of the car. Before arriving at this area I saw a patrol car located on the right-hand shoulder of the road, headed toward Fayetteville; there was a fifty-seven black Chevrolet in front of it. I saw one man on the right-hand side of the patrol car, with his hand on it. I saw two men in the black Chevrolet, in the front seat. I did not see the Patrolman there. The man I saw with his hand on the patrol car was a light skinned man, heavy set, and that is all I know. The two men in the black Chevrolet were colored men is all I could tell." On cross examination, this witness further testified: "I saw a light skinned man standing on the road beside the patrol car and two men in the other car; I did not see the Patrolman and didn't see another man. I could not say Bruton is the man I saw; it was a light skinned man like that. At the time I saw him I did not see the defendant Smith but saw the two other men sitting in the car."

Several other State's witnesses testified that they passed by this cornfield on this particular afternoon and saw a "bright skinned man" standing by the patrol car. Some of these witnesses identified the man as the defendant Bruton. Mrs. Wyatt Upchurch testified that she was on Highway 401 on this particular afternoon; that "* * * I saw a patrol car in the area of Mrs. Thompson's house middleway of the cornfield parked beside the road, on the same side of the road that I was traveling, in the direction of Fayetteville. There was a dark skinned man coming out of the cornfield and the light skinned man was standing back of the patrol car. I did not see anyone else in the area at the time, nor any vehicles nor a Highway Patrolman. After the dark skinned man came out of the cornfield he went around to the driver's side and a door opened * * * I don't know whether he got in or not. You could tell the dark skinned man was in a hurry as he came out of the cornfield. I saw nothing else as I passed."

Bruton made certain statements, according to the State's evidence, tending to show that he had been near the body of the deceased in the cornfield. According to Sheriff David Barrington's testimony, Bruton stated to him in the presence of Patrolman R. F. Williamson, that "if he (Bruton) did hit him, he didn't hit him with his gun." Bruton fur-

ther stated to Patrolman Williamson that "he had heard the shots fired in the field, that he was beside the patrol car at that time, out at the highway, and that he had heard several shots, and that Willie Smith came out of the cornfield and as he approached the patrol car that he saw a shining pistol in Willie Smith's pocket." Patrolman Williamson further testified that Bruton told him that "he (Bruton) looked at the pistol and says, 'Is that the Patrolman's gun?' And Willie Smith said it was. * * * (H)e (Bruton) said he took the pistol and held it in his left hand for two or three seconds. He stated then that he gave the pistol back to Willie Smith, and Willie Smith put the pistol in his pocket, got in the patrol car and moved the patrol car down in the woods. He (Bruton) stated as Willie Smith drove the patrol car down into the woods, that he (Bruton) went into the cornfield, up to the area where Herbin was lying, looked at Herbin, and turned around and walked out to the north end of the cornfield, and went over to Mrs. Thompson's house and asked for a ride into Fayetteville. He stated to me that Mrs. Thompson told him that her husband was sick and she did not drive. He then stated that he saw Willie and they broke up and he went into Fayetteville * * *."

It appears from the record that after Bruton made a statement to Sheriff Barrington and Patrolman Williamson, they asked Bruton if he would go down to the next cell and make the same statement in the presence of Smith, and he said he would. When Bruton, the Sheriff and Williamson arrived at Smith's cell, Patrolman Williamson testified, "* * * I told Rudy Clegg Bruton to go ahead and make the statement, and then he said, 'May I ask some questions?' or 'May I ask a question?' and I replied to him that he could. And then he asked Willie Smith, 'Willie, did you see me go in the cornfield?' or 'You didn't see me go in the cornfield,' or words to that effect and Willie said, 'No.' And he said, 'Willie, did I have anything to do with this situation?' or this murder or trouble that I am in. And then I said, 'Rudy, just a moment. I brought you down here to tell the same thing that you told up there in the cell, not to cross examine or to question Willie; you go ahead and tell him what you told Sheriff Barrington and I.'" These officers were then unable to get Bruton to make the statement they wanted him to make in the presence of Smith.

The body of Patrolman Herbin was discovered about 9:30 P.M. on the night of 31 August 1964; it was lying near the edge of the cornfield which the Patrolman had entered in his pursuit of Smith, a distance of 110 feet from where he had parked his patrol car on Highway 401. According to the State's evidence, "* * * The corn was so thick you could not see very well from one or two rows. You can stand in one

row and it would be hard to see anything two rows away. The corn was in excess of six feet."

A footprint, similar to the print of the shoe worn by Bruton, was found in the cornfield near the body of the deceased. Haywood Starling, a Special Agent of the North Carolina Bureau of Investigation, testified as follows: "* * * (T)he similarities which I found in these two exhibits include a similarity of length and also in addition include a similarity of contour of sole. I found also similarity in wear of the heel, included in the shoe which I hold, and similarities of wear included in the cast which I also hold. * * *

"From my comparison of these two exhibits, I have an opinion satisfactory to myself as to whether or not the impression made by that mold and the left shoe of Exhibit Number 11 (shoe of the defendant Bruton) are the same. It is my opinion that the impression represented by the cast in State Exhibit 15 could have been an impression of the left shoe included in State Exhibit 11, and further that it not only could have been, but was impressed by the shoe in State Exhibit 11, or another shoe of the same similarities which I have testified to." This witness was not present when the cast referred to was made.

The State's evidence further tends to establish that Bruton had a residue of chemicals on the back side of his left hand which could have been left by the firing of a pistol. Tests of the palms and webs of Bruton's hands were negative with regard to the metals normally found on the hands of a person who has recently fired a pistol.

Dr. W. S. Gilmer testified in substance that he examined the body of Patrolman Herbin on 3 September 1964 and discovered five injuries, four of which were penetrating wounds and a fifth a crushing fracture of the skull. The fracture was located over the left frontal bone, extending from the left eyebrow upward a distance of two inches, and was about two and a half inches wide. "That is what we call a depressed fracture." Of the four penetrating wounds, three were located on the face and one behind the right ear. Of those on the face, one was located just to the right of the nose, about three-quarters of an inch below the eyelid. This wound entered at this point, fracturing the bone. The second wound was located about an inch below the right cheekbone, and about two and a half inches from the midline of the upper lip. The third wound on the face was lower in the right jawbone.

The three bullets which passed through the head of Patrolman Herbin were found imbedded in the ground where they had penetrated to a depth of approximately six inches. Dr. Gilmer further testified that in his opinion the wounds were inflicted by bullets passing through the head from a gun discharged after Patrolman Herbin was unconscious

and immobile. All three wounds were exactly parallel, one to the other. "In my opinion the three wounds I have described were the cause of death." The bullet that entered behind the right ear was removed several days later.

Dr. Duncan S. Owen testified: "* * * I * * * have an opinion from my examination that the fracture of the left forehead would have caused death; I have an opinion that the fracture would have rendered him unconscious, immediately unconscious."

At the close of the State's evidence, the defendant Bruton moved for a directed verdict of not guilty. The motion was denied.

The defendant's evidence tends to show that Bruton is a man of good character; that he had never been charged with any infraction of the law prior to his indictment in this case; that he graduated from Peabody High School in Troy, North Carolina, in 1961, and attended Winston-Salem State College for one year; that in August 1964 he was employed as a bartender at Whispering Pines and had previously held a similar position at the Pinehurst Country Club; that some of his duties included making the bank deposits for the club and getting the mail from the postoffice; that on 31 August 1964 it had rained over the week end and the ground was too wet to play golf and his boss told him he could close up the bar and have the day off after he made the bank deposit and got the mail. That afternoon, Bruton made an agreement with Allen to take him to Fayetteville. He had never seen Reaves prior to that day, and while he knew Smith and Allen he had never associated with either of them until he started on this trip to Fayetteville.

Bruton testified that the Patrolman asked him if he had a driver's license and that he told him he did, and that he showed him his driver's license; that the Patrolman asked him to drive the car and follow him to Raeford. He (the Patrolman) then put Allen and Reaves under arrest, told Smith to ride with him, and Reaves and Allen to ride with him (Bruton). Reaves and Allen were in the front seat and he (Bruton) was under the steering wheel. "* * * (T)he Patrolman saw Willie take off for the field and the Patrolman took off behind him and he taken the pistol and fired it into the air right behind him. The Patrolman was running after Willie through the field, shooting over his head. He shot up in the air once before he entered the cornfield. Reaves and Will (Allen) tried to get me to drive on and I wouldn't drive off because the Patrolman had put us under arrest. * * * I then got my raincoat out of the car and walked to the Patrolman's car and stayed right there at the patrol car. Will and Reaves drove off * * *."

Defendant Bruton further testified that he heard shots while he was standing by the parked patrol car on the highway a short time before defendant Smith came back out of the cornfield; that he asked Smith

why he ran from the Patrolman and that Smith said "he had been in prison for three years for driving without an operator's license." Defendant Bruton also testified that Smith told him that he and the Patrolman had "wrestled over the gun and it started going off and one of the bullets grazed his (the Patrolman's) arm or shoulder, like, and that was all." That he and Smith started walking toward Fayetteville when Smith decided to go home and they parted. Bruton continued to Fayetteville to do his shopping; he then returned home by bus where he was arrested later that night.

With respect to the chemicals found on the back of his left hand, Bruton testified that sometime during the night of 31 August 1964, he was arrested and put in the back seat of the officer's car with the defendant Smith and that his left hand was handcuffed to Smith's right hand and they were carred to jail in Raeford.

At the close of all the evidence, the defendant Bruton renewed his motion for a directed verdict of not guilty. The motion was again denied. From a verdict of guilty of murder in the first degree with the recommendation that his punishment be imprisonment in the State's Prison for life, and from the judgment entered pursuant thereto, the defendant Bruton appeals, assigning error.

Attorney General Bruton, Deputy Attorney General Harry W. McGalliard for the State.

H. F. Seawell, Jr., for defendant Bruton.

DENNY, C.J. The defendant's only exceptions and assignments of error are (1) to the failure of the court below to direct a verdict of not guilty at the close of the State's evidence; (2) in denying the renewal of the motion of the defendant for a directed verdict of not guilty; and (3) to the failure of the court below to set aside the verdict.

Upon a motion for judgment as of nonsuit or for a directed verdict at the close of the State's evidence, and renewed by the defendant after the introduction of his own evidence, all the evidence upon the whole record tending to sustain a conviction will be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *S. v. Kelly*, 243 N.C. 177, 90 S.E. 2d 241; *S. v. Kluckhohn*, 243 N.C. 306, 90 S.E. 2d 768; *S. v. Smith*, 237 N.C. 1, 74 S.E. 2d 291; *S. v. McKinnon*, 223 N.C. 160, 25 S.E. 2d 606.

The State concedes in its brief that the sole question presented on this appeal is whether or not there was enough evidence to go to the jury on the question of the defendant's guilt of murder in the first degree.

The State cites and quotes from *S. v. Redfern,* 246 N.C. 293, 98 S.E. 2d 322, as follows: "Where two persons aid or abet each other in the commission of a crime, both being present (either actually or constructively), both are principals and are equally guilty. *S. v. Holland,* 234 N.C. 354, 67 S.E. 2d 272; *S. v. Jarrell,* 141 N.C. 722, 53 S.E. 127.

" 'A person aids or abets in the commission of a crime within the meaning of this rule when he shares in the criminal intent of the actual perpetrator *(S. v. Oxendine,* 187 N.C. 658, 122 S.E. 568), and renders assistance or encouragement to him in the perpetration of the crime.' *S. v. Birchfield,* 235 N.C. 410, 70 S.E. 2d 5."

This Court, speaking through Higgins, J., in *S. v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431, said: "We are advertent to the intimation in some of the decisions involving circumstantial evidence that to withstand a motion for nonsuit the circumstances must be inconsistent with innocence and must exclude every reasonable hypothesis except that of guilt. We think the correct rule is given in *S. v. Simmons,* 240 N.C. 780, 83 S.E. 2d 904, quoting from *S. v. Johnson,* 199 N.C. 429, 154 S.E. 730: 'If there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury.' The above is another way of saying there must be substantial evidence of all material elements of the offense to withstand the motion to dismiss. It is immaterial whether the substantial evidence is circumstantial or direct, or both. * * *." The foregoing rule has been followed in *S. v. Horner,* 248 N.C. 342, 103 S.E. 2d 694; *S. v. Haddock,* 254 N.C. 162, 118 S.E. 2d 411; *S. v. Casper,* 256 N.C. 99, 122 S.E. 2d 805; *S. v. Thompson,* 256 N.C. 593, 124 S.E. 2d 728; and *S. v. Moore,* 262 N.C. 431, 137 S.E. 2d 812.

In analyzing the State's evidence, we find that notwithstanding Allen's statement to the effect that Bruton ran into the cornfield with Smith, the State's witness Wooten testified that he passed along Highway 401 on the afternoon in question and saw two colored men in the 1957 black Chevrolet and that he saw one man on the right-hand side of the patrol car; that he did not see a Patrolman there and did not see any other man. In describing the man who was standing beside the patrol car, he testified: "I could not say Bruton is the man I saw; it was a light skinned man like that." The State's evidence clearly shows that Reaves and Allen did not tarry long after Smith ran into the cornfield with the Patrolman following him.

The State introduced some thirty-five or forty witnesses in the trial below, and of the witnesses who testified that they passed along Highway 401 and saw the Patrolman talking to the occupants of the 1957

black Chevrolet, or that they saw a patrol car parked on the highway, each one of them either placed Bruton or a "light skinned man" talking to the Patrolman beside the Chevrolet or standing beside the patrol car. None of these witnesses testified that he or she saw the patrol car parked on the highway with no person near it. Without exception, these witnesses testified that Bruton was standing by or near the patrol car or that a "light skinned man" was at the patrol car.

The evidence further disclosed that when Mrs. Wyatt Upchurch drove along this highway and saw the dark skinned man coming out of the cornfield, she saw the light skinned man standing back of the patrol car. Mrs. Upchurch, it appears from the evidence, was the last witness to see the patrol car before it was driven into the woods.

Furthermore, if it be conceded that Bruton told the officers everything which they testified he did tell them, then Bruton was not placed in the cornfield until sometime after the four shots were fired and Smith had returned to the highway; that Patrolman Herbin was dead when Bruton saw him at the place where he was later found.

In the case of *S. v. Ham,* 238 N.C. 94, 76 S.E. 2d 346, this Court, in substance, held that in order to render one who does not actually participate in the commission of the crime guilty of the offense committed, there must be some evidence tending to show that he, by word or deed, gave active encouragement to the perpetrator or perpetrators of the crime, or by his conduct made it known to such perpetrator or perpetrators that he was standing by to render assistance when and if it should become necessary.

In *S. v. Birchfield,* 235 N.C. 410, 70 S.E. 2d 5, Ervin, J., speaking for the Court, said: "The mere presence of a person at the scene of a crime at the time of its commission does not make him a principal in the second degree; and this is so even though he makes no effort to prevent the crime, or even though he may silently approve of the crime, or even though he may secretly intend to assist the perpetrator in the commission of the crime in case his aid becomes necessary to its consummation. *S. v. Hart,* 186 N.C. 582, 120 S.E. 345; *S. v. Hildreth,* 31 N.C. 440, 51 Am. D. 369." See also *S. v. Burgess,* 245 N.C. 304, 96 S.E. 2d 54 and *S. v. Banks,* 242 N.C. 304, 87 S.E. 2d 558.

When the officers took Bruton to Smith's cell for the purpose of having him repeat a statement that Patrolman Williamson testified Bruton had made to him and Sheriff Barrington, Bruton requested permission to ask Smith some questions. Permission was granted; but when these officers realized that the questions asked by Bruton and the answer given by Smith tended to exculpate Bruton from having been with Smith in the cornfield, these officers stopped the questioning. Un-

der the circumstances, Bruton was fully justified in declining to make any further statements before Smith.

In the case of *S. v. Carter,* 254 N.C. 475, 119 S.E. 2d 461, this Court said: "When the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by these statements. *S. v. Todd,* 222 N.C. 346, 23 S.E. 2d 47; *S. v. Boyd,* 223 N.C. 79, 25 S.E. 2d 456; *S. v. Watts,* 224 N.C. 771, 32 S.E. 2d 348; *S. v. Ray,* 229 N.C. 40, 47 S.E. 2d 494." *S. v. Gaines,* 260 N.C. 228, 132 S.E. 2d 485.

Likewise, the State did not rebut, contradict, or in any manner seek to refute the testimony of the defendant to the effect that upon his arrest he was placed in the back seat of the officer's car and his left hand was handcuffed to Smith's right hand and they were carried from Pinehurst to Raeford in that condition. This constituted defendant's explanation of why he had certain chemicals on the back of his left hand.

On a motion to nonsuit, the defendant's evidence which explains or makes clear the evidence of the State may be considered. Strong's North Carolina Index, Vol. I, Criminal Law, § 99; *S. v. Nall,* 239 N.C. 60, 79 S.E. 2d 354; *S. v. Smith,* 237 N.C. 1, 74 S.E. 2d 291; *S. v. Bryant,* 235 N.C. 420, 70 S.E. 2d 186; *S. v. Sears,* 235 N.C. 623, 70 S.E. 2d 907.

On a motion for nonsuit, the foregoing rule also permits the consideration of defendant's evidence which rebuts the inference of guilt when it is not inconsistent with the State's evidence. *S. v. Oldham,* 224 N.C. 415, 30 S.E. 2d 318.

No one would attempt to minimize the atrocious and indefensible conduct of the person who murdered Patrolman Herbin. Even so, this defendant is entitled to his liberty unless the State's evidence was sufficient to support his conviction.

After a careful consideration of all the State's evidence, and so much of the defendant's evidence as it is permissible for us to consider on a motion for judgment as of nonsuit or for a directed verdict, we have concluded that the evidence against this defendant is insufficient to sustain the verdict rendered below. Therefore, the judgment entered by the court below is

Reversed.

PARKER, J., dissents.

TOMMY EDWARD HUGHES, BY HIS NEXT FRIEND, C. E. HUGHES v. PAUL DAVID VESTAL AND DONALD WAYNE VESTAL.

(Filed 2 June, 1965.)

1. Evidence § 24—

Even a competent public record or document must be properly identified, verified or authenticated by some recognized method before it may be introduced in evidence.

2. Automobiles § 38—

A chart or table of distances required to bring automobiles traveling at particular speeds to a stop, even though prepared by the Department of Motor Vehicles as an aid to driver education, is incompetent in evidence, even as a guide, to show at what distance the particular plaintiff could have stopped his car under the particular circumstances of the accident in suit.

3. Evidence § 16—

A chart of distances at which motor vehicles traveling at given speeds can be stopped is not competent in evidence as experimental evidence, since an experiment ordinarily involves the re-enactment of the occurrence under investigation under substantially similar circumstances, and must ordinarily be introduced in evidence by the testimony of the experimenter.

4. Evidence § 3—

While the courts may take judicial notice of reaction time of motorists and the distance at which a vehicle traveling at a given speed can be stopped, the courts can do so only within recognized judicial limits with respect to whether a particular result is possible or impossible as a matter of common knowledge, but the courts cannot take judicial notice of precise reaction times or stopping distances set forth in a chart or published table.

5. Same—

Matters of which a court will take judicial notice are necessarily uniform or fixed, and a disputable matter cannot be classified as common knowledge.

6. Appeal and Error § 4—

Where plaintiff's action is dismissed upon the jury's verdict answering the issues of negligence and contributory negligence both in the affirmative, defendant is not the party aggrieved by the judgment and may not appeal for the purpose of presenting his contention that the court erred in refusing to nonsuit plaintiff's action, but may appeal from nonsuit of his counterclaim against plaintiff.

7. Automobiles § 41f—

Evidence that defendant's car, headed west, was parked, with the parking lights burning, on the south side of the highway, extending 4 to 4½ feet onto the hard surface, that it could be seen some 300 feet to the west from which plaintiff approached, and that plaintiff's vehicle left skid marks for some 145 feet before impact in such manner as to indicate loss of control, and collided with defendant's car, *held* sufficient to be submitted to the jury on the issue of plaintiff's negligence upon defendant's counterclaim for damages to his car.

8. Automobiles § 9—

Stopping on a highway in violation of G.S. 20-161 is negligence *per se*, but whether such violation is the proximate cause of injury in a particular case is ordinarily a question for the jury.

APPEAL by plaintiff and defendant Donald Wayne Vestal from *McConnell, J.*, October 1964 Civil Session of DAVIDSON.

Action to recover damages resulting from a collision of automobiles.

This is plaintiff's version of the occurrence: About 10 minutes after midnight on 19 May 1963 plaintiff (17 years of age) was operating an Oldsmobile eastwardly on Cid Road (Rural Public Highway 2318) in Davidson County. It is an asphalt road, 16 feet wide. When, or just before, plaintiff reached the crest of a hill, he saw about 100 to 150 feet in front of him dim lights of another vehicle in his lane of travel; he couldn't tell at the moment whether the vehicle was standing, moving toward him or entering the highway. The hill obstructed his view until he was at or near its crest. Plaintiff's speed was 50 to 55 miles per hour (the speed limit at this point was 55); he applied brakes but could not stop in time to avoid collision. The Oldsmobile was equipped with power brakes in good condition; the tires were relatively new and had good tread. The right front of the Oldsmobile collided with the right front of the other vehicle, a Ford. The Ford had been parked and was standing on the south side of the highway, headed west, partly on the shoulder and extending 4 to 4½ feet onto the hardsurface. The shoulder at that point was 2 to 2½ feet wide. The Ford was registered in the name of Paul David Vestal. It had been parked there, in front of the home of Edsel Harris, by Donald Wayne Vestal (Donald), son of Paul David Vestal. Donald, age 23, was a member of his father's household. There was a private driveway leading from the highway into the Harris premises, the driveway was suitable for parking vehicles off the highway. As a result of the collision plaintiff suffered bodily injury.

Plaintiff instituted this action against the Vestals, father and son. He alleges that his injuries were caused by defendants' negligence, consisting of parking the Ford on the paved portion of the highway when it was practicable to park it off the highway, parking it without leaving an unobstructed width of 15 feet of pavement, parking it at a place where there was not an unobstructed view of the vehicle for 200 feet in both directions, and parking it on the south side of the highway headed west without proper lights.

Defendants' version: Donald had taken Doraleen Harris, daughter of Edsel Harris, to a movie. Upon their return, Donald had parked the Ford, parking lights on, in front of the walkway to the Harris home and as far on the shoulder as he could get. He did not park in the gravel driveway because Mrs. Harris was ill and the noise would dis-

turb her. Donald and Doraleen walked to the front porch and were talking. A car, going east, passed without incident. The weather was clear and the highway was dry. A few minutes later they heard the roar of the Oldsmobile approaching, going east also. There was no other traffic. Then they heard tires "squalling." The Oldsmobile skidded forward in an irregular course. ". . . the headlights (were shining) out in the woods like maybe the car was in a broadslide because the whole woods were lit up. He seemed to skid along like that, and then hit" the Ford. When the cars collided it "sounded like dynamite." The Ford was knocked backwards 36 feet and came to rest in the Harris yard. The Oldsmobile went 85 feet after the collision and stopped on the north side of the highway. After the collision tire marks were found leading from the Oldsmobile west 230 feet. From the point of collision these marks extended 145 feet west; they "swayed" in an irregular line — they "started off sort of swayed, and then swayed back across the road, sort of swaying mark." The marks began 50 feet or more west of the crest of the hill. By actual test, made later, the lights of a car, parked as the Ford was, could be seen a distance of 300 feet by a motorist approaching from the west. The highway is straight. Plaintiff lived a short distance from the place where the accident occurred and was familiar with the highway. Donald was employed and earned wages; he lived in the home of his father but paid board. Though the Ford was registered in his father's name, it was Donald's property. He bought it, paid for it, used it, and paid all expenses of operation and repair.

Defendants aver that plaintiff was contributorily negligent in that he was operating the Oldsmobile in excess of 55 miles per hour and at a speed greater than was reasonable and prudent and failed to keep a reasonable lookout and maintain proper control. Donald counterclaimed for damage to the Ford.

At the close of all the evidence the court sustained the motion of Paul David Vestal for nonsuit, and also plaintiff's motion for nonsuit of Donald's counterclaim. Issues were submitted to the jury with respect to plaintiff's cause of action against Donald. The jury found Donald negligent and plaintiff contributorily negligent. Judgment was entered dismissing plaintiff's action and Donald's counterclaim. Plaintiff and Donald appeal.

Walser, Brinkley, Walser & McGirt for plaintiff.

Jordan, Wright, Henson & Nichols and Hubert E. Olive, Jr., for defendant Donald Wayne Vestal.

MOORE, J. We first consider plaintiff's appeal.

Plaintiff contends that the court erred in the admission of certain evidence bearing on the contributory negligence issue. The jury resolved that issue against plaintiff, thereby precluding any recovery of damages by him. Defendant alleged, *inter alia*, that plaintiff's speed at the time he first became aware of the presence of the Vestal car was in excess of the maximum speed limit of 55 miles per hour. There was no specific testimony as to plaintiff's speed other than the testimony of plaintiff himself. Plaintiff fixed his speed at 50 to 55 miles per hour. There was, however, testimony that plaintiff's car left 230 feet of tire marks — 145 before reaching the point of collision, and 85 from that point to the place the car came to rest. For proof of excessive speed, defendants offered and the court admitted in evidence, over the objection of plaintiff, a chart entitled "Stopping Distance from Different Speeds with Good Brakes" — the back page of the 1959 "Driver's Refresher Handbook of Traffic Laws and Highway Safety," published by the North Carolina Department of Motor Vehicles. Plaintiff also objected to the following procedures: (1) Counsel for defendants, referring to the chart, stated to the jury, ". . . fifty miles per hour, driver sees danger, 55 feet driver's thinking distance; driver applies brakes 156 feet; vehicle braking distance, 211 feet; car stops here." (2) The court instructed the jury as follows:

> "The Court allowed the defendant to introduce in evidence the back page of the driver's license instruction book with which many of you are familiar. In two recent cases our Supreme Court referred to this manual, so this Court allowed it to be introduced into evidence; and the defendant brought out from a chart which appears therein which appears to show the average stopping speed under average conditions, including road conditions, tire conditions, car conditions, taking into consideration that as to a car with good brakes and different road conditions, the average stopping speed from braking time when driver first sees danger when traveling at fifty miles an hour was 211 feet, including 55 feet reaction time or thinking time of driver and getting his foot on the brakes, and 156 feet for braking time. I instruct you that you will consider this along with all the other evidence, remembering that this is just evidence as to the average that some persons have found and have put in this chart — the average distance that a car with good brakes would stop under average road conditions."

Plaintiff's objections were well taken; the chart is incompetent and its admission in evidence was clearly improper and prejudicial.

In the first place, no foundation was laid for the introduction of the chart. It was not identified, verified or authenticated by witnesses

or other recognized method. Stansbury: North Carolina Evidence (2d Ed.), §§ 153, 195, pp. 379-381, 512, 513. Furthermore, the chart does not qualify as an "experiment," as that term is ordinarily understood in the law of evidence. ". . . an experiment ordinarily involves the re-enactment of an occurrence under circumstances substantially similar to those which attended the actual occurrence, and for the experiment to be competent those attending circumstances must be understood and simulated with reasonable certainty . . . The experiment should speak for itself and be complete within itself. 'To be admissible in evidence . . . the result of the experiment must have a legitimate tendency to prove or disprove an issue arising out of such occurrence.'" *Service Co. v. Sales Co.*, 259 N.C. 400, 412, 131 S.E. 2d 9. An experiment is introduced in evidence by the testimony of the experimenter. Some courts have declared that reaction time or the distance required to stop a given vehicle at a given speed under given conditions of road surface is a proper matter for expert opinion. *Young v. Patrick*, 153 N.E. 623 (Ill.); *Knight v. Knight*, 324 P. 2d 797 (Wash.); *Mathews v. Carlson*, 130 S. 2d 625 (Fla.). There were no expert witnesses in the instant case and no one testified even by reference to the chart. An expert witness must be better qualified than the jury to draw appropriate inferences from the facts, and his testimony must be based on sufficient data. Stansbury (2d Ed.), § 132; *Service Co. v. Sales Co., supra.* Courts look with disfavor upon attempts to reconstruct traffic accidents by means of expert testimony, owing to the impossibility of establishing with certainty the many factors that must be taken into consideration. *Shaw v. Sylvester*, 253 N.C. 176, 116 S.E. 2d 351. However, in *State v. Gray*, 180 N.C. 697, 104 S.E. 647, expert testimony as to the distance within which a certain truck could be stopped when going at a certain rate of speed was held admissible. But, of course, an unauthenticated chart purporting to show absolute stopping distances is not expert "testimony" (evidence).

Without regard to the lack of proper formality in authenticating and presenting the information contained in the chart, we pass to the consideration of the information itself. The court charged that the chart "appears to show the average stopping speed under average conditions, including road conditions, tire conditions, (and) car conditions." Further: "I instruct you that you will consider this along with all the other evidence, remembering that this is just evidence as to the average that some persons have found and have put in this chart — the average distance that a car with good brakes would stop under average road conditions." Defendant-appellee contends that the court properly permitted the jury to consider the chart as a *guide.* There is nothing upon the face of the chart to indicate upon what data the stopping distances are

based or that it involves average conditions. But assuming that the stopping distances shown are the result of average conditions, we are at a loss to perceive how they would furnish *guidance* in a particular case. The chart shows nothing but rates of speed, reaction time and braking distances. It does not indicate what an average driver, car, tire, brake or roadway is. What are the characteristics of the average driver? What is the weight of the average motor vehicle? What is an average tire? What kind and in what condition are "good" brakes? What is the composition and condition of an average roadway? The chart does not answer these questions. It furnishes no specific standards by which the facts of a particular case may be evaluated. The parties have had no opportunity to examine and cross-examine those who furnished the data and made the chart to determine its relevancy, if any, to the facts in the case under consideration.

The weight of authority is that charts and tables of stopping distances are incompetent and inadmissible. Such charts are, we assume, based upon experiments conducted by many different motor vehicles and drivers at different times and places. The information contained in the charts is undoubtedly of value in driver education. But in courts of law it is pure hearsay. The factors involved in stopping automobiles are so many and varied that a fixed formula is of slight, if any, value in a given case. The weight of the vehicle, type and condition of tire tread, type and condition of brakes, force with which brakes are applied, type and condition of roadways, and differences in reaction time among individual drivers, are some of the variable factors. A formula, in which so many components are variables and in which there is only one constant (rate of speed), cannot by projection of a positive result (distance), based on speculative averages, be of sufficient accuracy and relevancy to rise of its own force to the dignity of evidence in an actual set of circumstances. This and its hearsay character have led to its rejection as evidence in a large majority of the jurisdictions where the question has been directly raised. *Muse v. Page,* 4 A. 2d 329 (Conn); *McDonald v. Mulvihill,* 202 A. 2d 213 (N.J.); *Smith v. Hardy,* 88 S.E. 2d 865 (S.C.); *Breshears v. Myers,* 266 S.W. 2d 638 (Mo.); *Tuite v. Union Pacific Stages,* 284 P. 2d 333 (Ore.); *Lemons v. Holland,* 286 P. 2d 656 (Ore.); *Thedorf v. Lipsey,* 237 F. 2d 190 (CC, 7C). However, there are decisions to the contrary. *Steffes v. Farmers Mutual Auto. Ins. Co.,* 96 N.W. 2d 501 (Wis.); *Mainz v. Lund,* 119 N.W. 2d 334 (Wis.). There are also some cases in which the tables have had appellate application or have been referred to with intimation of approval. *Dupre v. Union Producing Co.,* 49 S. 2d 655 (La.); *Wilson v. Williams,* 82 S. 2d 71 (La.); *Autrey v. Swisher,* 155 F. 2d 18 (CC, 5C).

We adopt the majority view and hold that the published tables of stopping distances are inadmissible.

The effect of the ruling of the judge below was to take judicial notice of the information contained in the chart. In a great majority of cases, in which the problem has been presented, the courts have ruled in favor of taking judicial notice of reaction time and stopping distance. But in the overwhelming majority of these cases the courts declined to take judicial notice of precise reaction time or stopping distance; they took notice only "within judicially recognized limits," *e.g.,* that a car travelling at 5 to 10 miles per hour when 30 to 40 feet from a railroad crossing "could have been stopped almost instantly," *Jeffries v. Powell,* 221 N.C. 415, 20 S.E. 2d 561, and that a car travelling at 33 miles per hour could have been stopped within 480 feet, *Reece v. Reed,* 326 S.W. 2d 67 (Mo.). There are a few cases in which the courts have taken judicial notice of precise stopping distances set out in published tables. See *Rodi v. Florida Greyhound Lines, Inc.,* 62 S. 2d 355 (Fla.); *Goldsmith v. St. Paul Mercury Indem. Co.,* 123 S. 2d 797 (La.). For an exhaustive discussion of the problem of judicial notice of reaction time and stopping distances, see "Anno: Evidence — Car — Stopping Distance," 84 A.L.R. 2d 979-990.

We hold that it was improper for the court to take judicial notice of the information contained in the chart presented in this action. "Courts take judicial notice of subjects and facts of common and general knowledge." *Dowdy v. R. R.,* 237 N.C. 519, 75 S.E. 2d 639. A matter is the proper subject of judicial notice only if it is "known," well established and authoritatively settled. Matters of which a court will take judicial notice are necessarily uniform or fixed and do not depend on uncertain testimony. A disputable matter cannot be classified as common knowledge and will not be judicially recognized. *McCoy v. Gilbert,* 169 N.E. 2d 624, 84 A.L.R. 2d 964 (Ohio) — dealing with the problem of judicial notice of tables of stopping distances.

In Virginia there is a statute providing that courts shall take judicial notice of a table of speed and stopping distances (set out in the statute), but that the table raises no presumptions. The statute also requires the courts to take notice that the table is "the result of experiments made with motor vehicles, unloaded except for the driver, equipped with four wheel brakes, in good condition, on dry, hard, approximately level stretches of highway free from loose material." Code of Va., § 46.1 — 195. We have in North Carolina no such legislative sanction or requirement.

The trial judge states in the charge that "In two recent cases our Supreme Court referred to this (Driver's Refresher) manual." He concluded therefrom, we presume, that the chart in question was compe-

tent evidence and a proper subject of judicial notice. Defendant-appellee asserts that we have so ruled. It is true that this Court has in a few cases made casual reference to stopping-distance tables. *Brown v. Hale,* 263 N.C. 176, 139 S.E. 2d 210; *Clayton v. Rimmer,* 262 N.C. 302, 304, 136 S.E. 2d 562; *Ennis v. Dupree,* 262 N.C. 224, 229, 136 S.E. 2d 702. The references were rhetorical and illustrative rather than judicial notice to support decision. In none of the cases has the information contained in the indicated table formed the controlling or even a significant collateral basis for decision. These cases may be construed, perhaps, to fall within that class of cases in which judicial notice of stopping distance is taken "within judicially recognized limits," not of precise stopping distances. See *Burgess v. Mattox,* 260 N.C. 305, 132 S.E. 2d 577. The references may have been misleading. But we now make it clear that such tables are not admissible as evidence in the trial of cases and are not proper subjects of judicial notice for the purposes of trials of cases in Superior Court.

There must be a new trial of plaintiff's cause of action.

We now consider the appeal of defendant, Donald Wayne Vestal. It raises two questions: (1) Did the court err in overruling said defendant's motion for nonsuit of plaintiff's action; (2) did the court err in sustaining plaintiff's motion for nonsuit of said defendant's counterclaim?

(1) Plaintiff contends that the judgment below was favorable to defendant-appellant, he is not aggrieved by the judgment and his appeal should be dismissed. It is well settled that when a judgment is favorable to a party and he does not desire a new trial or modification of the judgment, his appeal based on some supposed error in the trial will be dismissed. *Teague v. Power Co.,* 258 N.C. 759, 129 S.E. 2d 507; *Hooper v. Casualty Co.,* 233 N.C. 154, 63 S.E. 2d 128; *McCullock v. Railroad,* 146 N.C. 316, 59 S.E. 882.

As stated above, there must be a new trial of plaintiff's cause of action. The retrial will proceed upon all of the issues raised by the pleadings — negligence, contributory negligence and damages. The evidence may not be the same as that adduced at the first trial. Defendant-appellant may at the proper time, if he is so advised, move for and have considered his motion for nonsuit. A decision as to whether, on the present record, the evidence makes out a *prima facie* case of actionable negligence as against the said defendant would serve no useful purpose. As to plaintiff's cause of action, defendant-appellant is not aggrieved.

(2) On the other hand, the judgment below is adverse to defendant-appellant on his counterclaim, and as to his cause of action stated in the counterclaim he desires a trial and a favorable judgment. In our opinion the court below erred in nonsuiting his counterclaim. The evi-

dence in the present record will permit, but not compel, a jury to find facts and draw inferences as follows: Defendant-appellant was the owner of the Ford which he parked in front of the Harris home. Plaintiff, had he been keeping a reasonable lookout, could have seen the Ford during the last 300 feet of his approach. He did not apply his brakes or attempt to bring the car he was driving, Oldsmobile, under control until he was 145 feet from the Ford. He was operating the Oldsmobile at a speed greater than was reasonable and prudent under the circumstances and could not bring it under control even by applying brakes. He skidded from side to side, out of control, and collided with and damaged the Ford. Had he maintained control, there was ample space on the hardsurface for him to pass the Ford to the left thereof. There was no other traffic to interfere with his operation. A vehicle, which proceeded in the same direction as plaintiff, had, a few minutes before, passed in safety and without incident. It is true that the violation of the statute relating to "Stopping on Highway," G.S. 20-161, is negligence *per se*. But whether such violation is the proximate cause of injury in a particular case is ordinarily a question for the jury. *Barrier v. Thomas and Howard Co.*, 205 N.C. 425, 171 S.E. 626; *Burke v. Coach Co.*, 198 N.C. 8, 150 S.E. 636. Under the circumstances disclosed by the record, it is a jury question in the instant case.

The court allowed the motion of defendant, Paul David Vestal, for nonsuit. Neither plaintiff nor defendant-appellant appeals from this ruling. It will, therefore, not be disturbed.

On plaintiff's appeal —

New trial.

On defendant-appellant's appeal — Nonsuit of Counterclaim —

Reversed.

STATE v. PATRICIA McLAWHORN PHILLIPS.

(Filed 2 June, 1965.)

1. Homicide § 13—

Defendant's contention that the fatal shooting of deceased was purely an accident is not an affirmative defense but is a denial of guilt, and therefore places no burden upon defendant but leaves the burden upon the State to show beyond a reasonable doubt all the essential elements of the offense, including intent, and the presumptions arising from the use of a deadly weapon do not obtain unless and until the jury finds beyond a reasonable doubt that defendant intentionally shot deceased.

2. Homicide § 23—

Where defendant contends that the fatal shooting of deceased was purely accidental, an instruction to the effect that if the jury found beyond a reasonable doubt that defendant intentionally shot deceased with a deadly weapon defendant would be guilty of murder in the second degree unless defendant established to the satisfaction of the jury that the killing was the result of misadventure or accident, must be held for prejudicial error.

3. Homicide § 31—

Where defendant on appeal from a conviction of voluntary manslaughter contends that the fatal shooting of deceased was purely accidental and involved no negligence on her part, an instruction placing the burden upon defendant to exculpate herself upon the grounds of accident must be held for prejudicial error, even though the instruction related to the question of defendant's guilt of murder in the second degree, since the erroneous instruction upon the question of accidental killing was prejudicial upon the question of whether the killing was the result of culpable negligence or was purely accidental in the legal sense.

APPEAL by defendant from *Johnson, J.*, January 1965 Criminal Session of DURHAM.

Defendant was tried upon an indictment charging her with the first-degree murder of her husband, Harry E. Phillips. The State elected not to seek a conviction of the capital crime. The jury returned a verdict of guilty of voluntary manslaughter. From the prison sentence imposed, defendant appeals, assigning numerous errors.

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

Arthur Vann and Everett, Everett & Everett for defendant appellant.

SHARP, J. About 9:00 p.m. on October 23, 1964, defendant killed her husband with one shot from a pistol as he sat in the driver's seat of an automobile parked in the driveway of their home. The deceased was drunk.

The State's evidence, ample to withstand defendant's motions for nonsuit, tends to show that defendant shot the deceased when he pushed her out of the automobile as she attempted to get in it. A deputy sheriff testified that when he arrived in response to a call defendant said to him, "I shot my husband and you can do what you please with me, I don't give a G - - d - - -"; that she said he would not let her do what she wanted to do, so she shot him; that she said, "You can carry me to jail, do whatever you please." So far as the record discloses, defendant made this statement spontaneously without any questioning by

the officer. The next morning the sheriff visited her in jail. He testified as follows:

> "The next morning I told her, I said, 'Mrs. Phillips, I want to ask you a few questions.' And I said, 'You know what you tell me I can use it against you.' And she said 'I understand that.' And she said, 'What do you want to know about it?' I said, 'What did happen last night at your house?' She said most of the day they were drinking, she had some, and said Phillips was drunk, and said she was going out on the Fayetteville Road something around 8:45 or 9:00 o'clock to see a man there on the Fayetteville Road. She said she went out to the car and Phillips was sitting in the car, the company's car, and when she started in Phillips threw his hands up and pushed her out and she said she shot him. That was all there was to it."

Defendant, without assigning any reason whatever, objected and excepted to the admission of the testimony of both the sheriff and the deputy sheriff. To be sure, this evidence was relevant, and no reason appears why it was not competent. The statements were freely and voluntarily made. Defendant was told that anything she said might be used against her. *State v. Upchurch, ante,* 343, 141 S.E. 2d 528; *State v. Egerton, ante,* 328, 141 S.E. 2d 515. Whether defendant was then represented by counsel the record does not disclose. The matter of counsel was not mentioned. It is implicit in this evidence, however, that defendant knew of her right to counsel. One of her character witnesses, an attorney of many years' experience, testified that he had represented her previously.

Defendant's evidence tends to show: She acquired the pistol for protection during the absence of her husband, a traveling salesman, from home. It had been registered with the Clerk of the Superior Court since December 30, 1953. Because of prowlers in the vicinity she never leaves the house after dark without the pistol. Her lot abuts upon a railroad track at the rear, and a number of large trees make the premises dark. On the night in question she put the pistol in her pocketbook when she left the house to go to her daughter's. Outside, she was surprised to find her husband in the car. She told him he had had too much to drink to drive and reached over to take the keys from the car. He shoved her backward, but she continued her efforts to get the keys. He jerked her violently, and she fell forward onto him. She did not hear the gun go off, but immediately observed him go limp. She straightway went into the house and said to her daughter, "Honey, there's been a terrible accident. Our daddy's been shot. Call an ambulance and the sheriff."

Defendant does not rely on self-defense. She contends that the shooting was entirely accidental. She testified: "I am not contending or saying that I shot Harry in self-defense. If I pulled that trigger I know nothing about it."

The trial judge charged the jury, *inter alia,* as follows:

"(W)hen 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, legal provocation that will rob the crime of malice and thus reduce it to manslaughter, or that *will excuse it altogether upon the ground of* self-defense, *accident or misadventure.*" (Except for the use of the word *intentional* in the first line, this portion of the charge is taken almost verbatim from the opinion in *State v. Benson,* 183 N.C. 795, 111 S.E. 869.)

* * *

"Now, members of the jury, when you come to consider the guilt or innocence of the defendant on the charge of murder in the second degree, the Court instructs you that you must ask yourselves first these questions: First, did the deceased, Harry Phillips, die as a result of any wound received by him on the occasion in question? Second, did the defendant, Patricia McLawhorn Phillips, shoot and kill the deceased, Harry Phillips? Third, did she kill him intentionally and did she kill him with a deadly weapon? If the State has satisfied you from the evidence and beyond a reasonable doubt that each and every one of these questions should be answered 'Yes,' then it would be your duty to return a verdict of guilty of murder in the second degree, *unless the defendant has established to your satisfaction from the evidence offered by her, or from the evidence offered against her, the legal provocation* which would take from the crime the element of malice and reduce it to manslaughter or *which would excuse her altogether on the grounds of misadventure.* (Assignment 81)

"So, if the State has satisfied you from the evidence and beyond a reasonable doubt that on the night of October 23, 1964, the defendant intentionally shot and killed the deceased, Harry Phillips, that she killed him with a deadly weapon, then the defendant would be guilty of murder in the second degree, and it would be your duty to return that as your verdict if the State has so satisfied you beyond a reasonable doubt, *unless,* as I have heretofore said, *the defendant, Mrs. Phillips, has established to your satis-*

faction the legal provocation which will take from the crime the element of malice or *which would excuse her altogether upon the grounds of misadventure or accident.*" (Assignment 82).

A defendant's assertion that a killing with a deadly weapon was accidental is in no sense an affirmative defense shifting the burden of proof to him to exculpate himself from a charge of murder. On the contrary, it is merely a denial that the defendant has committed the crime, and the burden remains on the State to prove an intentional killing, an essential element of the crime of murder, before any presumption arises against the defendant. (Of course, accident will be no defense to a homicide committed in the perpetration of or in the attempt to perpetrate a felony. G.S. 14-17.) To hold otherwise would impose conflicting burdens of proof on the same issue and create two irreconcilable rules pertaining to the same matter. The charge here, in effect, recognizes an intentional accident — an impossibility. In accident "the will observes a total neutrality, and does not co-operate with the deed; which therefore wants one main ingredient of a crime." 4 Blackstone, Commentaries 26 (12th Ed., Christian's, London, 1795). Manifestly, if the State has satisfied the jury beyond a reasonable doubt that the shooting was intentional, a defendant could not thereafter establish to the satisfaction of the jury that it was accidental. In addition to posing a practical and a logical impossibility, the charge robbed defendant of the presumption of innocence and the benefit of the requirement that the State prove each and every element of the offense. *State v. Dallas,* 253 N.C. 568, 117 S.E. 2d 415; *State v. Cephus,* 239 N.C. 521, 80 S.E. 2d 147.

" 'Where the death of a human being is the result of accident or misadventure, in the true meaning of the term, no criminal responsibility attaches to the act of the slayer. Where it appears that a killing was unintentional, that the perpetrator acted with no wrongful purpose in doing the homicidal act, that it was done while he was engaged in a lawful enterprise, and that it was not the result of negligence, the homicide will be excused on the score of the accident.' 26 Am. Jur., Homicide, § 220, p. 305. The negligence referred to in the foregoing rule of law has been declared by this Court to mean something more than actionable negligence in the law of torts. It imports wantonness, recklessness or other conduct, amounting to culpable negligence." *State v. Faust,* 254 N.C. 101, 112, 118 S.E. 2d 769, 776. (The Court used this language in *Faust* in holding that there was no evidence of an accidental killing; it was not speaking directly to the problem of whether accident is a matter in denial or in affirmative defense.)

"The plea of accidental homicide, if indeed it can be properly called a plea, is certainly not an affirmative defense, and therefore does not impose the burden of proof upon the defendant, because the State cannot ask for a conviction unless it proves that the killing was done with criminal intent." *State v. Ferguson,* 91 S.C. 235, 244, 74 S.E. 502, 505. "It is the duty of the State to allege and prove that the killing, though done with a deadly weapon, was intentional or willful. * * * (T)he claim that the killing was accidental goes to the very gist of the charge, and denies all criminal intent, and throws on the prosecution the burden of proving such intent beyond a reasonable doubt." *State v. Cross,* 42 W. Va. 253, 258, 24 S.E. 996, 997. *Accord, State v. Matheson,* 130 Iowa 440, 103 N.W. 137; *State v. Budge,* 126 Me. 223, 137 Atl. 244, 53 A.L.R. 241; *State v. Hazlett,* 16 N.D. 426, 113 N.W. 374; *State v. Lindsey,* 68 S.C. 276, 47 S.E. 389; *Hardin v. State,* 57 Tex. Crim. 401, 123 S.W. 613; 26 Am. Jur., Homicide §§ 106, 290 (1940); 40 C.J.S., Homicide § 196 (1944).

This Court clearly recognized these principles in *State v. Williams,* 235 N.C. 752, 71 S.E. 2d 138, a case in which the defendant, pleading accident, was convicted of second-degree murder. Speaking through Valentine, J., this Court said:

> "An intent to inflict a wound which produces a homicide is an essential element of murder in the second degree. (Citations) Therefore, to convict a defendant of murder in the second degree, the State must prove that the defendant intentionally inflicted the wound which caused the death of the deceased.
>
> "When it is made to appear that death was caused by a gunshot wound, testimony tending to show that the weapon was fired in a scuffle or by some other accidental means is competent to rebut an intentional shooting. *No burden rests on the defendant.* He merely offers his evidence to refute one of the essential elements of murder in the second degree. If upon a consideration of all the testimony, including the testimony of the defendant, the jury is not satisfied beyond a reasonable doubt that the defendant intentionally killed deceased, it should return a verdict of not guilty of murder in the second degree." *Id.* at 753, 71 S.E. 2d at 139. (Italics ours.)

The opinion in *State v. Williams, supra,* makes no reference to *State v. Haywood,* 61 N.C. 376, or to *State v. Keever,* 177 N.C. 114, 97 S.E. 727, two cases *contra,* which hold that the burden is on the defendant to prove accident. In *State v. Haywood, supra,* the defendant contended that he shot the deceased accidentally because the lock on the gun was out of order. Affirming a death sentence, the Court said, *per* Pearson,

C.J., "(T)he *onus* of proof (of accident) lay upon the prisoner, the killing by him having been proven." *Id.* at 378. In *State v. Keever, supra,* the defendant was charged with the murder of two persons who died from drinking wood alcohol contained in bottled cream soda the defendant had sold them. Brown, J., speaking for the Court, said, "If the liquid he (defendant) was dispensing contained it (wood alcohol), as the undisputed evidence tends to show, it was incumbent on defendant to satisfy the jury that he did not put poison in the liquid and did not know it was there when he sold it. This was a fact exclusively within his own knowledge." *Id.* at 116, 97 S.E. at 728. The opinion quotes with approval the following statement from Foster's Crown Law:

> "In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner unless they arise out of the evidence produced against him, for the law presumeth the fact to have been founded in malice until the contrary appeareth; and very right it is that the law should so presume."

Citing *State v. Davis,* 175 N.C. 723, 95 S.E. 48, Brown, J., reasoned that the principle of law governing a killing by poison was similar to that relating to a killing with a deadly weapon. In *Davis,* Walker, J., had written:

> "It is a familiar rule that when the State has shown that the defendant killed the deceased with a deadly weapon the burden shifts to him, and he must satisfy the jury as to any matters of mitigation or excuse, or the jury should convict him of murder in the second degree, as the law in such a case implies the malice." *Id.* at 728, 95 S.E. at 50.

Similar statements omitting the requirements that the State prove, or that the defendant admit, an *intentional* killing before any presumptions arise against him are to be found in our earlier reports. *E.g., State v. Robinson,* 188 N.C. 784, 125 S.E. 617; *State v. Benson,* 183 N.C. 795, 111 S.E. 869; *State v. Rowe,* 155 N.C. 436, 71 S.E. 332; *State v. Cox,* 153 N.C. 638, 69 S.E. 419; *State v. Fowler,* 151 N.C. 731, 66 S.E. 567; *State v. Worley,* 141 N.C. 764, 53 S.E. 128; *State v. Clark,* 134 N.C. 698, 47 S.E. 36; *State v. Willis,* 63 N.C. 26; *State v. Haywood, supra.*

Intervening, however, among the above decisions, which omit the requirement that the killing be intentional, are many others which restrict the presumptions of malice and unlawfulness against a defendant to an intentional killing with a deadly weapon. *E.g., State v. Pasour,* 183 N.C. 793, 111 S.E. 779; *State v. Lane,* 166 N.C. 333, 81 S.E. 620; *State v. Quick,* 150 N.C. 820, 64 S.E. 168; *State v. Brittain,* 89 N.C. 481.

"When it is proved that one has killed *intentionally,* with a deadly weapon, the burden of showing justification, excuse, or mitigation is on him." Pearson, C.J., in *State v. Ellick,* 60 N.C. 450, 459 (Italics ours.) *(Cf. State v. Haywood, supra.)*

Since *State v. Gregory,* 203 N.C. 528, 166 S.E. 387 (a case in which the State's evidence tended to show that deceased's death was caused by the accidental discharge of a shotgun), the rule has been firmly established in our criminal jurisprudence that "the presumptions that a homicide was unlawful and done with malice do not arise against the slayer in a prosecution for homicide unless he admits or the State proves that he intentionally killed the deceased with a deadly weapon." *State v. Phillips,* 229, 538, 539, 50 S.E. 2d 306, 306; *accord, State v. Wagoner,* 249 N.C. 637, 107 S.E. 2d 83; *State v. Crisp,* 244 N.C. 407, 94 S.E. 2d 402; *State v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322; *State v. Burrage,* 223 N.C. 129, 25 S.E. 2d 393; *State v. Keaton,* 206 N.C. 682, 175 S.E. 296.

Since *State v. Gordon, supra,* it has likewise been clear that:

> "(T)he expression, *intentional killing,* is not used in the sense that a specific intent *to kill* must be admitted or established. The sense of the expression is that the presumptions arise when the defendant *intentionally assaults* another with a deadly weapon and thereby proximately causes the death of the person assaulted. . . . A specific intent *to kill,* while a necessary constituent of the elements of premeditation and deliberation in first degree murder, is not an element of second degree murder or manslaughter. The intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives rise to the presumptions . . . The presumptions do not arise if an instrument, which is *per se* or may be a deadly weapon, is not intentionally used as a weapon, *e.g.* from an accidental discharge of a shotgun." *Id.* at 358, 85 S.E. 2d at 323. (Citations omitted.)

Even after *State v. Gregory, supra,* the Court continued to quote the statement of Stacy, J. (later C.J.), in *State v. Benson, supra*:

> "The law then (after the State makes out a *prima facie* case of murder in the second degree) 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." Id.* at 799, 111 S.E. at 871. (Citations omitted; emphasis ours.)

E.g., State v. Matthews, 263 N.C. 95, 138 S.E. 2d 819; *State v. Wagoner, supra; State v. Burrage, supra; State v. Howell,* 218 N.C. 280, 10 S.E. 2d 815; *State v. Keaton, supra.* In these cases, however, as in *Benson* itself, the full implications of the statement with reference to accident or misadventure were not discussed or noticed. The statement was not the point on which the decision turned. The above statement, insofar as it relates to accident or misadventure, is disaproved. It could be correct only if a presumption of guilt arose against a defendant from the mere fact that he had killed deceased with a deadly weapon. It follows that the cases of *State v. Keever, supra,* and *State v. Haywood, supra,* are overruled. Of course, the circumstances of a killing alone are frequently sufficient to establish that it was intentionally done. For instance, if *A* should walk up to *B* on a public street, pull out a pistol and shoot him dead, the clear inference, nothing else appearing, would be that *A* intended to kill *B.*

It results that the following portion of his Honor's charge, assignment of error 82, as well as assignment of error 81, contains a fundamental error:

> "If the State has satisfied you beyond a reasonable doubt that . . . defendant *intentionally* shot and killed deceased . . . defendant would be guilty of murder in the second degree . . . *unless . . . the defendant, Mrs. Phillips, has established to your satisfaction the legal provocation which* will take from the crime the element of malice or which *would excuse her altogether upon the ground of misadventure or accident.*"

His Honor erroneously put defendant's assertion of accidental killing in the same class with a plea of self-defense or killing in the heat of passion, both affirmative defenses, which, it is true, a defendant must prove to the satisfaction of the jury. *State v. Beachum,* 220 N.C. 531, 17 S.E. 2d 674. Although assignments of error 81 and 82 relate to the charge on second-degree murder and not voluntary manslaughter, of which defendant was convicted, yet we cannot say that those portions of the charge which imposed on defendant an erroneous burden of proof as to the charge of second-degree murder did not adversely affect her entire defense of accidental shooting. Defendant contends that the killing of her husband was an accident in the strictest meaning of the term and involved no negligence on her part. *In this sense* accident was relevant to the charge of involuntary manslaughter. It was not relevant as a denial of an intentional killing, since intent is not an element of involuntary manslaughter. Assignments of error 81 and 82 are sustained.

With reference to involuntary manslaughter, the court charged:

"In this connection, members of the jury, you will ask yourselves these questions. First, did the deceased, Harry Phillips, die as a result of any wound inflicted upon him by the defendant on the occasion in question? Second, did the defendant shoot and kill the deceased? *Third, did she kill him unintentionally? That is to say, if you do not find from the evidence and beyond a reasonable doubt that such killing was intentional but you find from the evidence and beyond a reasonable doubt that it was unintentional, was the defendant, Mrs. Phillips, culpably and criminally negligent in the manner in which she held and had the pistol there with her on the occasion in question?* And was such negligence on her part, if any you find, the proximate cause of the injury and death of the deceased? *Now, if you find from the evidence and beyond a reasonable doubt, members of the jury, that the truth requires an affirmative answer to each and every one of these questions, then it would be your duty to find the defendant guilty of involuntary manslaughter.*" (Assignment 84).

In its relation to the rest of the charge, the jury could easily have understood this instruction to require the defendant not only to show *accident* but also to show it beyond a reasonable doubt, a compound error. Its mischief, as it relates to involuntary manslaughter, is that as to that crime intent was not an issue. The only question was whether defendant had been culpably negligent. "It seems that, with few exceptions, it may be said that every unintentional killing of a human being proximately caused by a wanton or reckless use of firearms, . . . is involuntary manslaughter." *State v. Foust,* 258 N.C. 453, 459, 128 S.E. 2d 889, 893; *accord, State v. Brooks,* 260 N.C. 186, 132 S.E. 2d 354; *State v. Honeycutt,* 250 N.C. 229, 108 S.E. 2d 485; *State v. Kluckhohn,* 243 N.C. 306, 90 S.E. 2d 768; *State v. Trollinger,* 162 N.C. 618, 77 S.E. 957; *State v. Limerick,* 146 N.C. 649, 61 S.E. 568.

Since there must be a new trial, we deem any discussion of the other assignments of error unnecessary.

New trial.

STATE v. ALBERT (ALTON) E. BARNES, PETITIONER.

(Filed 2 June, 1965.)

1. Constitutional Law § 1—

The Supreme Court of North Carolina is the supreme arbiter in the construction of the State Constitution and laws but must accept the interpre-

tation of the Supreme Court of the United States with regard to a defendant's rights under the Federal Constitution; nevertheless, Federal Courts inferior to the United States Supreme Court have no authority to review and reverse the decisions of the State Supreme Court, even in regard to questions arising under the Federal Constitution.

2. Criminal Law § 71—

A free and voluntary confession is admissible in evidence.

3. Same—

It is not required that a statement be volunteered in order to be voluntary.

4. Same—

When the findings of fact by the trial court with regard to the voluntariness of a confession are supported by competent evidence they are conclusive on appeal to the courts, both State and Federal, although the conclusions of law to be drawn from the facts found are not binding on the reviewing courts.

5. Same—

Where defendant challenges the voluntariness of a confession it is the duty of the trial court, in the absence of the jury, to make a full investigation, record the evidence, and find the facts in regard to the circumstances surrounding the making of the incriminating statements in order that its conclusions as to whether the confession was free and voluntary may be reviewed and the prisoner's rights protected under both the State and Federal Constitutions, and when the court admits a confession in evidence over defendant's objection without setting forth the predicate facts, a new trial must be awarded.

PARKER, J., concurring in result.

ON *certiorari* to review the trial and conviction of Alton E. Barnes, before *Bundy, J.*, at the February, 1964 Session, ONSLOW Superior Court.

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

Earl Whitted, Jr., Samuel S. Mitchell for defendant appellant.

HIGGINS, J. On October 3, 1961, the Grand Jury returned a bill of indictment against the defendant, Alton E. Barnes, Robert E. Elliott, and James A. Andrews, charging that on September 23, 1961, the above named "unlawfully, wilfully, maliciously, and feloniously did injure the home of Robert E. Christenbury and wife . . . situate near the Rifle Range Road, by use of a high explosive, to-wit: a hand grenade. . . ."

Both Barnes and Christenbury were members of the United States Marine Corps in active service. Barnes was arrested by the Marine Corps authorities and on September 29, 1961, was turned over to the Sheriff of Onslow County for prosecution in the State court. The defendant and his family made an unsuccessful effort to employ counsel. He was not afforded a preliminary hearing. On the day following the return of the indictment the case was called for trial. According to the record, Elliott and Andrews, represented by counsel, entered pleas of *nolo contendere*. Barnes, without counsel, entered a plea of not guilty. At the conclusion of the State's evidence a verdict of not guilty was directed by the court on the charges against Elliott and Andrews. They were released. The defendant Barnes then entered a plea of guilty. From a sentence of 20 years in the State's prison, he did not appeal.

On November 2, 1962, Barnes filed a petition before the Superior Court of Onslow County for a Post Conviction Hearing, upon the ground his constitutional rights were denied him in the following particulars: (1) He was not given a preliminary hearing. (2) He was not represented by counsel. (3) He was placed on trial the day after the indictment was returned. (4) The two codefendants were represented by counsel and that he alone was without counsel and in this predicament he entered a plea of guilty because of "his lack of legal knowledge to cope with the legal machination in which he was involved." After a hearing on February 6, 1963, Judge Mintz concluded:

> "2. That it does not appear from the records that the rights guaranteed under the Constitution of the United States or the State of North Carolina, or both, were prejudiced by the fact that the defendant in this case did not have a preliminary hearing or that he was tried on the same day a bill of indictment was returned against him.
>
> "3. That the petitioner has failed to show that there was a substantial denial of the constitutional rights of the petitioner in the original criminal action in which he was convicted."

This Court, on April 16, 1963, denied the defendant's application for *certiorari* to review the Post Conviction Hearing. The Supreme Court of the United States granted *certiorari* and on October 14, 1963, vacated our order of April 16, 1963, and remanded the cause to us for further consideration in the light of the decision in *Gideon v. Wainwright*, 372 U.S. 335. Upon further consideration, this Court set aside the verdict of guilty, vacated the judgment, and remanded the cause to the Superior Court for a new trial. *State v. Barnes*, 260 N.C. 775, 133 S.E. 2d 680.

The new trial began on February 27, 1964. After the defendant's plea of not guilty, Judge Bundy conducted a preliminary inquiry, in the

absence of the jury, to determine whether SBI Agent John B. Edwards should be permitted to testify before the jury as to certain incriminating admissions the defendant made to him a few minutes before the first trial began. At the time of the statements the defendant was in custody. His efforts to employ counsel had been unsuccessful. The Grand Jury had returned the indictment on the previous day. The witness Edwards told the defendant the trial was to begin immediately. The defendant knew the codefendents were represented by counsel. In this situation he entered his plea of not guilty. The State offered evidence, including the defendant's admission of guilt made to Agent Edwards. At this juncture the defendant changed his plea to guilty. From prison he initiated procedures which culminated in our order for a new trial.

After the defendant had entered his plea of not guilty at the *new trial,* the Presiding Judge (Bundy) in the absence of the jury, heard evidence concerning the circumstances under which the defendant's admissions were made to the witness Edwards. By stipulation, Judge Bundy took into account the court record of the evidence on the same question presented before Judge Mintz at the Post Conviction Hearing. This evidence is voluminous. Some of it, on essential points, was conflicting. The present record leaves the conflict unresolved. Judge Bundy should have found the facts under which the incriminating statements were made. This he failed to do. In the absence of findings of fact, we are unable to determine whether the confession was properly admitted. Under present procedures it is essential not only that a full investigation be made and the evidence recorded, but the facts must be found which disclose the circumstances and conditions surrounding the making of the incriminating admissions. Even then, some United States District Judge, on petition, may order another trial or a release upon the basis of the petitioner's unsupported allegations challenging not only the integrity of the court proceedings but the competency of his own counsel.

When a confession is offered in evidence and challenged by objection, the court, in the absence of the jury, should determine whether the confession was free and voluntary. *State v. Davis,* 253 N.C. 86, 116 S.E. 2d 365; *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572; *State v. Elam,* 263 N.C. 273, 139 S.E. 2d 601. In passing on the admissibility of a confession, it is as much the duty of the State courts to protect the prisoner's rights under the Due Process Clause of the 14th Amendment to the Constitution of the United States as it is to protect his rights under our State Constitution. There is this difference, however: this Court places its own interpretation on the North Carolina Constitution and laws but we must accept the interpretation the Supreme Court of

the United States places on a prisoner's rights under the Due Process Clause. *State v. Davis, supra; Constantian v. Anson County,* 244 N.C. 221, 93 S.E. 2d 163; *Escobedo v. Illinois,* 378 U.S. 478, 12 L. Ed. 2d 977; 84 S. Ct. 1758; *Massiah v. U. S.,* 377 U.S. 201, 12 L. Ed. 2d 246, 84 S. Ct. 1199.

Since *State v. Roberts,* 12 N.C. 259, this Court has held voluntary confessions are admissible in evidence. To be voluntary, however, they must be uninfluenced either by hope or by fear. As stated in the *Roberts* case, confessions are reliable and admissible when "attributable to that love of truth which predominates in the breast of every man not operated upon by other motives more powerful with him . . ." When the admissions are made to relieve the pressure on the conscience arising from a sense of guilt, they would seem to carry sufficient stamp of truth to justify their admission in evidence. We have consistently held that such admissions, when freely and voluntarily made, are competent, whether made before or after arrest; before or after indictment; before or after the employment of counsel. We think our decisions are based on sound legal principles. We modify them only to the extent necessary to comply with the mandates from the Supreme Court of the United States.

In the establishment of a factual background by which to determine whether a confession meets the tests of admissibility, the trial court must make the findings of fact. When the facts so found are supported by competent evidence, they are conclusive on appellate courts, both State and Federal. *State v. Outing,* 255 N.C. 468, 121 S.E. 2d 847; *State v. Davis,* 253 N.C. 86, 116 S.E. 2d 365; *certiorari* denied, 365 U.S. 855; *Watts v. Indiana,* 338 U.S. 49; *Lyons v. Oklahoma,* 322 U.S. 596; *Lisenba v. California,* 314 U.S. 219. Of course, the conclusions of law to be drawn from the facts found are not binding on the reviewing courts. In *Watts,* the principle is stated concisely: "(I)n all the cases which have come here . . . from the courts of the various states in which it was claimed that the admission of coerced confessions vitiated convictions for murder, there has been complete agreement that any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such conflict comes here authoritatively resolved by the State's adjudication." A statement, to be voluntary, of course, need not be volunteered.

In matters involving Federal law we recognize the authority of the Supreme Court of the United States to review and reverse our decisions. However, as a State court of last resort, we do not concede that United States Courts inferior to the Supreme Court have that authority.

In this case, after preliminary inquiry, Judge Bundy, concluding the defendant's admissions to the witness Edwards were voluntary, permit-

ted the witness to repeat them to the jury over the defendant's objection. The record of the Post Conviction Hearing which was before Judge Bundy on stipulation discloses discrepancies with respect to the circumstances surrounding the incriminating admissions. Judge Bundy did not resolve the conflicts by findings of fact. This was the exclusive function of the trial court. Absent findings of fact, this Court is unable to say whether Judge Bundy committed error in admitting the contested confession. We may, it seems, no longer rely on the presumption of regularity in such matters. If the confession is offered and challenged in the next trial, the Presiding Judge should make a full investigation, record the evidence, and make findings of fact. The evidence should sustain the findings and the facts found should support the conclusion. To have finality, the record must show the accused was tried in accordance with due process of law. On account of the deficiency of the record in this respect, the defendant is entitled to a

New trial.

PARKER, J. I concur merely in the result that the defendant is entitled to a new trial.

This is another in a long line of cases presenting the question as to whether a confession was properly admitted into evidence under the Fourteenth Amendment.

This is stated in *S. v. Chamberlain,* 263 N.C. 406, 139 S.E. 2d 620:

> "It is also well settled that the 14th Amendment to the United States Constitution prohibits the use of coerced confessions in state prosecutions, whether the coercion is physical or mental. *Hayes 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."

"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.

It is well-settled law that we are required to accept the interpretation the United States Supreme Court has placed on the due process clause of the Fourteenth Amendment to the Federal Constitution. *S. v. Davis,* 253 N.C. 86, 116 S.E. 2d 365, cert. den. 365 U.S. 855, 5 L. Ed. 2d 819.

These facts are shown without contradiction in the evidence: A warrant was sworn out before the Onslow county court on 25 September 1961 charging defendant with a violation of G.S. 14-49, a serious felony, for which the punishment, as prescribed in the statute, is imprisonment for not less than five years and not more than thirty years. It was returnable to the Onslow county court on 28 September 1961. On 29 September 1961 the U. S. Marine Corps surrendered defendant to the county authorities. By reason of his inability to give bail, defendant was placed in the common jail of Onslow County. On 29 September John B. Edwards, an agent of the State Bureau of Investigation, saw defendant in custody in the sheriff's office. Edwards told defendant he needed a lawyer, and did not have to make a statement unless he so desired. Defendant said he did not want to make a statement.

On 29 or 30 September 1961 defendant in jail conferred with E. W. Summersill of the Onslow County Bar in an endeavor to employ him as his counsel to defend him. He saw Summersill again on 1 and 2 and 3 October 1961. Summersill did not appear for him, because defendant could not pay him the fee he demanded.

Superior court convened in Onslow County on 2 October 1961. According to the record proper, the indictment charging defendant with the same offense as the warrant was returned by the grand jury on 3 October 1961 — the exact hour of the day when returned does not appear in the record.

Edwards knew defendant's case was to be tried on the afternoon of 3 October 1961, because the solicitor for the State had told him so. On that afternoon Edwards saw and talked with defendant in the sheriff's office about the explosion at the Christenbury home. Defendant told Edwards he had no lawyer, although he had tried to employ Summersill. Defendant, after conferring with his wife privately, in the absence of counsel made a statement incriminating himself. Edwards wrote down his statement and asked him questions. When he finished, it was about 5 p.m. Defendant was immediately carried to the courtroom, entered a plea of guilty, and was sentenced to imprisonment for 20 years. It is a reasonable inference that the indictment to which defendant pleaded guilty had been returned before defendant had completed his statement to Edwards, if not before he began it. At least he was certainly in custody before he made his confession under a warrant charging him with the same offense the indictment did.

Defendant was given no preliminary hearing. There is no satisfactory evidence in the record to show that defendant knew an indictment had been returned against him, or that he was to be tried on the afternoon of 3 October 1961 in superior court. It is true defendant was not sub-

jected to long and persistent questioning, and there is no evidence of threats or promises by Edwards.

Considering the totality of the circumstances here shown by the uncontradicted evidence, it is my opinion that the confession deliberately elicited under such conditions, when defendant needed a lawyer and in the very short time allowed him had tried unsuccessfully to employ a lawyer, contravenes the dictates of fairness in the conduct of criminal cases to a defendant under indictment immediately before his trial upon an indictment returned the day of his trial, when he had had no preliminary hearing and had been in custody only parts of five days, and was in real effect an overcoming of his will not to make a statement, is a denial of due process under the Fourteenth Amendment as interpreted in the decisions of the United States Supreme Court above cited, and was wrongfully admitted in evidence against defendant.

In my opinion, the uncontradicted evidence shows that the extrajudicial confession of defendant is incompetent as a matter of law, and there is no need for any additional finding of facts by a trial judge. *Massiah v. United States,* 377 U.S. 201, 12 L. Ed. 2d 246 (18 May 1964).

STATE v. ROY LEE TODD.

(Filed 2 June, 1965.)

1. Homicide § 13—

Where defendant makes no judicial admission that he intentionally shot deceased, but the State introduces evidence of an intentional killing with a deadly weapon, it is for the jury to determine whether they are satisfied from the evidence beyond a reasonable doubt that the killing with a deadly weapon was intentional, in which event the law will presume that the killing was unlawful and that it was done with malice, constituting murder in the second degree.

2. Same—

Where an intentional killing with a deadly weapon is admitted or proved by the State's evidence, the defendant has the burden of showing to the satisfaction of the jury legal provocation negating malice and thus reducing the offense to manslaughter, or of establishing self-defense exculpating defendant altogether, legal provocation and self-defense being affirmative pleas.

3. Homicide § 12—

Under his plea of not guilty defendant may present evidence that he acted in self-defense or that the shooting was accidental, or both, since defendant may rely upon more than one defense and is not required to make an election.

4. Homicide § 27—

Where defendant contends upon supporting evidence that he was without fault in bringing on the difficulty, that deceased was holding a pistol pointed toward him and his wife and child, and that he advanced on deceased keeping himself between deceased and his wife and child for the protection of his wife and child and, because of threats made by deceased and his reputation for violence, feared that deceased would inflict great bodily harm or death upon himself or his wife or child, and shot deceased, the evidence requires the court to declare and explain defendant's right to kill in defense of self or his wife and child upon necessity, real or apparent.

5. Criminal Law § 107—

It is the duty of the court to charge the jury upon each substantial and essential feature of the case arising upon the evidence notwithstanding the absence of prayer for special instructions.

APPEAL by defendant from *Clark, S. J.*, October 1964 Regular Criminal Session of BLADEN.

Criminal prosecution upon an indictment charging defendant with murder in the first degree of Jerry Earl Cain. G.S. 14-17; G.S. 15-144. When the case was called for trial, the prosecuting officer for the State announced he would ask for a verdict of guilty of murder in the second degree.

Plea: Not guilty. Verdict: Guilty of voluntary manslaughter.

From a judgment of imprisonment, defendant appeals.

Attorney General T. W. Bruton, and Assistant Attorney General Charles W. Barbee, Jr., for the State.

Robert J. Hester, Jr., and James R. Nance for defendant appellant.

PARKER, J. The undisputed evidence presents these facts: On 24 May 1964 defendant and Elmer Guyton were operating on N. C. Highway #211, about one mile east of the town of Bladenboro, a cafe or grill, serving food and drink inside and also rendering curb service. The cafe or grill building was located about 100 feet off the highway, and there was parking space for 30 cars between the building and the highway. Defendant and Guyton had bought the place four days before then. Before 7 p.m. on 24 May 1964, defendant, his wife, and his three children, aged nine, seven, and three years, went to the cafe. When he arrived his 18-year-old sister, Patsy Todd, was there cooking and waiting on cars, and also there waiting on cars was Emily Holden, a 17-year-old-girl. Later that evening Jerry Earl Cain, 18 years old, was sitting in Phillip Little's 1957 Oldsmobile parked in front of the cafe. They had had a drink of "stumphole liquor." Between 7 and 8 p.m. Emily Holden came out of the cafe and got in a car occupied by Clifford Cashwell and Patsy Todd. She and Cain had been going together.

From this point on there is conflict in the State's evidence and defendant's evidence as to the crucial facts of what occurred.

The State's evidence tends to show these facts: Cain went to the Cashwell car, and he and Cashwell had an argument. Emily Holden got out of the Cashwell car. Cain took her wrist and told her not to get back in it. She told Cain he did not own her, and walked back into the cafe. Defendant Todd walked up and, without saying a word to Cain, knocked him down with his fist. Defendant told Cain to leave his place. Cain got up, walked to, and got in Little's car. Defendant came to Little's car, caught Cain's foot, and partially dragged him out of the car. He pulled off one of Cain's shoes. Then defendant slammed the car door shut, threw the shoe in the car, and Little drove off with Cain in the car. Emily Holden testified in rebuttal to the effect that Cain did not hurt her arm, and that she did not leave the Cashwell car screaming and crying. Little drove his car to Luther Berry's grill about a mile from defendant's grill. Two or three times later that evening he, with Cain in the car, drove by defendant's cafe, and went back to Berry's grill. Bobby Harrelson, who was in defendant's grill eating a hamburger, testified that defendant, after they had passed by two or three times, made the following statements: "He was going to teach them a lesson like he did the rest. If he couldn't learn them one way, he would learn them another. * * * So he said, 'Well, I am going uptown and get the law,' or something like that. He said, 'If the law won't do anything about it, I will.'" About 9:00 or 9:30 p.m. that night, Cain, Little, Mitchell Tickles, and Johnny McKeithan were sitting in Little's car parked at Berry's grill. All four had been drinking "stumphole liquor." Little was behind the steering wheel and Cain was to his right beside him. The car was pointed to the highway. Defendant drove by one time, came back, and parked his car 30 or 40 feet from them. His wife and three-year-old child were in the front seat with him. He got out of his car carrying a double-barreled shotgun about waist high, walked up to Little's car, and said, "Let's see the gun." Cain replied, "We ain't got no gun." Defendant stuck the gun in the open window of the car pointed right at Cain's face, pulled the trigger, and shot Cain. The shotgun blast blew out Cain's right eyeball, and made a hole in his face and head large enough to stick a fist in it. Mitchell Tickles testified: "I got out and asked Roy Lee Todd why he shot him and he didn't say nothing. He just looked at me." Defendant's wife and youngest child got out of the car. Defendant and William Delbert Smith placed Cain's body in defendant's car, and they left at high speed for a hospital in Lumberton. On arrival Cain was dead. On the trip to Lumberton, defendant threw the gun out of the window into Big Swamp. Charles Edgar Bullard rode back to Bladenboro from the hospital with

defendant that night. He testified as to the following conversation between defendant and himself: "He told me that the only way he could get out of this was that I seen them boys shoot at him three times with a pistol, and I hadn't seen none of that. * * * When he said the only way that he could get out of this was for me to say I seen them boys shoot at him three times with a pistol I told him that I would. I was scared, because I was thinking he might shoot me or something."

Defendant's evidence tends to show the following facts: Cain grabbed Emily Holden's arm, snatched her out of Cashwell's car, and slapped her. She screamed and ran toward the grill. Defendant heard her screaming and came out of the grill. Defendant went to Cain and told him, "I have just started this place, and I have got to keep it in order." Cain made a "swing" at defendant, and defendant slapped him down. Cain got up and "came right back" at defendant, and defendant slapped him down again. Defendant told Phillip Little to carry Cain away, and not to bring him back that night, because Cain was too drunk to be there. Cain got in Little's car and Little started to leave, but stopped. Cain stuck his head out of the window, and said to defendant: "You s. o. b. — mark my word — I might leave, but I will be back. You will never live to see the sun rise tomorrow." Then they drove away toward Bladenboro. In 10 or 20 minutes Little, with Cain as a passenger, drove by the grill headed toward Clarkton. Defendant asked Cashwell if he had a shotgun he could lend him to protect his place of business. Cashwell replied he could. Cashwell drove home to water his cows, got his double-barreled shotgun and a box of shells, and returned to defendant's grill around 8 p.m. Upon arrival he gave the shotgun and box of shells to defendant, who carried them into the grill.

A little later that night defendant drove his car to Carsey Davis's place in Bladenboro to get change for a ten dollar bill. On the way Little's Oldsmobile drove up behind him, and kept about ten feet behind him. When he reached Davis's place, he stopped by the gas tanks, and Little's car stopped across the street in front of Bridgers' Motor Company. He went in Davis's place, got change for his ten dollar bill, and came out and got in his car. Little, Cain, and Mitchell Tickles were in the Little car. Someone from the Little car said, "Wait a minute, you s. o. b., let's settle that now." He started back to his grill. Little's car followed him. At that time Little was driving, Tickles was in the middle sitting beside him, and Cain was beside Tickles on the outside. He turned into his grill. Little drove by, made a "tail spin" throwing rocks all over his building, and started back to Bladenboro. All of them were hollering. Later, Little, with Cain and Tickles as passengers, drove by his grill as many as fifteen times, sometimes at a speed of 30 miles an hour, sometimes at 15 miles an hour, and in passing they were

cursing and saying, "Get out on the road, you s. o. b. Let's see how damned brave you are now."

About 9 p.m. defendant, his wife, and three-year-old child got in his car — all three on the front seat with the child in the middle — and he started to his home in the direction of Clarkton. When he had driven down the highway about 200 feet, Little's car came up behind him, and a pistol fired three times out of its right window. His wife fell down on the floorboard, and he shoved the child down. Little's Oldsmobile passed him in the direction of Clarkton. As it passed, he recognized Little as its driver. He turned around and went back to his grill.

He got the shotgun and box of shells, placed them in his car, and, with his wife and three-year-old child as passengers, drove to the police station in Bladenboro to get a warrant and police protection, because he was scared they would shoot his wife, his child and him. Upon arrival at the police station, no officer was there. He stayed there about seven minutes. He then drove to Pelo's drive-in thinking a police officer or deputy sheriff might be there. He found no officer there, drove back to the police station, and found no officer there. He stayed about 15 minutes. He then drove to Berry's grill to see if an officer was there. When he parked there, he did not know Little's automobile was there, parked back off the highway.

When he got out of his car and was standing by the door, Cain, who was sitting in the front seat of Little's car on the right side with Tickles and Little to his left, said, "Wait a minute, you s. o. b. — now, this is where we are going to settle this." He turned his head, and saw Cain with a black pistol in his hand pointed toward his chest. He was scared to death. He reached in his car, grabbed the shotgun with the barrel in his left hand, and started walking toward the Little car, keeping his body between the pistol and his wife and child. As he was walking, he said, "Boys, I am not mad with you all. Don't be mad with me. Let's forget this here right where it is at. Let's don't let it go no further." Cain was cursing. When he got within three feet of the Little car, Cain was holding the pistol pointed toward his chest, and he was holding the shotgun about five inches below the window. When he made another step toward the car, Tickles, who was sitting beside Cain with his hand out of the open window, grabbed his shotgun, jerked it in the car, and it fired. Defendant testified: "God in heaven knows that I did not ever pull that trigger on the shotgun. I do not know what caused the gun to go off, except the jarring of it. My index finger on my right hand was setting right behind the trigger on the barrel. * * * I never consciously pulled the trigger to that gun. * * * I had never loaded that gun, but Cliff [Cashwell] said it was loaded. * * * I knew the general reputation of Jerry Cain for danger and violence in

the community in which he lived and it was bad." On cross-examination he testified as follows: "I would walk in between my wife and youngun and get blowed half in two before I would let them get killed. * * * I walked the gun about 40 feet facing a man who I said had a pistol pointed in my bosom because I was scared of him. * * * So far as the shooting was concerned it was completely accidental. * * * I took the gun and advanced on him because I got a wife and youngun setting over there. I walked in between them, because my car was setting, and they had that gun. If they had shot, it would have come right through the car and killed my wife and youngun. You would have done it. Anyone in this Courthouse would have done the same thing I did. I took the gun out of the car because I was scared of him. I walked 40 feet toward him with a drawn gun pointed in his direction because he had a gun on me. All I was doing was trying to talk him out of it. * * * And the gun was pointed right towards me, and I was looking every step I took to get blowed right half in two."

W. E. Blackley, a State highway patrolman, testified that Cain had a bad general reputation in the community where he lived for fighting and acts of violence when he was drinking.

The State's evidence was amply sufficient to carry the case to the jury on the charge of murder in the second degree — an intentional killing of Cain by defendant with a deadly weapon, to wit, a shotgun. When an intentional killing of a person with a deadly weapon is admitted judicially in court by a defendant or is proven by the State's evidence, the law raises two presumptions against the killer: First, that the killing was unlawful; and, second, that it was done with malice; and an unlawful killing with malice is murder in the second degree. But the jury alone may determine whether an intentional killing has been established where no judicial admission of the fact is made by the defendant, as none was made here. *S. v. Gregory,* 203 N.C. 528, 166 S.E. 387; *S. v. DeGraffenreid,* 223 N.C. 461, 27 S.E. 2d 130; *S. v. Phillips,* 229 N.C. 538, 50 S.E. 2d 306; *S. v. Mangum,* 245 N.C. 323, 96 S.E. 2d 39; *S. v. McGirt,* 263 N.C. 527, 139 S.E. 2d 640. The law then casts upon the defendant the burden of showing to the satisfaction of the jury, if he can do so — not by the greater weight of the evidence nor beyond a reasonable doubt, but simply to the satisfaction of the jury — from all the evidence, facts and circumstances, the legal provocation that will rob the crime of malice and thus reduce it to manslaughter, or that will excuse it altogether upon the ground of self-defense. "The burden is on the defendant to establish such facts to the satisfaction of the jury, unless they arise out of the evidence against him." *S. v. Quick,* 150 N.C. 820, 64 S.E. 168; *S. v. Gregory, supra* (which quotes with approval the above quotation from the *Quick* case); *S. v. Keaton,* 206

N.C. 682, 175 S.E. 296 (which quotes with approval the above quotation from the *Quick* case); *S. v. Beachum,* 220 N.C. 531, 17 S.E. 2d 674; *S. v. Jernigan,* 231 N.C. 338, 56 S.E. 2d 599; *S. v. Mangum, supra; S. v. McGirt, supra.* The legal provocation that will rob the crime of malice and thus reduce it to manslaughter, and self-defense, are affirmative pleas, with the burden of satisfaction cast upon the defendant. *S. v. McGirt, supra; S. v. Jernigan, supra; S. v. DeGraffenreid, supra; S. v. Beachum, supra.*

"The defendant's plea of not guilty entitled him to present evidence that he acted in self-defense, that the shooting was accidental, or both. Election is not required. The defendant may rely on more than one defense." *S. v. Wagoner,* 249 N.C. 637, 107 S.E. 2d 83.

Defendant contends that the evidence, and particularly his evidence, before the jury shows that he was free from fault in bringing on the circumstances that led to the killing of Cain, and was sufficient to present the question as to whether he acted in his own self-defense, or in defense of his wife and three-year-old child, or in defense of all three of them, upon necessity, real or apparent, in killing Cain, and also the question as to whether the killing of Cain was unintentional — the result of an accident. He assigns as error this part of the charge: "The defendant in answer to the charge against him relies on the defense known in law as the plea of accident or misadventure," on the ground that it deprived him of his defense of self-defense arising on the evidence. Nowhere in the charge did the court instruct the jury in respect to defendant's plea of self-defense arising on his evidence.

Stacy, C. J., speaking for the Court, said in *S. v. Marshall,* 208 N.C. 127, 179 S.E. 427:

> "The right to kill in self-defense or in defense of one's family or habitation rests upon necessity, real or apparent, and the pertinent decisions are to the effect:
>
> "1. That one may kill in defense of himself, or his family, when necessary to prevent death or great bodily harm. [Citing authority.]
>
> "2. That one may kill in defense of himself, or his family, when not actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for the belief. [Citing authority.]"

We hold defendant's evidence in the case was sufficient to require the court to declare and explain the law arising on his evidence tending to show that he killed Cain in self-defense, or in defense of his wife and three-year-old child, or in defense of all three of them, upon necessity,

real or apparent. As this defense of self-defense was a substantial and essential feature of the case arising on defendant's evidence, no special prayers for instructions were required, and the judge's failure to charge with respect thereto was prejudicial error, and entitles defendant to a new trial. *S. v. Wagoner, supra; S. v. Brady,* 236 N.C. 295, 72 S.E. 2d 675; *S. v. Ardrey,* 232 N.C. 721, 62 S.E. 2d 53.

S. v. Crisp, 244 N.C. 407, 94 S.E. 2d 402, is distinguishable. In that case one of defendant's counsel stated during the trial that defendant did not plead self-defense, and defendant stated in his brief that defendant has contended at all times that the shooting was accidental.

New trial.

WACHOVIA BANK AND TRUST COMPANY, SUCCESSOR TRUSTEE UNDER THE WILL OF ALEXANDER B. ANDREWS v. F. M. SIMMONS ANDREWS, MARY G. ANDREWS, A MINOR, JOHN W. ANDREWS, A MINOR, SARA SIMMONS ANDREWS, A MINOR, MRS. MARY A. WORTH, JULIA A. WORTH RAY, HAL V. WORTH, III, SIMMONS HOLLADAY WORTH, A MINOR, LAURENCE H. MARKS, JANE A. MARKS, ELIZABETH M. GREEN, JUDGE ALEXANDER A. MARKS, JULIA A. MARKS, A MINOR, FRANCES MARKS BRUTON, RALPH STANLEY MARKS, WILLIAM M. MARKS, III, MRS. JULIA M. DOZIER, RICHARD T. DOZIER, MRS. JANE DOZIER HARRIS, MRS. MARTHA A. WING, SANDRA JOHNSON WALKER, MRS. AUGUSTA A. YOUNG, MRS. ELEANOR Y. BOOKER, MRS. AUGUSTA YOUNG MURCHALL, GRAHAM H. ANDREWS, JR., MRS. JANE V. PHILBRICK, MRS. JULIA A. PARK, S. LEIGH PARK, A MINOR, BRUCE R. PARK, A MINOR, ALEX B. ANDREWS, MABEL Y. ANDREWS, A MINOR, ALEX B. ANDREWS, JR., A MINOR.

(Filed 2 June, 1965.)

1. Constitutional Law § 23—

The General Assembly may not diminish a vested interest by artificially increasing the class in which the estate has vested. Constitution of North Carolina, Sec. 17, Art. I, Fourteenth Amendment to the Federal Constitution.

2. Same—

While the legislature may create a presumption to be applied in the construction of instruments executed prior to the enactment of the statute, its power to create such presumptions or inferences is not unlimited but it may create only those presumptions or inferences which have some reasonable relation to the facts upon which they arise.

3. Wills § 27—

When the intent of testator can be ascertained with assurance from the language used, there is no need for presumptions or extrinsic evidence, and the court must give effect to the testamentary intent.

4. Adoption § 6; Wills § 47—

Where the trust provides benefits for named blood relatives of testator with provision that this number could be increased only in the event great nieces and great nephews were born within 21 years after testator's death, the will clearly indicates testator's intent to exclude children adopted by his nieces and nephews from the benefits, and therefore Chapter 967, Session Laws of 1963 (G.S. 48-23) by its express language, does not apply, and the children adopted by testator's nieces and nephews do not take under the will.

APPEAL by Howard E. Manning, guardian *ad litem* for S. Leigh Park, Bruce R. Park, Mabel Y. Andrews and A. B. Andrews, Jr., and any other person who may be adopted by any of the nieces and nephews of A. B. Andrews, deceased, prior to October 21, 1967, from *Carr, J.*, February 1965 1st Non-Jury Civil Session of WAKE.

A. B. Andrews died testate on October 21, 1946. His will, probated in Wake County, gave the residue of his estate to his brothers, John and Graham, as trustees for the beneficiaries named in item 2.

John and Graham, the trustees, died prior to August 20, 1957. On that date, plaintiff was, by order of the Superior Court of Wake County, appointed as successor trustee.

The only portions of the will relevant to this litigation are items 2 and 6, which provide:

"2. After the payment of my just debts, and the payment of the specific legacies, hereinafter named, I give, devise, and bequeath the remainder of my estate, of whatsoever kind, character or description, whether real or personal, into the hands of my brothers J. H. Andrews and G. H. Andrews, their successor or successors and associate or associates, as trustee or trustees, to have and to hold and to invest, and sell and re-invest, and manage the same upon the following uses and trusts, that is to say:

"(a) After paying the expense of handling the trust, they shall divide the annual income into twenty equal parts or shares which shall be disposed of as set out in items.

"(b) One share of the net income shall be annually paid to my sister, Mrs. Jane Marks, 525 S. Perry St., Montgomery, Ala., for and during her natural life.

"(c) One share of the net income shall be annually paid to my brother, John H. Andrews, 831 Wake Forest Road, Raleigh, North Carolina, for and during his natural life.

"(d) One share of the net income shall be paid to my brother, Graham H. Andrews, 421 N. Blount St., Raleigh, North Carolina, for and during his natural life.

"(e) One share of the net income shall be divided in equal parts, or divisions, and paid to my eleven (11) nieces and nephews; namely, Mrs. Augusta Andrews, Mrs. Martha Andrews Johnson, and Mrs. Jane Virginia Power (the children of my deceased brother William J. Andrews), Mrs. Julia Marks Dozier, Alex A. Marks, and Laurence H. Marks (the surviving children of my sister Mrs. Jane A. Marks), Alexander B. Andrews, III (the son of my brother John H. Andrews), and Mrs. Julia Andrews Park, Mrs. Mary S. Andrews Worth, Graham H. Andrews, Jr., and F. M. Simmons Andrews (the children of my brother Graham H. Andrews) for and during their lifetime.

"(f) Upon the death of either my sister Jane H. Andrews or my brothers John H. Andrews or Graham H. Andrews, the one share severally allotted to them shall cease, and it shall be allotted to, and added to, the one share to be divided among the eleven (11) living nieces and nephews, which directions shall apply to each of these three shares to my sister and two brothers.

"(g) Upon the death of anyone of my now living eleven (11) nieces and nephews, his or her share shall cease and the division of this share remaining among the nieces and nephews shall be only to those then alive.

"(h) When the number of nieces and nephews shall be reduced by death down to four, then the annual share of any one dying thereafter shall not be divided among those surviving, but then such share or shares shall be added to the sixteen shares to be divided among my great nieces and great nephews.

"(i) The income from the sixteen shares shall be equally divided among my great nieces and nephews, now twelve (12) in number, and those who hereafter may be born within twenty-one (21) years after my death, they to share equally with the others.

"(j) The share of income allotted to each great-niece and great-nephew shall be paid to the child's parent (my niece or nephew) or to the child's guardian, if there be such, and disbursed by him or her for the benefit of the child, The object of this provision is to simplify the handling of income, which will be small. The share of my great-nieces and great-nephews William M. Marks, III, and Stanley Marks shall be paid to their mother, Mrs. Elva Quisenberry Marks, of Montgomery, Ala."

Item 6 of the will declares the trust shall continue in effect "for, and during the joint and several lives of": his surviving brothers and sisters, listed by name, his eleven nieces and nephews, listed by name, and the twelve great nieces and great nephews, then in being, listed by name, with the name of the parent of each of the great nieces and great nephews. It further provides that the trust shall continue in effect "for and during the joint and several lives of any other nieces or nephews or great nieces or great nephews born prior to, and alive at the time of my death, and until the death of the last survivor of my brothers and sister, and the last survivor of my nieces and nephews, and the last survivor of my great nieces and nephews (alive at my death), as just above referred to, and no longer."

The eleven nieces and nephews named in the will are now alive and are parties to this proceeding. Augusta Andrews is now Mrs. Young. Martha Johnson is now Mrs. Wing, and Jane Powers is now Mrs. Philbrick.

The twelve great nieces and great nephews named in testator's will, natural born children of testator's nieces and nephews, are living and parties to this proceeding. In addition to the twelve great nieces and great nephews named in the will, five children have been born to testator's nieces and nephews since his death. These five are: Julia A. Marks, Simmons H. Worth, Mary G. Andrews, John W. Andrews and Sara S. Andrews.

In addition to the twenty-eight natural born nieces and nephews, great nieces and great nephews of testator, whose right to participate in the distribution of the income of the trust estate is conceded by all parties, there are four adopted children, *i.e.*, S. Leigh Park, Bruce R. Park, Mabel Y. Andrews and A. B. Andrews, Jr., who assert their right to participate in the distribution of the income and corpus of the trust estate. S. Leigh Park and Bruce R. Park are adopted children of Julia A. Park, niece of testator. S. Leigh Park was adopted in May 1950. Bruce R. Park was adopted in April 1951. Mabel Y. Andrews and A. B. Andrews, Jr. are adopted children of A. B. Andrews, III, testator's nephew. Mabel was adopted in March 1957, and A. B. Andrews, Jr., in March 1960. All adoption proceedings were had in the Superior Court of Wake County. Each was regular and conclusive.

Because of claims made by or on behalf of the four adopted children that they, by virtue of their adoption and the provisions of c. 967, S.L. 1963 (now codified as G.S. 48-23), were beneficiaries of the trust estate and entitled to participate therein, plaintiff, as trustee, instituted this action to obtain a judicial determination of the rights of the parties and its duties as trustee.

The natural born nieces, nephews, great nieces and great nephews, who answered, asserted the adopted children were not, by the Act of 1963, beneficiaries of the trust for that: (1) The Act did not apply to the trust; and (2) if it were applicable, it is unconstitutional since it violates the provisions of Art. 1, § 17, of the Constitution of North Carolina, Art. 1, § 10(1), and § 1 of the Fourteenth Amendment of the Constitution of the United States.

Judge Carr concluded: "That within the meaning of G.S. 48-23(c), it does not plainly appear from the terms of the Will of Alexander B. Andrews that the words 'great nieces' and 'great nephews' were intended to exclude children adopted by the nieces and nephews of Alexander B. Andrews." He further concluded that the eleven nieces and nephews and twelve great nieces and great nephews, named in the will, took, on testator's death, a vested estate; this estate could only be opened to permit a natural born great niece or great nephew to benefit from the trust fund; the 1963 Act, purporting to include the four adopted children as beneficiaries of the fund, was void, because prohibited by the Constitution of North Carolina and the Constitution of the United States.

Defendant Manning, guardian *ad litem* for the four adopted children, excepted and appealed.

Manning, Fulton & Skinner; Jack P. Gulley for defendant appellant, Howard E. Manning, Guardian ad Litem.

Joyner & Howison for plaintiff appellee.

Maupin, Taylor & Ellis for Armistead J. Maupin, Guardian ad Litem, and for F. M. Simmons Andrews Et Al, defendant appellees.

RODMAN, J. The rights which a child acquires by adoption are those and only those declared by legislative act. The adoption statute in effect when Mr. Andrews died may be found in G.S. (1943 edition) 48-23. If appellants had been adopted prior to Mr. Andrews' death, the statute then in effect would not have conferred on appellants the right to participate in the distribution of his estate; nor would they, by reason of the statute, have qualified as great nieces and great nephews of testator, *Grimes v. Grimes*, 207 N.C. 778, 178 S.E. 573; *Barton v. Campbell*, 245 N.C. 395, 95 S.E. 2d 914; nor would they, by any of the adoption laws enacted prior to 1963, have qualified, as heirs or distributees of Mr. Andrews, nor as his great nieces and great nephews, entitled to take under his will. *Thomas v. Thomas*, 258 N.C. 590, 129 S.E. 2d 239; *Allen v. Allen*, 260 N.C. 431, 132 S.E. 2d 909.

The 1963 Legislature, by c. 967, S.L. 1963, rewrote G.S. 48-23. That Act, ratified June 18, 1963, by express provision, became effective from and after its ratification. The provisions of the 1963 Act, pertinent to

the decision of this case, are the concluding sentence of subsection (a), and subsection (c). The last sentence of subsection (a) reads: "An adopted child shall have the same legal status, including all legal rights and obligations of any kind whatsoever, as he would have had if he were born the legitimate child of the adoptive parent or parents at the date of the signing of the final order of adoption, except that the age of the child shall be computed from the date of his actual birth." Unless subsection (c) requires a different rule, this change would operate prospectively and would have no application to vested estates. *Bennett v. Cain,* 248 N.C. 428, 103 S.E. 2d 510.

Subsection (c) provides: "From and after the entry of the final order of adoption, the words 'child', 'grandchild', 'issue', 'descendant', or an equivalent of the plural forms thereof, or any other word of like import in any deed, grant, will or other written instrument shall be held to include any adopted person, unless the contrary plainly appears by the terms thereof, whether such instrument was executed before or after the entry of the final order of adoption and whether such instrument was executed before or after the enactment of this Act."

Sec. 17, Art. I, of the Constitution of North Carolina, and Sec. 1 of the Fourteenth Amendment to the Constitution of the United States, forbid the Legislature from diminishing a vested interest by artificially increasing the class in which the estate has vested. Here, the trust estate vested in the brothers, the sister, the nieces and nephews, eleven in number, and the great nieces and great nephews, twelve in number, living on October 21, 1946, the day testator died, G.S. 31-41. *Parker v. Parker,* 252 N.C. 399, 113 S.E. 2d 899; *Hummell v. Hummell,* 241 N.C. 254, 85 S.E. 2d 144. If G.S. 48-23, as amended in 1963, is construed to make a child adopted by a niece or nephew of Mr. Andrews, subsequent to 1946, his great niece or great nephew, and thereby entitled to participate in the trust he created, it unconstitutionally diminishes the estate given to the natural born children of nieces and nephews and is void. *Robinson v. Barfield,* 6 N.C. 391; *Hoke v. Henderson,* 15 N.C. 1; *O'Connor v. Harris,* 81 N.C. 279; *Booth v. Hairston,* 193 N.C. 278, 136 S.E. 879; *Bateman v. Sterrett,* 201 N.C. 59, 159 S.E. 2d 14.

Appellants do not contend the Legislature could enact a statute diminishing the share vested in a beneficiary by artificially increasing the number of beneficiaries. Their position is: Mr. Andrews had the legal right to make adopted great nieces and great nephews beneficiaries of his estate, just as he had the right to make natural born great nieces and great nephews beneficiaries of his estate; and if, when he wrote his will, he meant to include within the words "great niece" or "great nephew," one thereafter adopted by a niece or nephew, the person so adopted would participate equally with a child born naturally

to a niece or nephew. It is quite true that the words "great niece" and "great nephew" would, if Mr. Andrews so intended, when he wrote the will, have included all who became a great niece or a great nephew by adoption or by birth. *Bradford v. Johnson,* 237 N.C. 572, 75 S.E. 2d 632; *Barton v. Campbell, supra.*

Appellants interpret the 1963 Act not as divesting a vested estate, but as creating a presumption that the words "great niece" and "great nephew" were understood by testator, when he wrote his will, to include both natural born and adopted children, thereby imposing on the natural born great nieces and great nephews the burden of showing that the words "great niece" and "great nephew" did not include one adopted by a niece or nephew, but only one born to a niece or nephew.

This interpretation of the statute, they argue, would not do violence to either State or Federal Constitutions, since the statute, so interpreted, would merely create a rule of evidence to be used in ascertaining intent — a power which the Legislature may constitutionally exercise. *Spencer v. Motor Co.,* 236 N.C. 239, 72 S.E. 2d 598; *State v. Griffin,* 154 N.C. 611, 70 S.E. 292; *Prince v. Nugent,* 172 A. 2d 743. The power of the Legislature to create presumptions is not unlimited. The presumption, or inference to be drawn from a given set of facts must have some reasonable relation to the stated inference. *State v. Griffin, supra; Bailey v. Alabama,* 219 U.S. 219, 55 L. Ed. 191; *Tot v. United States,* 319 U.S. 463, 87 L. Ed. 1519; Anno. 162 A.L.R. 495-535. The power to create a presumption can not be made a device to short circuit constitutional prohibitions.

It is the duty of the Court when interpreting a will to give effect to a testator's intention. When that intent can be ascertained with assurance from the words used, there is no need for presumptions or extrinsic evidence. *Yount v. Yount,* 258 N.C. 236, 128 S.E. 2d 613; *Stellings v. Autry,* 257 N.C. 303, 126 S.E. 2d 140; *Morris v. Morris,* 246 N.C. 314, 98 S.E. 2d 298; *Trust Co. v. Wolfe,* 243 N.C. 469, 91 S.E. 2d 246; *Trust Co. v. Green,* 239 N.C. 612, 80 S.E. 2d 771.

In deciding this case, it is not necessary to fathom legislative intent. The Legislature made it abundantly clear that the Act did not apply to instruments in which it clearly appeared testator did not intend for an adopted child to stand on the same footing with a blood relative.

Judge Carr was of the opinion that Mr. Andrews' will did not clearly indicate testator's intent to exclude adopted children from the trust he created. We reach a different conclusion. The persons specifically named in the will as beneficiaries of the trust, twenty-six in number, were all natural born. They were blood relatives of testator. This number could be increased only if great nieces or great nephews were *born* within twenty-one years after testator's death. Birth is, by the express pro-

visions of subsection (i) of item 2, and subsection (b) of item 6, made a condition precedent to participate in the trust. Born to whom, one may inquire? The answer, of course, is to a niece or nephew of the testator. Birth is not synonymous with adoption.

Holding, as we do, that the 1963 Act, by its express language, excludes from its provisions those trusts or estates where it clearly appears that the beneficiaries are to be the natural born, and not adopted children, it follows that the judgment must be, and is,

Affirmed.

DR. C. R. MONROE v. MIRIAM LUCILLE DIETENHOFFER, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF HERBERT J. DIETENHOFFER, DECEASED, AND CAROLINA BANK.

(Filed 2 June, 1965.)

1. Pleadings § 21.1—

If separate causes are not separately stated in the complaint, demurrer must be sustained without prejudice to plaintiff's right to move for leave to amend, G.S. 1-131, but if there is a misjoinder of parties and causes of action the action should be dismissed as to the demurring defendant.

2. Executors and Administrators § 18—

Allegations that plaintiff paid a securities dealer a stated sum for particular stock and that the dealer failed to purchase and deliver the stock prior to his death, states a cause of action against the estate of the dealer *ex contractu* based on matters occurring prior to the dealer's death and determinable as of that time.

3. Executors and Administrators § 22—

Allegations that the personal representative, after the death of her testator and prior to her qualification, paid claims which exhausted the assets of the estate so that there was not sufficient funds to pay anything on plaintiff's claim of the same priority, states a cause of action against the personal representative in her individual capacity for wrongful intermeddling and misapplication of assets, and she is a proper party in her representative capacity only because any recovery would go to her in that capacity for administration.

4. Banks and Banking § 10; Executors and Administrators § 6—

The relationship between a bank and a depositor is that of debtor and creditor, and, upon the death of the depositor, title to the account vests in the depositor's personal representative for collection and administration, and the bank is under duty to see that payment of the deposit is made to the duly appointed legal representative of the deceased depositor, G.S. 28-172, and the bank's payment otherwise does not discharge the bank's liability to the estate.

5. Same; Pleadings § 18— Demurrer for misjoinder of parties and causes held properly sustained.

Plaintiff, alleging *ex contractu* claim against the estate, sued the personal representative of the estate in her individual and representative capacities, and sued the bank in which testator had an account at the time of his death, alleging that the personal representative, prior to her appointment, wrongfully depleated the assets of the estate, leaving nothing for any payment on plaintiff's claim, and that the bank, with knowledge of testator's death, wrongfully paid the checks on the account which were not drawn by the duly appointed legal representative of the estate. *Held:* Demurrer of the bank for misjoinder of parties and causes of action was properly sustained, since the personal representative in her individual capacity is not a necessary or proper party to the claim against the bank. G.S. 1-123(1).

APPEAL by plaintiff from *Crissman, J.*, September 1964 Civil Session of MOORE.

The hearing below was on the amended demurrer of defendant bank to the amended complaint.

Plaintiff instituted this action against Miriam Lucille Dietenhoffer (Mrs. Dietenhoffer), individually, and also in her capacity as executrix of the estate of Herbert J. Dietenhoffer (Dietenhoffer), deceased, and Carolina Bank, a North Carolina banking corporation.

The allegations of the complaint, apart from those relating to the identity and residence of the parties, are summarized below.

Dietenhoffer, prior to his death on December 20, 1959, operated as a sole proprietorship under the name of Dietenhoffer and Heartfield a business in which he purchased investment securities for plaintiff and other customers. In October 1959 plaintiff ordered one thousand shares of N. C. Telephone Company stock and paid Dietenhoffer the purchase price of $1,640.00 therefor but none of said stock was delivered by Dietenhoffer to plaintiff.

Mrs. Dietenhoffer, after the death of Dietenhoffer and prior to her qualification on February 9, 1960 as executrix of his estate, continued to operate said business. During this period, Mrs. Dietenhoffer paid $14,109.80 of the funds of the deceased to purchase stocks certain customers (other than plaintiff) had ordered and paid for but which had not been delivered to them by Dietenhoffer. These customers and plaintiff were in the same order of preference in respect of their claims against the estate. In addition, Mrs. Dietenhoffer paid $3,491.59 of the funds of the deceased to other unsecured creditors of his estate.

The estate of Dietenhoffer is insolvent. On account of said unauthorized and preferential payments of $17,601.39, the assets of the estate are not sufficient to pay any sum on plaintiff's claim against the estate. If the $17,601.39 were restored, the estate would have sufficient assets

to pay a substantial amount on plaintiff's claim against the estate. Mrs. Dietenhoffer has refused plaintiff's demand that she, in her capacity as executrix, bring an action against herself, individually, to recover the amount ($17,601.39) of her unauthorized and preferential payments from funds of the estate of Dietenhoffer.

The officers and employees of the Carolina Bank in Pinehurst were personally acquainted with Dietenhoffer. They knew he conducted the business of Dietenhoffer and Heartfield as a sole proprietorship and that he deposited "practically all" of his personal funds and the funds of said sole proprietorship in said bank.

Notwithstanding the officers and employees of said bank were fully advised of the death of Dietenhoffer on December 20, 1959, they negligently continued to honor checks drawn on his account and on the account of said sole proprietorship. The checks so honored were signed, without lawful authority, by persons other than Dietenhoffer. Also, said bank, after it had knowledge of the death of Dietenhoffer, negligently allowed Mrs. Dietenhoffer to open a special account in the name of "Dietenhoffer and Heartfield" and to deposit therein checks drawn to the order of said sole proprietorship of Dietenhoffer and Heartfield, and thereafter negligently permitted Mrs. Dietenhoffer prior to her qualification as executrix to draw checks on said special account. The said conduct of said bank enabled Mrs. Dietenhoffer to make said unauthorized and preferential payments to common creditors other than plaintiff and thereby deplete the assets to such extent that plaintiff is unable to recover any sum on his claim against the estate of Dietenhoffer.

Mrs. Dietenhoffer has refused plaintiff's demand that she, in her capacity as executrix, bring an action against the Carolina Bank to recover for the estate of Dietenhoffer for its said unauthorized and unlawful payment of checks drawn on funds belonging to said estate.

Plaintiff is entitled to a judgment against the defendants jointly and severally requiring that they pay to the estate of Dietenhoffer such sum(s) as will enable plaintiff to recover from said estate the exact amount plaintiff would have received if said unlawful preferences had not been made, to wit, $17,601.39.

Plaintiff prays "(t)hat the estate of Herbert J. Dietenhoffer recover of the defendants jointly and severally the sum of $17,601.39 and that the executrix of said estate be required to pay to plaintiff the sum of money which he would have received but for the unlawful preferences of other common creditors."

Defendant Carolina Bank demurred to the amended complaint on these grounds: (1) misjoinder of parties and causes of action; and (2) plaintiff's failure to state separately his alleged causes of action.

The court sustained the demurrer and, as to defendant Carolina Bank, dismissed the action. Plaintiff excepted and appealed.

Wilson, Bain & Bowen for plaintiff appellant.
Boyette & Brogden for defendant appellee Carolina Bank.

BOBBITT, J. Plaintiff's allegations relate to: (1) his alleged claim against the estate of Dietenhoffer; (2) his alleged claim against Mrs. Dietenhoffer, individually, on account of her unlawful use of funds of the deceased; and (3) his alleged claim against Carolina Bank because (a) it honored checks, signed by (unauthorized) persons other than Dietenhoffer, drawn on funds on deposit to the credit of Dietenhoffer and of Dietenhoffer and Heartfield at the time of Dietenhoffer's death, and (b) it honored checks drawn on funds deposited in a special account, "Dietenhoffer and Heartfield," which was opened by Mrs. Dietenhoffer and in which deposits were made after the death of Dietenhoffer.

The complaint is subject to demurrer on the ground plaintiff "improperly united" several causes of action. G.S. 1-127(5); G.S. 1-123; Rule 20(2), Rules of Practice in the Supreme Court, 254 N.C. 783, 802; *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; *Bannister & Sons v. Williams,* 261 N.C. 586, 588, 135 S.E. 2d 572; *Kearns v. Primm,* 263 N.C. 423, 426, 139 S.E. 2d 697. However, sustaining the demurrer on this ground would be without prejudice to plaintiff's right under G.S. 1-131 to move for leave to amend his complaint so as to state separately his alleged causes of action. On the other hand, if there is a misjoinder of parties and causes of action, the action as to Carolina Bank was properly dismissed. *Kearns v. Primm, supra; Bannister & Sons v. Williams, supra,* 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.

Plaintiff's alleged cause of action (claim for $1,640.00) against the estate of Dietenhoffer is based on what occurred prior to Dietenhoffer's death and is determinable as of the time thereof. It is based on Dietenhoffer's receipt of plaintiff's $1,640.00 and his failure, in breach of his contractual obligations, to purchase for and deliver to plaintiff one thousand shares of N. C. Telephone Company stock.

The alleged cause of action against Mrs. Dietenhoffer, individually, is based entirely on transactions alleged to have occurred after the death of Dietenhoffer on December 20, 1959, and before the qualification of Mrs. Dietenhoffer as executrix of his estate on February 9, 1960. The sole basis upon which Mrs. Dietenhoffer, in her capacity as executrix, may be considered a proper party to this alleged cause of action

and to the alleged cause of action against Carolina Bank is the fact that any recovery would pass to the personal representative of Dietenhoffer's estate for administration in accordance with law, not to the plaintiff. *Spivey v. Godfrey,* 258 N.C. 676, 129 S.E. 2d 253, and cases cited.

Before considering further the alleged causes of action against Mrs. Dietenhoffer, individually, and against Carolina Bank, it is noteworthy that the complaint is silent as to (1) whether plaintiff filed a claim against the estate of Dietenhoffer and, if so, whether it was allowed or denied, and (2) whether the executrix has made or purported to make a final settlement of Dietenhoffer's estate. Moreover, the complaint is silent as to what action, if any, plaintiff has taken to have Mrs. Dietenhoffer removed as executrix and to have a disinterested person appointed as personal representative in her stead.

Plaintiff's factual allegations are to the effect Mrs. Dietenhoffer, without authority, operated the business of Dietenhoffer and Heartfield from Dietenhoffer's death until her qualification as executrix on February 9, 1960, and during this period used funds ($14,109.80) constituting general assets of Dietenhoffer's estate to prefer certain creditors and to prejudice other creditors, including plaintiff, of the same class, and paid $3,491.59 to other unsecured creditors of Dietenhoffer's estate. These alleged facts are deemed sufficient to state a cause of action against Mrs. Dietenhoffer (for an undetermined amount) in behalf of the personal representative of Dietenhoffer's estate, for the benefit of creditors, including plaintiff, prejudiced by her tortious intermeddling and misapplication of assets of Dietenhoffer's estate.

Plaintiff alleges Carolina Bank had full knowledge that Dietenhoffer, at the time of his death on December 20, 1959, was the sole owner of the funds theretofore deposited in the bank in the account and to the credit of Dietenhoffer and Heartfield; and thereafter, with full knowledge of Dietenhoffer's death, honored checks against said account signed by (unauthorized) persons other than Dietenhoffer. There is no allegation as to the balance in said account when Dietenhoffer died or as to the number, amounts, payees, etc., of the checks so honored.

On said alleged facts, Carolina Bank was obligated to Dietenhoffer, its depositor, when he died, in an unstated amount. The relationship theretofore subsisting was that of debtor and creditor. *Lipe v. Bank,* 236 N.C. 328, 72 S.E. 2d 759. Upon Dietenhoffer's death, the title to said account vested in his personal representative for collection and administration. G.S. 28-172; *Sales Co. v. Weston,* 245 N.C. 621, 627, 97 S.E. 2d 267; *Spivey v. Godfrey, supra.* "The bank is bound to see that payment of the deposit of a deceased depositor is made to his duly appointed legal representative." 9 C.J.S., Banks and Banking § 1004.

Ordinarily, a bank's contractual obligation to its deceased depositor can be discharged only by payment to his personal representative. *Sides v. Bank,* 246 N.C. 672, 674, 100 S.E. 2d 67. Hence, upon the facts alleged by plaintiff, whatever payments were made by Carolina Bank with reference to the balance on deposit to the credit of Dietenhoffer at the time of his death did not discharge the bank's liability to Dietenhoffer's personal representative for the amount thereof. These alleged facts are deemed sufficient to state a cause of action against Carolina Bank (for an undetermined amount) in behalf of the personal representative of Dietenhoffer's estate, for the benefit of creditors, including plaintiff. This cause of action against Carolina Bank is the identical cause of action that existed in favor of the personal representative of Dietenhoffer's estate as of the time of Dietenhoffer's death. In this connection, it is noted that plaintiff does not allege that Mrs. Dietenhoffer was the drawer of any of the unauthorized checks on said account.

With reference to the alleged special account in the name of "Dietenhoffer and Heartfield," opened by Mrs. Dietenhoffer after Dietenhoffer's death, plaintiff alleges Carolina Bank honored checks drawn on this account by Mrs. Dietenhoffer. There is no allegation as to the amount deposited in said special account or as to the number, amounts, payees, etc., of the checks so honored. Under plaintiff's allegations, the status of this special account and the nature of transactions in connection therewith are unclear. However, the basis of the cause of action, if any, stated in connection therewith, is that the funds deposited therein were assets of Dietenhoffer's estate and that the bank is now liable to Dietenhoffer's estate for the amount thereof.

While the complaint alleges the bank "carelessly and negligently" honored unauthorized checks, plaintiff's alleged cause of action against the bank is based on its contractual obligations. Under the facts alleged, the bank, if liable to the estate of Dietenhoffer for the amount of said deposits, is the only party to suffer loss if, through carelessness and negligence, it paid to unauthorized persons amounts due the personal representative of Dietenhoffer's estate.

G.S. 1-123, in part, provides: "The plaintiff may unite in the same complaint several causes of action, of legal or equitable nature, or both, where they all arise out of — 1. The same transaction, or transaction connected with the same subject of action." The words and phrases used in G.S. 1-123(1) are defined by Barnhill, J. (later C. J.), in *Hancammon v. Carr,* 229 N.C. 52, 47 S.E. 2d 614.

The conclusion reached is that Mrs. Dietenhoffer, individually, is not a necessary or proper party to plaintiff's alleged cause of action against Carolina Bank; that plaintiff's alleged cause of action against

Carolina Bank based on its contractual obligations is separate and distinct from plaintiff's alleged cause of action against Mrs. Dietenhoffer for tortious intermeddling and misapplication of general assets of Dietenhoffer's estate; that the facts alleged do not support plaintiff's allegation as to joint and several liability in the amount of $17,601.39; and that each cause of action rests on different legal principles. Hence, there was a misjoinder of parties and causes of action; and the judgment, sustaining the bank's demurrer and dismissing the action as to it, is affirmed.

Affirmed.

GLEMON RAY MOSS v. C. G. TATE, TRADING AS C. G. TATE CONSTRUCTION COMPANY.

(Filed 2 June, 1965.)

1. Trial § 21—

Defendant's evidence in conflict with that of plaintiff, or which tends to show facts at variance with plaintiff's evidence, is not to be considered on motion to nonsuit.

2. Highways § 7— Where evidence shows that barricade causing injury was made and placed by Commission, nonsuit of highway contractor is proper.

Plaintiff's evidence was to the effect that he was proceeding along a highway, the center line of which had been obliterated by resurfacing, when he was forced partly off the highway to his right by oncoming vehicles, that the lights of these vehicles blinded him, and that when they had passed he for the first time saw a barricade on the shoulder, extending to within ten or twelve inches of the hard surface, and that when he swerved left to miss this barricade, he lost control, resulting in the injury in suit. Plaintiff alleged that defendant, in connection with its construction of a by-pass converging with the highway, had placed the barricade across a part of the hard surface of the by-pass and on the shoulder of the highway, but all of the evidence was to the effect that the barricade was made and placed by the Highway Commission and not defendant. *Held:* Defendant's motion for nonsuit was properly allowed.

APPEAL by plaintiff from *Bundy, J.*, September 1964 Session of NASH.

Plaintiff's action is to recover for personal injuries and damage to his pickup truck allegedly caused by the negligence of defendant.

Plaintiff's injuries and damage were caused by a mishap that occurred on U. S. Highway No. 64, approximately 1.34 miles west of Nashville, at or about 10:45 p.m., on December 25, 1962.

Plaintiff had been employed for "about three weeks" as a clerk in Langley's Superette, a general country store located between Nashville and Rocky Mount. He went to his work at Langley's Superette on December 25, 1962 about 2:00 p.m. When the mishap occurred plaintiff, alone in his pickup truck, was driving in a westerly direction toward his home in Spring Hope.

Plaintiff alleged he was "completely blinded" by the "bright headlights" of two motor vehicles approaching from the opposite direction which "appeared to be or were" in plaintiff's lane of travel; that "to avoid a head-on collision" plaintiff drove "to his right and partly onto the Northern shoulder of said highway"; that, when the lights of the approaching vehicles had passed, plaintiff noticed for the first time "an unlighted large wooden barricade *which had been placed by the defendant* within ten or twelve inches of the Northern edge of the hardsurfaced portion of said highway"; and that, to avoid colliding with the barricade and wrecking his truck, plaintiff pulled to his left and, "due to the conditions of the highway at that point," his truck "turned over," causing injuries to plaintiff and damage to his truck. (Our italics.)

Under its contract of September 1961 with the North Carolina State Highway Commission, defendant was obligated to construct and complete a project in Nash County for "the relocation of U. S. Highway 64 from a point approximately 1.34 miles West of Nashville, Easterly, around the North side of Nashville, to Rocky Mount," and on December 25, 1962 "was in the process of carrying out the terms" of said contract.

The pleadings raise issues as to negligence, contributory negligence and damages. Evidence was offered by plaintiff and by defendant. At the conclusion of all the evidence, the court, allowing defendant's motion therefor, entered judgment of nonsuit. Plaintiff excepted and appealed.

Valentine & Valentine for plaintiff appellant.
Battle, Winslow, Merrell, Scott & Wiley for defendant appellee.

BOBBITT, J. Only one question is presented: Was the evidence, when considered in the light most favorable to plaintiff, sufficient to require submission to the jury?

Under its contract of September 1961 with the State Highway Commission, defendant had been engaged "for many months" in the construction of the Nashville bypass, referred to hereafter as the bypass or "new 64." On December 25, 1962, the bypass west of Nashville had been paved but was not open to traffic.

The bypass and U. S. Highway No. 64, referred to hereafter as #64 or "old 64," converged approximately 1.34 miles west of Nashville. At said point of convergence, going east, #64 continued straight and the bypass diverged to the (left) north. The "V" or "fork" between said roads near said point of convergence was to the right (north) of approaching westbound motorists.

Plaintiff testified the barricade was located "about 20 or 25 feet from the peak of the corner made by old 64 coming together with the new 64," the south end being "within 10 or 12 inches of the hard surface" of "old 64." Edwards, plaintiff's witness, testified the barricade was "close to the intersection of those two roads."

All the evidence tends to show the barricade extended partway across "new 64"; that its sole purpose was to warn eastbound motorists that "new 64" was not open to traffic; and that there were no lights, reflectors or warnings of any kind "on the back side of that barricade."

According to Fleming, defendant's witness, who was the State Highway Commission's Resident Engineer, this was "a standard barricade erected at the beginning-end of the project, which was the West end of the bypass." He described it as follows: "The barricade consisted of three reflectorized boards attached to an upright frame with a 'Road Closed' sign bolted to the middle board. These boards are approximately 8 feet long with black and yellow cross-hatchings across the boards with beaded points applied to them to reflect lights. When an automobile's headlights strike these boards at night, it lights like a Christmas tree. In the middle of this thing, bolted to the center board, we had a 'Road Closed' sign. The whole unit stands approximately 5 feet high." Suffice to say, there is no evidence or contention that the barricade failed to give adequate warning to eastbound motorists of its presence and purpose.

Plaintiff knew "the area" was under construction, that "the shoulders had just been built," and that the shoulders "were soft with right much rain." Each day, during the three weeks preceding December 25, 1962, plaintiff had made a round trip between his home in Spring Hope and Langley's Superette. Approximately ninety per cent of these trips were made on #64. He had noticed the barricade each time he passed. The last time he passed was about 2:00 p.m. on December 25, 1962. Previously, while traveling west on #64, he had noticed eight or ten "Soft Shoulders" signs during the last quarter of a mile before reaching the convergence of #64 and the western terminus of the bypass.

There was no center line on #64 at the time of plaintiff's mishap. There had been "a center line along there before the recent application of tar and asphalt." The "blacktop" on this part of the highway "had

been newly sprayed not too many days before and . . . was real black."

Plaintiff guessed the width of #64 was "about 20 feet." Wheeler, defendant's witness, who was the investigating State Highway Patrolman, testified: "The width of the paved surface that night of the old U. S. Highway 64 was 24 feet."

As to what occurred at the time of his mishap, plaintiff testified: "I could see them (the approaching trailer-truck and car) 400 or 500 yards. I could see the lights. . . . Those lights were very bright. I did not continue to drive along at 35 miles per hour, but slowed down when I met the truck. I imagine I slipped off during the time before I got past the truck. It was a long truck. I didn't just slam on brakes all at once. I was going to follow it on out because I knowed the shoulders was soft and I knew when I slipped off, and I knowed if I pulled back on probably what would happen, but there was that barricade sitting right in front of me when I got past the truck." Again: "When I went off the road the first time, I went off on my right side. When I pulled back . . . when I cut to my left on the blacktop, my truck went in a spin and threw me out and the truck turned over and was headed right back up facing the highway just like it was coming in off a side road. After the truck came to a stop, it was on the south side of the highway."

According to Edwards, plaintiff's truck, when it came to rest on the south shoulder, was "almost opposite the barricade."

Plaintiff testified: "So far as I know, the truck never got on my side of the road. Insofar as I know, the car never got on my side of the road."

There is no evidence or contention that plaintiff's truck struck any part of the barricade. All the evidence tends to show it did not do so.

The evidence is silent (1) as to the width of the north shoulder of #64, (2) as to how much of plaintiff's truck actually got on the north shoulder of #64, and (3) as to the distance between these two converging roads at the point where the barricade was located.

There is no evidence as to the identity of the oncoming truck-trailer and car referred to in plaintiff's testimony or as to the driver of either.

We do not set forth Wheeler's testimony tending to show (1) that the place on the south shoulder where plaintiff's pickup came to rest was 100-150 feet east from the intersection of "old 64" and "new 64," (2) that tire marks "extended from the pickup back to the East for a distance of 75 feet to this shoulder on the North side of the highway," and (3) that plaintiff when interviewed, both at the scene of the mishap and later, made no reference to the barricade. This testimony, being in conflict with plaintiff's evidence, must be disregarded when considering the motion for judgment of nonsuit.

"In ruling upon a motion for an involuntary judgment of nonsuit under the statute after all the evidence on both sides is in, the court may consider so much of the defendant's testimony as is favorable to the plaintiff or tends to clarify or explain evidence offered by the plaintiff not inconsistent therewith; but it must ignore that which tends to establish another and different state of facts or which tends to contradict or impeach the testimony presented by the plaintiff." *Bundy v. Powell,* 229 N.C. 707, 711, 51 S.E. 2d 307; Strong, N. C. Index, Trial § 21.

It is asserted in plaintiff's brief that the gravamen of his action *"is the positive act of the defendant* in placing the unlighted and invisible five-foot high barricade within ten inches of the northern edge of the hard surface of Old Highway 64 at the intersection with the bypass directly in the path of the plaintiff and any other user of the said highway who might have been forced to take refuge on the shoulder of the highway." (Our italics.)

Defendant admitted plaintiff's allegations that his contract of September 1961 with the State Highway Commission imposed upon him certain obligations with reference to barricades and warnings in connection with the work covered by said contract. However, there is no evidence or contention that defendant was negligent in any respect in connection with his work on the bypass or in warning the public of hazards in connection therewith. Plaintiff's mishap did not occur on the bypass.

Unquestionably, there devolved upon defendant, under his contract with the State Highway Commission, the positive legal duty "to exercise ordinary care for the safety of the general public traveling over the road on which he was working." *Council v. Dickerson's, Inc.,* 233 N.C. 472, 475, 64 S.E. 2d 551, and cases cited.

It is noted that defendant's said contract with the State Highway Commission is not in evidence. Defendant's superintendent on the "Nashville bypass" job testified: "The defendant as a part of this job had resurfaced or re-blacktopped that road about a month or so prior to the accident. This resurfacing was done by a subcontractor. We were the prime contractor and the resurfacing rubbed out the center line of the road or covered the center line of that road, that is, 64 West of Nashville." He testified further: "The Highway Department had the duty to reline old 64 after it was resurfaced." He also testified: "The shoulders at the West end of the bypass and old 64 had been at that time roughed in. The dirt had been hauled but it wasn't grassed yet. We had to prepare it for grassing." In this connection, it is noted that the condition of the north shoulder of #64, of which plaintiff was fully aware, is not an alleged cause of plaintiff's mishap. Too, it does not

appear that defendant had any further obligation in connection with #64.

Fleming testified: "With respect to the Nashville bypass, in December 1962, I was in direct charge of the construction of that particular project at that time." After describing the barricade as set forth above, he testified further: "During the times that I made my inspections during the month of December 1962, and with respect to where the barricade was located, we placed the barricade at the intersection of the new portion to the old 64 in such a manner that traffic coming from the west could readily see the sign and would be forewarned ahead of time so that they would not enter the new portion of the project." Again: "The State Highway Commission sign shop in Wilson prepared the signs and erected them."

Defendant's superintendent on the "Nashville bypass" job testified: "The State Highway Department made that barricade. The State Highway Department installed that barricade."

As stated in plaintiff's brief, the gist of plaintiff's cause of action is the fact that a portion of the barricade was on the north shoulder of #64. There is no evidence defendant had any part in constructing or locating this barricade. All the evidence is to the effect this was done by the State Highway Commission. Plaintiff has failed to establish the fact upon which all his allegations as to defendant's actionable negligence are based. For this reason, the judgment of involuntary nonsuit is affirmed. Decision on this ground renders unnecessary a discussion of other serious questions pertinent to the question of nonsuit.

Affirmed.

IVAN D. JONES, JR. v. WESLEY VERNON HORTON AND MORRIS CRAWLEY JONES.

(Filed 2 June, 1965.)

1. Automobiles § 41g— Evidence held for jury on question of whether excessive speed in entering intersection was proximate cause of collision.

Plaintiff's evidence to the effect that appealing defendant, traveling north, approached the intersection at a speed in excess of 60 miles per hour, that a vehicle entered the intersection from appealing defendant's right and turned right in front of appealing defendant, that to avoid hitting this car appealing defendant turned to his left and was traveling on his left side of the highway when he saw plaintiff's vehicle approaching from the north, that plaintiff's vehicle had been driven off the highway and onto a parking lot on plaintiff's right when defendant's vehicle collided therewith, *held*

sufficient to take the case to the jury, it being for the jury to determine whether defendant's negligence in violating G.S. 20-141(b)(c), was a proximate cause of the accident in that his excessive speed made it impossible for him to control his vehicle in the emergency, and whether his failure to keep a proper lookout prevented him from ascertaining that plaintiff's vehicle had gotten completely off the hard-surface so that he could have proceeded in safety on his left side of the highway.

2. Automobiles §§ 19, 43—

Evidence that a third vehicle entered an intersection from defendant's right and turned right, causing defendant to lose control and collide with plaintiff's vehicle, which approached from the opposite direction, *held* not to insulate defendant's negligence in approaching the intersection at excessive speed, nor does it entitle defendant to rely upon the doctrine of sudden emergency, if defendant's excessive speed contributed to the emergency and was the proximate cause of defendant's inability to control his vehicle.

3. Negligence § 8—

Where the jury answers the issue of negligence in the affirmative as to one defendant and in the negative as to the other in a suit instituted by plaintiff against both as joint tort-feasors, the one defendant may not complain that the other was exonerated, since the author of negligence proximately causing injury is liable therefor irrespective of the liability of others.

4. Automobiles § 38—

Where it is made to appear that the witness observed the lights of a car approaching from the opposite direction at night for a distance of some 130 yards, and saw that the car was "swaying back and forth" because of its speed, it is competent for the witness to testify that its speed was in excess of 60 miles per hour, the weight and credibility of the testimony being for the jury.

5. Appeal and Error § 1—

The verdict of the jury upon conflicting evidence is conclusive, the jurisdiction of the Supreme Court being limited to matters of law and legal inference. Constitution of North Carolina, Art. IV, § 8.

APPEAL by defendant Horton from *Bone, E. J.,* Second August 1964 Regular Civil Session of WAKE.

Action to recover for personal injuries and property damages sustained in an automobile collision between plaintiff and the appealing defendant Horton. As between plaintiff and defendant Horton these facts are undisputed: U. S. Highway No. 401, the dominant highway, and rural road No. 1103 intersect at right angles about 6 miles south of Louisburg in a 60 MPH zone. Between a hillcrest north of the intersection and one south of the intersection, each 300-400 feet from the center of the intersection, the road is level for about 800 feet. On March 31, 1963, at about 1:00 a.m., plaintiff, operating his 1957 Austin-Healey, was approaching the intersection from the north on Highway 401 at

the same time defendant Horton, operating a Ford, was approaching from the south. Defendant Jones, operating a Chevrolet pickup truck, also was approaching the intersection from the east on No. 1103, on which the State Highway Commission had erected stop signs. Jones entered No. 401 from No. 1103 and headed north. (According to Horton, Jones entered from a right-hand cutoff, instead of making a right-angle turn from the intersection. As to this, plaintiff did not know.) In order to avoid a collision with defendant Jones, Horton turned to his left into the southbound lane for traffic on No. 401. Plaintiff, in an effort to avoid a collision with one or both of defendants, pulled to his right completely off the hard-surface, and Horton continued to his left across the southbound traffic lane and collided with plaintiff, "completely off the hard-surface." In the collision plaintiff's automobile was damaged, and he suffered personal injuries.

Plaintiff brought this action against both Horton and Jones, alleging that their joint and concurring negligence proximately caused his injury and damage. He alleges that Jones was negligent in that (1) he entered Highway 401 from a servient road without stopping and (2) he failed to yield the right of way to Horton, who was approaching on the dominant thoroughfare. Plaintiff alleges that Horton was negligent in that (1) he approached the intersection at a speed in excess of 60 MPH, (2) he failed to keep a proper lookout, and (3) he collided with plaintiff off the highway on plaintiff's right. Defendant Jones' answer is not in the record. Defendant Horton denies that he was in anywise negligent, alleges that the negligence of defendant Jones was the sole proximate cause of his collision with plaintiff, and pleads that plaintiff was contributorily negligent in that (1) he drove his automobile at a high and dangerous speed and (2) he failed to slow down for the intersection, to keep a proper lookout, to have his car under control, and "to apply brakes, stop, turn aside, continue straight ahead, or to take any other precaution in time to avoid the collision as he could and should have done."

Plaintiff's version of the accident is that when he came over the hilltop north of the intersection at 45-50 MPH, he observed the Chevrolet truck of defendant Jones entering the intersection and turning north. Plaintiff dimmed his lights and slowed his car. At almost the same instant he saw Horton's Ford behind the truck in the northbound lane of No. 401. In plaintiff's opinion Horton was traveling in excess of 60 MPH, between 75-80 MPH, "swaying back and forth." Plaintiff was 350-400 feet from the pickup truck when he first saw it, and the Ford was 50-100 feet behind the truck. The Ford came up behind the pickup and suddenly pulled into plaintiff's lane to pass it. "That put a vehicle in both lanes, both lanes taken." Plaintiff applied his brakes and at 15

MPH pulled completely off the highway into the parking lot of the store located in the northwest corner of the intersection. At that time the Ford was still traveling north in its left lane. When plaintiff was 15-20 feet off the pavement and was traveling at 10 MPH, the Ford also left the pavement. When, having slowed to about 10 MPH, plaintiff was 25-27 feet west of the pavement into the parking lot and 200-225 feet north of the center of the intersection, the left front of the Ford struck the left front of the Austin-Healey. Skidmarks made by Horton's Ford started south of the center of the intersection (about 46 feet, according to a diagram made by plaintiff) and continued 75-100 feet in the right lane before crossing the center line, angling for a distance of 35-50 feet before they straightened out for 125-150 feet in the left lane. They then veered to the left off the pavement to the point of impact. The total length of the skid marks was 225-235 feet. After the impact plaintiff's Austin-Healey had only salvage value.

Defendant Jones did not stop.

Horton's version is that, when he was 200-250 feet south of the intersection, traveling at a speed of 45-55 MPH, he observed the Jones pickup slowing down on No. 1103 as if to stop before entering the intersection. Instead, when Horton was only 50-60 feet away, Jones turned to his right into a cutoff lane (which made a grassy triangle at the northeast corner of the intersection) and entered No. 401 slightly north of its right-angle intersection with No. 1103. Horton applied his brakes, his tires squalled, and he cut to the left at about 20 MPH. He had not then seen plaintiff's car approaching. When he saw plaintiff come over the hillcrest 300-350 feet away, he pulled into the parking lot in the northwest corner of the intersection. After he had stopped, plaintiff, sliding on the dirt of the shoulder, came "right at" him and struck him at a speed in excess of 10 MPH. The two cars collided at an angle; the left front and side of plaintiff's car struck the right, front wheel of the Horton Ford. A young man who came to the scene of the collision overtook defendant Jones and secured his license number.

One of the five passengers in the Horton car testified that plaintiff's car was on the west shoulder at the time defendant Horton left the highway.

Jones' version of the accident is that he stopped at the intersection. Seeing no traffic approaching from either direction, he made a right-angle turn into No. 401 and headed north. He did not use the cutoff road. After he was proceeding north in the right lane, plaintiff came over the hillcrest and turned off the road to his right. Thereafter defendant Jones heard a crash and slowed down long enough to see a man walking from the wreck. Jones then "just went on to Louisburg."

Defendants' motions for nonsuit were overruled. The jury's verdict established that plaintiff was injured and damaged by the negligence of Horton *alone;* that plaintiff was not contributorily negligent; and that plaintiff was entitled to recover $5,900.00 from defendant Horton. From judgment entered against him on the verdict defendant Horton appeals, assigning as error the failure of the judge to sustain his motion for nonsuit, the admission of plaintiff's estimate of his (Horton's) speed, and certain portions of the charge.

Yarborough, Blanchard & Tucker by Irvin B. Tucker, Jr., for plaintiff appellee.

Dupree, Weaver, Horton & Cockman by F. T. Dupree, Jr. and Jerry S. Alvin for Wesley Vernon Horton, defendant appellant.

SHARP, J. Plaintiff's evidence, taken as true and considered in the light most favorable to him, was sufficient to withstand the motion for nonsuit. If Horton approached the intersection at a speed in excess of 60 MPH — and we must assume that he did, *Hutchens v. Southard,* 254 N.C. 428, 119 S.E. 2d 205 —, he violated G.S. 20-141(b) and (c) and was thus guilty of negligence *per se. Redden v. Bynum,* 256 N.C. 351, 123 S.E. 2d 734. Horton contends, however, that his speed was not a proximate cause of his collision with plaintiff; that his negligence was completely insulated by that of Jones when the latter entered No. 401 from a servient road directly in the path of Horton's approaching automobile. This contention is unsound. Plaintiff's evidence would permit the jury to find (1) that Horton's excessive speed made it impossible for him to control his automobile and (2) that Horton's failure to keep a proper lookout in the direction of his travel was the reason he did not see plaintiff's Austin-Healey leave the pavement at the moment it did. *Aldridge v. Hasty,* 240 N.C. 353, 82 S.E. 2d 331; *Riggs v. Motor Lines,* 233 N.C. 160, 63 S.E. 2d 197. It was not inevitable that Horton, because of Jones' negligence, should collide with plaintiff. Had Horton remained on the pavement, there would have been no collision. Under the evidence, it was for the jury to say whether Horton was traveling at an unlawful rate of speed without keeping a proper lookout and, if so, whether such negligence caused him to leave the pavement and collide with the Austin-Healey with such force that it was almost demolished. Conceding that Jones' entrance into the highway confronted Horton with a sudden emergency, plaintiff's evidence tends to show that Horton's excessive speed contributed to the emergency. Therefore, upon a consideration of the motion for nonsuit, it is due plaintiff that Horton not be given the benefit of the rule that one confronted by a sudden emergency will not be held to the wisest choice of conduct but only to

such choice as a person of ordinary care and prudence, similarly situated, would have made. *Lawing v. Landis,* 256 N.C. 677, 124 S.E. 2d 877.

Plaintiff's evidence makes out a *prima facie* case that the negligence of both Horton and Jones concurred in proximately causing plaintiff's injury and damage. Plaintiff could have sued either Horton or Jones separately; he elected to sue them jointly. "The mere fact that another is also negligent and the negligence of the two results in injury to the plaintiff does not relieve either." *Green v. Tile Co.,* 263 N.C. 503, 506, 139 S.E. 2d 538, 540. And, if the jury erred in its finding that negligence on the part of Jones was not a proximate cause of plaintiff's injury and damage, on this record we are powerless to correct it, and it does not affect Horton's liability to plaintiff. Horton's motion for nonsuit was properly overruled. His demurrer *ore tenus,* interposed in this court upon the ground that it affirmatively appears from the complaint that the negligence of Jones insulated that of Horton, is likewise overruled.

Horton's second assignment of error raises the question of the admissibility of plaintiff's estimate of Horton's speed as he approached the intersection. It is the rule in this state that any person of ordinary intelligence who has had a reasonable opportunity to observe is competent to testify as to the rate of speed of an automobile. *Darroch v. Johnson,* 250 N.C. 307, 108 S.E. 2d 589; *Lookabill v. Regan,* 247 N.C. 199, 100 S.E. 2d 521; *Hicks v. Love,* 201 N.C. 773, 161 S.E. 394. In *Darroch v. Johnson, supra,* plaintiff's estimate of the speed of defendant's automobile as it approached him from the opposite direction, the estimate based upon an observation of 75-100 yards, was held admissible. Here plaintiff testified that he observed defendant's approach for a distance of 400-500 feet, or at least 130 yards, and that the speed of the Ford was so great that it was "swaying back and forth." Under the circumstances, even though it was nighttime, we cannot say as a matter of law that plaintiff did not have a reasonable opportunity to form an intelligent opinion as to the speed of Horton's vehicle. At night a witness may judge the speed of an automobile by the movement of its lights if his observation is for such a distance as to enable him to form an intelligent opinion. *State v. Harrington,* 260 N.C. 663, 133 S.E. 2d 452. Plaintiff's opinion testimony that the Horton vehicle was traveling "in excess of 60 MPH, between 75-80 MPH" was competent. Its weight and credibility were for the jury. *Ray v. Membership Corp.,* 252 N.C. 380, 113 S.E. 2d 806.

Defendant Horton's remaining assignments of error relate to the judge's charge, which we have examined carefully. In its entirety it fairly presented the case to the jury and contains no error prejudicial to Horton. His Honor made it quite clear that, whether Jones entered

No. 401 at the right-angle intersection or from the cutoff, it was his duty to yield the right of way to Horton if he was approaching at such a speed or from such a distance that it was not safe for him to enter No. 401 until Horton had passed. The jury evidently took the view that Horton's negligence was the sole proximate cause of the collision in question. The issues of fact raised by the pleadings and the evidence were for the jury. Our jurisdiction is limited to matters of law and legal inference. N. C. Const., Art. IV, sec. 8.

This appeal "will make no tremor on the face of the law if it fails," Harman, L. J., in *W. v. W.*, [1961] P. 113, 135, as we hold that it does.

No error.

MAURICE STONE v. ADA S. ASHLEY, ADMINISTRATRIX OF THE ESTATE OF F. D. ASHLEY, DECEASED; AND GUY F. McCORMICK, T/A FAIRMONT GAS COMPANY.

(Filed 2 June, 1965.)

1. Sales § 16—

Evidence that the distributor of tobacco curing equipment operating on liquid petroleum gas was under contractual duty to service and inspect the equipment, that the equipment failed to work properly, and that plaintiff was injured in a fire or explosion when he attempted to repair the equipment, *is held* sufficient to be submitted to the jury on the issue of the distributor's negligence, since a distributor who undertakes to inspect equipment must exercise that degree of care commensurate with the known hazards involved in the use of his product.

2. Same; Negligence § 26—

Plaintiff's evidence tending to show that when his petroleum gas tobacco curer failed to work properly he undertook, in violation of written instructions, to repair it, that he closed the valve to the hundred gallon tank, drained the pipes in the tobacco barn of what he thought to be only water, re-opened the valve and attempted to light the pilot light, resulting in an explosion causing injury, *held* to disclose contributory negligence as a matter of law on the part of plaintiff.

APPEAL by plaintiff from *Hall, J.*, October, 1964 Session, ROBESON Superior Court.

The plaintiff, a tobacco farmer, instituted this civil action against the defendant, trading as Fairmont Gas Company, to recover for the serious burns allegedly resulting from the defendant's negligent failure properly to inspect and service the plaintiff's tobacco curer at the time the defendant filled the storage tank with liquid petroleum gas, some

of which the plaintiff drained through the connecting pipes and which exploded when plaintiff attempted to relight the burners after they had sputtered and gone out.

The defendant, by answer, denied negligence in any particular, and as a first further defense alleged:

> "5. That the defendants had no control over the equipment on the property and could not prevent the plaintiff from taking his wrenches and removing and disconnecting the pipes, caps and plugs so that the liquid substances from the pipes were drained onto the ground inside of the barn causing a dangerous situation and in violation of the law; that plaintiff unlawfully, after having been forbidden and contrary to posted operating instructions, worked on the gas lines, drained substances from the gas lines into the barn and thereafter attempted to light the burner causing a fire or explosion.
>
> "6. That the negligent and unlawful acts and conduct of the plaintiff was the sole, exclusive, direct and proximate cause of the fire and explosion complained of, and the same is pleaded in bar of his recovery against the defendants."

As a second further defense, the defendant conditionally pleaded the plaintiff's contributory negligence in these particulars:

> "12. Plaintiff had been warned not to work on the equipment. Posted notice at the barn instructed plaintiff 'Do not try to make adjustments to the equipment. CALL YOUR GAS DEALER.'
>
> "13. Plaintiff, fully aware of the dangerous propensity of gas, nevertheless, and contrary to posted written instructions, went to his home, got a wrench, returned to the barn in approximately one hour and did then:
>
> "(a) Unlawfully and against the laws of the State of North Carolina remove the caps (plugs) from the end of each of the four pipes leading to the burners and permitted the substance (which he described as water) to drain out on to the ground floor inside of the barn;
>
> "(b) That the ground became saturated with this substance which plaintiff drained from gas lines and allowed to remain inside of the barn;
>
> "(c) After draining this substance from gas lines onto the floor inside the barn, plaintiff then replaced the caps (plugs) back on the end of the lines in a secure position;

"(d) Did then negligently, unlawfully and carelessly and without due caution and care went back to the storage tank and turned open the gas valve and permitted the gas again to flow from storage tank into the barn;

"(e) That he then attempted to light the pilot light when fire and explosion occurred;

"That the unlawful and negligent acts and conduct as herein set forth on the part of the plaintiff constituted contributory negligence, and said wrongful, negligent and unlawful acts and conduct are hereby expressly pleaded as contributory negligence and a bar to any recovery by the plaintiff.

"2. That the laws of North Carolina specifically forbid the draining of gas lines and allowing the drained substance to remain in or near the building or construction and plaintiff was negligent in draining this substance out into the dirt and ground floor of his barn; plaintiff was negligent in tampering with and taking the caps (plugs) from the gas lines, and after doing so to take a live flame or strike a match inside the barn causing and bringing about the fire and explosions; that the negligent acts and conduct of the plaintiff was the sole, direct, exclusive and proximate cause, or was one of the proximate causes of said fire and explosion and which is pleaded in bar of plaintiff's right to recover of the defendants."

At the conclusion of the plaintiff's evidence, which will be discussed in the opinion, the court entered a judgment of compulsory nonsuit, from which the plaintiff appealed.

Barrington & Britt by J. H. Barrington, Jr., for plaintiff appellant.
Ellis E. Page, Henry & Henry for defendant appellees.

HIGGINS, J. The plaintiff's allegations and evidence were sufficient to go to the jury on the issue of defendant's negligent failure to inspect and service the tobacco curing equipment after filling the tank with liquid petroleum gas and before the plaintiff began curing operations. The distributor who undertakes the inspection must exercise a degree of care commensurate with the known hazard involved in the use of his product. *Skelly Oil Co. v. Holloway*, 171 Fed. 2d 670, 17 A.L.R. 2d 890, anno.; *Frazier v. Gas Co.*, 247 N.C. 256, 100 S.E. 2d 501; *Gas Co. v. Montgomery Ward & Co.*, 231 N.C. 270, 56 S.E. 2d 689. The nonsuit in this case can not rest on the failure of the plaintiff to allege negligence and to offer proof sufficient for jury consideration that the defendant had failed to discharge its duty to service and inspect the equipment. Hence, in order to sustain the judgment, the plaintiff's contribu-

tory negligence, as a matter of law, must appear from his own evidence. *Short v. Chapman,* 261 N.C. 674, 136 S.E. 2d 40; Strong's Supplement to Vol. 3, N. C. Index, Negligence, § 26, n. 277.

The plaintiff, age 50, testified he had been curing tobacco with petroleum gas burning equipment for years. "So far as I know, you can not operate one until you get a certificate of operation from the Department of Agriculture. I had a barn certificate that gas was installed properly. . . . A drawing of the equipment showing installation and operating instructions, a copy of which was duly posted at the tobacco barn . . . The last sentence of the instructions says, do not try to make adjustments on the control yourself, and it says for service call Fairmont Gas Company, MA 8-5641. Fairmont Gas Company furnishes service and advice. When I found out it was not working I took an hour off and did not call . . . and ask them to come."

The equipment consisted of a 1,000-gallon tank located 20 feet from the barn. A one-inch pipe entered the barn at or near ground level. There was a cutoff valve at the tank. Inside the barn there was a control unit from which smaller pipes branched out to four rows of burners, three burners to the row. These were distributed throughout the floor.

On the day of his injury the plaintiff began his curing operations by first opening the valve at the tank permitting the gas to enter the control unit inside the barn. The pilot light operated, showing gas was flowing from the tank. Then, in succession, he lighted the burners which, after burning momentarily, each in turn hissed, sputtered, flickered, and went out. After relighting the units they again sputtered and went out. After it ceased to burn, "something was spraying out of the little yellow burners. . . . It was water."

After cutting off the valves at the tank, at the control unit, and at the burners, the plaintiff went home and in about 40 minutes to an hour, returned. Here is the story as to what he did in his own words: "I got a wrench and came on back to the barn. . . . I was gone from the barn to the house for about forty minutes. When I got back to the barn, my father and I went in. He had a flashlight, and I left the front door about half-open.

"There is a small plug that screws in the end of each of the four pipes which constitute the four rows of burners. It is a small plug that screws in the end of the pipe. . . . My father held the light on the little plug and I took it out. A little bit of water came out, so I left little plug laying right there. I went to the next one and did the same thing and a little bit of water came. I went to the next one, did the same thing; then stayed there a few minutes and went back and mashed the little red button, and it didn't do anything; I heard it say, 's-s-s-s,'

about like that; then went back and put the plugs in and water came out. I decided it was all out. Then I went back out, cut the tank on, just like I always had, came back in, mashed the red button and lit the pilot light and the closest burner, I started to mash it down, the same match came down to the ground and fire flew all over me."

The plaintiff, in careless violation of rules and posted notices, and in utter disregard of his own safety, made adjustments with a wrench by opening the valves and draining the contents from the pipes onto the floor of the barn. He then opened the valves between the tank and the burners, struck a match over the condensate which had drained from the pipes and which he said he thought was water. The condensate exploded and the plaintiff received serious burns. The plaintiff had no right to assume that he had drained nothing but water out of a pipe that was connected with a tank containing 1,000 gallons of liquid petroleum gas. It would be difficult to conceive of conduct more likely to result in injury. The plaintiff's contributory negligence, according to his own evidence, appears as a matter of law. The judgment dismissing the action is

Affirmed.

STATE v. JAMES CLARENCE HALL.

(Filed 2 June, 1965.)

1. Searches and Seizures § 1—

Protection against unlawful searches extends to the guilty as well as to the innocent, and an unlawful search without a warrant does not become lawful by the discoveries which result from it. Fourth and Fifth Amendments to the Federal Constitution, Art. I, § 15 of the Constitution of North Carolina.

2. Same; Criminal Law § 79—

The wife has no authority to consent to a search of the home in regard to the possessions of the husband, and therefore stolen property recovered from the home while the husband was lodged in jail is incompetent in evidence against him.

3. Same—

Where stolen property is obtained by the unlawful search of defendant's home without a warrant, and, upon confrontation, defendant admits he stole the property found and also admits that he stole other property to which he directs the officers, such other property is discovered by reason of defendant's admissions and not as the result of the search, and evidence in respect to such other property is not subject to objection of want of a search warrant.

4. Criminal Law § 71—

Where a confession is obtained from defendant after confronting him with stolen property recovered from his home in an unlawful search without a warrant, the court must find whether such confession was actually free and voluntary or whether it was triggered by the use of the articles obtained by the illegal search.

5. Criminal Law § 169—

Where the Supreme Court determines that incompetent evidence was admitted, the cause must be remanded for a new trial, and in such instance defendant is not entitled to a dismissal even though there is insufficient competent evidence in the record to sustain a conviction, since upon the retrial the State may be able to offer sufficient competent evidence to go to the jury.

APPEAL by defendant from *Fountain, J.*, September 14, 1964 Criminal Session, CHOWAN Superior Court.

The defendant was originally tried before Stevens, J., at the April Session, 1962, Chowan Superior Court, on two indictments. The first charged the larceny of a specifically described truck valued at $1,000.00, and the second charged store breaking and the larceny of $100.00 in cash, one clock, and one radio of the value of $25.00, all the property of Edenton Feed and Livestock Corporation. The cases were consolidated for trial and judgment. Judge Stevens imposed a sentence of five to seven years in the State's prison.

In a Post Conviction Review of the original trial, Judge Fountain set aside the verdict and judgment and ordered a new trial upon the ground the defendant was not represented by counsel. At the new trial the evidence disclosed that the Edenton Feed and Livestock Corporation building in Chowan County was broken into on the night of December 23, 1960. One Hundred Dollars in currency, one clock, and one radio were taken from the building. The corporation's truck, worth $1,000.00 (left outside the building) was stolen. Sheriff Goodwin and SBI Agent Epps began an investigation.

The officers ascertained the defendant, who lived in Norfolk, Virginia, had visited his mother near Edenton about the time the offenses were committed. Other suspicious circumstances induced the officers to obtain a warrant charging the defendant with the above described offenses. They notified the Norfolk, Virginia, officers who advised them that the defendant was in custody there on a charge of larceny of an automobile.

Sheriff Goodwin and Agent Epps went to Norfolk jail and in the presence of the Virginia officers questioned the defendant with respect to the charges against him in North Carolina. He denied any connection with, or knowledge of, them. In the meantime, they ascertained the street address of the house where the defendent and his wife lived.

The officers of both states went to the house described in the evidence as the defendant's home, identified themselves as officers, and requested permission to search the house for stolen property. The defendant's wife consented to the search in which the officers found and took possession of the radio and clock later identified as the articles stolen from the feed store in Edenton.

With the stolen clock and radio in their possession, the officers returned to the jail to question the defendant about them. At this juncture the defendant asked to speak to the North Carolina officers alone. He confessed that he had broken into the store, stolen the clock and the radio, and the truck. He directed the officers to the place where they found, and took possession of the truck which was partially dismantled. The officers did not notify the defendant of their purpose and intent to search his house for the stolen articles and did not request his permission for the search. Instead, they requested and received from defendant's wife permission to search the dwelling without a warrant.

At the new trial the State introduced in evidence the stolen radio and clock, and the defendant's admissions with respect to the breaking, the theft of the articles, including the truck. From a verdict of guilty and a prison sentence of four to six years, the defendant appealed.

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

John W. Graham for defendant appellant.

HIGGINS, J. The record comes to us in a condensed form as a pauper appeal. The evidence is somewhat equivocal as to the caution given by the officers to the defendant that he had a right to remain silent and was not required to answer questions, or that any statement he made might be used against him in court. On the other hand, the defendant's objections appear somewhat by inference. However, enough appears to warrant the trial court in finding the defendant was advised of his right to refuse to incriminate himself and likewise require this Court to consider the fundamental question whether, under the circumstances disclosed by the evidence, the wife could consent to a search of the defendant's dwelling without a search warrant and thereby permit the State to use the results of that search to convict the defendant. *State v. Elam,* 263 N.C. 273, 139 S.E. 2d 601; *Escobedo v. Illinois,* 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 977.

This is the factual background leading up to the search of the defendant's dwelling: The defendant was in jail. This the officers knew. They neither requested nor received his permission to make the search. The officers, no doubt, suspected they might turn up something incrim-

inating. They went to the house, confronted the defendant's wife with their identity as officers, and asked the privilege of searching the house. Nothing in the evidence indicates the officers had sufficient information to enable them to make the affidavit necessary to authorize the court to issue a search warrant. There is some question as to the extent the officers left the wife free to consent to the search, or whether the number of officers had a coercive effect sufficient to make her consent involuntary. *Amos v. U. S.*, 255 U.S. 313, 41 S. Ct. 266, 65 L. Ed. 654. The circumstances did not suggest to her anything better that she could do in the presence of so much "law" at a time when they had her husband in jail. The officers confronted the defendant with the clock and radio. He then admitted his guilt. Unless proper authority existed for the search of the dwelling, the search was unlawful. The protection extends to the justly as well as to the unjustly accused. *State v. Mills*, 246 N.C. 237, 98 S.E. 2d 329; *In Re Walters*, 229 N.C. 111, 47 S.E. 2d 709; *Agnello v. U. S.*, 269 U.S. 20, 46 S. Ct. 4, 70 L. Ed. 145. An unlawful search does not become lawful by the discoveries which result from it. Fourth and Fifth Amendments to the Constitution of the United States; Article I, Section 15, North Carolina Constitution; *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081.

If it be deemed the wife's consent as far as she was able to give it, was voluntary, we are still confronted with the question whether she was authorized to give her husband's consent to the search. The courts are not in agreement on this question. Divergent views are discussed and authorities cited in 47 Am. Jur., Search and Seizure, § 72:

> "The decisions are in conflict as to the implied authority of one spouse to consent to a search of the property of the other. In a number of cases, representing the weight of authority, it has been held a wife has no implied authority in the absence of her husband, to consent to a search of his property. So, also, a waiver of his constitutional right against unlawful search made by a husband has been held not to affect the rights of a wife as to property owned by her. But assuming that it is possible for a wife, in the absence of her husband, thus to waive his constitutional right against unreasonable search and seizure, under the doctrine of implied coercion mere acquiescence in a search of his premises by officers having an insufficient warrant will not render lawful a seizure by them. Upon the same assumption, a wife's admission of officers without a search warrant to her husband's premises upon their demand under alleged governmental authority that they be allowed to enter has been held not to effect a waiver of the husband's constitutional rights. In other cases, the view has been taken that the

wife has authority, in the absence of her husband, to permit the search." See, also, 31 A.L.R. 2d 1078.

This Court seems not to have passed on the right of the wife to consent to a search of a husband's dwelling. The majority view seems to fit in with our concept of the defendant's rights. We hold the wife's consent to the search was not sufficient to waive the husband's constitutional right to be "Secure . . . against unlawful search and seizures." We hold, therefore, that the possession of the radio and clock were unlawfully obtained. They were improperly admitted in evidence.

The stolen truck was recovered as a result of the admissions of the defendant and not as a result of the illegal search. Evidence with respect to the truck was not subject to the objections interposed against the admission of the clock and radio. However, the confession which led to its recovery was not made until the officers confronted the defendant in jail with the clock and radio which they had obtained as a result of a search which had violated his rights. At the next trial the court may determine whether the confession was actually free and voluntary or whether it was triggered by the use the officers made of the fruits of their illegal search to such an extent as to render it inadmissible in evidence.

The defendant's counsel has argued that the State's case against the defendant must fail when the radio and clock recovered by the illegal search and the confession which led to the recovery of the truck are excluded; and that this Court should order the case dismissed. However, the admission of incompetent evidence, as in this case, entitles the defendant to a new trial but does not work a dismissal of the case. The State may be able to offer sufficient competent evidence at the next trial. *State v. Littlejohn,* decided this day. For the reasons assigned, the Court holds the defendant is entitled to a

New trial.

SHARP, J., dissents.

STATE v. ARTHUR GOFF.

(Filed 2 June, 1965.)

Escape § 1—

A prisoner escaping while serving a sentence is not immune to punishment for the escape even though the sentence he was serving at the time

of the escape was irregular or voidable and is set aside and a new trial ordered after the escape but prior to imposition of sentence for escape, since a prisoner serving a sentence imposed by authority of law may not defy that authority but must seek redress in compliance with due process.

CERTIORARI allowed by this Court 13 April 1965 on petition of the State of North Carolina to review the judgment of *Cowper, J.*, at the March Session 1965 of the Superior Court of PITT County allowing Arthur Goff's application for writ of *habeas corpus*.

At the August 1961 Criminal Session of the Superior Court of Pitt County, the defendant was tried upon two bills of indictment. In Indictment No. 7751, he was charged with breaking, entering, and the larceny of property of the value of less than $100.00; in Indictment No. 7752, he was charged with a felonious assault. He pleaded guilty to Indictment No. 7751 and received a sentence of not less than three nor more than five years in the State's Prison. In Indictment No. 7752 he entered a plea of not guilty, but upon a jury verdict of guilty was sentenced to serve not less than seven nor more than ten years in the State's Prison, this sentence to begin at the expiration of the sentence imposed in Case No. 7751.

On 11 August 1963, the defendant completed serving the sentence imposed in Case No. 7751 and began serving the sentence imposed in Case No. 7752.

On 10 August 1964, while serving the sentence imposed for felonious assault in Case No. 7752, the defendant escaped from the custody of the State's Prison and was recaptured on 12 August 1964.

Indictment No. 4880 was returned at the January-February 1965 Session of the Superior Court of Sampson County charging the defendant with having escaped from the custody of the State's Prison system while in the lawful custody thereof.

After waiver of counsel, the defendant entered a plea of guilty and was sentenced to be confined in the common jail of Sampson County for a term of six months and to be assigned to work under the supervision of the State Prison system. This sentence was set to begin at the expiration of the sentence imposed in the Superior Court of Pitt County at the August 1961 Session in Case No. 7752.

On 26 January 1965, pursuant to this Court's opinion in *S. v. Goff*, 263 N.C. 515, 139 S.E. 2d 695, filed 15 January 1965, Cowper, J., presiding over the January 1965 Session of the Superior Court of Pitt County, entered judgment vacating the judgment and sentence imposed in Case No. 7752, on the ground that the defendant had not been represented by counsel, and ordered a trial *de novo* on the bill of indictment entered at the August 1961 Session in Case No. 7752.

Thereafter, on 26 March 1965, the defendant having filed a petition for writ of *habeas corpus,* Judge Cowper entered an order releasing the defendant from the sentence imposed in Case No. 4880 in Sampson County.

On 5 April 1965, pursuant to a motion filed by the State of North Carolina, Bundy, J., Resident Judge for the County of Pitt, entered an order staying the execution of Judge Cowper's judgment of 26 March 1965.

The Attorney General filed an application for *certiorari* in this Court on 6 April 1965, which was granted as hereinbefore set forth.

Attorney General Bruton, Staff Attorney Andrew A. Vanore, Jr., for the State, appellant.

H. Horton Rountree for defendant appellee.

DENNY, C.J. The question for determination on this appeal is simply this: Did the court below commit an error in vacating the sentence imposed by the Superior Court of Sampson County for an escape while the defendant was serving a sentence which had been vacated and a new trial ordered before the sentence for the escape was imposed? We think the question must be answered in the affirmative.

G.S. 148-45 in pertinent part reads as follows: "* * * Any prisoner serving a sentence imposed upon conviction of a felony who escapes or attempts to escape from the State prison system shall for the first such offense be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than six months nor more than two years. * * *"

This Court, in *S. v. Garrell,* 82 N.C. 580, recognized the rule that one cannot take it upon himself to reverse or ignore an erroneous judgment. The prisoner was delivered to the custody of a constable, pursuant to an erroneous judgment. The constable negligently allowed the prisoner to escape. In holding the constable liable, the Court said:

> "The judgment pronounced was at most merely erroneous, and not void. * * *
>
> "The Judge may have erred in that portion of his judgment which committed Hogan to the house of correction, and we think he did, as such sentences, according to the true intent and meaning of the Constitution and statutes on that subject, extend only to vagrants and persons guilty of misdemeanors; but of that question, as of every other arising on the trial, his Honor had jurisdiction, and if he erred in that particular it was an error of law for

which the judgment was voidable, but of full force and effect until reversed in the appropriate way. * * *

"* * * Hence it follows that, until the sentence of commitment to the house of correction was reversed, it was the duty of the defendant in his capacity of manager to hold and keep the prisoner committed to his custody, and not assume practically to reverse the judgment of one of the courts of the State by allowing the prisoner by his negligence to escape. * * *"

A similar result was reached in *S. v. Armistead,* 106 N.C. 639, 10 S.E. 872.

In the case of *Bayless v. United States* (9th C.C.A.), 141 F. 2d 578, the defendant had been convicted of several violations of federal law, and defendant had not been afforded counsel nor had he intelligently waived counsel. He was committed pursuant to the conviction and subsequently attempted to escape. The Ninth Circuit Court held that he could be convicted of an attempt to escape even though his detention was irregular in that he had not been afforded counsel. The Court quoted with approval from an opinion by the Fifth Circuit Court in the case of *Aderhold v. Soileau,* 67 F. 2d 259, as follows:

"'* * * A prisoner in a penal institution whose sentence is irregular or voidable may not for that reason, and before some court has so adjudged, defy his guards and run away. A difference of opinion might cause a death. Such a doctrine would set discipline at naught. The statute, 18 U.S.C.A. § 753h, forbids escape, not only to those "properly in the custody of the Attorney General" but also to all "who are confined in any penal or correctional institution, pursuant to his direction," without mention of the propriety of the confinement. We are of opinion that attempts at escape from such institutions are * * * forbidden to all inmates, and that, if they consider their confinement improper, they are bound to take other means to test the question.'"

The Supreme Court of the United States denied *certiorari* in *Bayless v. United States,* 322 U.S. 748, 88 L. Ed. 1580.

In *Tann v. Commonwealth,* 190 Va. 154, 56 S.E. 2d 47, the defendant had been convicted of a number of felonies. He escaped from the State Penitentiary while serving a sentence for one of these offenses. He was recaptured and tried upon a bill of indictment for escape. He pleaded the unlawfulness of his imprisonment on the ground that he had been denied due process of law in that he did not have the assistance of counsel upon his trials. The Supreme Court of Appeals of Virginia said:

"An escape from custody authorized by law is a crime against public justice. The statute declaring it to be an offense proceeds from the theory that a citizen should yield obedience to the law. When one has been, by authority or command of the law, confined in prison, it is his duty to submit to such confinement until delivered by due course of law, no matter whether he has been committed for a future trial, or for punishment after conviction. It is generally held by the more modern authorities that it is immaterial whether he is innocent or guilty of the original offense in so far as his liability for escaping is concerned. * * *

"It would bring the law into disrepute and completely render prison order and discipline unenforceable if prisoners convicted of crime could exercise the right of self-judgment and self-help and be allowed to escape from imprisonment, either because they believe themselves to be innocent, or that their convictions were obtained through legal error. The validity of a judgment often presents a difficult question for experienced lawyers and the courts. * * *

"When a prisoner is held in legal custody and commits an escape, the crime itself does not depend upon whether he would have been adjudged guilty or innocent of the original offense had the proper procedure for appeal been followed. Under the same conditions, and for the same reasons, the crime does not depend upon whether it may or may not be determined in a future *habeas corpus* proceeding that his original conviction was void for defects in the judgment of conviction by a court of competent jurisdiction."

See 70 A.L.R. 2d Anno.: Justification for Escape, page 1430, *et seq.*, where the cases from many jurisdictions have been collected.

We hold that the sentence imposed in the Superior Court of Sampson County at the January-February Session 1965 on the charge of escape was a valid sentence irrespective of the outcome of the new trial ordered by this Court; and that the order of Cowper, J., entered in a *habeas corpus* proceeding in Pitt County on 26 March 1965, to the effect that the defendant Goff "is being illegally confined under sentence imposed in Docket No. 4880, Sampson County," was erroneous and such order is reversed and set aside. When this opinion has been certified down, whether the defendant has been retried or not as directed by Judge Cowper's order entered on 28 January 1965, and regardless of the outcome of such trial, this cause will be remanded to Sampson County for the imposition of a proper sentence on the conviction for escape. *S. v. Fain*, 250 N.C. 117, 108 S.E. 2d 68.

The order entered below releasing the defendant from the sentence imposed in the Superior Court of Sampson County for escape is

Reversed.

THE NATIONAL BANK OF SANFORD v. GREENSBORO MOTOR COMPANY, T/A GREENSBORO FORD.

(Filed 2 June, 1965.)

1. Automobiles § 4—

Under the 1961 amendment to G.S. 20-72(b) no title to a motor vehicle passes to the purchaser until the certificate of title has been assigned, delivered to the purchaser and application made for a new certificate.

2. Same; Chattel Mortgages and Conditional Sales § 12—

Where the purchaser of a motor vehicle executes a chattel mortgage which is registered prior to the acknowledgment of the assignment of the certificate of title by the seller and the forwarding of an application for a new certificate to the Department of Motor Vehicles, the chattel mortgage does not create a lien on the vehicle, since the purchaser, at the time it was executed, did not have title, and the instrument can operate only as a contract to execute a chattel mortgage upon the acquisition of title.

APPEAL by plaintiff from *May, S.J.*, October 12, 1964 Civil Session of LEE.

Plaintiff instituted this action to recover $3,300, the amount due it by Carolina Concrete & Paving, Inc. (Carolina), secured by chattel mortgage on two 1957 G.M.C. trucks, which plaintiff alleges were converted by defendant.

The parties waived jury trial. Summarized, the facts found, supported by stipulations, parol and documentary evidence, are these: On March 5, 1957, the Commissioner of Motor Vehicles issued to Fields Ready Mixed Concrete Company (Fields) certificates of title for two motor vehicles. Each certificate referred to a G.M.C. truck, identified by motor and serial number. Each certificate stated the vehicle was subject to a lien in favor of Yellow Manufacturing Acceptance Corporation in the sum of $19,427.28. Yellow Manufacturing Acceptance Corporation marked the certificates "PAID IN FULL AND CANCELLED" on August 31, 1959. Each shows an assignment of title by Fields, the registered owner, to Carolina. The assignments were acknowledged before a notary public on March 15, 1962. They recite a sale made December 4, 1961.

On the back of the certificate is a form entitled: "PURCHASER'S APPLICATION FOR NEW CERTIFICATE OF TITLE." On March 15, 1962, Carolina filled out and executed this form for each of the vehicles. The certificate and application by Carolina for a new certificate for one of these trucks was forwarded to, and received by, the Department of Motor Vehicles in May 1962; the other was forwarded and received on November 1, 1962. Neither of the applications for a new certificate disclosed the fact that Carolina had mortgaged the vehicle therein described to plaintiff; nor did it indicate the existence of any other liens.

Carolina, on October 30, 1962, sold the trucks to defendant, a registered dealer. It paid a valuable consideration therefor. On November 1, 1962, it applied to the Department of Motor Vehicles for new certificates. It sold the trucks to Carolina Ready Mix, Inc. (Mix) on January 24, 1963. Mix, on the same day, applied to the Department for new certificates. They were issued.

On December 14, 1961, Carolina borrowed $8,500 from plaintiff. As evidence of its debt, it gave plaintiff a negotiable note payable in monthly installments. It secured payment of this note by chattel mortgage on the two G.M.C. trucks which Carolina had, on December 4, 1961, contracted to purchase from Fields. This chattel mortgage was, on December 18, 1961, recorded in the office of the Register of Deeds of Lee County, where Carolina had its office. The balance owing plaintiff by Carolina on the note secured by the chattel mortgage is $3,300 plus interest.

Based on its findings, the court concluded defendant acquired title to the trucks, free of any claim which plaintiff could assert. Judgment that plaintiff take nothing was entered.

Teague, Williams & Love for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter; Herbert O. Davis for defendant appellee.

RODMAN, J. Prior to 1961, the title to motor vehicles and liens thereon could be transferred, created and protected in the same manner that title to and liens on other chattels could be transferred and created. The certificates of title issued by the Department of Motor Vehicles were mere means of protecting "the general public from fraud, imposition and theft." That was the holding of this Court in *Corporation v. Motor Co.,* 190 N.C. 157, 129 S.E. 414, decided in September 1925.

Notwithstanding the conclusion reached in 1925, litigants continued their efforts to secure a judicial declaration that certificates of title for motor vehicles issued under then existing statutes were analagous to

statutory certificates of title for real estate, registered as to title, pursuant to the provisions of c. 43 of the General Statutes. Our last answer to these contentions was given in December 1960, when *Finance Co. v. Pittman,* 253 N.C. 550, 117 S.E. 2d 423, was decided. We then said: "The interpretation given in 1925 has not been rejected by the Legislature. If public policy now requires a different system of establishing ownership and encumbrances on motor vehicles, such policy must be declared by the Legislature. It can enact laws to accomplish that purpose. We have neither the power nor the desire to usurp its prerogative."

The 1961 Legislature convened February 8, 1961. It enacted c. 835, S.L. 1961. It would be difficult to read that Act and the decision in *Finance Co. v. Pittman, supra,* without reaching the conclusion that the Legislature did intend to make the very changes which we said were beyond our power to make, but within the power of the Legislature.

By express language, §12 of the Act eliminated the necessity of recording mortgages on motor vehicles in the county in which the mortgagor resided. Creditors and purchasers, after January 1, 1962, did not have to go to the office of the Register of Deeds to ascertain if the vehicle was mortgaged; a purchaser or mortgagee need only look at the certificate of title. That paper would provide him with all necessary information as to ownership and liens created subsequent to January 1, 1962. The other portions of the Act took effect July 1, 1961.

G.S. 20-72(b), prior to the ratification of the 1961 Act (c. 835, S.L. 1961), required the owner to endorse his certificate with a warranty of title and a statement of liens to a purchaser or mortgagee, which transfer and assignment the mortgagee was required to transmit to the Department of Motor Vehicles within twenty days. Failure of the owner to comply with the statute was made a misdemeanor, but such failure did not invalidate a mortgage or other transfer made by the owner. *Corporation v. Motor Co., supra.*

Sec. 8 of the 1961 Act amended the statute, G.S. 20-72(b), expressly providing: "Transfer of ownership in a vehicle by an owner is not effective until the provisions of this subsection have been complied with." After July 1, 1961, the effective date of the amendment, no title passed to a purchaser until the certificate had been assigned, delivered to the purchaser and application made for a new certificate. *Credit Co. v. Norwood,* 257 N.C. 87, 125 S.E. 2d 369.

The statement in Fields' assignment to Carolina that the date of sale was "12/4/61" had no effect on the legal title. It was a mere statement of the date on which the parties contracted to buy and sell.

Since Carolina was not, on December 14, 1961, the owner of the trucks, it could not then create a lien thereon. The paper it gave plaintiff was nothing more than a contract to mortgage, if and when it ac-

quired title. *Chandler v. Cameron,* 229 N.C. 62, 47 S.E. 2d 528, 3 A.L.R. 2d 571.

The parties stipulated defendant, before purchasing, examined the certificates issued Carolina. These certificates, showing Carolina acquired title subsequent to January 1, 1962, did not disclose plaintiff's claim of lien. Since Carolina could not create a lien before it acquired title, defendant was protected against any act of Carolina ante-dating the dates of the certificates. Registration of plaintiff's claim on December 18, 1961 was not notice to defendant. *Chandler v. Cameron, supra; Bank v. Johnson,* 205 N.C. 180, 170 S.E. 658; *Door Co. v. Joyner,* 182 N.C. 518, 109 S.E. 259, 25 A.L.R. 81; *Richardson v. Atlantic Coast Lumber Co.,* 75 S.E. 371, L.R.A. 1918C 788; Anno: Instrument Executed before Title Acquired, 18 Ann. Cas. 15; 45 Am. Jur. 477-8.

Plaintiff now contends defendant has not acquired title to the trucks because the assignment of the certificates issued Carolina fail to disclose either the office or the authority of Chalmers H. Thomas, who executed the assignments in Carolina's name, to act for it. The contention, seemingly an afterthought, is without merit.

The parties stipulated defendant, on November 1, 1962, purchased both of these trucks, paying a valuable consideration therefor; and further stipulated that the Department of Motor Vehicles had acted on the assignments and issued new certificates to defendant. The stipulations manifest an intent to submit the controversy to the Court on the theory that defendant purchased and acquired title, and that the only question for decision was whether the title acquired was or was not subject to a lien in plaintiff's favor.

No error.

STATE OF NORTH CAROLINA v. LEROY LITTLEJOHN, RALPH LITTLEJOHN, BENJAMIN FOSTER AND WALLACE MOORE.

(Filed 2 June, 1965.)

1. Conspiracy § 5—

In a prosecution for conspiracy to commit larceny, a declaration of one of the alleged conspirators narrating the conspiracy and the part taken by each, which declaration is made after the commission of the larceny and the sale of the stolen property, is incompetent and prejudicial as to the others as an *ex parte* declaration, the acts and declarations of one conspirator being competent as against the others only when made during the existence of the conspiracy and in the furtherance of the common design, and when the existence of the conspiracy is established by evidence *aliunde.*

2. Conspiracy § 6—

Where there is evidence that one defendant stole certain tires, transported them in the vehicle of another defendant and sold them, statements by the other defendants that on the alleged date they accompanied the first defendant to sell the tires and received a certain amount each, but that they had no part in the theft of the tires, does not amount to an admission of conspiracy to commit the crime of larceny.

3. Criminal Law § 169—

The admission of incompetent evidence which is prejudicial necessitates a new trial, but defendants are not entitled to dismissal even though there is insufficient competent evidence in the record to sustain conviction, since if the incompetent evidence had not been admitted the State might have introduced competent evidence upon the point.

4. Conspiracy § 3—

One person alone may not be guilty of the crime of conspiracy, and therefore when all but one of the conspirators named is granted a new trial for the admission of incompetent evidence a new trial must be awarded as to all, and if upon the retrial insufficient competent evidence is introduced against the others and they are acquitted, the conviction of the lone defendant may not be allowed to stand.

APPEAL by defendants from *Froneberger, J.*, Fall 1964 Mixed Session of POLK.

This is a criminal action. It is charged in the bill of indictment that defendants, LeRoy Littlejohn, Ralph Littlejohn, Benjamin Foster and Wallace Moore, on Sunday, 7 June 1964, "unlawfully, wilfully and feloniously did combine, conspire, confederate and agreed *(sic)*, each with the other to take, steal and carry away" 9 tires (giving makes and serial numbers), "the value of $500; the property of P. L. Barnette . . ."

The defendants pleaded not guilty. The jury found all guilty as charged. From judgments imposing active prison sentences, defendants appeal.

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

Christ Christ for defendants.

MOORE, J. The principal assignment of error relates to the admission in evidence, as against all of the defendants and over their objection, of a purported declaration of defendant Moore made after his arrest, and made in the absence of the other defendants. The declaration was made to P. L. Barnette, owner of the stolen tires, and to police officers.

The declaration was to this effect: Moore received an "order" for some tires from a man who resided in or near Landrum, S. C. On Sunday, 7 June 1964, Moore and the Littlejohns were together and discussed the "deal." They were at the home of LeRoy Littlejohn. Foster came to the house and Moore told him that he was going to "pull a little deal" and asked for the use of Foster's automobile. Moore indicated that it involved Barnette's service station. Foster said that if the deal was "pulled" he wanted something out of it. They drove to Barnette's service station, after putting LeRoy and Ralph Littlejohn out at a place across the street from the service station. Foster drove the car onto the "wash-rack" at Barnette's; Moore loaded the tires. They left, picked up Leroy and Ralph, carried the tires to Landrum and sold them for $45. Foster received $15 for the use of his car and the other three got $10 each.

The witness Barnette and the Chief of Police of Tryon, N. C. testified that Moore made the declaration on 9 June 1964, two days after the theft and sale of the tires. Defendant Moore did not testify. The declaration was incompetent and inadmissible as against Foster and Leroy and Ralph Littlejohn; it was clearly prejudicial. The existence of a conspiracy may not be established by the *ex parte* declaration of an alleged conspirator made in the absence of his alleged coconspirator. Only evidence of acts committed and declarations made by one of the coconspirators, after the conspiracy is formed, is competent against all, and then only when the declarations are made or the acts are committed in furtherance of the conspiracy. *State v. Potter,* 252 N.C. 312, 113 S.E. 2d 573; Stansbury: North Carolina Evidence (2d Ed.), § 173, pp. 442-3; 1 Strong: N. C. Index, Conspiracy, § 5, pp. 509, 510. "A declaration or act of one conspirator, to be admissible against his coconspirators, must have been made when the conspiracy was still in existence or in progress. Hence, the declaration or act of one is not admissible in evidence as against other members of the conspiracy if it was made after the termination of the conspiracy. . . . This is true whether the conspiracy is terminated by the achievement of its purpose or by the failure to achieve it. And a confession or admission by one conspirator, after he has been apprehended, is not in furtherance of the conspiratorial purpose, but in frustration of it, and his confession is not admissible against others in the conspiracy." 16 Am. Jur. 2d, Conspiracy, § 40, p. 148.

The declaration of defendant Moore is the only evidence in the record tending to show the existence of the conspiracy alleged or tending to implicate defendants LeRoy and Ralph Littlejohn and Foster in such conspiracy. There is no evidence in the record that Foster made any declaration, admission or confession. The witness Barnette testified

that LeRoy and Ralph Littlejohn made statements that they were with Moore on the date of the alleged offense, had no part in the theft of tires, accompanied Moore to Landrum to sell the tires, and received $10 each. This falls short of admission of a conspiracy to commit the crime of larceny, though it may be sufficient basis for prosecution for other criminal offense or offenses.

Nevertheless, defendants LeRoy and Ralph Littlejohn and Foster are not entitled to nonsuit and dismissal. Though the court below, in denying their motion for nonsuit, acted upon evidence which we now hold to be incompetent, yet if this evidence had not been admitted, the State might have followed a different course and produced competent evidence tending to establish the conspiracy. *State v. McMilliam,* 243 N.C. 771, 774, 92 S.E. 2d 202. Said defendants are entitled to a new trial and it is so ordered.

There must also be a new trial as to defendant Moore. A criminal conspiracy is an unlawful concurrence of *two or more* persons in an agreement to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. *State v. McCullough,* 244 N.C. 11, 92 S.E. 2d 389; *State v. Smith,* 237 N.C. 1, 74 S.E. 2d 291. A person may not conspire with himself. One person alone may not be convicted of criminal conspiracy, and when all of the alleged conspirators are acquitted except one, the one convicted is entitled to his discharge. *State v. Raper,* 204 N.C. 503, 168 S.E. 831. It is true that Foster and the Littlejohns have not been acquitted, but they will be entitled to an acquittal upon retrial unless the State is able to produce competent evidence of their participation in the alleged conspiracy. If the State is not able to do so, defendant Moore will be entitled to his discharge notwithstanding his admission. If upon retrial Moore is again convicted of the conspiracy charged, the conviction will not stand unless at least one of his alleged coconspirators is also convicted. Hence, Moore is entitled to a new trial that it may be determined whether, within the meaning of the applicable rules of law, he is guilty of the offense charged.

It is not to be inferred that there are not circumstances under which a single conspirator may be convicted of conspiracy. See 16 Am. Jur. 2d, Conspiracy, § 33, pp. 144-5; 15 C.J.S., Conspiracy, § 37, pp. 1060, 1061. However, in the instant case, as the circumstances appear to be in the record, conviction of only one defendant of the conspiracy may not be sustained; there must be conviction of at least two, otherwise all must be acquitted.

Other errors appearing in the record may not arise when the case is again tried. Therefore, we do not discuss them here. The State might be well advised to obtain, and proceed upon, bills of indictment charging offenses more in keeping with the evidence available.

As to all defendants,
New trial.

STATE v. HAROLD ALLEN SMITH.

(Filed 2 June, 1965.)

1. Criminal Law § 19—

Upon transfer of a cause from a municipal-county court to the Superior Court upon defendant's demand for a jury trial, the Superior Court acquires jurisdiction of the offense charged in the warrant, but the trial in the Superior Court must be upon an indictment, notwithstanding statutory provision that it be upon the warrant.

2. Automobiles § 76—

G.S. 20-166(b) is not limited to streets or highways, and therefore the failure of a warrant or indictment for this offense to aver the street or highway where the collision occurred is not fatal.

3. Same—

The requirement of G.S. 20-166(b) that a motorist whose vehicle is involved in an accident resulting in property damage must stop is not limited to a motorist at fault in causing the accident, the purpose of the statute being to require a motorist to stop and identify himself to facilitate investigation.

4. Same; Indictment and Warrant § 9—

Where a prosecution for violating G.S. 20-166(b), a misdemeanor in the exclusive jurisdiction of a municipal-county court, is transferred to the Superior Court upon defendant's demand for a jury trial, the jurisdiction of the Superior Court is limited to the charge in the warrant, and therefore the warrant constitutes an essential part of the record, so that any failure of the indictment to identify the property damaged and the owner thereof is cured when the warrant supplies this information and thus affords defendant protection against another prosecution for the same offense.

APPEAL by defendant from *Gambill, J.*, October, 1964 Regular Criminal Session, GUILFORD Superior Court, Greensboro Division.

This criminal prosecution originated by warrant issued from the Municipal-County Court of Guilford (Criminal Division) charging that on April 3, 1964, Harold Allen Smith did "unlawfully and willfully violate Chapter 20, Section 166, Subsection (b), General Statutes of North Carolina, to-wit: Operate a motor vehicle and being involved in an automobile accident resulting in property damage to two automobiles at Ashe and Sycamore Street, Greensboro, North Carolina, the prop-

erty of B. E. Headen and Worth Dillon, and did fail and refuse to stop in accordance with the above statute, . . ."

Upon arraignment in the Municipal-County Court, Criminal Division, and before plea, the defendant moved for a jury trial. The Municipal Court entered this order: "Pursuant to such motion the case is forwarded to Guilford Superior Court."

In the Superior Court the Grand Jury returned a bill of indictment charging the offense in the language of G.S. 20-166(b), 1963 Cumulative Supplement. The indictment failed to designate either the place of the accident, or the description or ownership of the property damaged. Upon the call of the case for trial in the Superior Court, the defendant entered a plea of guilty. The court imposed a jail sentence of six months, from which the defendant appealed.

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

Cahoon & Swisher by Robert S. Cahoon for defendant appellant.

HIGGINS, J. "The defendant brings forward only his exception to the adverse judgment as set forth above, which constitutes his one and only exception." The appeal, motions in this Court to quash the bill, and to arrest judgment, present the question whether error of law appears upon the face of the record. More particularly, the defendant argues the indictment fails to charge a criminal offense cognizable in the Superior Court of Guilford County.

When the defendant was arraigned in the Municipal-County Court, he demanded a jury trial. The amendatory Municipal-County Court Act, Chapter 971, Session Laws of 1955, does not provide for jury trial. However, a demand for a jury trial transfers jurisdiction over the offense *charged in the warrant* to the Superior Court. Rule Six provides that the trial in the Superior Court shall be on the warrant. However, our decisions are to the effect that in the absence of a trial in the court below, and on appeal to the Superior Court from judgment, the demand for a jury trial places jurisdiction of the offense charged in the warrant in the Superior Court where trial must be upon indictment. *State v. Thomas,* 236 N.C. 454, 73 S.E. 2d 283; *State v. Peede,* 256 N.C. 460, 124 S.E. 2d 134; *State v. Hollingsworth,* 263 N.C. 158, 139 S.E. 2d 235.

The defendant argues the bill of indictment is bad for that it fails to give (1) the street or highway where the collision occurred; (2) the description of the property damaged in the collision, and (3) the name of the owner. Failure to designate the street or highway on which the collision occurred is not fatal. The statute does not restrict the offense

to a public highway. "It has been held that where so-called 'hit and run' statutes are silent with respect to the place where the alleged offense must occur . . . it is not necessary to allege and prove that the offense was committed on a public highway, but that the statute applies to accidents occurring . . . off a public highway." 77 A.L.R. 2d 1171.

"The growing practice of banks, supermarkets, and amusement centers and other organizations, maintaining large parking facilities for public convenience . . . is an added reason why the statute should not be restricted in scope in the absence of clear legislative intent to do so." *State v. Gallagher,* 102 N.H. 335, 156 A. 2d 765; *Kennedy v. State,* 39 Ala. Appeals 676, 107 So. 2d 913; 7 Am. Jur. 2d 724.

The purpose of the requirement that a motorist stop and identify himself is to facilitate investigation. Failure to stop is the gist of the offense. Absence of fault on the part of the driver is not a defense to the charge of failure to stop.

The defendant contends the indictment is invalid for failure to identify either by description or by ownership the property damaged in the accident, and hence the plea of guilty in this case will not protect him against another prosecution for the same offense. In this particular instance the indictment is not defective for the reason assigned. The offense charged is within the exclusive original jurisdiction of the Municipal-County Court, Ch. 971, § 3(b)(1), Session Laws of 1955. The demand for a jury trial before plea compelled the transfer of the case to the Superior Court and necessitated a bill of indictment. *State v. Hollingsworth, supra; State v. Thomas, supra.* However, the indictment and trial in the Superior Court were confined to the charge embraced in the warrant. Jurisdiction over all other misdemeanors not embraced in the warrant remained in the Municipal-County Court.

It follows from what has been said that the jurisdiction of the Superior Court to indict and try the defendant was limited to the charge in the warrant which thereby constitutes the warrant an essential part of the record proper. The warrant identifies the injured property as two automobiles belonging to B. E. Headen and Worth Dillon, and the damage as having been caused at Ashe and Sycamore Streets in Greensboro. The record proper will protect the defendant from another prosecution for the same offense. Error of law does not appear upon the face of the record. The judgment of the Superior Court of Guilford County is

Affirmed.

STATE v. WOODROW W. KING.

(Filed 2 June, 1965.)

1. Criminal Law § 101—

Evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction is sufficient to be submitted to the jury, but evidence which raises a mere suspicion or conjecture in regard to the issue is insufficient.

2. Intoxicating Liquor § 13c— Circumstantial evidence of defendant's constructive possession of intoxicating liquor held insufficient for jury.

The evidence tended to show that defendant, a noted rabbit hunter, was observed with his hounds in a wooded area some 500 yards from his home, that he walked around and stopped and looked at several places, then walked to a paper bag at the foot of a cedar tree, straightened the bag and covered it with leaves, and had started away when he was apprehended by the officers, and that the officers found pints of taxpaid whiskey at the places at which defendant had looked and in the bag at the foot of the cedar tree. There was also evidence that there were other occupied houses nearer to the *locus* than defendant's house, and that the area was a honeysuckle thicket with paths going in every direction. *Held:* The evidence was insufficient to be submitted to the jury on the question of defendant's constructive possession of the whiskey.

APPEAL by defendant from *Braswell, J.*, 1 March 1965 Criminal Session of ALAMANCE.

Criminal prosecution on a warrant charging defendant on 21 November 1964 (1) with the unlawful possession of one gallon of taxpaid whisky, and (2) with the unlawful possession of one gallon of taxpaid whisky for the purpose of sale (see warrant in the record of *S. v. Welborn*, 249 N.C. 268, 106 S.E. 2d 204, on file in the clerk's office), heard *de novo* on appeal from a conviction on both counts and a judgment in the municipal recorder's court of the city of Graham.

Plea: Not guilty. At the close of the State's evidence, defendant moved for a judgment of compulsory nonsuit on both counts. The trial court allowed the motion on the count charging the unlawful possession of one gallon of taxpaid whisky for the purpose of sale, and denied the motion on the count charging the unlawful possession of one gallon of taxpaid whisky, and defendant excepted. Verdict: "Guilty of illegal possession of taxpaid whiskey."

From the judgment imposed, defendant appeals.

Attorney General T. W. Bruton and Assistant Attorney General James F. Bullock for the State.

H. Clay Hemric for defendant appellant.

PARKER, J. Defendant assigns as error the denial of his motion for judgment of compulsory nonsuit on the count in the warrant charging him with the unlawful possession of one gallon of taxpaid whisky. The State's evidence presents these facts:

About 3 p.m. on Saturday, 21 November 1964, J. C. Scoggins and A. B. Gross, officers employed by the Burlington-Graham Board of Alcoholic Control, found in a wooded and honeysuckle area of land off of Chase Street in the city of Burlington eight pints of Governor's Club taxpaid whisky in a paper bag sitting beside a cedar tree in a "honeysuckle thicket in the wooded area" near Snooper's Lake. The paper bag was not covered up, and was sitting beside the tree "in a crumbled position — like somebody sat it down right quick." There are paths in the honeysuckle area going in every direction. The two officers concealed themselves by lying down in a place twelve steps from the cedar tree where they could watch this whisky.

About 4:45 p.m. on the same afternoon, these two officers saw defendant, who lived at 202 Dixon Street about 500 yards from this wooded area, and who is "a renowned rabbit hunter," accompanied by eight beagle hounds, a bulldog, and a little dog, near the cedar tree walking in a heavily traveled path. He would walk four or five steps, stop and look around. When he came into the wooded area, he stopped and looked at an area where the officers later found eight pints of taxpaid whisky. He walked four or five more steps, stopped and looked at another area, where the officers later found another eight pints of taxpaid whisky. He walked four or five more steps and came to the paper bag containing eight pints of taxpaid whisky sitting beside the cedar tree. He bent over, squatted down, straightened up the paper bag, covered it over with leaves, and started away. When he did, the officers arrested him. The hunting season was open. All three gallons of taxpaid whisky were on land owned by M. C. Hayes. After arresting defendant, the two officers took possession of the gallon of whisky sitting beside the cedar tree, and found and took possession of two separate gallons of whisky in pint bottles in the areas where defendant had looked. The twenty-four pint bottles of whiskey indicated they had been purchased that day from three liquor stores situate in Graham and Burlington.

In and around the area where all the whisky was found, there are some eight or nine houses, a plumbing place of business, and a house trailer, and all, or nearly all, were occupied at the time. All these buildings, except three, were closer to the places where the officers found the whisky than defendant's home. In the area "near the honeysuckle patch" was a little house used by one Rainey Harris who was selling whisky. Defendant owned this house.

All twenty-four pints of taxpaid whisky found by the two officers were on land owned by M. C. Hayes. All of it was found about 500 yards from where defendant lived at 202 Dixon Street. Some five or six houses that were occupied at the time were situate closer to all this whisky than defendant's home. Certainly, the later finding of two bags containing eight pints of taxpaid whisky each by the two officers in two separate areas toward which areas defendant had merely looked is not sufficient to carry the case to the jury that defendant was in the unlawful possession of this whisky or any of it.

Eight pints of taxpaid whisky were sitting in a paper bag "in a crumbled position," and not covered up, beside a cedar tree in a "honeysuckle thicket in the wooded area" near Snooper's Lake on land owned by M. C. Hayes. There are paths in the honeysuckle area going in every direction. In the area "near the honeysuckle patch" was a little house used by Rainey Harris, who was selling whisky. Defendant owns this house. About 4:45 p.m. on Saturday, 21 November 1964, defendant, who is "a renowned rabbit hunter," accompanied by eight beagle hounds (a rabbit hunter's favorite hunting dog), a bulldog, and a little dog, was walking in this area near the cedar tree in a heavily traveled path. The hunting season was open. After stopping twice and looking at two areas where the two officers later found 16 pints of taxpaid whisky, he came to the cedar tree. He stopped, bent over, squatted down, straightened up the paper bag containing eight pints of taxpaid whisky beside the cedar tree, covered it over with leaves, started away, and was arrested by the officers, who were concealed twelve steps away, and whom, so far as the record discloses, defendant's pack of dogs never noticed. It seems clear that whoever was in possession of the eight pints of taxpaid whisky sitting in a paper bag by the cedar tree had it in his possession for the purpose of sale, but the trial judge dismissed the count in the warrant charging possession for the purpose of sale. The question for decision is: Is the State's evidence, considered in the light most favorable to it, sufficient to carry the case to the jury that defendant was in the actual or constructive possession of the eight pints of taxpaid whisky in a paper bag sitting beside the cedar tree in such sense that he could and did command its use or control? *S. v. Meyers,* 190 N.C. 239, 129 S.E. 600.

"It is sometimes difficult to distinguish between evidence sufficient to carry a case to the jury, and a mere scintilla, which only raises a suspicion or possibility of the fact in issue. [Citing authority.] The general rule is that, if there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury."

S. v. Johnson, 199 N.C. 429, 154 S.E. 730. The State's evidence does no more than raise a suspicion or conjecture, very strong perhaps, of defendant's guilt. If the officers had waited and watched longer, they might or might not have obtained indubitable proof of defendant's guilt. Hence, under the principles announced in *S. v. Johnson, supra; S. v. Love,* 236 N.C. 344, 72 S.E. 2d 737; *S. v. Wiley,* 242 N.C. 114, 86 S.E. 2d 913; *S. v. Glenn,* 251 N.C. 156, 110 S.E. 2d 791; *S. v. Guffey,* 252 N.C. 60, 112 S.E. 2d 734; *S. v. Hunt,* 253 N.C. 811, 117 S.E. 2d 752; *S. v. Carver,* 259 N.C. 229, 130 S.E. 2d 285, the court erred in overruling defendant's motion for judgment of compulsory nonsuit on the count in the warrant charging the unlawful possession of taxpaid whisky.

Reversed.

CAROLINA POWER & LIGHT COMPANY, PETITIONER v. W. OSMOND SMITH, JR. AND WIFE, ROBERTA K. SMITH; C. L. PEMBERTON, TRUSTEE, AND THE FIRST NATIONAL BANK OF DANVILLE, DEFENDANTS.

(Filed 2 June, 1965.)

1. Attorney and Client § 5—

The fact that the attorney for condemnor is also a defendant in the proceeding as trustee in a deed of trust on the land is not in itself ground for disturbing the judgment fixing the amount of compensation, it appearing that no objection was made by the owners of the equity of redemption until after verdict, and that the *cestue que trust* made no objection at any time, and that the remaining land was a great deal more than sufficient security for the amount of the debt.

2. Eminent Domain § 11; Evidence § 55—

Trial in the Superior Court upon appeal from the commissioners' report in condemnation is *de novo,* and respondents are not entitled to have the commissioners testifying for them also testify that they had been appointed by the clerk, since the good character of a witness may be established by general reputation only, and not by the esteem in which he is held by a particular person.

3. Appeal and Error § 24—

An exception to the entire charge, assigned as error for that the court failed to explain the evidence and declare the law arising thereon and failed to recapitulate the evidence as required by law, is ineffectual.

APPEAL by defendants Smith from *Riddle, S.J.,* December 1964 Civil Session of CASWELL.

This condemnation proceeding was instituted in January 1964 to acquire 118 acres of land, owned by defendants Smith (appellants), for

use in constructing and operating an electric generating plant. Process was served on appellants. Defendants Pemberton, as trustee, and First National Bank of Danville accepted service of process, but did not answer. Appellants answered, admitting the material allegations of petition, including section 6, which alleged the land was subject to the lien of a deed of trust, dated April 21, 1961, from appellants to C. L. Pemberton, trustee, "securing an indebtedness to the defendant The First National Bank of Danville." They averred the land to be taken had a value of $35,000; petitioner had only offered $10,213.12.

Commissioners were appointed. They conducted a hearing in April 1964. Their report was confirmed in June 1964. Petitioner excepted and appealed. The jury, at the December 1964 Session, fixed the value of the land taken at $17,700. Appellants moved to set the verdict aside. The motion was denied. Judgment in conformity with the verdict was signed.

Gwyn & Gwyn for defendant appellants.

Burns, Long & Burns; Pemberton & Blackwell; Charles F. Rouse for petitioner appellee.

PER CURIAM. Appellants' first assignment of error, and the one principally relied on in the oral argument, is the denial of their motion to set the verdict aside. The motion is based on the fact that C. L. Pemberton, who, as trustee in the deed of trust described in section 6 of the petition, and for that reason a defendant herein, took an active part as counsel for petitioner in the trial of the case. This dual relationship of defendant and counsel for petitioner, they contend, is so contrary to public policy as to make the trial void. They do not charge any improper or wrongful conduct on the part of Mr. Pemberton, other than that which they contend arises as a matter of law from his relation as counsel for petitioner and his position as trustee in the deed of trust given by appellants.

Neither the pleadings nor the evidence show the amount appellants borrowed from the Danville Bank. We were told at the oral argument the amount borrowed was $19,000. The amount owing when this proceeding was begun does not appear, nor does it appear what duty was imposed on Mr. Pemberton by the deed of trust. In the absence of evidence to the contrary, it is fair to assume that the only duty imposed on the trustee related to a sale of the pledged property in the event of a default in paying the debt thereby secured. If and when that occurred, and creditor called on the trustee to sell, it would be the duty of the trustee to advertise and sell in such manner as to secure, for the benefit of mortgagor and the creditor, the fair value of the property.

Here, manifestly, the creditor was not disturbed about its security. It did not answer. It has not taken part in this litigation. It is not now complaining about the fact that the trustee appeared for petitioner in this proceeding.

The pleadings raise only one question, *viz:* What is fair compensation for the property to be taken? The commissioners appointed to determine that fact heard evidence in April 1964. Mr. Pemberton, one of the counsel for petitioner, participated in that hearing. When the case was called for trial in the Superior Court, the parties stipulated numerous facts, specifically agreeing that the only question for jury consideration was the amount of compensation to be paid. Mr. Pemberton acted for petitioner in selecting the jury; he examined and cross examined witnesses; he presented to the jury petitioner's contentions. Not until the jury reached and reported its verdict did appellants give any indication that they objected to Mr. Pemberton's appearing for petitioner.

All of the evidence establishes the fact that appellants could have given petitioner the land it needed without impairing the creditor's security. W. O. Smith testified the portion not taken was worth $75,000, nearly four times the sum originally borrowed. Pemberton and Smith did not, as appellants now contend, occupy the relation of attorney and client; to the contrary, appellants selected other counsel to represent them. They are only entitled to fair compensation for the property petitioner has taken. There is no suggestion that Pemberton has been guilty of fraud or chicanery. The only charge is that Pemberton, by fair examination of witnesses and plausible argument, succeeded in convincing the jury "fair compensation" was less than the sum claimed by appellants; nor, it may be noted, did he succeed in convincing the jury that the sum offered by petitioner was in fact fair compensation. The jury awarded $7,000 or 70 per cent more than petitioner had offered in private negotiation.

Appellants' delay in questioning Mr. Pemberton's right to appear as counsel for petitioner was a waiver of any right which they might otherwise have had. If appellants thought trustee was violating the confidence imposed in him by acting as attorney for petitioner, they owed him the duty of informing him that they objected to his appearance as counsel in this proceeding. The law here applicable is, we think, aptly stated in Bogert, Trusts & Trustees, 2d Ed., § 941. It is there said:

> "If a beneficiary, of full age and sound mind, acting with full knowledge of the facts of the case and of his rights, and not under the influence of misrepresentation, concealment, or other wrongful conduct on the part of the trustee or another, consents

> that the trustee or a third person may perform an act or refrain from performing an act, equity will not permit the beneficiary to allege thereafter that the conduct of the trustee or third person to which consent was given was a breach of trust, or amounted to participation in a breach. * * * It would be extremely unfair to allow him thereafter to contend that the act which he impliedly said would be rightful was in fact wrongful. He would be entrapping the opposing party."

Application of the rule, as there stated, may be found in *Wolfe v. Land Bank,* 219 N.C. 313, 13 S.E. 2d 533; *Hare v. Weil,* 213 N.C. 484, 196 S.E. 869; *Pearson v. Caldwell,* 70 N.C. 291.

The commissioners appointed to value the property taken were called by appellants as witnesses. They gave, without objection, their estimate of the damage which appellants would sustain by the taking. They sought to buttress the testimony of these witnesses by having them testify that they had been appointed by the Clerk of the Court to ascertain appellants' damage. Petitioner objected. The objection was sustained — properly so. The hearing in the Superior Court was *de novo.* If appellants wished to establish the good reputation of their witnesses, they could have done so by the testimony of other witnesses. They could not establish that fact by showing the esteem in which the witnesses were held by a particular person; they could only show the general reputation. *Lorbacher v. Talley,* 256 N.C. 258, 123 S.E. 2d 477.

There appears in the record, following the charge: "This is DEFENDANTS SMITH'S EXCEPTION #4." Presumably the word "this" refers to the entire charge. This assumption is fortified by looking at the assignments of error where it is stated that the court committed error by failing to explain the evidence and declare the law arising thereon, as required in G.S. 1-180, in that the court failed to array and recapitulate the evidence as required by law. The exception is broadside and totally ineffective. The court gave the jury the correct rule for measuring damages, namely, the difference in value before and after the taking.

A careful examination of the record fails to disclose prejudicial error.

No error.

SOUTHERN NATIONAL BANK OF NORTH CAROLINA, ADMINISTRATOR OF THE ESTATE OF LACY OXENDINE, DECEASED v. HENRY LINDSEY.

(Filed 2 June, 1965.)

1. Automobiles § 41a—

Evidence tending to show that defendant drove off the highway at a slight curve, bounced down a drainage ditch some 484 feet before bringing the truck to a stop in an undamaged and upright position, that defendant's passenger was thrown from the truck to his fatal injury and that shortly after the accident defendant was too intoxicated to walk unaided, *held sufficient to* sustain plaintiff's allegations that defendant was guilty of reckless driving, G.S. 20-140, constituting negligence *per se*.

2. Automobiles § 49—

Plaintiff's own evidence, considered in the light most favorable to plaintiff, compelled the consideration that plaintiff's intestate and defendant had been drinking together for a considerable time, and that intestate voluntarily rode with defendant and was thrown from the vehicle to his fatal injury as the result of the culpably negligent operation of the vehicle. There was no evidence that intestate was too drunk to know what was going on. *Held:* The evidence discloses contributory negligence as a matter of law on the part of intestate in voluntarily riding and in continuing to ride with an intoxicated driver.

APPEAL by plaintiff from *Mallard, J.*, January 1965 Civil Session of ROBESON.

Action *ex delicto* to recover damages for an alleged wrongful death. G.S. 28-173, -174.

From a judgment of compulsory nonsuit entered at the close of plaintiff's evidence, it appeals.

Joseph C. Ward, Jr., for plaintiff appellant.

Anderson, Nimocks & Broadfoot by Henry L. Anderson for defendant appellee.

PER CURIAM. Plaintiff's evidence shows these facts: About 12:15 p.m. on Sunday, 23 February 1964, David O. Pearce, a State Highway patrolman, arrived at the scene of a motor vehicle accident on Rural Paved Road #1150 about five miles north of the town of Rowland. "Rural Paved Road 1150 runs generally north and south, or northwest to southeast, it is crooked, runs all kinds of ways." He saw there a 1960 GMC log and pulpwood truck, owned by defendant, headed south, upright on its wheels, on the west side of the road with its left wheels in a drainage ditch of the highway and its right wheels in a field beyond the drainage ditch. There was no damage to the truck. The door on the driver's side was open; the door on the right was closed. Defendant was leaning against his truck, his "tongue was thick," his eyes

were bloodshot, he could not walk without aid, and he was drunk. The warm body of Lacy Oxendine, plaintiff's intestate, a 45-year-old man, was lying to the left of the truck and about 75 feet behind it. Tire tracks went back up the ditch 484 feet from the back wheels of the truck to where it ran off the hard-surfaced part of the road. The ditch was about 18 inches deep. Pearce testified: "The ditch was kind of V-shape ditch and the wheels would bounce from side to side; for a distance dragged on one side and for a distance on the other, bouncing from side to side." The truck ran off the road on a slight curve. He asked defendant who was driving the truck. Defendant pointed to Lacy Oxendine's body, and said, "He was." He talked to defendant in jail three or four hours later. At that time defendant had sobered up "pretty well." There defendant told him he could not tell a lie, he was driving the truck at the time of the accident, that Lacy Oxendine was in the truck with him, that they had been together all night and all day and had been drinking liquor together, and he did not know how the accident occurred.

J. A. Thompson, a deputy sheriff of Robeson County, arrived at the scene a few minutes before Pearce arrived. Defendant was there, and he was "obviously drunk." He assisted him to walk to his car, and carried him to jail in Rowland. Before reaching Rowland five miles from the scene, defendant's head dropped over on the seat of the car, and he went to sleep.

The parties stipulated that Lacy Oxendine died as a result of the injuries he received in the accident and that the maximum speed limit on Rural Paved Road #1150 was 45 miles per hour at the time and place complained of.

Plaintiff alleges in his complaint that defendant was guilty of negligence in the operation of his truck, which proximately caused its intestate's death, in the following respects: (1) He operated his truck in a reckless manner in violation of G.S. 20-140; (2) he operated his truck at a speed greater than was reasonable and prudent under the attendant circumstances and without keeping a proper lookout; (3) he operated his automobile at a speed in excess of a posted speed limit of 45 miles an hour; and (4) he operated his truck in such a manner and at such a speed as to be incapable of keeping it on the paved part of the road.

Defendant in his answer denies that he was driving the truck at the time of the accident, and avers that Lacy Oxendine was driving it at such time. And by way of a further answer and defense, he alleges that if he was driving the truck at the time of the accident, which he denies, he was drunk to such an extent that his ability to operate a motor vehicle was materially impaired, that Lacy Oxendine knew his drunken condition when he voluntarily got into the truck as a passenger and

rode with him without protest, that such conduct on the part of Lacy Oxendine constituted negligence which proximately contributed to his injuries and death, and bars any recovery by his administrator.

Plaintiff has no evidence as to the speed of the truck at the time of the accident, or just before it. Its evidence shows the truck, after bouncing down the drainage ditch 484 feet, stopped upright on its wheels, and undamaged. All of plaintiff's evidence shows that defendant was operating his truck on the public highway in a drunken condition, when his mental and physical faculties were materially impaired. A person drunk by the use of intoxicating liquor is necessarily under the influence of intoxicating liquor within the intent and meaning of G.S. 20-138. *S. v. Painter,* 261 N.C. 332, 134 S.E. 2d 638. It is negligence *per se* for a person to operate an automobile while under the influence of intoxicating liquor upon a public highway of the State. G.S. 20-138; *Watters v. Parrish,* 252 N.C. 787, 115 S.E. 2d 1. All of plaintiff's evidence compels the necessary inference that his drunken condition was the cause of his perilous operation of his truck in driving it off the road on a slight curve into a drainage ditch, and then bouncing down the ditch 484 feet, which resulted in Lacy Oxendine falling out of the truck and receiving injuries proximately resulting in his death. That defendant's such perilous operation of his truck in a drunken condition constituted a driving of it upon the public highway without due caution and circumspection and in a manner so as to endanger persons or property, and was reckless driving within the intent and meaning of G.S. 20-140(b). The language of subsections (a) and (b) of G.S. 20-140 "constitutes culpable negligence." *Dunlap v. Lee,* 257 N.C. 447, 126 S.E. 2d 62. A violation of either of the two subsections of G.S. 20-140 is negligence *per se. Stegall v. Sledge,* 247 N.C. 718, 102 S.E. 2d 115. Plaintiff's evidence manifestly shows that defendant was guilty of negligence *per se* in operating his truck in a reckless manner in violation of G.S. 20-140(b), which was a proximate cause of plaintiff's intestate's death, as alleged in the complaint. Plaintiff's complaint was verified on 2 September 1964. It seems clear that plaintiff did not allege that defendant was negligent in operating his truck while drunk or under the influence of intoxicating liquor by reason of the decision in *Davis v. Rigsby,* 261 N.C. 684, 136 S.E. 2d 33 (29 April 1964).

Plaintiff's evidence is that his intestate and defendant had been together all night and all day, and had been drinking liquor together. There is no evidence to the effect that its intestate was too drunk to know what was going on. In our opinion, and we so hold, plaintiff's own evidence, considered in the light most favorable to it, leads to the unescapable conclusion that its intestate knew that defendant was drunk from drinking intoxicating liquor to a degree that he was incapable of

safely operating his truck on a public highway at the time he voluntarily placed himself in a position of extreme danger known to him by entering defendant's truck and voluntarily riding with defendant who was driving it on a public highway, and that plaintiff's intestate, by voluntarily continuing to ride with defendant in his truck under such circumstances and conditions as would have impelled an ordinarily prudent man in the exercise of ordinary care for his own safety to stay out of the truck, which was being driven by a drunken driver, committed an act of continuing negligence which proximately contributed to his injuries and death as a matter of law, and which bars any recovery by his administrator for his death. This is in line with our decisions in *Davis v. Rigsby, supra; Rice v. Rigsby,* 261 N.C. 687, 136 S.E. 2d 35; *Tew v. Runnels,* 249 N.C. 1, 105 S.E. 2d 108.

Randall v. Rogers, 262 N.C. 544, 138 S.E. 2d 248, relied on by plaintiff, is factually distinguishable, in that, *inter alia,* plaintiff got in defendant's automobile parked at the Moose Lodge, went to sleep, and the next thing he remembered was waking up next day in a hospital hurting all over. He did not know of his own knowledge who drove the car off, or who was driving it at the time of the accident.

The judgment of compulsory nonsuit is

Affirmed.

STATE v. HENRY LINDSEY.

(Filed 2 June, 1965.)

1. Automobiles § 59—

Evidence that defendant, while highly intoxicated, drove his truck off the highway into a ditch and that the truck proceeded along the ditch some 544 feet before striking a bank and stopping, that defendant and his companion were thrown out of the vehicle some 75 feet before it stopped, resulting in fatal injury to the passenger, *held* sufficient to be submitted to the jury and sustain a conviction of involuntary manslaughter, notwithstanding defendant's explanation that he "believed" the steering rods became loose, there being no evidence that the steering mechanism or the brakes were defective.

2. Automobiles § 72—

Evidence tending to show that defendant was seen driving his truck some 30 minutes before a highway patrolman reached the scene of the accident, that defendant had then been arrested and was in the custody of a deputy sheriff, that defendant was in a highly intoxicated condition and that no intoxicating liquor was found in or about the vehicle, *is held* sufficient to

support an instruction in regard to the law if defendant at the time of the accident was driving while under the influence of intoxicating liquor.

APPEAL by defendant from *Hall, J.*, October 1964 Session of ROBESON.

Defendant was indicted for manslaughter in connection with the death on February 23, 1964 of Lacy Oxendine. He pleaded not guilty. The State offered evidence. Defendant did not testify but offered evidence. The jury returned a verdict of guilty of involuntary manslaughter. Judgment imposing a prison sentence was pronounced. Defendant excepted and appealed.

Attorney General Bruton, Assistant Attorney General Brady and Staff Attorney Hornthal for the State.

Barrington & Britt for defendant appellant.

PER CURIAM. Defendant's brief presents only two questions: (1) Did the court err in denying defendant's motion for judgment as of nonsuit? (2) Did the court err in his instructions relating to G.S. 20-138?

There was evidence tending to show the following facts: On Sunday, February 23, 1964, about 12:00 o'clock, defendant was driving his "GMC log truck" in an easterly direction on the Elrod-Purvis Road. Lacy Oxendine was riding with defendant. The hard-surfaced portion of said road was 20 feet wide. South thereof, to defendant's right, there was a dirt (grass covered) shoulder of "about six feet" and south of this shoulder there was a ditch "about 8 or 9 feet wide" and "about 18 inches or two feet" deep. The truck ran onto the south shoulder and, after proceeding thereon for some 15 feet, ran off into the ditch; and, bouncing "from one side of the ditch to the other," proceeded in the ditch a total distance of 544 feet before it struck a bank and stopped. Defendant and Oxendine "both fell out together" on or near the south side of the shoulder at a point 75 feet west of where the truck stopped. When officers arrived, Oxendine, his neck broken, was dead. Defendant was "leaning up against a car," — "heavily under the influence" of intoxicating liquor.

There was no evidence or contention that defendant was driving at excessive speed. The State contends defendant, while "heavily under the influence" of intoxicating liquor, was unable to control his slowmoving truck sufficiently to keep it on the hard-surfaced highway or to bring it under control and stop it after it got into the ditch and was proceeding therein. Testimony that defendant, while en route to jail, told the arresting officer "he believed the steering rods came loose . . . that he got out of control and went in the ditch" is insufficient to exculpate defendant. The truck was upright, on its wheels, when it stopped. It had

not turned over. There was no evidence of any defect in the steering rods. Nor was there evidence of any defect in the brakes.

A person whose culpable (criminal) negligence in the operation of a motor vehicle proximately causes death is guilty of manslaughter at least. The pertinent and oft-stated legal principles are well established. *S. v. Cope,* 204 N.C. 28, 167 S.E. 456; *S. v. Hancock,* 248 N.C. 432, 103 S.E. 2d 491. Based thereon, the evidence, when considered in the light most favorable to the State, *S. v. Orr,* 260 N.C. 177, 179, 132 S.E. 2d 334, was amply sufficient to support a finding that defendant was guilty of involuntary manslaughter.

Defendant challenges the court's instructions relating to G.S. 20-138 on the ground the evidence was insufficient to show defendant was under the influence of intoxicating liquor *at the time* the truck he was driving ran off the road or that his conduct, if a violation of said statute, proximately caused Oxendine's death. The contention is untenable. When State Highway Patrolman Pearce arrived at the scene "about 12:15," defendant had been arrested and was in the custody of Deputy Sheriff Thompson. Thompson was "about two miles" away when he received a radio call. There were five or six people at the scene when Thompson arrived. No intoxicating liquor was found in or about defendant's truck. A witness for defendant testified he had seen defendant and Oxendine in the truck "at about 11:45" — "coming out of Elrod." These circumstances, together with the evidence as to defendant's condition when Thompson and Pearce arrived, constituted ample basis for the court's instructions as to violation of G.S. 20-138 and as to proximate cause.

Presumably, Oxendine and defendant were friends. The evidence indicates another in the long list of tragedies chargeable to the operation of a motor vehicle while under the influence of intoxicating liquor.

No error.

IN THE MATTER OF THE CUSTODY OF TERESA ANN BOWMAN, MINOR.

(Filed 2 June, 1965.)

1. Habeas Corpus § 3—

The welfare of a minor child and not that of either parent is the criterion for determining custody.

2. Same—

Where the court finds upon supporting evidence that the best interest of the child requires that her care and custody be awarded the father, with the physical possession to be in the home of the paternal grandparents, such findings are conclusive and support the award of the custody to the child's father with visitation rights to the mother, no abuse of discretion being shown.

APPEAL by respondent from *Braswell, J.*, February 1965 Civil Session of ALAMANCE.

Habeas corpus to determine the custody of 5-year-old Teresa Ann Bowman, the child of petitioner-husband and respondent-wife, who are living in a state of separation without being divorced.

This matter was first heard on December 23, 1964, by Latham, S. J., upon the return of writ issued that day upon petitioner's allegations of apprehension that respondent would remove the child from this jurisdiction. Judge Latham made an order awarding temporary custody to petitioner and setting the matter for a plenary hearing at a later date. On February 2, 1965, Judge Braswell heard the evidence of both parties. It reveals: Petitioner, who had then been regularly employed by Western Electric Company for two years, married respondent on June 5, 1959, when she was under sixteen and still in high school. At the time, she was pregnant with his child, Teresa, who was born December 31, 1959. Thereafter, the parties lived with petitioner's parents in Burlington while respondent finished high school. The marriage was not successful, and the parties finally separated on February 7, 1963. On that date they executed a deed of separation, in which respondent was given "exclusive supervision, custody, care and control" of Teresa, to whose support petitioner agreed to contribute $15.00 a week. Respondent released petitioner from any further obligation to the child and from all obligation to her. Respondent then moved to Greensboro, where she worked as a waitress. Between November 1963 and June 18, 1964, respondent, although not obligated to do so, frequently permitted petitioner to take the child to the home of his parents for extended weekends; and from time to time the parties discussed reconciliation.

Respondent, voluntarily and without any request from petitioner, delivered Teresa to petitioner on June 18, 1964. She told him that she was going west and would reclaim the child when she returned. At that time she was pregnant — with petitioner's child, she testified under oath. He testified under oath that it was not his child. On the day she left he gave her $300.00. She said the money was to help defray the cost of the birth and disposition of the child in Colorado. He said that it was money he gave her to return her rings and a stereo to him and

that he did not know she was pregnant until she wrote him from Denver requesting money for food. He sent her a total of $35.00.

In Colorado respondent gave birth to a baby boy, whom she surrendered to the Welfare Department of Golden, Colorado, for adoption. She then returned to North Carolina. She rented a trailer at a mobile-homes park 7 miles from Burlington and secured a job as a waitress at a steak house, where she works "from eleven until eight, from twelve to nine" and "a split shift from eleven until two and back from five to ten." Her take-home pay is $17.96 a week.

On December 8, 1964, without notice to petitioner, respondent took the child from the home of petitioner's parents, with whom he lives in a large house located on a 4½-acre tract of land. In that home Teresa has her own room. When respondent failed to return the child, petitioner instituted this proceeding.

Upon the final hearing, Judge Braswell found facts which are fully supported by the evidence. Upon the facts found and his evaluation of the parties based on his observation of their demeanor in court, Judge Braswell concluded, and found as a fact, "that it is for the distinct best interest and welfare of the child, Teresa Bowman, that her care and custody be awarded to the father, W. B. Bowman," who "is a fit and proper person to have the care and custody of his minor child." He found, also, that the grandparents are fit and proper persons to have custody of Teresa. Whereupon, he entered an order awarding the custody of the child to petitioner "with the child's physical possession to be in the home of the paternal grandparents, Mr. and Mrs. J. S. Bowman." Respondent was allowed to have the child on Sundays from 1:00 p.m. until 6:00 p.m. From this order respondent appeals.

Ross, Wood & Dodge for petitioner appellee.
Dalton & Long for respondent appellant.

PER CURIAM. In determining who shall have the custody of the child of a broken home — one of the gravest responsibilities cast upon a Superior Court judge — "the welfare of the child . . . is the polar star . . ." *Kovacs v. Brewer,* 245 N.C. 630, 635, 97 S.E. 2d 96, 100; *accord, Thomas v. Thomas,* 259 N.C. 461, 130 S.E. 2d 871. In making this determination, a judge must be ever on his guard not to substitute the welfare of the parent who appeals to his sympathy for that of the child and not to succumb to the temptation to punish, at the expense of the child, the parent whom he deems the original offender. Respondent here, "deprived by the petitioner of her adolescence at age 15" — as her counsel charges —, lacking the family background of respondent, and having no financial security, is indeed a tragic, sympathetic figure.

And this is true whether the child she left in Colorado be legitimate or illegitimate. She said that she could not cope with the financial and social problems resulting from her broken home and that she could give up her second child because she had not known and loved him for five years as she had Teresa.

The judge made no finding as to the paternity of this second child. He did find, however, that, even if petitioner were the father, "it is still in the best interest of the child, Teresa Ann Bowman, to be in the custody of W. B. Bowman."

"The love of a mother for her child is one of the most powerful of the human emotions. Usually, it is the best guaranty of the child's welfare," Parker, J., in *Spitzer v. Lewark*, 259 N.C. 50, 54, 129 S.E. 2d 620, 623. This rule, however, is not without its exceptions, and the findings of the judge make this case an exception. Competent evidence supports each of the court's findings of fact, which, in turn, support his judgment. The findings are, therefore, binding and render the judgment conclusive on appeal. *In re White*, 262 N.C. 737, 138 S.E. 2d 516; *Kovacs v. Brewer, supra; Clegg v. Clegg*, 186 N.C. 28, 118 S.E. 824. No abuse of discretion is shown. None of respondent's assignments of error can be sustained.

The judgment of the court below is

Affirmed.

BEULAH PAYNE v. F. K. GARVEY, FRANK SOHMER, DAVID CAYER AND THE NORTH CAROLINA BAPTIST HOSPITALS, INC.

(Filed 2 June, 1965.)

Hospitals § 3; Physicians and Surgeons § 11—

Evidence tending to show that as a student nurse was shaking down a thermometer it broke and mercury and glass hit plaintiff's eye, causing injury, *held*, to disclose an accidental injury for which neither the hospital nor the physician having plaintiff admitted to the hospital may be held responsible, there being no evidence of negligence in furnishing the equipment, or in failing to make reasonable inspection of it, or in failing to properly instruct the nurse.

APPEAL by plaintiff from *Braswell, J.*, January, 1965 Session, ALAMANCE Superior Court.

The plaintiff became a patient of Dr. Garvey, a specialist in one field of medicine who called in consultation Dr. Cayer and Dr. Sohmer,

specialists in other fields. Dr. Sohmer had the patient admitted to the hospital.

The opening paragraph in plaintiff's brief contains a concise statement of this case:

> "Plaintiff sues a hospital and three doctors for injuries resulting from a thermometer breaking and glass and mercury falling into her left eye. The complaint alleges that the doctors are liable for the negligence of the nurse handling the thermometer as their agent. The complaint does not allege any cause of action against the hospital based on *respondeat superior* but alleges corporate or administrative negligence in regard to (1) the instruments furnished, (2) permitting incompetent personnel to attend plaintiff, and (3) not giving this person proper instructions. The plaintiff appeals from judgment of nonsuit as to all defendants at close of plaintiff's evidence. Appeal was not perfected and is abandoned as to two of the defendants, but was perfected and is prosecuted as to the defendant THE NORTH CAROLINA BAPTIST HOSPITALS, INC., and Dr. Frank Sohmer."

The plaintiff's evidence disclosed that Miss Adams, a student nurse, had been in training at the hospital's nursing school for more than eight months. The supervisor of nursing testified that Miss Adams had been instructed and trained to take patients' temperatures . . . "We consider taking temperature one of the less complicated procedures. . . . I am sure she had been under supervision long enough to have been doing it by herself for several months." "There is no prescribed method as to where the nurse shall stand or face in relation to a bed patient when shaking down the thermometer."

The plaintiff testified: "I was watching her while she was shaking the thermometer. The thermometer did not hit me. It did not hit anything." . . . "It broke and the only thing I felt was when the mercury and glass hit my eye. . . ." The plaintiff offered evidence that she had suffered pain and had some permanent injury to her vision. At the close of all the evidence the court sustained demurrers thereto and entered compulsory nonsuit against all defendants. The plaintiff prosecutes the appeal against Dr. Sohmer and the hospital.

Dalton & Long by W. R. Dalton, Jr., for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter by Richmond G. Bernhardt, Jr., for defendant Dr. Frank Sohmer, appellee.

Womble, Carlyle, Sandridge & Rice by Irving E. Carlyle, Sapp & Sapp by Armistead W. Sapp for North Carolina Baptist Hospitals, Inc., appellee.

PER CURIAM. The plaintiff admits the defendant Hospital is an eleemosynary institution, and perhaps not responsible under *respondeat superior* rules for the negligent acts of its employees. She does contend, however, that the hospital was under a positive duty to furnish safe equipment, including thermometers, for the use of employees in treating the hospital patients. If we accept the proposition that the hospital was charged with that duty, its exercise would require due care in the selection, inspection, and maintenance of the equipment. At most, the hospital was required to furnish standard equipment and to make reasonable inspection and remedy any defects discoverable by such inspection. The hospital did not guarantee a glass thermometer against breakage. Wherein the hospital failed to exercise due care in any particular, the evidence does not disclose.

Something more than an accident and injury is necessary to make out a case of actionable negligence against either the hospital or Dr. Sohmer. In fact, Dr. Sohmer did no more than have the plaintiff admitted to the hospital.

The plaintiff's own witness testified the student nurse had been instructed in the simple procedure of taking temperature and perhaps had several months experience in that procedure. The evidence in the light most favorable to the plaintiff does not bridge the *hiatus* between the accident and the injury. Negligent causation does not appear. The demurrer to the evidence was properly sustained. Judgment dismissing the action was required.

Affirmed.

STATE v. ROBERT G. WILSON.

AND

STATE v. CHARLES HENRY POOLE ALIAS JULIUS SECHREST.

(Filed 2 June, 1965.)

1. Indictment and Warrant § 17—

Discrepancies in the name used in referring to the occupant of the building and the owner of the chattels stolen will not justify nonsuit for variance when it is apparent that all witnesses were talking about the same corporate person.

2. Criminal Law § 101—

Circumstantial evidence as to defendants' identity as the perpetrators of the offense charged, *held* sufficient to overrule nonsuit.

3. Larceny § 1—

Since larceny by breaking and entering a building is a felony, without regard to the value of the stolen property, the admission of evidence in regard to the value of the property cannot be prejudicial.

4. Criminal Law § 164—

Where concurrent sentences are imposed, error relating to one count alone is not prejudicial.

APPEALS by Robert G. Wilson and Charles Henry Poole, alias Julius Sechrest, from *Mallard, J.*, November 30, 1964 Session of CHATHAM.

Robert G. Wilson (appellant), Charles Henry Poole alias Julius Sechrest (appellant), Peggy Ann Lineberry and James Luther Pruitt were indicted jointly in a bill containing two counts, to wit: First, feloniously breaking and entering a certain building occupied by B. M. Hancock & Son, a corporation; second, larceny of chattels of said corporation of the value of $750.00.

The court, in accordance with G.S. 15-4.1, appointed an attorney for each defendant; and each defendant was represented at trial by court-appointed counsel.

The only evidence was that offered by the State. Defendant Lineberry's motion for judgment as of nonsuit was allowed. Separate motions for judgment as of nonsuit in behalf of each of defendants Wilson (appellant), Poole (appellant) and Pruitt were denied.

The record contains no further reference to defendant Pruitt.

As to each appellant, the jury returned verdicts of guilty as charged in the first and second counts of the bill of indictment; and, as to each defendant, the court pronounced a separate judgment as to each count, to wit, a judgment that appellant be confined in the State's Prison for not less than seven nor more than ten years.

Each appellant, through his separate court-appointed counsel, excepted and appealed; and, incident to such appeal, Judge Mallard ordered that Chatham County pay for a transcript of the evidence and the cost of printing the brief filed in behalf of each appellant.

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

Edward S. Holmes for defendant appellant Wilson.

B. C. Smith for defendant appellant Poole.

PER CURIAM. A separate brief was filed in behalf of each appellant by his court-appointed counsel.

Each appellant contends his motion for judgment as of nonsuit should have been allowed on two grounds, (1) a fatal variance between the indictment and the evidence, and (2) insufficiency of the evidence.

The indictment refers to the building occupied by and to chattels of "one B. M. Hancock & Son, a corporation." The corporation's president and general manager refers to the occupant of the building and the owner of the chattels therein as "B. M. Hancock & Son's Feed Mill, Inc." and also as "B. M. Hancock & Son, Inc." Other witnesses, referring to the identical building and the owner of the chattels therein, speak variously of "B. M. Hancock & Son's," "B. M. Hancock & Son," "B. M. Hancock & Son's Feed Mill," "B. M. Hancock's Feed Mill," "B. M. Hancock's Mill," and "B. M. Hancock." During the trial, no attempt was made to stress or identify the precise corporate name. The various names indicated were used interchangeably to identify the occupant of the building and the owner of the chattels therein. As stated by Winborne, C. J., in *S. v. Wyatt,* 254 N.C. 220, 118 S.E. 2d 420: "It is apparent that all the witnesses were talking about the same thing." The variance was not fatal and did not require a nonsuit. *S. v. Wyatt, supra; S. v. Davis,* 253 N.C. 224, 226, 116 S.E. 2d 381; *S. v. Whitley,* 208 N.C. 661, 182 S.E. 338.

There was plenary evidence of a felonious breaking and entering of said corporation's office building on the night of Tuesday, July 7, 1964, and that said corporation's check-writing machine and filing cabinet, referred to in the bill of indictment, were stolen therefrom. The break-in was discovered and later that night the four persons named in the joint indictment were arrested.

The State relied upon circumstantial evidence to identify appellants as persons who committed the crimes charged in the two-count bill of indictment. After careful examination thereof in the light of the rule stated in *S. v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431, and subsequent cases in accord therewith, the conclusion reached is that the evidence, when considered in the light most favorable to the State, *S. v. Orr,* 260 N.C. 177, 179, 132 S.E. 2d 334, was sufficient to require submission to the jury and to support the verdict as to each appellant.

With reference to assignments of error based on exceptions to the failure to strike certain evidence as to the value of the check-writing machine and filing cabinet, it is noted: Under G.S. 14-72, as amended in 1959 (S.L. 1959, c. 1285), larceny by breaking and entering a building referred to therein is a felony without regard to the value of the stolen property. *S. v. Cooper,* 256 N.C. 372, 378, 124 S.E. 2d 91; *S. v. Jones,* 264 N.C. 134, 137, 141 S.E. 2d 27. Moreover, since the two sentences run concurrently, error, if any with reference to the second (larceny) count was not prejudicial to appellants. *S. v. Vines,* 262 N.C. 747, 749, 138 S.E. 2d 630, and cases cited.

All assignments of error of each appellant, including those based on exceptions to evidence rulings and to portions of the charge, have been

considered. In our opinion, they do not disclose prejudicial error and particular discussion thereof is deemed unnecessary.

No error.

STATE OF NORTH CAROLINA v. JAMES JOHNSON.

(Filed 2 June, 1965.)

Assault and Battery § 14—

Evidence that defendant's wife, after separation, came to the home, armed with a box of lye, to get some personal belongings, that an altercation ensued, that defendant had an open knife in his hand and that when he came toward her she told him to let her out, whereupon defendant immediately unlocked the door, and that the wife then threw the lye upon him and he ran out the door and left, without any evidence that he menaced or threatened her with the knife, or that he intended or did restrain her, *is held* insufficient to be submitted to the jury in a prosecution for assault.

CERTIORARI for review of the trial of a criminal action before *Mintz, J.*, and a jury, November 1964 Session of EDGECOMBE.

Defendant is charged with an assault on a female, his wife, he being a male person over the age of 18 years. From a conviction and prison sentence in the Recorder's Court of Rocky Mount, defendant appealed to the Superior Court of Edgecombe County.

Plea: Not guilty. Verdict: Guilty. Judgment: Active prison sentence.

Attorney General Bruton, Deputy Attorney General Moody, and Assistant Attorney General Sanders for the State.

Frank R. Brown for defendant.

PER CURIAM. Defendant contends the court erred in overruling his motion for nonsuit.

The State's evidence tends to show: Defendant and his wife, Ella Johnson, had separated. On 16 January 1964 Ella went to their former home to get some personal belongings. She knocked on the door and defendant let her in; he took a skeleton key from his pocket and locked the door behind her. Everything she picked up to take with her "he would make" her put down. He had a knife in his hand and it was open. He came toward her with the knife and she told him to let her out. "When he went to open the door," she threw lye on him; she had brought the lye in her pocketbook. Some of it got on his coat. He ran

out the door and left; she went home. Defendant "took out a warrant" for her, and after she was arrested she "took out a warrant for him."

Ella made these explanations: "He did not do anything to me while I was inside the house. . . . if I had taken anything I don't know whether he was planning to cut me or what. . . . I had asked him to let me out before I threw the lye; he was on the way to the door. . . . It was my clothes I was picking up that he made me put back down . . . I picked up some bed linens, they were mine. I took some sheets and things . . . I bought them and they were mine. He told me to put them down, that I was not going to get anything. . . . He did not say what he was going to do with the knife. I did not ask him what he was planning to do with it. He has never cut me before but he has stuck a knife in me; I do not mean he had stabbed me before but he had stuck a knife in me a little bit. . . . It was not enough to hurt much but I know he was not playing. I had the box of lye with me when I came to the house because I was afraid of James" (defendant).

Defendant made these uncontradicted explanations: "The knife I had was a little knife that you mostly see on a key ring with car keys, a little knife with a chain on the end. I was cleaning my fingernails with it. . . . the knob on the door that you generally open the door with had been broken, so in order for the door to stay closed you had to lock it with a skeleton key."

Defendant had been convicted on at least one prior occasion of assault on his wife.

"In order to constitute a criminal assault there must be an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a man of reasonable firmness in fear of immediate bodily harm." 1 Strong: N. C. Index, Assault and Battery, § 4, p. 182 (Supp., p. 60).

When these elements essential to constitute the offense are considered, it is clear that the conduct of defendant on the occasion in question does not amount to a criminal assault. Prosecutrix stated that she was afraid of defendant. This was because of his conduct on prior occasions, not because of anything that transpired on this occasion. She went to his home, reinforced by the box of lye which she had concealed in her pocketbook; thus she had put matters on an equal footing. She testified: "I considered the box of lye protection to keep him from hurting me. I could keep him off of me by throwing it on him." She stated that when she picked up things "he would make" her put them down. She explained that he "told" her to put them down. There is no evidence that he threatened her or offered any violence. He started toward her with the knife; there is no evidence that the knife was drawn or that

he menaced her with it. At this point she asked him to open the door and he immediately complied. As he was opening the door she threw lye on him. He ran outside and left the premises. There is nothing to indicate that by locking the door he intended to imprison her or that he did restrain her. There is nothing to show she was "in fear of immediate bodily harm."

The judgment below is

Reversed.

STATE v. LUKE WHITE.

(Filed 2 June, 1965.)

Criminal Law § 136—

The fact that a criminal prosecution for possession of intoxicating liquor results in a verdict of not guilty upon the suppression of evidence obtained without a search warrant does not preclude the court from activating a prior sentence suspended on condition that defendant not have on his premises any quantity of intoxicating beverage and that he permit a search of his premises without a warrant.

APPEAL by defendant from *Mallard, J.*, Regular January, 1965 Session, ROBESON Superior Court.

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

L. J. Britt & Son, Barrington & Britt for defendant appellant.

PER CURIAM. At the October, 1963 Criminal Session, Robeson Superior Court, the defendant, Luke White, entered a plea of guilty to a charge of manufacturing liquor — his second offense. The court imposed a prison sentence of two years, suspended upon certain conditions to which the defendant consented, among them: "(3) That he not have on the premises occupied by him any quantity of intoxicating beverages or materials for manufacturing intoxicating beverages; (4) That he permit any lawful officer to search his premises without a search warrant."

At the January 3, 1965, Session the appellant was charged with the unlawful possession of nontaxpaid whisky and beer. The charge grew out of the discovery of the intoxicants on his premises. The defendant challenged the validity of the search warrant under which the officers

discovered the whisky and beer. The court held the warrant defective and suppressed the evidence which resulted in a verdict of not guilty.

After the trial, the Solicitor, in the manner provided by G.S. 15-200.1, gave notice of his motion to revoke the suspended sentence. After hearing, Judge Mallard entered judgment finding the defendant had breached the suspension order and he activated the prison sentence. The defendant excepted to the order upon the ground the evidence showing the violation was obtained by an illegal search. The defendant had agreed that he would not possess intoxicants on his premises and that the officer might search without a warrant to determine whether the order was obeyed. The defendant intentionally breached his agreement not to possess intoxicants. The court refused to permit him to welch on the agreement that the officers might search without a warrant. The evidence of the violation was discovered in accordance with the conditions of the judgment to which the defendant had agreed. The court's order finding a breach of the conditions of the suspended sentence and ordering the suspension revoked and the sentence activated is

Affirmed.

HENNIE P. LUCAS v. HENRY HAROLD BRITT.

(Filed 2 June, 1965.)

Appeal and Error § 1—

The conclusion to be reached upon conflicting evidence is the province of the jury and its verdict is conclusive on appeal.

APPEAL by defendant from *Hall, J.*, November 1964 Civil Session of ROBESON.

Plaintiff instituted this action to recover damages resulting from a collision between an automobile operated by her and an automobile operated by defendant. The usual issues of negligence, contributory negligence and damage were submitted to a jury. It answered the first issue "yes," the second "no," and fixed the compensation to which plaintiff was entitled. Judgment for plaintiff, in accordance with the verdict, was entered.

Johnson, McIntyre, Hedgepeth, Biggs & Campbell for defendant appellant.

Henry & Henry for plaintiff appellee.

PER CURIAM. Defendant has no exception to the evidence. The charge was omitted from the record. Appellant, in his brief, asks only one question: Did the court err in refusing to allow his motion to nonsuit?

In the absence of the charge, we must assume that the court made it clear to the jury that their answers to the issues submitted depended entirely on their evaluation of conflicting testimony. The collision occurred in the daytime. Plaintiff was traveling east on U. S. Highway #74. Defendant was traveling west. Plaintiff alleged defendant drove his car into that portion of the highway set aside for eastbound traffic, causing a collision which occurred 3.4 feet south of the center line of the highway. Her evidence, viewed in the light most favorable to her, supports her allegation.

Defendant testified the collision occurred in his lane of travel; plaintiff went to sleep; she turned from her proper lane into defendant's lane, hit an embankment on the north side of the road; she sought to get back into her lane, at which time the collision occurred. Plaintiff, on cross examination, admitted when she first saw defendant she was in the center of the road; she immediately turned right into her lane. The two vehicles were then 100 yards apart.

Resolution of the factual controversy, disclosed by the evidence, was properly left to the jury. Conflicts in evidence do not present questions of law. *Watt v. Crews,* 261 N.C. 143, 134 S.E. 2d 199; *Bridges v. Graham,* 246 N.C. 371, 98 S.E. 2d 492. If, as defendant contends, the jury reached a wrong result, we are without power to correct the error. See concurring opinion of Barnhill, C.J. in *Jyachosky v. Wensil,* 240 N.C. 217, 81 S.E. 2d 644.

Affirmed.

NORTH CAROLINA BOARD OF ARCHITECTURE v. C. A. LEE.

(Filed 18 June, 1965.)

1. Architecture—

The N. C. Board of Architecture has statutory authority to institute suit to restrain a person from practicing architecture in violation of the provisions of G.S. 83-12.

2. Appeal and Error § 23—

Exclusion of evidence cannot be held prejudicial when the record fails to show what the answer of the witness would have been had he been permitted to reply.

3. Architecture—

The N. C. Board of Architecture is not required to warn a person of violating G.S. 83-12 before instituting action against such person.

4. Appeal and Error § 21—

An exception to the judgment does not present for review the evidence upon which the findings of the court are based, but does present the question whether error or law appears on the face of the record proper, including whether the facts found are sufficient to support the judgment and whether the judgment is regular in form.

5. Appeal and Error § 38—

A theory of liability alleged in the complaint, but not pursued upon the trial and in support of which no argument is advanced in the brief, will be deemed abandoned.

6. Husband and Wife § 15—

In a tenancy by the entirety both the husband and wife own the entire estate, but the husband has the absolute and exclusive right to control, use, and receive the income from the lands, and does not have to account to his wife therefor.

7. Architecture—

Where a person at the time of drawing plans for the construction of a building has title to some of the component tracts in himself and title to some in himself and his wife as tenants by the entireties, he comes within the meaning of the exception contained in G.S. 83-12, and does not violate the law in drawing such plans, even though he is not a licensed architect, and this result is not affected by the fact that prior to the completion of the construction of the building he sells an interest therein to another.

8. Same—

The fact that a building is constructed for the purpose of leasing it for commercial uses does not preclude the owner of the land from drawing the plans for such building even though he is not a licensed architect, since the exemption of G.S. 83-12 is broad and comprehensive and is not limited.

9. Statutes § 5—

Where the language of a statute is clear and unambiguous the courts must declare such meaning and are without power to interpolate or superimpose provisions and limitations not contained therein.

10. Architecture—

A trustee holding title to land in common with other trustees of a church does not come within the exception of G.S. 83-12, and is liable to prosecution if he, not being an architect, draws plans for the construction of a building on the church property.

11. Same; Equity § 2—

Where the N. C. Board of Architecture waits for some nine years before instituting action against defendant for defendant's violation of G.S. 83-12 in drawing plans for the construction of a building costing in excess of twenty thousand dollars, such action is correctly dismissed for laches, since courts of equity discourage delay in the enforcement of rights.

12. Appeal and Error § 49—

Where a legal conclusion of the trial court is not supported by its findings of fact, the judgment must be modified by eliminating such conclusion.

HIGGINS, J., concurring.

RODMAN, J., concurs in concurring opinion.

APPEAL by plaintiff from *Copeland, S.J.*, December 1964 Assigned Civil Session of WAKE.

Civil action instituted by the North Carolina Board of Architecture (prior to the 1957 amendment, Chapter 794, 1957 Session Laws, the Board was designated "State Board of Architectural Examination and Registration"), under the authority of G.S. 150-31, for a permanent injunction to restrain the defendant, C. A. Lee, "from making plans or specifications either personally or as the head of an office or organization for any religious, industrial, commercial, or residential building or any other type of structure or building of a value exceeding $20,000, when, regardless of ownership, such building is designed and constructed for others or to be sold or leased in whole or in part, or is designed or intended for the occupancy or use of others; or to otherwise practice architecture as defined in G.S. 83-1(3), except for plans for the construction of residential, farm or commercial buildings of a value not exceeding $20,000; or until and unless he shall have secured from the North Carolina Board of Architecture his certificate of admission to practice architecture, and thereafter complies with the provisions and laws of North Carolina governing the registration and licensing of architects."

Defendant filed an answer in which, while admitting that he is not an architect, that he does not hold himself out to the public as being an architect, and that he has not been engaged in the practice of architecture as defined in G.S. 83-1(3), he denies that he violated any of the provisions of Chapter 83 of the General Statutes as alleged in the complaint, on the ground that he was an individual "making plans or data for buildings for himself" within the meaning of the exception in G.S. 83-12 as now constituted, which reads: "Nothing in this chapter shall be construed to prevent any individual from making plans or data for buildings for himself." Prior to 1957, and all during the year 1955, the

exception in G.S. 83-12 read as follows: "Nothing in this Act shall be construed to prevent any person from making plans or data for buildings for himself." The General Assembly in Chapter 794, 1957 Session Laws, substituted "individual" for "person" in the part of the statute above quoted.

At the December 1964 Assigned Civil Session of Wake County superior court, plaintiff applied for a temporary restraining order by Judge Copeland. When it came on to be heard, the parties stipulated "that this hearing shall be considered a final hearing on the merits of the case and that the judgment shall be a final judgment in the cause subject only to the right of either party to appeal from the judgment," and further stipulated "that defendant is not a registered architect licensed by the Board of Architecture in the State of North Carolina, and has never been licensed." Only the plaintiff offered evidence. Among its witnesses, plaintiff called the defendant C. A. Lee. Based upon the evidence offered by the plaintiff, the court made the following FINDINGS OF FACT:

"1. The defendant is a citizen and resident of Winston-Salem, Forsyth County, North Carolina, is 59 years of age, and has been engaged in the general construction business for a period of over 30 years.

"2. The defendant is not licensed under the laws of North Carolina to practice architecture and he has never applied for nor taken any examination with the N. C. Board of Architecture and he has not been licensed or certified by said Board as eligible to practice architecture in this State and he is not a licensed 'registered engineer' within the laws of North Carolina.

"3. During the year 1955, the defendant applied to and received from the City of Winston-Salem a building permit for the construction of an educational building costing approximately $175,000 for Salem Baptist Church in Winston-Salem; that on the plans submitted for the building there appeared the notation: 'Plans by C. A. Lee.' The defendant prepared or assisted in the preparation of the plans for the building and then supervised the construction of the building for the church. The building was constructed by day labor and many of the laborers were members of the church. At all times during 1955, the defendant was a member of Salem Baptist Church and a Trustee of the church; that the title of the land on which the educational building was constructed was held by the five trustees of the church, including the defendant; that the defendant being a Trustee executed the mortgage to finance the construction of the building. The defendant prepared

the plans for the building as a Trustee and owner and made no charges therefor; that the defendant did receive a weekly salary for his services in overseeing the construction work.

"4. The next application to the City of Winston-Salem made by the defendant for a building permit was on April 9, 1963. The application was for a permit for the construction of a $45,000.00 addition to Deeds Hall for Piedmont Bible College and the plans submitted were certified under seal of a duly licensed architect.

"5. On March 9, 1964, the defendant applied to and received from the City of Winston-Salem a building permit for the construction of an automobile sales and service building on land owned by the defendant costing approximately $65,000.00; that the defendant had bought the property in several tracts acquired at different times over a period of years and some of the tracts were deeded to the defendant and some were deeded to the defendant and his wife as tenants by the entirety; that the application for the permit indicated that the owners were 'E. L. Connor and C. A. Lee'; that prior to and at the time the permit was issued the lands on which the building was constructed was actually owned by the defendant or by the defendant and wife by the entirety; that the defendant designated on the application E. L. Connor as an owner because Connor was a brother-in-law of the defendant, and the defendant had been trying to persuade Connor to go in with him in the construction of the building; that Connor could not make up his mind and would not commit himself and the defendant proceeded individually to commence to build the building for himself; that the defendant completed the preparation of the plans for the building December 27, 1963, and revised them on March 9, 1964; that the defendant prepared his own plans for the building constructed on land owned by him in Winston-Salem, and the building was designed and constructed in conformity with the building codes of the City of Winston-Salem and the State of North Carolina. On or about March 31, 1964, the defendant's brother-in-law, E. L. Connor, decided to go in with the defendant on the building. Connor owned a smaller tract adjoining the defendant's tract on which the building was being constructed. On March 31, 1964, Connor and his wife (the defendant's sister) and defendant and his wife executed a deed conveying both tracts to one Barbara Ann Adams (a straw person) who then executed a deed conveying both tracts to the defendant and his wife and Connor and his wife. Prior to these conveyances, the defendant owned about 90 to 95% of the entire land and Connor's interest

was approximately 5%. The building was later leased by the owners to an automobile agency.

"6. The defendant has no applications for building permits pending and no evidence was introduced tending to show that the defendant was preparing any plans for any buildings at this time."

Based upon his findings of fact, Judge Copeland made the following CONCLUSIONS OF LAW:

"1. Since the defendant was a member of the church and a trustee when he assisted in the preparation of plans for a church building he stood in the position of owner and had both a legal and an equitable interest in the building to be constructed.

"2. When defendant prepared plans for an automotive sales and service building, he was preparing his own plans for a building on land owned by himself.

"Under the evidence presented the Court concludes that the plaintiff has failed to establish that the defendant has violated any provisions of the statutes relating to the practice of architecture.

"Under the law and facts of this case, the Court concludes that the plaintiff is not entitled to any of the relief sued for and plaintiff's application for an injunction should be denied, and this action should be dismissed."

Based upon his findings of fact and his conclusions of law, Judge Copeland entered judgment adjudging and decreeing that the application of plaintiff for an injunction against the defendant be denied, that the action be dismissed, and that plaintiff be taxed with the costs. From this judgment, plaintiff appealed to the Supreme Court.

Arendell, Albright, Reynolds & Farmer by R. Mayne Albright for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice by I. E. Carlyle and Charles F. Vance, Jr., for defendant appellee.

PARKER, J. Plaintiff was empowered by the specific provisions of G.S. 150-9 and 150-31 to institute this suit in the Wake County superior court for a permanent injunction to restrain defendant from allegedly practicing architecture in violation of the provisions of G.S. 83-1(3) and 83-12.

Chapter 83 of the General Statutes is entitled "Architects." G.S. 83-1(3) defines "The practice of architecture." G.S. 83-12 provides in relevant part: "In order to safeguard life, health and property, it shall be unlawful for any person to practice architecture in this State as defined in this chapter, except as hereinafter set forth, * * * unless such person shall have secured from the Board a certificate of admission to practice architecture in the manner herein provided, and shall thereafter comply with the provisions of the laws of North Carolina governing the registration and licensing of architects." G.S. 83-12 contains this express exception: "Nothing in this chapter shall be construed to prevent any individual from making plans or data for buildings for himself, * * *; provided that such persons preparing plans and specifications for buildings of any kind shall identify such plans and specifications by placing thereon the name and address of the author." G.S. 83-12 further provides that anyone unlawfully violating the provisions of Chapter 83 of the General Statutes shall be guilty of a misdemeanor, and shall upon conviction be sentenced to pay a fine or imprisonment, or both, "each day of such unlawful practice to constitute a distinct and separate offense."

Plaintiff's first assignment of error is that the court erred in sustaining defendant's objection to the following question it asked its witness, Louis Polier, its executive secretary: "Do you recall that any warning was issued to Mr. Lee about unauthorized practice in connection with the educational building for Salem Baptist Church?" In sustaining the objection the court stated: "What difference does it make?" Counsel for defendant in replying stated in part: "The Board is not required to give warnings." This assignment of error is overruled on two grounds: First, because plaintiff failed to insert in the record what the answer of Polier would have been had he been permitted to respond, *Board of Education v. Mann*, 250 N.C. 493, 109 S.E. 2d 175; and second, because plaintiff concedes in his brief "that the showing of warnings is not required in order to warrant an injunction, a single act of unauthorized practice being sufficient, if shown, to invoke the criminal penalties of G.S. 83-12 or the injunctive relief of G.S. 150-31."

Plaintiff's second and last assignment of error is: "The court erred in rendering and signing the judgment as set forth herein." This assignment of error does not bring up for review the evidence upon which the findings of fact are based. It does, however, raise the question as to whether an error of law appears on the face of the record proper. This includes the question whether the facts found by the judge are sufficient to support the judgment, and whether the judgment is regular in form. *Insurance Co. v. Trucking Co.*, 256 N.C. 721, 125 S.E. 2d 25.

Judge Copeland's findings of fact relate to defendant's activities in respect to three buildings: (1) The construction in 1955 of an educational building for Salem Baptist Church in Winston-Salem; (2) the construction in 1963 of an addition to Deeds Hall for Piedmont Bible College; and (3) the construction in 1964 of an automobile sales and service building.

Judge Copeland's finding of fact in respect to the second building is that on 9 April 1963 defendant applied to the city of Winston-Salem for a building permit to construct a $45,000 addition to Deeds Hall for Piedmont Bible College, and the plans submitted were certified under seal of a duly licensed architect. Nothing in this finding of fact shows that defendant was engaged in the practice of architecture in violation of the provisions of Chapter 83 of the General Statutes. It appears that plaintiff has abandoned its allegation in its complaint and its contention that defendant violated the provisions of Chapter 83 of the General Statutes in respect to the construction of an addition to Deeds Hall for Piedmont Bible College, because upon the facts found by Judge Copeland it makes no contention in its brief that in doing this work defendant violated the provisions of Chapter 83 of the General Statutes. Further, plaintiff on the last page of its brief states: "Plaintiff contends that BOTH the church plans and the garage plans were violations, but that EITHER is sufficient to warrant an injunction against further violations by defendant." Judge Copeland was correct in his conclusion of law that in respect to the construction of this addition to Deeds Hall for Piedmont Bible College defendant was not engaged in the practice of architecture in violation of the provisions of Chapter 83 of the General Statutes.

Judge Copeland's findings of fact in respect to the third building are to this effect: On 9 March 1964 defendant applied to and received from the city of Winston-Salem a building permit for the construction of an automobile sales and service building on land which he had bought in several tracts over a period of years, and that titles to some of these tracts composing this land were conveyed to him by deed and some to him and his wife as tenants by the entirety. That the application for the building permit indicated that the owners were E. L. Connor and C. A. Lee, though in fact prior to, and at the time the building permit was issued, the land on which the building was constructed was actually owned by defendant or by defendant and his wife as tenants by the entirety. Defendant had completed his own plans for this building on 27 December 1963, and revised them on 9 March 1964. After receiving a building permit, defendant commenced to construct the building for himself. E. L. Connor, defendant's brother-in-law, owned a smaller tract of land adjoining defendant's land on which the building was be-

ing constructed. On 31 March 1964 Connor decided to go in with defendant on this building, and on that day Connor and his wife and defendant and his wife executed deeds conveying their respective lands to Barbara Ann Adams, and she then executed a deed conveying both tracts of land to defendant and his wife and Connor and his wife. Prior to the conveyances to Adams, defendant, and defendant and his wife as tenants by the entirety, owned about 90% to 95% of the entire land and Connor about 5%. The building was later leased by the owners to an automobile agency.

Tenancy by the entirety was recognized by the common law, at least as far back as the reign of Edward III, when husband and wife were regarded as one person, and that person was the husband, "and a conveyance to them by name was a conveyance in law to but one person." *Davis v. Bass,* 188 N.C. 200, 124 S.E. 566; *Motley v. Whitemore,* 19 N.C. 537; Lee, North Carolina Family Law, 3d Ed., Vol. 2, p. 55.

In tenancy by the entirety, "the husband and wife take the whole estate as one person. Each has the whole; neither has a separate estate or interest; but the survivor of the marriage whether husband or wife is entitled to the entire estate * * *." *Bank v. Hall,* 201 N.C. 787, 161 S.E. 484.

During the existence of the tenancy by the entirety, the husband has the absolute and exclusive right to the control, use, possession, rents, income and profits of the lands, and he does not have to account to his wife for the rents and income received from the property. *Porter v. Bank,* 251 N.C. 573, 111 S.E. 2d 904; *Davis v. Bass, supra;* Lee, North Carolina Family Law, 3d Ed., Vol. 2, § 115, where many cases are cited.

The estate by the entirety and the properties and incidents of this particular estate have not been changed or altered in their nature and character by statute or by constitutional provisions in North Carolina. *In re Estate of Perry,* 256 N.C. 65, 123 S.E. 2d 99; *Davis v. Bass, supra.*

Taking into consideration that during the existence of the tenancy by the entirety the husband has the absolute and exclusive right to the control, use, possession, rents, income, and profits of the lands held by him and his wife as tenants by the entirety, when defendant made plans for the construction of an automobile sales and service building upon lands composed of several tracts, title to some of the component tracts being in him, and some in him and his wife as tenants by the entirety, it seems clear that he was making plans for a building for himself within the meaning of the specific exception contained in G.S. 83-12, and that this is true even though before the building was completed Connor and his wife acquired an interest in it, for the express statutory exception contains no provision preventing him from

selling an interest in the building for which he made the plans. Plaintiff contends that making plans for the construction of a building for lease, as was the case here, or for use by the public, is not within the statutory exception of "buildings for himself." This contention is untenable, for there is nothing in the express exception in G.S. 83-12 to justify such a contention. The words "buildings for himself" contained in the express statutory exception are broad and comprehensive, *S. v. Cuthrell,* 235 N.C. 173, 69 S.E. 2d 233; 12 C.J.S., Building, pp. 380-81, and contain no limitation of any kind. Our statutory exemption differs from that of the State of New Jersey. The New Jersey Statutes Annotated, § 45:3-10, prohibits the illegal practice of architecture, and has an express exception as follows: "Nothing herein contained shall * * * prohibit any person in this State from acting as designer of any building that is to be constructed by himself for his own occupancy or occupancy by a member or members of his immediate family * * *." So far as we can determine from the briefs of counsel and from our own research, no other state has a statutory exception similar to ours. Obviously, a building may be erected for any one or more of many purposes. It seems plain that the statutory exception contemplates possession by the designer of the building for whatever lawful purpose he may choose. If the General Assembly had intended the statutory exception to be limited to buildings actually occupied by the designer, and not for lease and use by the public, it could quite easily have said so. The General Assembly in its wisdom and discretion did not so limit the statutory exception. The General Assembly having thus formally and clearly expressed its will, the Court is without power to interpolate or superimpose conditions and limitations which the statutory exception does not of itself contain. Judge Copeland was correct in his conclusion of law that defendant in making plans for the construction of this automobile sales and service building was not engaged in the practice of architecture in violation of the provisions of Chapter 83 of the General Statutes.

In respect to the first building, Judge Copeland's findings of fact show that defendant in the year 1955 "prepared or assisted in the preparation of the plans" for the construction of an educational building for Salem Baptist Church in Winston-Salem; that on the plans submitted to the city of Winston-Salem appeared the notation: "Plans by C. A. Lee"; and that defendant "supervised the construction of the building for the church." That in 1955 defendant was a member of this church; that title to the land upon which this educational building was constructed was held by five trustees, of whom he was one; and that he executed the mortgage to finance the construction of this educational building. The judge's findings of fact clearly show that defendant made

the "plans" for a building for Salem Baptist Church, and not for himself.

Plaintiff commenced this suit by the issuance of a summons on 27 October 1964. Defendant's answer was verified on 24 November 1964. The final hearing was held by Judge Copeland in December 1964. Conceding that in making these "plans" for the construction of this educational building for his church defendant violated the provisions of G.S. 83-12, plaintiff is guilty of unreasonable delay in applying for an injunction for this violation. Plaintiff has shown no legal ground for such delay. Considering all the facts and circumstances of defendant's preparing or assisting in preparing the plans for an educational building for his church in 1955, and plaintiff's waiting until 27 October 1964 to commence a suit to apply for an injunction for what defendant did in 1955, and that plaintiff has shown no other violation by defendant of the provisions of Chapter 83 of the General Statutes, it is our opinion that plaintiff's delay in seeking an injunction in respect to what defendant did in 1955 on this church building has been continued so long and under such circumstances as to make it inequitable for a court of equity to issue an injunction against defendant for this violation, that plaintiff is guilty of laches, and has forfeited any claim it may have to injunctive relief against defendant for making or assisting in making plans for this church building in 1955. As a general rule, equity protects the vigilant, and not those who sleep on their rights, and courts of equity discourage laches and unreasonable delay in the enforcement of rights. 43 C.J.S., Injunctions, § 171, (c), Laches; Pomeroy's Equity Jurisprudence, 5th Ed., Vol. II, § 419c, p. 175; 28 Am. Jur., Injunctions, § 59.

Judge Copeland's findings of fact do not support his legal conclusion that "since the defendant was a member of the church and a Trustee when he assisted in the preparation of plans for a church building he stood in the position of owner and had both a legal and an equitable interest in the building to be constructed." His judgment is modified by eliminating from it this conclusion of law.

Judge Copeland's conclusion of law in respect to the automobile sales and service building is modified by adding thereto these words: "and by him and his wife as tenants by the entirety."

Judge Copeland's conclusion of law that "under the evidence presented the Court concludes that the plaintiff has failed to establish that the defendant has violated any provisions of the statutes relating to the practice of architecture," is modified by adding thereto these words: "except in respect to his preparing or assisting in the preparation of the plans for the construction of an educational building for Salem Baptist Church in Winston-Salem, and that plaintiff by reason

of its laches has forfeited any claim it may have to injunctive relief for this violation."

Judge Copeland's findings of fact support his conclusions of law as modified in this opinion, and his findings of fact and conclusions of law as modified support his judgment. The judgment is regular upon its face.

Modified and affirmed.

HIGGINS, J., concurring: Judge Copeland, by finding of fact No. 3, determined that Mr. Lee, a member of the Salem Baptist Church and one of its five Trustees, drew the plans and specifications for the construction of a building on the church's property to be used in its church program. He made no charge for drawing the plans which complied with the building code and met all safety standards.

At the time (1955) Mr. Lee made the plans for the erection of the building on the church property, he held title as one of five trustees. The Architects' Licensing Act exempted him from the licensing requirement. "Nothing in this chapter shall be construed to prevent any *person* from making plans or data for buildings for himself." G.S. 83-12. By the 1957 amendment the word *person* was stricken and the word *individual* was substituted. Webster's Third International Dictionary, at p. 1686, defines "person": "(6) A human being, a body of persons, or a corporation, partnership or other legal entity that is recognized by law as the subject of rights and duties." *Commissioners v. Cooperative*, 246 Mass. 235, 140 N.E. 811. The word "person" as above defined was broad enough to include "the body of persons" (Salem Baptist Church) "recognized by law as the subject of rights and duties," to the end that one of the members could be designated by the body to prepare its building plans. The provision "for himself" includes "for herself" or, as in this case, "for itself," referring to the church. Black's Law Dictionary, 4th Ed., p. 1299.

The Architects' Licensing Act contains highly penal provisions. Drawing plans without an architect's license is made a misdemeanor for which punishment shall be by fine of not less than $100.00 nor more than $500.00, or imprisonment not exceeding three months, or both fine and imprisonment. Each day constitutes a separate offense. The Act, being penal, must be strictly construed in favor of the exemption, and against the implication of criminal intent and against the infliction of the penalty. *State v. Garrett*, 263 N.C. 773, 140 S.E. 2d 315; *Hinson v. Dawson*, 241 N.C. 714, 86 S.E. 2d 585; *State v. Scoggin*, 236 N.C. 1, 72 S.E. 2d 97; *Hilgreen v. Cleaners & Tailors, Inc.*, 225 N.C. 656, 36 S.E. 2d 252. The General Assembly evidently construed the word "person" as used in the original Act to mean something different from "in-

dividual." Otherwise, by making the substitution the lawmakers were merely spinning their wheels.

I am unwilling to join the majority in striking out conclusion of law No. 1. By doing so the Court in effect is holding that Mr. Lee was guilty of a misdemeanor and subject to punishment for each day he worked on the plans. If the Court's decision is correct, only the statute of limitations offers refuge from prosecution. I think Mr. Lee on this record has a better defense than the one the Court allows him — laches on the part of the plaintiff in bringing this action.

RODMAN, J., concurs in this opinion.

NORTH CAROLINA BOARD OF ARCHITECTURE v. HAZARD CANNON.

(Filed 18 June, 1965.)

APPEAL by plaintiff from *Copeland, S.J.*, December 1964 Assigned Civil Session of WAKE.

Civil action instituted by the North Carolina Board of Architecture (prior to the 1957 amendment, Chapter 794, 1957 Session Laws, the Board was designated "State Board of Architectural Examination and Registration"), under the authority of G.S. 150-31, for a permanent injunction to restrain the defendant, Hazard Cannon, from practicing architecture in violation of the provisions of Chapter 83 of the General Statutes of North Carolina.

Defendant filed an answer in which, while admitting "that he is not licensed under the laws of North Carolina to practice architecture, that he has never applied for nor taken any examination given by the North Carolina Board of Architecture and that he has not been otherwise licensed or certified by the said Board as eligible to practice architecture in North Carolina and that he is not licensed as a 'registered engineer' under the laws of North Carolina," he denies that he violated any of the provisions of Chapter 83 of the General Statutes as alleged in the complaint.

This action came on to be heard before Judge Copeland at the December 1964 Assigned Civil Session of Wake County superior court, and the parties agreed in open court prior to the hearing that the hearing of this action should constitute a trial of the action before Judge Copeland without a jury, and that a final judgment should be rendered by the court on all matters and things in controversy between the

parties. Only the plaintiff offered evidence. Based upon the evidence offered by plaintiff, the court made findings of fact, the crucial ones of which we quote:

"4. That the office of the Building Inspector of the city of Durham has issued to Hazard Cannon the following building permits:

"DATE AND PROPERTY LOCATION	TYPE OF STRUCTURE	COST
5/17/60 — N/S Leon Street (2)	8 Unit Apartment	$100,000
5/18/61 — 1306 Leon Street	7 Unit Apartment	75,000
10/9/63 — Leon Street	6 Unit Apartment	60,000
2/15/63 — Leon Street	4 Unit Apartment	36,000
5/22/63 — Buchanan Boulevard	12 Unit Apartment	100,000
3/10/64 — 2302 Lednum Street	12 Unit Apartment	85,725
3/10/64 — 2303 Lednum Street	10 Unit Apartment	71,425
3/10/64 — 2303 Lednum Street	12 Unit Apartment	85,725
3/10/64 — 2303 Lednum Street	12 Unit Apartment	85,725
3/10/64 — 2310 Lednum Street	12 Unit Apartment	85,725
3/10/64 — 2313 Lednum Street	12 Unit Apartment	85,725

"5. That the owner of the property upon which the aforementioned buildings were constructed or are being constructed was Hazard Cannon.

"6. That the owner, Hazard Cannon, prepared the plans for said buildings.

"7. That the aforementioned structures completed or being built by the defendant are constructed in accordance with the North Carolina State Building Code and the ordinances of the City of Durham."

Based upon his findings of fact, Judge Copeland made the following conclusions of law:

"1. That the defendant has not violated the provisions of Chapter 83 of the General Statutes of North Carolina.

"2. That the plaintiff is not entitled to the injunctive relief which it seeks in its complaint."

Based upon his findings of fact and his conclusions of law, Judge Copeland entered judgment adjudging and decreeing that the application of plaintiff for an injunction against the defendant be denied, that the action be dismissed, and that plaintiff be taxed with the costs.

From this judgment, plaintiff appealed to the Supreme Court.

Arendell, Albright, Reynolds & Farmer by R. Mayne Albright for plaintiff appellant.

Spears, Spears & Barnes by Marshall T. Spears, Jr., for defendant appellee.

PER CURIAM. Plaintiff has three assignments of error to the effect that the court erred in sustaining defendant's objections to three questions that it asked its witness, John A. Parham, Chief Building Inspector for the city of Durham. These three assignments of error are overruled on the ground that plaintiff failed to insert in the record what the answers of Parham would have been had he been permitted to respond. *Board of Education v. Mann*, 250 N.C. 493, 109 S.E. 2d 175.

Plaintiff's fourth and last assignment of error is that the court erred in rendering and signing the judgment as set forth herein. This assignment of error is overruled. The judgment below is affirmed upon authority of the *North Carolina Board of Architecture v. C. A. Lee, ante*, 602, ... S.E. 2d ....., decided this day.

Affirmed.

ROY G. ARMSTRONG, HAZEL H. ARMSTRONG, IRBY B. BUTLER, JOSEPH S. AMEEN, FRANCES B. AMEEN, WILLIAM S. McKINNEY AND VIRGINIA H. McKINNEY v. LYNN W. McINNIS, ADMINISTRATOR OF THE ESTATE OF HERVIE N. WILLIARD; HIGH POINT BANK AND TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF HERVIE N. WILLIARD; VIVIAN H. WILLIARD, WIDOW; RUSSELL N. WILLIARD, SR. AND WIFE, OLIVE D. WILLIARD; J. WAYNE WILLIARD AND WIFE, VERA F. WILLIARD; NANNIE W. GARLAND, SINGLE; ZELMA W. FREEMON AND HUSBAND, J. MARK FREEMON; G. JAY WILLIARD AND WIFE, BESSIE M. WILLIARD; PATTY M. WILLIARD AND PATTY M. WILLIARD, GUARDIAN FOR COY O. WILLIARD; AGNES C. WILLIARD, WIDOW; JOSEPH L. WILLIARD; JAMES G. SNIPES AND WIFE, MARY R. SNIPES; LEWIS CARTER AND WIFE, MARGARET CARTER; WADE MYERS AND WIFE, SARA MYERS; ROY GIBSON AND WIFE, LOIS GIBSON, ALL OF GUILFORD COUNTY, NORTH CAROLINA, AND THE CITY OF HIGH POINT, A MUNICIPAL CORPORATION OF GUILFORD COUNTY, NORTH CAROLINA.

(Filed 18 June, 1965.)

1. Municipal Corporations § 25—

The General Assembly has delegated its police powers to enact zoning regulations to municipal corporations. G.S. 160-172.

2. Municipal Corporations § 26—

In an action under the Declaratory Judgment Act to review the validity of a rezoning ordinance of a municipality, the Superior Court is an appellate court authorized to review only questions of law and legal inference arising on the record of the hearing before the zoning commission and the city council, and the court has the discretionary power to refuse a jury trial upon controverted facts, since they are questions of fact and not issues of fact.

3. Same—

The courts will not interfere with a duly adopted zoning ordinance unless it is made to appear clearly that the municipal regulation is arbitrary and has no substantial relation to the public health, safety or welfare, and a provision of a zoning ordinance that planned industrial parks should be located between heavy industrial areas and residential areas, and be served by a major thoroughfare, cannot be denominated arbitrary or unreasonable.

4. Municipal Corporations § 25—

A rezoned area lies between a residential area and an industrial area notwithstanding that the tracks of a railroad company lie between it and the heavy industrial area.

5. Municipal Corporations § 26—

Where petitioners for rezoning an area from a residential to a planned industrial park show a number of inquiries and requests from business concerns for locations, petitioners have produced sufficient evidence of demand for such district within the requirement of the municipal rezoning regulations, and the fact that there had been such inquiries and requests does not tend to show that the municipal governing bodies, in rezoning the area, misused their power in providing for the established need.

6. Municipal Corporations 25—

A municipal corporation may zone a part of a tract for commercial purposes and leave a part of the tract zoned for residential purposes as a buffer between the tract rezoned and the adjacent residential area.

7. Same—

A zoning ordinance is not a contract between a municipality and its citizens, and the fact that a petition for rezoning a tract for commercial purposes has been denied at the instance of owners of contiguous property does not entitle such owners to object to the later rezoning of a part of the property for commercial purposes under a plan substantially and materially different from the first, particularly in providing a buffer zone some 150 feet wide between the residential area and the part of the tract rezoned for commercial purposes.

8. Public Officers § 7—

A person who by proper authority is admitted and sworn into a public office is a *de facto* officer and has authority to discharge the duties of the office until he is removed in accordance with statutory procedure.

9. Municipal Corporations § 26—

The burden is upon those attacking the validity of a municipal zoning ordinance to show that the action of the municipal governing bodies was arbitrary and capricious to such an extent as to amount to an abuse of discretion.

APPEAL by plaintiffs from *Clark (E. B.), S.J.*, 7 December 1964 Civil Session of GUILFORD (High Point Division).

This is an action for a declaratory judgment to determine the validity of the action of the City of High Point in rezoning approximately 200 acres of vacant property within a residential area to a Planned Industrial Park District.

The trial judge, being of the opinion that the matters and questions presented should be heard and determined by the court without a jury, in his discretion heard the evidence offered by the plaintiffs and the defendants and made the following findings of fact, conclusions of law, and entered judgment as hereinafter set out:

"1. All the parties are properly before the court and the court has jurisdiction of the parties and the subject of the action.

"2. The defendants (excepting the defendant City of High Point), hereinafter referred to as the Williard Heirs, are the owners of a tract of land containing approximately 200 acres, hereinafter referred to as the Williard Tract, located in the northeast quadrant of the City of High Point, Guilford County, North Carolina, and being a part of the area annexed to the City of High Point in 1960.

"3. The Williard Tract is generally rectangular in shape and bounded on the north by the Greensboro Road for a distance of approximately 1,332 feet, bounded on the south by the Southern Railway Company right of way and track for a distance of approximately 1,005 feet, and has an average length or depth between the Greensboro Road and Southern Railway right of way of approximately 5,550 feet.

"Greensboro Road is a part of the State Highway system designated as U. S. Highway 29-70A and connects with Lexington Avenue in the City of High Point at 'Five Points,' which is zoned as 'Neighborhood Retail' and located at the northwest corner of the Williard Tract.

"Immediately south of the Southern Railway Company right of way, and running generally parallel therewith, is Kivett Drive, a paved thoroughfare, running from near the business area of the City eastwardly to Interstate 85, a distance of about 4 miles.

"Cedrow Avenue is a paved street running generally in an easterly and westerly direction from a densely populated residential area to the west of the Williard Tract, through the approximate center of the Williard Tract for approximately 1,500 feet, and eastwardly to Scientific Street at the corporate limits of the City of High Point.

"The lands adjoining the Williard Tract on the east, north and west are zoned as residential areas. The area adjoining to the west is substantially developed and populated as residential property. The area adjoining to the north, and along the Greensboro Road, is substantially developed and populated as commercial and residential property. The area adjoining to the east is largely undeveloped and sparsely populated. The plaintiffs Roy G. Armstrong and wife, Hazel Armstrong, own a tract of land of approximately 40 acres which adjoins the Williard Tract on the east and to the north of Cedrow Avenue, with their residence thereon being located some 300 feet east of the eastern property line of Williard Tract.

"The area to the south and adjoining the Williard Tract, consisting of approximately 400 acres, is zoned for heavy industry, designated as Industrial 6, and is substantially populated with a number of industrial plants located on said Kivett Drive. The Williard Tract is basically an undeveloped area of open fields and woods containing only a few scattered outbuildings and one residential structure.

"4. Prior to October 4, 1963, the City of High Point had adopted and the State Highway Commission had approved a Major Thoroughfare and Street Plan for the City of High Point which provides for an expressway designated as the East Belt Line, running generally through the center of the Williard Tract in a northerly and southerly direction, and had executed and entered into a Municipal Agreement setting forth their respective responsibilities regarding said Major Thoroughfare and Street Plan, but bids had not been requested by the State or City for the construction of said East Belt Line.

"5. On April 29, 1963, the Williard Heirs filed with the Planning and Zoning Commission of the City of High Point an application for rezoning of approximately 200 acres of the Williard Tract from Residential A-20 to Planned Industrial Park District, Residential A-2, and Residential B-2. Plaintiffs thereafter filed a protest with the Planning and Zoning Commission consisting of more than 20% of adjacent property owners under G.S. 160-176.

After due notice, a public hearing was held on May 13, 1963, before the Planning and Zoning Commission, at which time all interested persons were afforded full opportunity to be heard. Action was deferred until June 10, 1963, at which time the Planning and Zoning Commission gave further consideration to the proposed rezoning. Action was again deferred until June 12, 1963, at which time the Planning and Zoning Commission unanimously approved and recommended to the Council of the City of High Point a rezoning of the Williard Tract to Planned Industrial Park District.

"6. At a regular meeting of the Council of the City of High Point held on June 21, 1963, a public hearing was called for July 26, 1963, and notice of said hearing was ordered and published in the High Point Enterprise, a newspaper of general circulation in the City of High Point. On August 2, 1963, in accordance with the aforesaid published notice, a hearing was held and all persons present desiring to be heard were given an opportunity to express their views. The Council of the City of High Point voted unanimously to reject the proposed rezoning ordinance recommended by the Planning and Zoning Commission.

"7. On August 19, 1963, the Williard Heirs filed with the Planning and Zoning Commission an application for a new and different plan for rezoning of the Williard Tract from Residential A-20 to Planned Industrial Park District. After due notice, a public hearing was held on September 9, 1963, before the Planning and Zoning Commission, at which time all interested persons were afforded full opportunity to be heard. The Planning and Zoning Commission unanimously approved and recommended to the Council of the City of High Point a rezoning of the Williard Tract from Residential A-20 to Planned Industrial Park District.

"8. The rezoning ordinance recommended by the Planning and Zoning Commission on September 9, 1963, was different from the rezoning ordinance considered by the Council on August 2, 1963, in various respects including the following: provided for the rezoning of one unified tract; relocated the zoning lines at least 101 feet from adjoining residentially zoned property; provided additional building line agreements; and, eliminated access to Cedrow Avenue.

"9. At a regular meeting on September 16, 1963, the Council of the City of High Point called for a public hearing on the rezoning ordinance for October 4, 1963, and due notice of said hearing was published in the High Point Enterprise, a newspaper of general circulation in the City of High Point. On October 4, 1963,

at a regular meeting of the Council of the City of High Point, at which time a quoram was present, the meeting was called to order by the Mayor and it was announced that this was the date set for a public hearing on the adoption of an ordinance rezoning a portion of the Williard Tract from Residential A-20 to Planned Industrial Park District. All interested persons present were given an opportunity to be heard, and after full and thorough discussion, and upon motion duly made and seconded, the Council of the City of High Point voted to adopt the rezoning Ordinance. Five members of the Council, including Virgil P. Carrick, voted in favor of the adoption, and two members of the Council and the Mayor voted against the adoption.

"Mayor Mehan challenged Councilman Carrick's vote. Mayor Mehan declared that the motion to rezone the Williard property was defested because of insufficient majority voting for it. The City Attorney stated that the ordinance required 5 favorable votes for its passage and that a tabulation of the votes disclosed five favorable votes; therefore, the ordinance had passed. Councilman Bencini made a motion that Councilman Carrick's vote be declared valid on the zoning vote. This motion was seconded by Councilman Shelton. Mayor Mehan declared this motion out of order. On roll call vote on this motion, the vote was as follows: AYES: Councilman Bencini, Carrick, Clapp, Hancock, Koonce, and Shelton; Mayor Mehan voted 'No,' and Councilman Eshelman abstained.

"10. The Council of the City of High Point is composed of eight councilmen and a mayor. Virgil P. Carrick was duly elected as a councilman, and prior to October 4, 1963, and on May 13, 1963, took the oath of office and assumed the duties of a councilman. In May, 1938, Virgil P. Carrick was convicted of a felony in Davidson County, North Carolina. On May 10, 1963, and prior to his certification as a duly elected councilman, Virgil P. Carrick was granted a full pardon by the Governor of North Carolina. On November 11, 1963, by proper proceedings in the Superior Court of Guilford County, Virgil P. Carrick was restored to his full rights of citizenship. On December 6, 1963, Virgil P. Carrick resigned as a councilman, and was thereupon duly appointed to fill the vacancy created by his resignation.

"11. None of the plaintiffs own property within the boundaries of the rezoning ordinance adopted by the Council of the City of High Point on October 4, 1963.

"12. About January, 1963, Singer Fidelity, Inc., a large corporation engaged in the manufacture of textile machinery, made a

survey of the City of High Point to locate a site for an industrial plant, and determined that a site of approximately 15 acres in the northern part of the Williard Tract was desirable. Singer Fidelity, Inc. is the size and type of business which would attract allied and desirable industry to the City of High Point. Many other industries had requested various real estate firms, the Chamber of Commerce, and others to locate sites for location of limited industrial uses in a Planned Industrial Park District in the City of High Point. One real estate firm has an average of two to three inquiries per month for such locations. Many other industries had expressed a desire to locate in the City of High Point, and their needs and demands required sites as provided by a Planned Industrial Park District. Prior to October 4, 1963, there was no Planned Industrial Park District available in the City of High Point. There is a need in the City of High Point for an industrial subdivision providing for limited industrial, distributive, research, office and compatible uses, and there is a demand for such a district in the area of the Williard Tract.

"13. There was no prior commitment by the City of High Point to Singer Fidelity, Inc. or any other industry to rezone the Williard Tract to Planned Industrial Park District.

"14. The Williard Tract is located between a heavy industrial area to the south and residential areas to the west, north, and east, and is served by existing and to be served by proposed major thoroughfares. The Williard Tract is not feasible for medium to heavy industrial development because of the proximity to residential areas. It is, however, ideally located and feasible for limited industrial, distributive, research, office and compatible uses, and its uses as a Planned Industrial Park District will provide a harmonious relationship between such use and uses in adjacent districts.

"15. The Williard Heirs employed the firm of R. D. Tillson and Associates, Inc. to prepare a feasible plan for the orderly development of the Williard Tract. R. D. Tillson was Chairman of the Planning and Zoning Commission and President of R. D. Tillson and Associates, Inc. R. D. Tillson disqualified himself at all meetings of the Planning and Zoning Commission at which the rezoning of the Williard Tract was considered. R. D. Tillson at no time used his position as Chairman of the Planning and Zoning Commission to influence any member of the Planning and Zoning Commission, or the Council of the City of High Point, in any

matter pertaining to the rezoning of the Williard Tract, or its adoption on October 4, 1963.

"16. A restrictive covenant agreement was entered into August 7, 1939, by Sally M. Williard (widow) and L. O. Williard and wife, Mary Anne Williard, parties of the first part, and Roy Armstrong and wife, Catherine T. Armstrong, and D. J. Caldwell and wife, Ruby S. Caldwell, parties of the second part, which agreement purports to subject certain lands to restrictions for residential purposes. The evidence fails to disclose the specific location of the subdivision referred to and the court is unable to determine what property, if any, said purported restrictions cover.

"UPON THE FOREGOING FINDINGS OF FACT, THE COURT FINDS AND CONCLUDES AS A MATTER OF LAW, AS FOLLOWS:

"1. The adoption of the rezoning ordinance by the Council of the City of High Point on October 4, 1963, required only a vote of the majority of the Council under Section 2-19 of the Code of Ordinances, and was not a motion to reconsider requiring a two-thirds vote under Section 2-22 of the Code of Ordinances.

"2. On October 4, 1963, Virgil P. Carrick was a *'de facto'* member of the Council of the City of High Point, and the inclusion of his vote in the adoption of the rezoning ordinance does not invalidate such ordinance.

"3. The rezoning ordinance was duly and validly adopted on October 4, 1963, by a vote of the majority of the Council of the City of High Point, in accordance with the Code of Ordinances of the City of High Point and the General Statutes of North Carolina.

"4. The restrictive agreement dated August 7, 1939, does not invalidate the rezoning ordinance of October 4, 1963.

"5. The Council of the City of High Point, in adopting the rezoning ordinance on October 4, 1963, did not act arbitrarily or capriciously, but its action was in good faith, reasonable, and consistent with its comprehensive zoning plan.

"6. The rezoning ordinance adopted by the Council of the City of High Point on October 4, 1963, bears a reasonable and substantial relation to the public safety, health, morals, comfort, welfare and prosperity, and its provisions are not arbitrary, unreasonable or confiscatory.

"NOW, THEREFORE, upon the foregoing findings of fact and conclusions of law, IT IS ORDERED, ADJUDGED AND DECREED that the

rezoning ordinance of October 4, 1963, was adopted in accordance with law and is valid; that the plaintiff is not entitled to the relief prayed for in the complaint; and that the costs of this action shall be taxed by the Clerk against the plaintiffs."

From the foregoing findings of fact, conclusions of law, and the judgment entered pursuant thereto, the plaintiffs appeal, assigning error.

Schoch, Schoch & Schoch for plaintiffs, appellants.
Morgan, Byerly, Post & Keziah for defendants, appellees.
Knox Walker for defendant City of High Point.

DENNY, C.J. The appellants' first assignment of error is to the refusal of the trial court to submit issues of fact, allegedly raised by the pleadings, to a jury.

The General Assembly has delegated its police powers to enact zoning regulations to municipal corporations. G.S. 160-172; Strong's North Carolina Index, Vol. III, Municipal Corporations, §§ 25 and 26, page 409, *et seq.; In re O'Neal,* 243 N.C. 714, 92 S.E. 2d 189; *Raleigh v. Fisher,* 232 N.C. 629, 61 S.E. 2d 897; *Kinney v. Sutton,* 230 N.C. 404, 53 S.E. 2d 306.

In *Raleigh v. Fisher, supra,* this Court said:

"In enacting and enforcing zoning regulations, a municipality acts as a governmental agency and exercises the police power of the State. *Kinney v. Sutton,* 230 N.C. 404, 53 S.E. 2d 306; *Elizabeth City v. Aydlett,* 201 N.C. 602, 161 S.E. 78; *S. v. Roberson,* 198 N.C. 70, 150 S.E. 674. The police power is that inherent and plenary power in the State which enables it to govern and to prohibit things hurtful to the health, morals, safety, and welfare of society. *Drysdale v. Prudden,* 195 N.C. 722, 143 S.E. 530; *Skinner v. Thomas,* 171 N.C. 98, 87 S.E. 976. L.R.A. 1916E, 338. In the very nature of things, the police power of the State cannot be bartered away by contract, or lost by any other mode."

In the case of *In re Pine Hill Cemeteries, Inc.,* 219 N.C. 735, 15 S.E. 2d 1, the City of Durham had adopted a comprehensive zoning ordinance. The Board of Adjustment entered an order granting a certificate of occupancy for a nonforming use, and the petitioner applied to the Superior Court for a writ of *certiorari,* which was granted. The trial judge, on motion of petitioner, remanded the cause to the Board of Adjustment with instructions to take further evidence and to find such further facts as might be found therefrom, and upon the facts found, to make a new determination. This Court held:

"While it may be that the board has authority, on proper showing, to reopen or rehear for the consideration of additional evidence, it has the exclusive right to determine when and upon what conditions this shall be done. The court will not substitute its judgment for that of the board. Nor will it undertake to exercise discretion vested by law in the board.

"Furthermore, in the hearing below on the writ of *certiorari*, the judge was sitting as an appellate court. As such, he was authorized to review questions of law and legal inference arising on the record. The broad discretionary powers vested in him as a trial judge were absent.

"It follows that the court below was without authority to remand the cause for a rehearing except for errors of law committed by the board. Nor could he require the board to enter a new determination in the absence of clear legal error or oppressive and manifest abuse of discretion."

As we interpret the record before us, the questions for determination are questions of fact and not issues of fact. *Horton v. Redevelopment Commission*, 262 N.C. 306, 137 S.E. 2d 115; *Housing Authority v. Wooten*, 257 N.C. 358, 126 S.E. 2d 101.

In the case of *In re Housing Authority*, 235 N.C. 463, 70 S.E. 2d 500, this Court said:

"Indeed, so extensive is this discretionary power of housing commissioners that ordinarily the selection of a project site may become an issuable question, determinable by the court, on nothing short of allegations charging arbitrary or capricious conduct amounting to abuse of discretion. * * *

"Conceding, as we may, that the issuable question thus presented was a question of fact reviewable by the presiding judge *(Railway Co. v. Gahagan*, 161 N.C. 190, 76 S.E. 696; McIntosh, North Carolina Practice and Procedure, pp. 542, 543), nevertheless it was within the discretionary power of the Judge to submit the question to the jury for determination. * * *"

In the instant case, the trial judge held in his discretion that the questions presented were questions of fact and should be heard by the court without a jury, and in this ruling we concur. The trial judge below, like the trial judge in *In re Pine Hill Cemeteries, Inc., supra*, insofar as the hearings before the Planning and Zoning Commission and the hearings before the City Council of the City of High Point were concerned, and the official records as to what transpired in said meetings in connection with the adoption of the zoning ordinance under

attack, was sitting as an appellate court and was authorized only to review questions of law and legal inferences arising on the record.

This assignment of error is overruled.

Assignment of error No. 2 is based upon the mandatory provisions of the Code of Ordinances of the City of High Point, § 22-16.2, which require, among other things, that Planned Industrial Parks "* * * shall be located between heavy industrial areas and residential areas and in areas served by major thoroughfares that are not feasible for medium to heavy industrial development because of the proximity to residential areas * * *," and the contention that the findings of fact and conclusions of law are insufficient to support the proposed rezoning. We do not concur with the defendants' contentions in this respect. It is argued that since the southern boundary of the Williard Tract is the right of way and tracks of the Southern Railway Company for a distance slightly in excess of 1,000 feet, that the Williard property does not lie between an industrial area and a residential area. There is no dispute about the fact that approximately 400 acres of land immediately to the south of the Williard property, separated only by the right of way of the Southern Railway and Kivett Drive, which runs parallel with the railroad, have been zoned for heavy industry, designated as Industrial 6. Furthermore, some industries in this area are located on the south side of Kivett Drive.

It is conceded that the 200 acre tract of the Williard property is bounded on the north by Highway 29A-70A for a distance of 1,332 feet, and that the average length and depth between the highway on the north and the Southern Railway on the south is approximately 5,550 feet. The area to the east of the Williard property, including Roy G. Armstrong's lands, was previously zoned as Residential A-20. However, except for the Armstrong home, where he has lived since 1938, his property is like the Williard property, unurbanized. To the west of the Williard Tract the area is zoned as residential, except in the area to the northwest of the property there exists a combination of commercial and residential properties.

In the case of *In re Appeal of Parker,* 214 N.C. 51, 197 S.E. 706, the petitioner attacked the validity of a zoning ordinance adopted by the City of Greensboro. From a judgment upholding the ordinance, the petitioner excepted and appealed. This Court, speaking through Barnhill, J., later C. J., said:

> "The courts will not invalidate zoning ordinances duly adopted by a municipality unless it clearly appears that in the adoption of such ordinances the action of the city officials 'has no foundation in reason and is a mere arbitrary or irrational exercise of power

having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.' * * *

"When the most that can be said against such ordinances is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere. In such circumstances the settled rule seems to be that the court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals, or general welfare. * * * *Harden v. Raleigh, supra* (192 N.C. 395, 135 S.E. 151), in which the Court quotes with approval from *Rosenthal v. Goldsboro,* 149 N.C. 128 (62 S.E. 905), as follows: 'It may now be considered as established with us that our courts will always be most reluctant to interfere with these municipal governments in the exercise of discretionary powers conferred upon them for the public weal and will never do so unless their action should be so clearly unreasonable as to amount to an oppressive and a manifest abuse of their discretion. This position is, we think supported by the better reason and is in accord with the decided weight of authority.' * * *

"The petitioner complains that the ordinance is an arbitrary and unreasonable restriction upon the petitioner's property rights. That he, due to the particular circumstances of his case, may suffer hardship and inconvenience by an enforcement of the ordinance is not sufficient ground for invalidating it. * * * The fact that the ordinance is harsh and seriously depreciates the value of complainant's property is not enough to establish its invalidity. * * *"

This assignment of error is likewise overruled.

Assignment of error No. 3 is directed to the alleged non-compliance with the mandatory provisions of the Code of Ordinances of the City of High Point, § 22-16.3, which require, among other things, that "(a) The developer shall produce evidence that the district is needed and there is a demand for such district in the area proposed and that intended uses in said district will provide a harmonious relationship between such use and uses in adjacent districts."

In our opinion, the developers offered ample evidence to support the findings of fact with respect to the need for a Planned Industrial Park District in the City of High Point, and we so hold. Furthermore, whether or not such a park is needed and its establishment was in the public interest, involved discretionary power exercised by the City

Council of the City of High Point in its governmental capacity. *In re Markham,* 259 N.C. 566, 131 S.E. 2d 329.

The appellants contend that the action of the City Council of the City of High Point in adopting the ordinance creating the Planned Industrial Park District was a "mere sham, to cover the City's unconscionable misuse of governmental power," in that it, the appellants contend, made tentative commitments to Singer Fidelity, Inc., which concern wanted to purchase a part of the Williard property as a site provided it was zoned as a Planned Industrial Park District, before the application was filed.

There is plenary evidence not only that Singer Fidelity, Inc. was interested in purchasing a site from the Williard heirs, but that the Chamber of Commerce of the City of High Point, and local real estate men had received many inquiries about whether or not such an area was available. If there had not been inquiries or requests for sites in a Planned Industrial Park District, doubtless neither the Zoning Commission nor the City Council would have taken any action to establish such an area. In our opinion, this assignment of error is without merit and is overruled.

Assignment of error No. 4 purports to challenge the legality of the action of the City Council of the City of High Point in its attempt to rezone the Williard property on the ground that, as a matter of law, such action was unreasonable, arbitrary or capricious, and not in furtherance of the public health, safety, morals or general welfare, and any findings of fact or conclusions of law to the contrary are erroneous.

This assignment of error seems to be based largely upon the fact that on 29 April 1963 the Williard Heirs filed with the Planning and Zoning Commission of the City of High Point an application for rezoning the entire 200 acre tract of the Williard property from Residential A-20 to Planned Industrial Park District, and plaintiffs, consisting of more than 20% of the adjacent property owners (see Finding of Fact No. 5), pursuant to the provisions of G.S. 160-176, filed a protest with the Planning and Zoning Commission; whereupon, on 2 August 1963, the City Council unanimously rejected the application. Thereafter, on 19 August 1963, the Williard Heirs filed an application with the Planning and Zoning Commission for a new and different plan for rezoning the Williard Tract from Residential A-20 to Planned Industrial Park District. This plan was different from the original plan in that it relocated the zoning lines at least 101 feet from adjoining residentially zoned property, *et cetera* (see Findings of Fact Nos. 7 and 8).

The creation of a buffer zone of 101 feet around the outer edge of the Williard Tract, which buffer zone is to remain zoned as Residential A-20, is permissible. *Penny v. Durham,* 249 N.C. 596, 107 S.E. 2d 72.

In the last cited case, we upheld the creation or establishment of a buffer strip or zone 150 feet wide, to remain zoned for residential purposes, and further held the ordinance valid which had been adopted by only a majority of the members of the City Council of the City of Durham, rezoning the remainder of the property involved for business purposes. This Court said:

> "The fact that Northland owns both the 'buffer strip' and the rezoned area and that both are parts of one tract of land makes no difference in this case. We must consider the matter in the same manner as if these areas were under separate ownership. The 'Zoning Regulations' provide that the City 'may divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this article.' G.S. 160-173. To hold that zoning district lines must coincide with property lines, regardless of area involved, would be to render the act largely ineffective. * * *
>
> "The rezoning ordinance of 2 December, 1957, in question in this case was regularly adopted and is legal and valid. Upon the record before us, the 'buffer strip' is still zoned for one-family residence usage. Whatever the ultimate intention of Northland, the law is adequate to meet any exigency that may arise."

In *McKinney v. High Point,* 239 N.C. 232, 79 S.E. 2d 730, this Court said:

> "* * * The adoption of a zoning ordinance does not confer upon citizens living in a Residence A Zone, as therein defined, any vested right to have the ordinance remain forever in force, inviolate and unchanged.
>
> "A zoning ordinance is not a contract between the municipality and its citizens. * * * The adoption of such ordinances is a valid exercise of the police power * * *, which is not exhausted by its use.
>
> "It being a law enacted in the exercise of the police power granted the municipality, no one can acquire a vested right therein. * * * It is subject to amendment or repeal at the will of the governing agency which created it."

This assignment of error is overruled.

The appellants' final assignment of error is to the findings of fact and conclusions of law that the rezoning ordinance was adopted in accordance with the Code of Ordinances of the City of High Point.

The appellants do not challenge the validity of Councilman Carrick's vote on the ground that he had been convicted of a felony in 1938, and

that his citizenship had not been restored in the manner provided by Chapter 13 of the General Statutes of North Carolina (see Findings of Fact Nos. 9 and 10).

The Council of the City of High Point is composed of eight councilmen and a mayor. Five members of the Council, including Virgil P. Carrick, voted in favor of the adoption of the rezoning ordinance and two members of the Council and the Mayor voted against the adoption of the ordinance.

Mayor Mehan challenged Councilman Carrick's vote and declared "the motion to rezone the Williard property was defeated because of insufficient majority voting for it." The City Attorney called attention to the fact that it required only five favorable votes to adopt the ordinance and that five votes had been cast for its adoption and the ordinance had passed. Councilman Bencini made a motion that Councilman Carrick's vote be declared valid on the zoning vote. This motion was duly seconded, and upon a roll call vote, Councilman Bencini, Carrick, Clapp, Hancock, Koonce and Shelton voted for the motion; Mayor Mehan voted against it, and Councilman Eshelman abstained. One member of the Council was absent.

The appellants contend that the Mayor's ruling on Carrick's right to vote was final and could not be overthrown by appeal to the Council to override his ruling. In this we do not concur. G.S. 128-6 provides:

> "Any person who shall, by the proper authority, be admitted and sworn into any office, shall be held, deemed, and taken, by force of such admission, to be rightfully in such office until, by judicial sentence, upon a proper proceeding, he shall be ousted therefrom, or his admission thereto be, in due course of law, declared void."

We hold that Mayor Mehan had no right to deny Councilman Carrick's right to vote. Upon his election, and after having been sworn in as a member of the City Council of the City of High Point, Carrick was a *de facto* councilman until he was removed from said office in a *quo warranto* proceeding or otherwise removed therefrom as provided by law. *In re Wingler*, 231 N.C. 560, 58 S.E. 2d 372, and cited cases.

There are some inconsistencies in the allegations, contentions and arguments of the appellants. On the one hand, they argue that there is no need or justification for the creation of a Planned Industrial Park District in the City of High Point. They further contend there is no assurance that the East Belt Line as contemplated by the City of High Point and the State Highway Commission will ever be built to serve this property (see Finding of Fact No. 4). Yet, they allege in their complaint that prior to the request for rezoning the Williard prop-

erty it had a value of approximately $2,000 per acre; that if the rezoning ordinance is upheld, the value of the Williard land will be increased by $10,000 per acre; therefore, they allege, these plaintiffs and other citizens of High Point will be required to pay about $360,000 for approximately 36 acres of land within the Planned Industrial Park District that will be required for the right of way of the proposed East Belt Line. What proof could be more conclusive of the need for a Planned Industrial Park District than that property within such district will immediately be in such demand that its value will be increased five fold by being included in such a district?

The burden was upon the appellants to show that the action of the City Council of the City of High Point was arbitrary and capricious to such an extent as to amount to an abuse of discretion. We find no evidence on this record of an abuse of discretion on the part of the City Council of the City of High Point, or that the members thereof or any of them acted in bad faith in connection with the adoption of the contested ordinance.

The judgment of the court below is

Affirmed.

WILLIAM L. SCARBOROUGH, FOR HIMSELF AND ON BEHALF OF ANY OTHER RESIDENTS AND TAXPAYERS OF THE "METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY" WHO MAY BE INTERESTED AND DESIROUS TO MAKE THEMSELVES PARTIES PLAINTIFF v. J. G. ADAMS, JR., J. W. SPICER, GEORGE E. DAWSON, J. R. REAGAN, RONALD E. FINCH, MYRON PETERSON, OSCAR TANDY, MRS. ROBERT M. SWICEGOOD, C. LEROY ROBINSON AND T. S. GARRISON, SR., MEMBERS OF THE DISTRICT BOARD OF THE "METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY," AND "METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY."

(Filed 18 June, 1965.)

1. Sanitary Districts § 1; Constitutional Law §§ 17, 24— Creation of metropolitan district comprised of sanitary districts and municipalities held valid.

The statutes specifically authorize the creation of a metropolitan sanitary district comprised of other sanitary districts and municipalities, and the creation of such district upon the vote of the governing bodies of the constituent municipalities and districts, without a vote of the respective inhabitents, does not violate either section 1 or section 17 of Article I of the State Constitution, since even though a vote of the majority of the freeholders of any unincorporated area is required to create a district, G.S. 130-124, the constituent districts were presumably created by petition signed

by 51 per cent of their respective freeholders, and the governing bodies have power to act for the respective districts and municipalities. G.S. 153-295 *et seq.*, G.S. 143-215.2(e)(f).

2. Same—

The fact that one of the sanitary districts included in a metropolitan district does not have a sewerage system at the time of the creation of the metropolitan district does not preclude its inclusion in the district, since it may thereafter construct such system or the metropolitan district may construct a system for it. G.S. 153-300(5).

3. Contracts § 12—

Where no time is fixed for the termination of a contract it will continue for a reasonable time, taking into account the purposes the parties intended to accomplish.

4. Contracts § 6; Municipal Corporations § 17; Sanitary Districts § 1—

The fact that a contract between a metropolitan district and the municipalities and sanitary districts within its boundaries in regard to the operation, control, and financing of the metropolitan sanitary district provides that the contract should continue in force so long as the district's disposal system remains in existence and operation, is valid and is not against public policy, since the very nature and exigencies of the problem require contracts continuing for an indefinite time.

5. Sanitary Districts § 2—

The provisions of a contract between a metropolitan sanitary district and the municipalities and sanitary districts within its boundaries that the metropolitan district should have authority to cut-off water to users who are delinquent in their sewerage account is valid. G.S. 153-317(2)(c).

6. Counties § 5—

G.S. 153-324 expressly provides that all general or special laws inconsistent therewith are inapplicable, and G.S. 153-310 specifically permits the bond resolution of a sanitary district to contain provisions for the use and disposition of the revenues of the system and the creation and maintenance of reserves and sinking funds, and therefore the provisions of Ch. 4 Public-Local Laws of 1937 that the Sinking Fund Commission of Buncombe County should have custody and management of the sinking, revolving or other funds for the payment or retirement of bonded indebtedness is not applicable to the bonds of a metropolitan sanitary district.

APPEAL by plaintiff from *McLean, J.*, January 25, 1965 Regular Session, BUNCOMBE Superior Court.

The plaintiff, for himself and for other residents and taxpayers of the Metropolitan Sewerage District of Buncombe County similarly situated, instituted this civil action against the Metropolitan Sewerage District of Buncombe County and the ten individual members of the Metropolitan Sewerage District Board for the purpose of enjoining and restraining all defendants, their agents, etc., from issuing, offering for sale,

or selling bonds and notes not to exceed Ten Million, Four Hundred Thousand Dollars ($10,400,000.00) pursuant to the authority conferred by G.S. 153-295 to 324, inclusive, and as ordered by Bond Resolution dated September 25, 1964, and approved at the election held in the district on December 14, 1963.

The plaintiff alleges:

"(T)hat the Board of County Commissioners of Buncombe County, in conjunction with the State Stream Sanitation Committee, acting under and pursuant to the authority purported to be granted to them by Chapter 795 of the Act of the 1961 General Assembly of North Carolina, attempted to create the Metropolitan Sewerage District of Buncombe County . . . being comprised of the following political subdivisions located within Buncombe County, namely: City of Asheville, Town of Biltmore Forest, Town of Weaverville, Town of Black Mountain, Woodfin Sanitary Water and Sewer District, Busbee Sanitary Sewer District, Crescent Hill Sanitary Sewer District, Skyland Sanitary Sewer District, Fairview Sanitary Sewer District, East Biltmore Sanitary Sewer District, Caney Valley Sanitary Sewer District, Swannanoa Water and Sewer District, Beaverdam Water and Sewer District, Venable Sanitary District.

"The plaintiff is advised, informed and believes that the Act under which the Metropolitan Sewerage District of Buncombe County purports to have been created, authorizes and empowers said District to do, among other things, the following:

"(a) To acquire, lease as lessor or lessee, construct, reconstruct, improve, extend, enlarge, equip, repair, maintain and operate any sewerage system or part thereof within or without the District, the term 'sewerage system' embracing both sewers (as defined in said Act) and sewage disposal systems (as defined in said Act) and any part or parts thereof, either within or without the limits of the District, all property, rights, easements and franchises relating thereto, and any and all buildings and other structures necessary or useful in connection with the ownership, operation or maintenance thereof;

"(b) To issue its general obligation bonds or revenue bonds for the purpose of providing funds for paying all or any part of the cost of a sewerage system or systems;

"(c) To fix and revise from time to time and to collect rents, rates, fees and other charges for the use of or for the services and facilities furnished by any sewerage system;

"(d) To secure any general obligation bonds of the District by a pledge of the revenues of any sewerage system;

"(e) To levy and collect annually a tax *ad valorem* upon all the taxable property in the District sufficient to pay the interest on and the principal of any such general obligation bonds as such interest and principal become due; provided, however, that such tax may be reduced by the amount of other moneys actually available for such purpose;

"(f) To make and enter into contracts or agreements with the governing bodies of any political subdivisions upon such terms and conditions and for such periods as any such governing body and the District Board of the District (hereinafter sometimes called the 'District Board') may determine with respect to:

"(i) The collection, treatment and disposal of sewage;

"(ii) The collecting by such political subdivision or by the District of rents, rates, fees or charges for the services and facilities provided to or for such political subdivision or its inhabitants by any sewerage system, and for the enforcement of collection of such rents, rates, fees and charges; and

"(iii) The imposition of penalties, including the shutting off of the supply of water furnished by any water system owned or operated by any such political subdivision, in the event that the owner, tenant or occupant of any premises utilizing such water shall fail to pay any such rents, rates, fees or charges.

"4. That the defendants, pursuant to the purported authority in them vested, have caused their Consulting Engineers to make an investigation and to file report, together with said Engineers' recommendations as to the type of sewerage disposal system that will be adequate to accommodate the needs of the purported district, which includes the fourteen political subdivisions hereinbefore named in paragraph two, and the said Engineers have recommended and the District has estimated and found that a sewage disposal system which will be adequate to accommodate the needs of the purported district will cost approximately $10,400,000.00 to construct and place in operation, and the said District has estimated and purports to have found that the estimated cost of constructing a Metropolitan Sewerage Disposal System to serve the District, which includes the fourteen political subdivisions located in Buncombe County, hereinbefore named in paragraph two of this complaint, would be less than the aggregate cost of constructing individual sewage disposal systems to serve the fourteen var-

ious political subdivisions which are embraced in and comprise the purported District.

"5. That an election was held in the purported District on December 14, 1963, and a majority of the qualified voters voting in said election approved a bond order adopted by the District Board on October 8, 1963, which bond order, among other things, purported to authorize the issuance of not exceeding $10,400,000.00 sewage disposal system bonds of the District for the purpose of providing funds in addition to any other available funds for constructing a sewage disposal system for the District, including treatment plants, pumping stations, intercepting sewers, trunk sewers, pressure lines, mains and all other necessary appurtenances, equipment and apparatus, together with real property, rights, easements, franchises and any and every kind of property necessary and incident to the building, installation and maintaining collectively a sewerage disposal system and authorizing the levying and collecting a tax for the payment thereof.

"6. The plaintiff is advised, informed and believes, and on such information and belief, alleges that the District has done or caused to be done all those things required by the Act of the 1961 General Assembly, Chapter 795, and are now about to execute, sell and deliver general obligation bonds of the District in the aggregate amount of $10,400,000.00, and if the said bonds are sold and delivered they will, among other things, as provided therein and as provided by the Bond Order adopted by the District Board on October 8, 1963, irrevocably pledge for the prompt payment thereof, both principal and interest as the same become due, the full faith and credit of said 'Metropolitan Sewerage District of Buncombe County' and said bonds will be general obligation bonds of the District."

The plaintiff further alleged:

"(T)hat on or about September 1, 1964, the Metropolitan Sewerage District of Buncombe County entered into fourteen separate agreements with the fourteen separate political subdivisions named in paragraph two of this complaint. That, among other things, it was agreed between the Metropolitan District of Buncombe County and each of the fourteen political subdivisions, as follows:

"The District will use its best efforts to consummate the sale of its bonds at the earliest practicable date in an aggregate principal amount sufficient to pay the cost of constructing and placing in

operation the sewage disposal system recommended in the Engineering Report such sewage disposal system being hereinafter called the 'Sewage Disposal System.'"

The parties waived a jury trial and stipulated that Judge McLean should hear the evidence and decide the entire controversy. Among other findings, Judge McLean made the following:

"9. That the defendants, pursuant to the authority in them vested, have caused their Consulting Engineers to make an investigation and file report, together with Engineers' recommendations as to the type of sewage disposal system that will be adequate to accommodate the needs of the district, which includes the fourteen political subdivisions named in paragraph two of the complaint, and the said Engineers have recommended and the District has estimated and found that a sewage disposal system which will be adequate to accommodate the needs of the district will cost approximately $10,400,000.00 to construct and place in operation, and the said District has estimated and has found that the estimated cost of constructing a Metropolitan Sewerage Disposal System to serve the District, which includes the fourteen political subdivisions located in Buncombe County, named in paragraph two of the plaintiff's complaint, would be less than the aggregate cost of constructing individual sewage disposal systems to serve the fourteen various political subdivisions which are embraced in and comprise the District, a copy of said Consulting Engineers' investigation and report having been appended to the Agreed Statement of Facts, and, in its entirety, is made a part of this Finding of Fact.

"10. That an election was held in the District on December 14, 1963, and a majority of the qualified voters voting in said election approved a bond order adopted by the District Board on October 8, 1963, which bond order, among other things, authorized the issuance of not exceeding $10,400,000.00 sewage disposal system bonds of the District for the purpose of providing funds in addition to any other available funds for constructing a sewage disposal system for the District, including treatment plants, pumping stations, intercepting sewers, trunk sewers, pressure lines, mains and all other necessary appurtenances, equipment and apparatus, together with real property, rights, easements, franchises and any and every kind of property necessary and incident to the building, installation and maintaining collectively a sewer disposal system and authorizing and levying and collecting a tax for the payment thereof.

"11. That the District and District Board have done or caused to be done all those things required by the Act of the 1961 General Assembly, Chapter 795, and are now about to execute, sell and deliver general obligation bonds of the District in the aggregate amount of $10,400,000.00, and if the said bonds are sold and delivered they will, among other things, as provided therein and as provided by the Bond Order adopted by the District Board on October 8, 1963, irrevocably pledge for the prompt payment thereof, both principal and interest, as the same become due, the full faith and credit of said Metropolitan Sewerage District of Buncombe County, and said bonds will be general obligation bonds of the District." * * *

"14. That if any bonds are ever issued by the Metropolitan Sewerage District of Buncombe County, the Trustee named by the District in the bond resolution of September 25, 1964, will have custody, application of proceeds of bonds, the supervision and management of the funds of the District available for the payment of the District Bonds, and the management of the funds in every respect, and the management of the funds of the District will in no way or manner be under the supervision of the Buncombe County Sinking Fund Commission, as the same was established in 1937 and is now in full force and effect as provided by said Act."

The plaintiff challenges the validity of the Bond Resolution upon five grounds:

1. The method by which the Metropolitan Sewerage District was created violates Section 1 and Section 17 of Article I, North Carolina Constitution in that it included within the overall district the fourteen political subdivisions by resolutions of their governing boards without the joinder of the residents of the subdivision.

2. The inclusion of the Venable Sanitary District which has no public sewerage system violates the sections of the Constitution above referred to.

3. The agreements between the Metropolitan District and the fourteen subdivisions are against public policy in that they provide that the agreement shall continue so long as the sewerage district systems remain in existence and operation.

4. That part of the agreement between the Metropolitan District and each subdivision that the latter during default will discontinue furnishing water to the users whose sewage disposal service charges are delinquent is invalid.

5. The provision of the Bond Resolution that a trustee shall have custody, supervision, and management of the fund provided for the payment of bonds violates Section 9, Chapter 4, Public-Local Laws of 1937 which provides for a Sinking Fund Commission to perform these services.

After finding the facts to be as the parties stipulated, the court concluded:

1. The Metropolitan Sewerage District of Buncombe County was created according to law.

2. The inclusion of the Venable Sanitary District within Metropolitan was authorized by law.

3. Bonds issued pursuant to the Bond Resolution will be valid and binding obligations of the Metropolitan Sewerage District of Buncombe County.

4. The agreements between the fourteen subdivisions and Metropolitan, including the authority to cut off water in default of sewerage dues payment, are valid and binding and not in contravention of the North Carolina Constitution.

5. The provision of the bond resolution and the trust agreement that a trustee shall have custody and management of the District's funds committed to the specific purposes prescribed is valid and that the provisions of Section 9, Chapter 4, Public-Local Laws of 1937, are inapplicable.

The court entered judgment denying the restraining order and dismissing the action. Plaintiff excepted and appealed.

Loftin & Loftin by E. L. Loftin for plaintiff appellant.
Anthony Redmond for defendant appellee.

HIGGINS, J. The Board of Commissioners of Buncombe County in conjunction with the State Stream Sanitation Committee created in the manner provided by G.S. 153-295 through 324 the Metropolitan Sewerage District of Buncombe County. Prior to the creation, the city, the three towns, and nine of the ten sanitary sewerage districts each maintained its individual sewerage system. The tenth (Venable Sanitary District) did not have "a public sewerage collection system." All of the several systems discharged raw sewage into the French Broad River or into its tributary, Hominy Creek. Many of the discharge outlets emptied into the river within the corporate limits of the City of Asheville. All of the sanitary districts lacked facilities for the treatment of raw sewage. The resulting stream pollution is and has been in

violation of public health laws of the State. However, the State Stream Sanitation Committee, on a temporary basis, has permitted the pollution to continue, pending the arrangements herein contemplated.

To remove the health hazard resulting from pollution, the State Stream Sanitation Committee and the fourteen sanitary districts initiated the proceeding before the Board of County Commissioners for the creation of the Metropolitan District. Confronted, as they were, with the necessity of complying with the health laws by treating the sewage before its discharge into the river, and realizing the enormous cost to each unit if required to furnish a separate treatment facility, the several units, through their governing bodies, petitioned the Board of Commissioners for the creation of the Metropolitan District in order that they might pool their resources and create one unit to handle the problem for all. These constituent units contracted with the Metropolitan District as to their respective rights, duties, and obligations under which the contracting parties shall discharge the contract obligations which are to become effective only upon the sale of the Metropolitan District bonds authorized by the bond resolution.

The plan herein followed for dealing with the pollution problem is specifically authorized by law. G.S. 143-215.2(e) and (f) provides: "It is the intent of this section, however, that the Committee shall seek to obtain the co-operative effort of all persons contributing to each situation involving pollution in remedying such situation, and that the powers granted by this section shall be exercised only when the objective of this section cannot be otherwise achieved within a reasonable time. . . .

"When an order of the Committee to abate discharge of untreated or inadequately treated sewage and other waste is served upon a municipality or upon a sanitary district, the governing board of such municipality or the sanitary district board of such district shall, unless said order be reversed on appeal, proceed to provide funds, using any or all means necessary and available . . . by issuance of bonds secured by the full faith and credit of such municipality or district or by issuance of revenue bonds or otherwise, for financing the cost of all things necessary for full compliance with said order and shall thereby comply with said order. . . ."

The foregoing is a summary of the factual background as shown by the record before us. Untenable is the objection that the creation of the Metropolitan District is invalid as violative of Sections 1 and 17 (the inalienable rights and the law of the land guarantees) of Article I of the North Carolina Constitution. The Metropolitan District was created pursuant to petition filed by the governing bodies of the city, towns, and the ten sanitary districts without the joinder of any of the

residents of the subdivision. G.S. 153-297 provides for the creation of the district upon the petition of two or more political subdivisions, or any political subdivision and any unincorporated areas by the resolution of the governing body of a political subdivision, or "If any unincorporated area is to be included in such district, a petition, signed by not less than fifty-one per centum (51%) of the freeholders resident within such area, . . ."

Obviously the governing body acts for the subdivision. If there is no subdivision and no governing body to act for the subdivision, a majority of the freeholders must sign the petition. The governing body of each subdivision signed the petition in this case. The Metropolitan District does not include any unincorporated areas. The requirement that fifty-one per centum of the resident freeholders sign the petition (we presume) was met when the Sanitary Districts were created. G.S. 130-124; *Deal v. Sanitary District,* 245 N.C. 74, 95 S.E. 2d 362; *Idol v. Hanes,* 219 N.C. 723, 14 S.E. 2d 801. Hence the constitutional requirements of Article I, Sections 1 and 17, are satisfied.

The inhabitants of the entire area, through their representatives in the manner provided by law, have acted to accomplish that which had to be done, that is: treat the sewage before it entered the only available outlet, the French Broad River. The Legislature has provided machinery for the creation of the governmental agencies necessary to deal with the health hazard incident to stream pollution and has prescribed suitable rules and fixed available standards to govern these agencies in dealing with the problem. These enactments are within legislative competence. They neither violate the inalienable rights nor the law of the land sections of the State Constitution. *Sanitary District v. Lenoir,* 249 N.C. 96, 105 S.E. 2d 411; *Grimesland v. Washington,* 234 N.C. 117, 66 S.E. 2d 794; *Moore v. Board of Education,* 212 N.C. 499, 193 S.E. 732.

Likewise untenable is the plaintiff's contention that the creation of the Metropolitan District violates the constitutional rights of those located in the Venable Sanitary District by taxing them when in fact the Venable District does not have a sewerage system to which Metropolitan may attach its collecting lines. The Venable District, through its representatives, participated in the creation of Metropolitan which embraces all of Venable's territory. The contract obligates Metropolitan to receive and treat sewage for all its constituent members, including Venable, and under the contract must receive sewage from Venable if and when it constructs a system, which it may do at any time. Metropolitan facilities will not be available until there is a sale of the bonds and after its facilities are constructed. In the meantime, Venable may or may not construct needed facilities. The provision that unincor-

porated areas may become a part of the system refutes the contention that a system must be in existence at the time of the creation of Metropolitan. Actually, under the setup, Metropolitan is authorized to "acquire, lease . . . , construct, reconstruct, improve, extend, enlarge, equip, repair, maintain, and operate any sewerage system or part thereof within . . . the district." G.S. 153-300(5). It may be that Metropolitan, under its authority, will construct the needed facilities for the Venable District.

The agreements between the 14 subdivisions and Metropolitan are to continue in force only so long as the district sewerage disposal system remains in existence and in operation, either by the district or by any successor. The agreements provide that each subdivision may use its own or other available disposal facilities to the extent the district fails or is unable to meet the disposal needs of the subdivision. The contracts obligate Metropolitan, for a fixed charge, to pick up raw sewage from the subdivisions' connections and thereafter to transport, convey, treat, and dispose of it. To this end the subdivisions agree to use the services made available by Metropolitan. The General Assembly by G.S. 153-317 authorized the parties to make these contracts. Ordinarily, a valid contract once entered into may not be altered or abrogated except by agreement of the contracting parties. When no time is fixed for the termination of a contract, at least it will continue for a reasonable time, taking into account the purposes the parties intended to accomplish. *Lambeth v. Thomasville,* 179 N.C. 452, 102 S.E. 775; *Plant Food Co. v. Charlotte,* 214 N.C. 518, 199 S.E. 712. The power of the parties to make contracts of this character is discussed by McQuillan on Municipal Corporations, (3rd Ed. Rev. 1964) Vol. 11, Section 31.13:

> "Ordinarily, apart from the authority conferred upon them pertaining to contracts for the construction of public works and improvements generally, including sewers, considered elsewhere in this work, municipalities have power to enter into contracts with respect to their sewer systems. Thus, agreements frequently are entered into with adjoining municipalities or other public bodies, or with private parties, for the mutual development or use of sewerage facilities, upon such considerations, terms and conditions as the parties, acting within the scope of their lawful authorities, deem adequate and politic."

"Authorities, districts, boards, commissions and other supplementary public corporations are widely utilized as effective means for accomplishing the desirable and, in metropolitan areas, the imperative cooperation in the solution of common problems that are typically larger

than the single municipality. The metropolitan authority that takes over a number of the most important municipal functions from all the municipal corporations and townships in a metropolitan area is just coming into its own. . . . Of all the problems facing metropolitan communities requiring joint action and common solutions, that of sewerage and drainage may well be the most important." Antieau, Municipal Corporation Law (1964), Vol. 3, Sec. 28.06, p. 528.

The provision in the contracts between Metropolitan and the 14 subdivisions that the latter will cut off water from users who are delinquent in their sewerage accounts is valid. G.S. 153-317(2)(c) specifically provides for "(T)he shutting off of the supply of water furnished by any water system owned or operated by such political subdivision, in the event that the owner . . . shall fail to pay . . . fees or charges." "Laws authorizing the discontinuance of water services or supplies for nonpayment of sewer charges have been regarded as valid, and as not penal in nature." McQuillin, Municipal Corporations, (3rd Ed. Rev. 1964) Vol. 11, § 31.32(a).

Finally, the appellant challenges the validity of that part of the bond resolution and the trust agreement providing that a trustee shall have the custody, supervision, and management of the funds available for discharging the bonds. The basis of the challenge is the provision of Section 9, Ch. 4, Public-Local Laws of 1937, that the Sinking Fund Commission shall have the custody and management of all sinking, revolving, and other funds earmarked by law or by contract for the payment or retirement of bonded indebtedness of Buncombe County and its subdivisions. This provision of the Public-Local Law is rendered inapplicable to the bonds issued pursuant to the bond resolution here involved. The 1961 Act of the General Assembly, Ch. 795, and G.S. 153-310 provided that any resolution authorizing the issuance of bonds to finance the cost of any sewerage system or any trust agreement securing the bonds may contain the following:

> "(2) The use and disposition of the revenues of the sewerage system;
>
> "(3) The creation and maintenance of reserves or sinking funds and the regulation, use and disposition thereof";

The bond resolution and the trust agreement provide that a trustee shall have custody and management of the funds. G.S. 153-324 provides: "All general, special or local laws, or parts thereof, inconsistent herewith are hereby declared to be inapplicable." Hence, the Act of 1961 gives precedence to the bond resolution and the trust agreement and renders Public-Local Law, 1937, inapplicable.

As population increases it becomes manifest that an unpolluted water supply (along with food, clothing, and shelter) is a necessity not only for physical well-being, but as a means of sustaining life. The legislative enactments here involved look to the accomplishment of this end. The Constitution does not interpose any roadblock.

In addition to the assignments of error presented and discussed herein, we have examined the record proper. Error of law does not appear on the face thereof. *Skinner v. Transformadora,* 252 N.C. 320, 113 S.E. 2d 717; *Dare County v. Mater,* 235 N.C. 179, 69 S.E. 2d 244.

The judgment of the Superior Court of Buncombe County is

Affirmed.

J. C. SHERRILL AND CLEO C. SHERRILL, PETITIONERS v. N. C. STATE HIGHWAY COMMISSION; AND JEFFERSON STANDARD LIFE INSURANCE COMPANY, RESPONDENTS.

(Filed 18 June, 1965.)

1. Highways § 1; State § 4—

The State Highway Commission is an agency of the State and ordinarily is not subject to suit except in the manner expressly authorized by statute.

2. Same; Eminent Domain § 1—

Where private property is taken for a public purpose by a governmental 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.

3. Highways § 4—

When a city street becomes a part of the State highway system, the Highway Commission becomes responsible for its condition thereafter to the same extent as if originally constructed by it, and this rule applies to fills and culverts as well as to the surface areas of the highway. G.S. 136-66.1.

4. Eminent Domain § 2— Allegations held sufficient to state cause for taking of easement for discharge of water againt petitioners' property.

Allegations to the effect that a street having a culvert not aligned with the natural course of the creek running through the culvert, was taken over by the State Highway Commission, that gradually the culvert became inadequate to take care of the increase in the volume of water draining into the creek, causing the water after heavy rains to back up in front of the culvert and generate pressure impelling the water with force against the

bank on the other side of the culvert, so that, after a heavy rain, the creek washed away petitioners' retaining wall and the foundation to petitioners' building, resulting in the damage in suit, *held* sufficient, the allegation of negligence aside, to allege a permanent taking of an easement to discharge water against petitioners' property, constituting a taking in the constitutional sense.

APPEAL by petitioners from *McConnell, J.,* November-December 1964 Session of IREDELL.

Petitioners own, subject to a mortgage held by Jefferson Standard Life Insurance Company, a lot in Statesville, North Carolina, fronting on the east side of South Center Street, which is also U. S. Highway No. 21. A store building thereon occupies the entire frontage of 54 feet and extends back (east) from said street (highway) approximately 95 feet.

In their petition filed March 31, 1961 petitioners alleged they were entitled to recover from the State Highway Commission (Highway Commission) compensation for damages to their said realty. Answers were filed by the Highway Commission and by said mortgage holder. Thereafter, the Highway Commission demurred to the petition. After hearing, Judge McConnell sustained the demurrer and dismissed "this proceeding." Petitioners excepted and appealed.

Carswell & Justice and Hugh G. Mitchell for petitioner appellants.

Attorney General Bruton, Assistant Attorney General Lewis, Trial Attorney Rosser and R. A. Hedrick, Associate Counsel, for respondent appellee State Highway Commission.

BOBBITT, J. Petitioners' allegations, summarized, are set forth below.

Petitioners purchased said lot and building in 1950. The Highway Commission, for many years prior to 1950, had complete control and custody and responsibility for the proper maintenance of said street (highway) in front of said realty. It maintained said street over an artificial fill across a creek. The creek flowed east, passed under the fill through a culvert; and east of said street and culvert flowed approximately ten feet south of petitioners' south property line.

After petitioners had purchased said realty, the waters draining into said creek gradually increased to such extent that during normally heavy rains said culvert was totally inadequate to carry off the flow of water in said creek. At such times, the fill obstructed the creek; and water backed up on the west side of the fill was forced through the culvert at greatly increased pressure. The culvert was constructed at such angle to the natural course of the creek that water was forced through

the culvert against the south bank of the creek east of the culvert. This washed out a deep hole and created a whirlpool, which resulted in a washing away of the north bank of the creek adjacent to petitioners' property.

Notwithstanding it knew or should have known of said facts, the Highway Commission did nothing to prevent "this washing away" of the creek banks or to provide an adequate culvert under its fill.

In March 1959, the north bank of the creek had washed away up to petitioners' property; and it became necessary for petitioners to construct "an additional retaining wall" on the south side of their building in an attempt to prevent the wall of said building from being destroyed.

Notwithstanding the Highway Commission had knowledge of said condition, "which it had created," it did nothing to prevent further damage to petitioners' property or to prevent further diversion of the waters of said creek.

A rain storm during the early morning hours of October 14, 1959 caused the creek to overflow. Water backed up on the west side of the fill was forced through the culvert under great pressure in a solid stream. This resulted in the washing away of petitioners' retaining wall and the south wall and foundations of petitioners' store building and other damage to petitioners' property.

Petitioners alleged the Highway Commission was negligent in that: (1) it failed to provide proper drainage facilities for the normal run-off of the waters of the creek; and (2) it maintained a culvert (a) that was not large enough and (b) that was constructed in such manner as to create "the whirlpool" to the south of petitioners' property. They alleged further that the Highway Commission's negligence in these respects proximately caused a diversion of the waters of the creek from their natural flow and the damage to petitioners' property.

Petitioners, predicated upon the same facts, alleged further that the damage to their property caused by said diversion of the natural flow of the waters of the creek constituted a taking and appropriation of their property rights for which they are entitled to just compensation, namely, $20,000.00.

The Highway Commission asserted, as grounds of demurrer, that the facts alleged by petitioners (1) "are not sufficient to show an appropriation of the property of the petitioners by the respondent under its powers of eminent domain"; (2) "sound in tort"; and (3) "do not constitute a cause of action over which this Court has jurisdiction as against this respondent."

Petitioners, in their brief, assert: "While the petition in the present case contains allegations amounting to negligence of the defendant,

Highway Commission, it is to be observed that the basic cause of action and the facts underlying that cause of action as alleged in that petition is one for a constitutional taking of the plaintiffs' real property resulting from the diversion of creek waters onto the plaintiffs' property repeatedly and over a long period of time and in spite of the protest of the plaintiffs . . ."

The State Highway Commission is an unincorporated agency of the State. Petitioners cannot maintain an action against it in tort for damages to their property. Ordinarily, it is not subject to suit except in the manner expressly authorized by statute. *McKinney v. Highway Commission,* 192 N.C. 670, 135 S.E. 772; *Schloss v. Highway Commission,* 230 N.C. 489, 53 S.E. 2d 517; *Moore v. Clark,* 235 N.C. 364, 70 S.E. 2d 182; *Cannon v. Wilmington,* 242 N.C. 711, 89 S.E. 2d 595; *Williams v. Highway Commission,* 252 N.C. 772, 114 S.E. 2d 782.

Notwithstanding their allegations as to negligence, petitioners rightly concede they cannot maintain a tort action against the Highway Commission.

While their pleading refers to the Sherrills as "petitioners," there was no request for the appointment of commissioners. There appears in the record an order of the clerk "that this action be placed upon the Civil Docket of the Superior Court of Iredell County for trial by jury." There is no allegation, and apparently no contention, that this is a special proceeding in condemnation under G.S. 136-19 and G.S. 40-12 *et seq.*

This exception to the general rule is well established: Where private property is *taken* for a public purpose by a governmental 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, supra; 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; *Midgett v. Highway Commission,* 260 N.C. 241, 132 S.E. 2d 599; *Charlotte v. Spratt,* 263 N.C. 656, 140 S.E. 2d 341.

The question presented is whether the facts alleged constitute a (partial) taking in a constitutional sense of petitioners' property by the Highway Commission. If so, petitioners are entitled to just compensation therefor.

The clear import of petitioners' allegations is that Center Street, including the fill and culvert, was constructed prior to 1950, presumably by the City of Statesville. It is not alleged that the Highway Commis-

sion participated in any way in the original construction thereof. In this respect, the factual situation is distinguishable from *Braswell v. Highway Commission,* 250 N.C. 508, 108 S.E. 2d 912, and *Midgett v. Highway Commission, supra.* Nor is there allegation that the property now owned by petitioners was injuriously affected prior to March 1959 by the alleged inadequacy of the culvert in respect of size or manner of construction.

Petitioners alleged in substance that Center Street became a part of the State highway system prior to 1950 and since then has been a part thereof.

G.S. 136-41.1, as appears in the 1951 Cumulative Supplement to (original) Volume 3 of the General Statutes, contains this provision: "From and after July 1, 1951, all streets within municipalities which now or hereafter may form a part of the State highway system shall be maintained, repaired, improved, widened, constructed and reconstructed by the State Highway and Public Works Commission, to the same extent and in the same manner as is done on roads and highways of like nature outside the corporate limits . . ." While G.S. 136-41.1 was repealed by Chapter 687, Session Laws of 1959, this 1959 Act contains the provisions of like import now codified as G.S. 136-66.1 of Volume 3B of the General Statutes, 1964 Replacement.

Under the cited statutes, when a city street becomes a part of the State highway system, the Highway Commission is responsible for its condition *thereafter* to the same extent as if originally constructed by it; and we hold that this applies to the fill and culvert here concerned as well as to the surface areas of the highway.

In a West Virginia decision, *Riddle v. Baltimore & Ohio R. Co.,* 73 S.E. 2d 793, 34 A.L.R. 2d 1228, plaintiff recovered damages on the ground the defendant maintained an inadequate culvert under its railroad fill, causing the backwaters of the run to flood his residence property. This excerpt from the opinion is noted: "Although defendant's culvert was evidently adequate when originally constructed in 1895, the evidence is, in our opinion, sufficient for the jury to find, as it did, from a preponderance thereof, that defendant's culvert was inadequate to serve the waters of Bunnells Run during the height of the flood of June 24 and 25, 1950, and on the occasions of prior floods." See 93 C.J.S., Waters § 20, p. 628.

Petitioners allege the culvert became inadequate because of the gradual increase in the volume of water draining into the creek west of Center Street. When the petition is construed in the light most favorable to petitioners, it may be inferred that this increase was occasioned by the growth of the City of Statesville and the grading and paving of streets west of Center Street. In this connection, see *Braswell v. High-*

way Commission, supra, and *Roberson v. Kinston,* 261 N.C. 135, 134 S.E. 2d 193. It is not alleged that this increase was caused by any conduct of the Highway Commission.

Ordinarily, "(a) 'diversion,' as applied to watercourses, is a taking of water from a stream and not returning it so that the lower riparian owner can use it." 93 C.J.S., Waters § 58, p. 722. Obviously, "diversion," is not used by petitioners in its ordinary sense. Rather, as used by petitioners, it refers to the alleged fact that the culvert does not run with the natural course of the creek.

According to petitioners' allegations: Nothing in the nature of a taking of their property rights occurred until March 1959. Prior thereto, a portion of the north bank of the creek, once approximately ten feet wide, was between petitioners' south property line and the creek. During normal heavy rains and rain storms the culvert, since March 1959, has been insufficient to carry the waters of the swollen creek. The fill obstructs the natural flow thereof. The water passes through the culvert under pressure and at greater velocity and force. The culvert does not follow the natural course of the stream. On account of these facts, of which the Highway Commission has had knowledge or notice since March 1959, the impact of the water against the south bank creates a whirlpool and the swirling water is cast thereby against petitioners' property.

Construing the petition in the light most favorable to petitioners, the facts alleged are sufficient to establish that the continued maintenance of said permanent structure, fill, culvert and highway, constitutes a permanent taking in the constitutional sense as of March 1959 or subsequent thereto of an easement to discharge water in like manner against petitioners' property. *Midgett v. Highway Commission, supra,* and cases cited.

The factual situation depicted by petitioners' allegations is unusual in that the damage allegedly caused by the fill and culvert, which apparently have stood the test of time, is to property *below* the fill and culvert. Be that as it may, we are not presently concerned with whether petitioners can establish the facts alleged. Nor do we anticipate serious questions that may arise upon the trial. We hold only that, nothing else appearing, the facts alleged by petitioners are sufficient to withstand the Highway Commission's demurrer.

Reversed.

R. J. LYERLY, JR. AND JOE J. WALKUP, TRADING AS SHERRILL'S SUPER MARKET, PETITIONERS *v.* NORTH CARROLINA STATE HIGHWAY COMMISSION, RESPONDENT.

(Filed 18 June, 1965.)

Eminent Domain § 2—

Allegations to the effect that the Highway Commission maintained a culvert under a highway in such manner as to cause the waters of a creek, after a heavy rain, to wash away the foundation of the building leased by petitioners, causing the destruction of the wall of the building, resulting in damage to petitioners' stock of goods, extra expense, and loss of profits, *held* insufficient to state a cause of action for a "taking", since no allowance may be had for damage to personal property as distinguished from fixtures.

APPEAL by petitioners from *McConnell, J.*, November-December 1964 Session of IREDELL.

This appeal is from a judgment which sustained the State Highway Commission's demurrer to the petition and dismissed "this proceeding."

Carswell & Justice and Hugh G. Mitchell for petitioner appellants.

Attorney General Bruton, Assistant Attorney General Lewis, Trial Attorney Rosser and R. A. Hedrick, Associate Counsel, for respondent appellee.

PER CURIAM. As stated in petitioners' brief, their allegations herein "are substantially identical with those" in the companion case of *Sherrill v. Highway Commission, ante,* 643, 142 S.E. 2d 653. Petitioners alleged they, as lessees, operated a grocery store in the Sherrill building on South Center Street, Statesville, N. C., and that, on account of the destruction of the south wall of said building on October 14, 1959, (1) their stock of goods was damaged, (2) they incurred extra expense, and (3) they lost profits, to their damage in the aggregate amount of $2,800.00.

In *Midgett v. Highway Commission,* 260 N.C. 241, 132 S.E. 2d 599, it was held the complaint stated "a legally cognizable cause of action for damages by reason of the appropriation of land for public use." The plaintiff alleged valuable personal property was in the buildings on his lands. With reference thereto, the Court, in opinion by Moore, J., said: "The allegations of damage to personal property, however, are not sustained. Under the circumstances of this case and the permanent nuisance theory upon which it is maintained an action for the 'taking' of movable personal property may not be upheld. There is no permanent nuisance with respect to such property and the damage thereto is regarded as incidental and not direct. Furthermore, the Highway Com-

mission has no authority to appropriate personal property for public use. G.S. 136-19. 'No allowance can be made for personal property, as distinguished from fixtures, located on the condemned premises. . . .' 29 C.J.S., Eminent Domain, § 175a(1), p. 1045. Under the facts alleged, any injury to personal property is *damnum absque injuria.* See *Williams v. Highway Commission,* 252 N.C. 141, 113 S.E. 2d 263; *Pemberton v. Greensboro,* 208 N.C. 466, 181 S.E. 258."

Applying the law as stated in *Midgett,* it is held that the petition herein fails to state facts sufficient to constitute a cause of action. Hence, the judgment of the court below is affirmed.

Affirmed.

HIGH POINT SURPLUS COMPANY, INC. v. ROBERT PLEASANTS, SHERIFF OF WAKE COUNTY, NORTH CAROLINA, W. H. TRENTMAN, CHAIRMAN, AND BILLY K. HOPKINS, JAMES L. JUDD, W. J. BOOTH, SR., VASSAR P. SHEARON, JOE W. BARBER AND SWANNIE D. BRYAN, COMMISSIONERS, BOARD OF COUNTY COMMISSIONERS FOR WAKE COUNTY, NORTH CAROLINA.

(Filed 18 June, 1965.)

1. Constitutional Law § 4—

While ordinarily the constitutionality of a criminal statute may not be tested by injunction proceedings, this rule is subject to exception if the enforcement of a statute or ordinance would result in irreparable injury to property or personal rights.

2. Same; Municipal Corporations § 34—

The proprietor of a mercantile establishment doing a large percentage of its business on Sunday may maintain an action to enjoin the enforcement of an ordinance prohibiting the sale of merchandise on Sunday.

3. Counties § 1; Municipal Corporations § 4—

Neither counties nor municipalities have any inherent powers and have power to enact police regulations only pursuant to statutes delegating to them, respectively, a portion of the State's police power, and therefore the power of counties and the power of municipalities to enact such regulations, being derived from separate statutes, are not the same.

4. Statutes § 2—

A statute delegating to counties the power to prohibit the sale of merchandise on Sunday is a statute pertaining to the regulation of trade within the purview of Art. II, § 29, of the State Constitution, notwithstanding that its ultimate purpose is to protect the public welfare rather than the regulation of trade.

5. Same—

A statute is either general or local within the purview of Art. II, § 29 of the State Constitution, depending upon whether or not it operates uniformly throughout the State within all areas coming within its purview, and a statute is general notwithstanding its application is limited to areas or subjects coming within classifications therein set out, provided the classifications are reasonable and based on rational difference of situation or condition.

6. Same; Counties § 3.1; Municipal Corporations § 27— Statute permitting designated counties to enact Sunday ordinances held void.

G.S. 153-9(55) conferring upon designated counties the power to enact ordinances regulating the sale of merchandise on Sunday in unincorporated areas and in corporated areas within the county when the governing bodies of such incorporated areas agree by resolution to such regulation, but which expressly exempts named counties from its application, *held* unconstitutional as a local statute regulating trade, there being no reasonable distinction germane to the purpose for which Sunday observance laws are designed between the counties included and those excluded so as to form a basis for classification, and the fact that the statute is permissive in that it takes effect only when invoked by action of the county commissioners of an included county does not affect this result, since the validity of the statute must be judged by what is possible under it.

APPEAL by plaintiff from *Carr, J.*, March 1, 1965, Regular Civil Session of WAKE.

This action was instituted on 3 April 1964, as a class action, to permanently enjoin the enforcement by defendants of an ordinance or regulation entitled "Resolution Regulating Sunday Sales of Goods, Wares and Merchandise" adopted by the Board of County Commissioners of Wake County on 2 March 1964.

The resolution was adopted pursuant to the provisions of Chapter 1060 of the Session Laws of 1963, codified as G.S. 153-9(55). It purports to make it unlawful, effective 31 March 1964, "to conduct, operate or engage in or carry on within Wake County on Sunday any business." Certain specified classes or types of business are excluded; amusements, games and sports are permitted after 1:00 P.M. on Sundays. The regulation applies "within the corporate limits and jurisdiction of any incorporated city or town (in Wake County), whose governing body, by resolution, agrees to this ordinance or regulation." The City Council of the City of Raleigh adopted a resolution on 2 March 1964 agreeing to the regulation.

Plaintiff seeks a permanent injunction to prevent the enforcement of the regulation by the Sheriff and County Commissioners of Wake County. Plaintiff complains and alleges in substance that it has and maintains a mercantile business in the City of Raleigh, it sells merchandise on Sunday, the sale of much of its merchandise is prohibited

by the ordinance, its Sunday sales (and such sales of similar businesses) of goods thus prohibited is a substantial "dollar-volume of business," the enforcement of the regulation will cause irreparable injury to plaintiff and those similarly situated and they have no adequate remedy at law, and the ordinance and the statute pursuant to which it was adopted are unconstitutional (specifying).

A temporary restraining order was issued. On 13 April 1964 defendants demurred to the complaint on the ground that the complaint does not state facts sufficient to constitute a cause of action. At the hearing on 17 April 1964, Bickett, J., sustained the demurrer and dismissed the action, but, in his discretion and pursuant to G.S. 1-500, he continued the temporary restraining order until the case could be heard and determined on appeal. The appeal was heard in Supreme Court at the Fall Term 1964, and the opinion, delivered by Parker, J., was filed 29 January 1965. *Surplus Co. v. Pleasants,* 263 N.C. 587, 139 S.E. 2d 892. See that opinion for a more particular recital of the allegations of the original complaint. We affirmed the ruling below sustaining the demurrer, for the reason that the original complaint did not set out the resolutions of the County Commissioners and City Council, matters of which we could not take judicial notice, and for the further reason that the facts alleged in the complaint did not show that plaintiff and those similarly situated were aggrieved by the regulation. We reversed the dismissal of the action, however, because of plaintiff's right to move for leave to amend.

On 22 February 1965 plaintiff moved to amend the complaint and for temporary injunction. Pless, J., heard the motions, issued temporary restraining order, and granted plaintiff leave to amend. Plaintiff filed amendment to the complaint on 1 March 1965, supplying the resolutions and deficiencies noted in our former opinion.

Defendants again demurred on the ground that the complaint does not state facts sufficient to constitute a cause of action, asserting with specificity that the statute, G.S. 153-9(55), and the resolutions adopted pursuant thereto are valid and constitutional, and that plaintiff may not challenge the constitutionality of the statute in an action to enjoin its enforcement. The demurrer was sustained, but the temporary restraining order was continued (G.S. 1-500) pending the outcome of appeal to the Supreme Court.

Cannon, Wolfe & Coggin and Broughton & Broughton for plaintiff appellant.

Thomas A. Banks for defendants appellees.

Smith, Leach, Anderson & Dorsett and C. K. Brown, Jr., for North Carolina Merchants Association, Amicus Curiae.

MOORE, J. Plaintiff's thesis is that Wake County's Sunday observance ordinance and the statute pursuant to which it was adopted are unconstitutional and the enforcement of the ordinance should be enjoined.

There is a well established rule that the constitutionality of a statute or ordinance purporting to create a criminal offense may not be challenged and tested by suit in equity to enjoin the enforcement of such statute or ordinance, for the reason that the unconstitutionality thereof may be pleaded as complete defense in a prosecution for violation of such statute or ordinance and such defense is ordinarily an adequate remedy at law for one adversely affected. *Walker v. Charlotte*, 262 N.C. 697, 138 S.E. 2d 501; *Smith v. Hauser*, 262 N.C. 735, 138 S.E. 2d 505; *Ice Cream, Inc. v. Hord*, 263 N.C. 43, 138 S.E. 2d 816. But there is an exception to the rule, as well established as the rule itself, that equity jurisdiction will be exercised to enjoin the threatened enforcement of a statute or ordinance which contravenes our Constitution, where it is essential to protect property rights and the rights of persons against injuries otherwise irremediable. *Speedway, Inc. v. Clayton*, 247 N.C. 528, 101 S.E. 2d 406; *Davis v. Charlotte*, 242 N.C. 670, 89 S.E. 2d 406. The facts and circumstances set out in the complaint in the case at bar, all of which are admitted by defendants for the purpose of testing the complaint by demurrer, are sufficient to invoke the equity jurisdiction of the court and to persuade us to consider the constitutionality of the challenged ordinance and statute.

In 1963 the General Assembly enacted a statute — S.L. 1963, C. 1060, §§ 1, 1½, codified as G.S. 153-9(55) — providing:

> "The boards of commissioners of the several counties have power: . . . (55) In that portion of the county, or any township of the county, lying outside the limits of any incorporated city or town, . . . to define, prohibit, abate, or suppress all things detrimental to the health, morals, comfort, safety, convenience and welfare of the people including but not limited to the regulation and prohibition of the sale of goods, wares and merchandise on Sunday . . .: Provided, that the board of county commissioners may make such regulations applicable within the limits of any incorporated city or town, or within the jurisdiction of any incorporated city or town, whose governing body, by resolution, agrees to such regulation, and during such time as the governing body continues to agree to such regulation.
>
> "This subdivision shall not apply to the following counties: Alamance, Alexander, Alleghany, Anson, Ashe, Avery, Cabarrus, Caldwell, Carteret, Catawba, Chatham, Cherokee, Clay, Craven,

Dare, Duplin, Gaston, Graham, Halifax, Harnett, Hoke, Jackson, Johnston, Jones, Lee, Lenoir, Macon, Madison, Onslow, Pamlico, Pasquotank, Pender, Pitt, Polk, Randolph, Richmond, Rowan, Rutherford, Scotland, Stokes, Surry, Swain, Transylvania, Warren, Watauga, Wilkes, Wilson and Yancey." (48 in number).

On 6 January 1964 the board of county commissioners of Wake County, declaring "that there exists a clear and present need to restrict the carrying on of business activities on Sunday . . . in the furtherance of the general welfare and in order to provide for the due observance of Sunday as a day of rest and to protect and promote the public health, general welfare, safety and morals of the citizens," ordained that, effective 31 March 1964, "it is prohibited and unlawful to conduct, operate or engage in or carry on within Wake County on Sunday any business except" (specified businesses and activities), and that this regulation "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." On 2 March 1964 the City Council of the City of Raleigh adopted a resolution agreeing to the regulation.

Plaintiff's mercantile establishment is located within the limits and jurisdiction of the City of Raleigh. It has regularly conducted its business on Sunday. Sunday sales of most of its merchandise are prohibited by the ordinance.

It will be observed that the ordinance regulating and restricting plaintiff's business is not an ordinance initiated and promulgated by the City of Raleigh pursuant to its own power and authority; it is an ordinance adopted by the County of Wake pursuant to the statute above set out. The distinction is vital and important. The power and authority of municipalities and of counties to legislate and make ordinances and regulations are not derived from the same statutes and laws —a fact which apparently is not generally understood, or is overlooked. Neither counties nor municipalities have any inherent legislative powers. Counties are instrumentalities and agencies of the State government and are subject to its legislative control; they possess only such powers and delegated authority as the General Assembly may deem fit to confer upon them. *Ramsey v. Comrs. of Cleveland*, 246 N.C. 647, 100 S.E. 2d 55; *Martin v. Comrs. of Wake*, 208 N.C. 354, 180 S.E. 777. A municipal corporation is a creature of the General Assembly, has no inherent powers, and can exercise only such powers as are expressly conferred by the General Assembly and such as are necessarily implied by those expressly given. *State v. McGee*, 237 N.C. 633, 75 S.E. 2d 783. The General Assembly, exercising the police power of the

State, may legislate for the protection of the public health, safety, morals and general welfare of the people. *State v. Chestnutt,* 241 N.C. 401, 85 S.E. 2d 297. Historically, the General Assembly has more readily and frequently delegated police power and the authority to make regulations for the implementation thereof to cities and towns than to counties — due undoubtedly to the greater necessity in the past for regulations for the promotion and preservation of health, safety, public peace and morals in crowded urban areas than in rural communities. Sunday observance statutes and ordinances derive their validity from the State's police power, the power to provide for the general welfare. *State v. Chestnutt, supra.*

The General Assembly, by G.S. 160-52 and G.S. 160-200(6), (7) and (10), has delegated to municipalities the power and authority to enact ordinances requiring the observance of Sunday. These are general statutes, conferring authority upon all cities and towns within the State, without exception. G.S. 160-199. Municipal ordinances regulating the observance of Sunday, made pursuant to the foregoing statutes, have been upheld by this Court where the classifications of those affected are based upon reasonable distinctions, the ordinance affects alike all persons similarly situated, and the provisions of the ordinance has some reasonable relation to the public peace, welfare and safety. *Charles Stores v. Tucker,* 263 N.C. 710, 140 S.E. 2d 370; *Clark's Charlotte, Inc. v. Hunter,* 261 N.C. 222, 134 S.E. 2d 364; *Davis v. Charlotte, supra; State v. McGee, supra; State v. Trantham,* 230 N.C. 641, 55 S.E. 2d 198.

The Wake County ordinance in question was adopted pursuant to G.S. 153-9(55), set out above, purporting to confer upon county commissioners power and authority to enact Sunday observance laws. Plaintiff contends that it is a local statute, contravenes Article II, section 29, of the Constitution of North Carolina, and is therefore void. We agree.

Article II, section 29 of the Constitution provides in pertinent part:

> "The General Assembly shall not pass any local, private or special act or resolution . . . regulating labor, trade, mining or manufacturing. . . . Any local, private or special act or resolution passed in violation of the provisions of this section shall be void. The General Assembly shall have power to pass general laws regulating matters set out in this section."

An act which restricts or regulates the operation, engaging in or carrying on of business, or prohibits the sale of merchandise on Sunday *regulates trade. Treasure City, Inc. v. Clark,* 261 N.C. 130, 133, 134 S.E. 2d 97. Trade within the meaning of Article II, section 29 of our Constitution is a business venture for profit and includes any em-

ployment or business embarked in for gain or profit. *Speedway, Inc. v. Clayton, supra; State v. Dixon,* 215 N.C. 161, 1 S.E. 2d 521. We do not agree with defendants' contention that the nature of a statute is determined entirely by the ultimate results and effects it is designed to achieve in the promotion of the many facets of the public welfare; its characterization is more specifically and positively designated by what it actually does, the means it employs, the area in which it directly operates, the acts it seeks to prohibit.

Article II, section 29 of our Constitution was adopted by a vote of the people in 1917. During each of the four sessions of the General Assembly, next preceding the adoption of the said 1917 amendment to the Constitution, more than 80% of the laws passed were local, private and special. It was the purpose of the amendment to free the General Assembly from the enormous amount of petty detail which had been occupying its attention, to enable it to devote more time and attention to general legislation of statewide interest and concern, to strengthen local self-government by providing for the delegation of local matters by *general laws* to local authorities, and to require uniform and coordinated action under general laws on matters related to the welfare of the whole State. The amendment removed some sixteen or more subjects from the field of local, private and special legislation — among them, regulation of trade. *McIntyre v. Clarkson,* 254 N.C. 510, 119 S.E. 2d 888; *Board of Health v. Comrs. of Nash,* 220 N.C. 140, 16 S.E. 2d 677. It is the fundamental law of the State and may not be ignored.

A statute is either "general" or "local"; there is no middle ground. If G.S. 153-9(55) is "local," it is *void* by the express provisions of Article II, section 29 of the Constitution. We have set out and fully discussed in *McIntyre v. Clarkson, supra,* the definitions, principles and guides for determining whether a statute is general or local. Applying these, we conclude that G.S. 153-9(55) is a local statute. It excepts 48 counties from its operation; it is applicable in only 52 counties. However, the number of counties included or excluded is not necessarily determinative. Conceivably, a statute may be local if it excludes only one county. On the other hand, it may be general if it includes only one or a few counties. It is a matter of classification. For the purposes of legislating, the General Assembly may and does classify conditions, persons, places and things, and classification does not render a statute "local" if the classification is reasonable and based on rational difference of situation or condition; " 'universality is immaterial so long as those affected are reasonably different from those excluded and for the purpose of the statute there is a logical basis for treating them in a different manner.' " A law is local, " 'where, by force of an inherent limitation, it arbitrarily separates some places from others upon which,

but for such limitation, it would operate, and where it embraces less than the entire class of places to which such legislation would be necessary or appropriate having regard to the purpose for which the legislation was designed, and where classification does not rest on circumstances distinguishing the places included from those excluded.' " On the other hand, a law is general " 'if it applies to and operates uniformly on all the members of any class of persons, places or things requiring legislation peculiar to itself in matters covered by the law.' . . . Classification must be reasonable and germane to the law. It must be based on a reasonable and tangible distinction and operate the same on all parts of the State under the same conditions and circumstances. Classification must not be discriminatory, arbitrary or capricious." *McIntyre v. Clarkson, supra.*

Neither the statute itself nor the appellees in the instant case suggest any reasonable distinction, germane to the purpose for which the Sunday observance law was designed, between the counties included and those excluded, forming a basis for classification. There is nothing of which we may take judicial notice which indicates that a Sunday observance law is more necessary or appropriate for the welfare of Wake County than for the welfare of Alamance, Catawba, Gaston or Wilson (excluded counties). The counties included and those excluded are similarly distributed geographically from the mountains to the coast. For each county included there is one or more excluded counties comparable in location, geography, population, activity, trade, industry and social structure. It is clear that the General Assembly did not intend that the statute have uniform statewide application to all similarly situated and conditioned in relation to the purposes of the law.

The present case is indistinguishable in principle from *Treasure City, Inc. v. Clark, supra.* That case deals with the constitutionality of a Sunday observance law, G.S. 14-346.2, from the operation of which there were excluded 25 counties, 4 townships, and parts of three counties. The statute was held to be regulatory of trade, local in nature by reason of failure of rational classification, and void. Appellees attempt to distinguish *Treasure City* on the ground that the statute involved was mandatory whereas G.S. 153-9(55) is permissive and takes effect only when invoked by action of the county commissioners of an included county. This argument is not valid. *McIntyre v. Clarkson, supra,* struck down a permissive statute for want of proper classification. A statute's validity must be judged not by what has actually been done under it but by what is possible under it. *State v. Williams,* 253 N.C. 337, 347, 117 S.E. 2d 444.

The judgment below is

Reversed.

FLOYD L. MAYBERRY, TRUSTEE OF JOHN FRANKLIN MAYBERRY, INCOMPETENT v. HOME INSURANCE COMPANY, A CORPORATION.

(Filed 18 June, 1965.)

1. Trial § 56—

In a trial by the court under agreement of the parties the rules of evidence are not so strictly enforced as in a jury trial, and it will be presumed that the judge disregarded any incompetent evidence that may have been admitted unless it affirmatively appears that he was influenced thereby.

2. Appeal and Error § 49—

In a trial by the court under agreement of the parties, the judge's findings of fact are as conclusive as a verdict of a jury when such findings are supported by competent evidence and the stipulation of the parties, even though incompetent and irrelevant evidence may also have been admitted.

3. Appeal and Error § 21—

An assignment of error to the judge's conclusion of law and the signing of the judgment presents for review whether error of law appears on the face of the record proper, which includes whether the facts found are sufficient to support the conclusion of law and judgment and whether the judgment is regular in form.

4. Insurance § 66.1—

The limits of insurer's liability under a policy must be determined by an analysis and examination of its provisions, and insurer may be obligated to pay costs or interest on a judgment recovered against insured even though such payment brings the total payments of insurer beyond the stated policy limit.

5. Same—

Where a policy of automobile liability insurance obligates insurer to pay "* * * and all interest accruing after entry of judgment until the company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability * * *," insurer's liability for interest is not limited to interest on that part of the judgment within the stated limit of liability, but insurer is obligated to pay interest on the entire judgment recovered against insured from the date of the judgment until the amount of the policy limit has been tendered, offered or paid.

6. Appeal and Error § 49—

Where the findings of the trial court do not support the court's conclusion of law and judgment, the cause must be remanded for the proper conclusion of law and judgment upon the facts found.

APPEAL by plaintiff from *Riddle, S.J.*, 19 October 1964 non-jury Civil Session of MECKLENBURG.

Civil action by a judgment creditor of defendant's insured against the insured's liability carrier.

It is stated in appellant plaintiff's brief, and not controverted in defendant appellee's brief, that "the parties waived a jury and agreed to allow the court to find the facts and conclusions of law." It would seem that the fact that the case was heard at a non-jury session confirms that statement. This is a summary of Judge Riddle's findings of fact:

Defendant, Home Insurance Company, a New York corporation, authorized to transact and transacting business in this State, issued a 1960 North Carolina assigned risk automobile liability policy, with limits of $5,000 for each injury and $10,000 for each accident, to Preston Douglas Grier, Jr., and said policy was in full force and effect on 23 November 1960, and covering Grier's 1958 Chevrolet automobile.

On 23 November 1960 plaintiff's incompetent was seriously injured while riding as a passenger in a 1958 Chevrolet automobile owned and operated by Preston Douglas Grier, Jr.

Plaintiff prosecuted a civil action against Preston Douglas Grier, Jr., and against Charlotte City Coach Lines, Inc., on behalf of his incompetent in the Mecklenburg County superior court, and at the regular schedule "B", 3 December 1962 civil session of Mecklenburg County superior court obtained a judgment against Preston Douglas Grier, Jr., in the amount of $79,500. (Another codefendant in that action was Wayne Heath Thomas, the driver of the bus of Charlotte City Coach Lines, Inc. The jury exonerated Thomas and the Coach Company, and plaintiff of contributory negligence, and awarded $79,500 damages against Grier. Plaintiff appealed assigning errors in the charge with reference to defendants Thomas and the Coach Company. This Court found no error. *Mayberry v. Coach Lines,* 260 N.C. 126, 131 S.E. 2d 671.)

The judgment in behalf of plaintiff's incompetent for $79,500 against Preston Douglas Grier, Jr., was entered on 12 December 1962. Grier gave notice of appeal, and Home Insurance Company made up and served on plaintiff a statement of case on appeal. Subsequently Grier authorized Home Insurance Company to abandon the appeal, and his motion for permission to abandon his appeal was allowed by the court in March 1963.

On 5 April 1963 Home Insurance Company paid the sum of $5,000 to the clerk of the superior court of Mecklenburg County to apply on the $79,500 judgment obtained by plaintiff against Grier, which was the limit of liability coverage of Home Insurance Company under its policy issued to Grier for bodily injuries to any one person in one accident. When Home Insurance Company filed its answer in the instant case on 11 February 1964, it paid to the clerk of the superior court of Mecklenburg County the sum of $93.70, representing interest at 6% from

12 December 1962 until 5 April 1963 on the $5,000 it had formerly paid to the clerk of the superior court of Mecklenburg County to be applied to the $79,500 judgment obtained by plaintiff against Grier.

Defendant's 1960 assigned risk automobile liability policy issued to Grier covering his 1958 Chevrolet automobile, and in force on 23 November 1960, contained the following Insuring Agreements:

> "II. Defense, Settlement, Supplementary Payments: With respect to such insurance as is afforded by this policy for bodily injury liability and for property damage liability, the company shall —
>
> "(a) defend any suit against the insured alleging such injury, sickness, disease, or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient;
>
> "(b) (1) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, the cost of bail bonds required of the insured in the event of accident or traffic law violation during the policy period, not to exceed $100 per bail bond, but without any obligation to apply for or furnish any such bonds;
>
> "(2) pay all expenses incurred by the company, all costs taxed against the insured in any such suit and all interest accruing after entry of judgment until the company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon;
>
> "(3) pay expenses incurred by the insured for such immediate medical and surgical relief to others as shall be imperative at the time of the accident;
>
> "(4) reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the company's request;
> "and the amounts so incurred, except settlements of claims and suits, are payable by the company in addition to the applicable limit of liability of this policy."

As early as May 1958 defendant changed its family automobile policy to provide expressly for payment of interest on the entire amount of judgments. Yet, defendant down to the present time has preserved the same wording in its assigned risk automobile liability policies which appears in the Grier policy.

On 29 January 1962 defendant's counsel wrote counsel for plaintiff offering to pay the full limits of its $5,000 coverage in exchange for a release or a covenant not to sue Grier, and repeated its offer on 17 February 1962. At all times, before and after judgment against Grier, Home Insurance Company was willing to pay its entire coverage limit of $5,000 in settlement or other disposition of plaintiff's claim against Grier.

Based upon his findings of fact, Judge Riddle made the following conclusion of law:

> "* * * the Court is of the opinion that the assigned risk automobile policy which the insured Grier had did not provide for payment of interest on any sum greater than $5,000, and that the only obligation of the defendant with regard to payment of interest on the judgment was to pay interest on $5,000 from the time of the rendition of the judgment until the defendant paid into court $5,000, which was the principal amount of its coverage."

Whereupon, he ordered and adjudged that plaintiff recover from defendant the sum of $93.70, which defendant has heretofore paid to the clerk of the superior court of Mecklenburg County, and nothing more, together with the costs of the action.

From the judgment, plaintiff appeals.

Bradley, Gebhardt, DeLaney & Millette by Paul B. Guthery, Jr., for plaintiff appellant.

Helms, Mulliss, McMillan & Johnston by James B. McMillan for defendant appellee.

PARKER, J. Plaintiff has a number of assignments of error to the admission of evidence over his objections and exceptions, and to the judge's findings of fact. All these assignments of error are overruled.

When the parties waived a jury trial, Judge Riddle occupied a dual position: he was the judge required to lay down correctly the guiding principles of law, and he was also the tribunal compelled to find the facts. In such a trial the rules of evidence as to the admission and exclusion of evidence are not so strictly enforced as in a jury trial. If there was incompetent evidence admitted, it will be presumed it was disregarded by the judge in making his decision, unless it affirmatively appears that the action of the judge was influenced thereby. *Bizzell v. Bizzell*, 247 N.C. 590, 101 S.E. 2d 668.

Defendant alone introduced evidence, except there was admitted in evidence a stipulation as to certain facts agreed upon by the parties in open court. Most of the evidence admitted was competent, and even if

irrelevant evidence was admitted, its admission was not prejudicial to plaintiff. The judge's findings of the crucial facts are amply supported by competent evidence and by the stipulation entered into by the parties, and are as conclusive on appeal as the verdict of a jury. Strong's N. C. Index, Vol. I, Appeal and Error § 49.

Plaintiff further assigns as error the judge's conclusion of law and the signing of the judgment. This assignment of error raises the question as to whether an error of law appears on the face of the record proper. This includes the question whether the facts found by the judge are sufficient to support his conclusion of law and judgment, and whether the judgment is regular in form. Strong's N. C. Index, Vol. 1, Appeal and Error § 21.

The question for decision in this case is whether Home Insurance Company, the liability insurer, is required to pay interest on the entire judgment of $79,500 rendered in plaintiff's favor against Grier, its insured, from 12 December 1962, the date on which the judgment was entered, until 5 April 1963, the date on which defendant paid $5,000 to the clerk of the superior court of Mecklenburg County to be applied to the judgment obtained by plaintiff against Grier, which was the limit of liability coverage under its policy issued to Grier for bodily injuries to any one person in one accident, as contended by plaintiff, or only interest on that part of the judgment which represents the policy limit of $5,000, as contended by defendant. On this question there is considerable conflict in the cases elsewhere. *Powell v. T. A. & C. Taxi, Inc.*, 104 N.H. 428, 188 A. 2d 654 (1963); *River Val. Cart. Co. v. Hawkeye-S. Ins. Co.*, 17 Ill. 2d 242, 161 N.E. 2d 101, 76 A.L.R. 2d 978 (1959). For a list of cases that hold that insurer's liability extends to interest on the entire amount of judgment, see Annot. 76 A.L.R. 2d 987, § 4. For a list of cases that hold that insurer's liability is limited to interest on the amount of the policy limit, see Annot. 76 A.L.R. 2d 991, § 5. This question has not been resolved in this jurisdiction. The determination of this question necessarily requires an analysis and examination of the provisions in the insurance policy here, as well as a choice of the preferable rule to be followed in this State. *Powell v. T. A. & C. Taxi, Inc., supra.*

Plaintiff and defendant stipulated and agreed in open court, *inter alia,* as follows: "On April 5, 1963, the defendant Home Insurance Company on behalf of Preston Douglas Grier, Jr., paid the sum of $5,000 to the clerk of the superior court of Mecklenburg County, N. C. to apply on the judgment. This was the stated limit of the liability coverage of Home Insurance Company providing injury to any one person in any one accident." This was also found as a fact by the judge. However, in the Insuring Agreement in the insurance policy here entitled

"II. Defense, Settlement, Supplementary Payments," there is a clear ray of light indicating additional benefits. Section (b) (2) thereof reads as follows: "pay all expenses incurred by the company, all costs taxed against the insured in any such suit and *all interest accruing after entry of judgment until the company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon.*" (Emphasis supplied.)

Several observations may be made concerning section (b) (2) quoted above. First, the phrase "all interest accruing after entry of judgment" does not connote the thought of some interest, or part of the interest on the judgment, but rather compels the conclusion of all interest whatever its amount in relation to the policy limits. Further, the phrase referring to interest uses the word "judgment" without qualification, while in the same clause the phrase limiting the liability for interest refers to "such part of such judgment as does not exceed the limit of the company's liability thereon." Obviously, the insurer knew how to qualify the term "judgment" to achieve the result that it urges here. It did not do so. *Powell v. T. A. & C. Taxi, Inc., supra; River Val. Cart. Co. v. Hawkeye-S. Ins. Co., supra; United Services Automobile Association v. Russom,* 241 F. 2d 296 (5th Cir. 1957), in all of which cases the insurance policy involved contained a provision identical with section (b) (2) in the instant case quoted above. Second, it has been well-established law for many years that the insurer may be obligated to pay costs or interest on a judgment recovered against its insured, although these terms may bring the total payment beyond the limits set in its policy. *Powell v. T. A. & C. Taxi, Inc., supra; Brown v. Great American Indemnity Co.,* 298 Mass. 101, 9 N.E. 2d 547, 111 A.L.R. 1065; *Maryland Casualty Co. v. Wilkerson,* 210 F. 2d 245 (4th Cir. 1954). Third, the language used in this section of the policy is consistent with the view that interest on the entire judgment until 5 April 1963 should be allowed. Finally, section (a) quoted above reads in part: "* * * but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient." In respect to this clause, the Supreme Court of Illinois said in a unanimous opinion in *River Val. Cart. Co. v. Hawkeye-S. Ins. Co., supra:*

> "In addition, the realities of the relationship between the insurer and the insured argue against the insurer's interpretation [that its liability is limited to interest on the amount of the policy limit]. Under the terms of the policy the insurer has complete control of any litigation from which it might incur liability. The insured cannot settle with the plaintiff without releasing the insurer from its obligation. Any delay that may cause the accumulation of in-

terest is thus the responsibility of the insurer. And until it has discharged its obligations under the policy it should bear the entire expense of this delay.

"Insurers themselves have recognized this. The National Bureau of Casualty Underwriters formerly included the clause now before us in its form of standard policy. It has now changed its form to read 'all interest on the entire amount of any judgment therein which accrues after entry of the judgment.' In announcing the change, it said: 'Several court cases have held that an insurer's obligation to pay interest extends only to that part of the judgment for which the insurer is liable. The respective rating committees have agreed that this is contrary to the intent. As a result, the wording with respect to payment of interest in the new Family Automobile Policy has been restated, in order that it be entirely clear that all interest on the entire amount of any judgment, which accrues after entry of the judgment, is payable by the insurer until the insurer has paid or tendered or deposited in court that part of the judgment which does not exceed the limit of the insurer's liability thereon,' Ramsey, 'Interest on Judgments under Liability Insurance Policies,' Insurance Law Journal No. 414 (July, 1957), p. 407, at p. 411."

In accord *Powell v. T. A. & C. Taxi, Inc., supra.*

In considering the supplementary payments which the liability insurer agreed to pay in Part II of its insuring agreements, there is additional language which supports the validity of the reasons stated above. In addition to agreeing to pay the expenses of its insured, costs and interest, it has specifically assumed the following obligation in Part II quoted above: "and the amounts so incurred, except settlements of claims and suits, are payable by the company *in addition to the applicable limit of liability of this policy.*" (Emphasis supplied.) In respect to this clause, the Supreme Court of New Hampshire said in respect to an identical clause of an automobile liability policy in *Powell v. T. A. & C. Taxi, Inc., supra:*

"While this clause has not been discussed in the cases extensively, it does serve to strengthen the view that the liability insurer regarded such payment of interest and costs and other expenses as clearly supplementary to the applicable limits of the policy, and without restricting such payments to that part of the judgment that is equal to the policy limit."

In the *Powell* case, the Supreme Court of New Hampshire further said:

"The insurer contends that the 'great weight of precedent' is that liability is limited to interest on the amount of the policy limit. It is doubtful if there is any great weight of authority supporting this view. Annot. 76 A.L.R. 2d 983, 987; 8 Appleman, Insurance Law and Practice, § 4899, p. 364. *Cf. Carlile v. Vari*, 113 Ohio App. 233, 177 N.E. 2d 694. The view that liability is limited to interest on the amount of the policy limit is generally supported by the older cases. *Sampson v. Century Indemnity Co.*, 8 Cal. 2d 476, 66 P. 2d 434, 109 A.L.R. 1162; *Standard Accident Insurance Co. v. Winget*, 197 F. 2d 97, 34 A.L.R. 2d 250 (9th Cir., 1952); *Casey-Hedges Co. v. Southwestern Surety Co.*, 139 Tenn. 63, 201 S.W. 137, L.R.A. 1918D, 184. Some of the cases cited in support of this view contain no discussion of why the insurer's liability for interest is restricted to interest on the amount of the policy limit. *Rumford Falls Paper Co. v. Fidelity & Cas. Co.*, 92 Me. 574, 43 A. 503; *Cleghorn v. Ocean Accident & Guarantee Corp.*, 244 N.Y. 166, 155 N.E. 87. Some of the cases cited in support of this rule such as *Watseka v. Bituminous Casualty Corp.*, 347 Ill. App. 149, 106 N.E. 2d 204, have been impliedly overruled by later cases in the same jurisdiction. To the extent that there is any modern trend, it is in favor of the rule that the insurer's liability for interest extends to interest on the entire amount of the judgment. *Plasky v. Gulf Ins. Co.* (1960), 160 Tex. 612, 335 S.W. 2d 581; *River Valley Cartage, Inc. v. Hawkeye-Security Ins. Co.*, 17 Ill. 2d 242; *Highway Casualty Co. v. Johnston* (1958 Fla.), 104 So. 2d 734; 2 Richards, Insurance (5th Ed.) § 283 (1962 supp.). We think the rule which allows interest on the entire amount of the judgment is consistent with the language used in the insurance policy and is not prohibited by public policy or any statutory provision in this state. R.S.A. ch. 268. 6 Blashfield (Part 2) Cyc. Automobile Law & Practice, §§ 4105.5 and 4106; Gowan, Provisions of Automobile and Liability Insurance Contracts, 30 Insurance Counsel J. 96, 98 (1963)."

It is true that in *Home Indemnity Co. v. Corie* (1954), 206 Misc. 720, 134 N.Y.S. 2d 443, affirmed without opinion 286 App. Div. 996, 144 N.Y.S. 2d 712, it was held in respect to an automobile liability policy apparently similar to the one here that the insurer's liability was limited to interest on the amount of the policy limit only. However, it seems the opinion was rendered by a single justice and whether that assumption is correct or not, the opinion does not contain an analysis and examination of the policy provisions, and the result reached is not convincing to us and is different from the result reached in the modern,

well-reasoned cases of many other courts, many of which were rendered by courts of last resort.

In *Alford v. Textile Ins. Co.* (1958), 248 N.C. 224, 103 S.E. 2d 8, the precise point presented for decision in the instant case was not raised in briefs of counsel for decision, and the precise point for decision here was not decided by the Court in the *Alford* case.

From our examination of many cases, it appears that the liability policy here contains what is termed the standard interest clause. The following cases support the view that interest clauses in automobile policies identical with or similar to the one here must be construed as creating a liability for interest on the entire judgment so as to render the insurer liable for interest on the entire amount of the judgment awarded plaintiff, until the amount of the policy limit, plus interest on the whole judgment, has been tendered, offered, or paid. *Powell v. T. A. & C. Taxi, Inc., supra; River Val. Cart. Co. v. Hawkeye-S. Ins. Co., supra; United Services Automobile Association v. Russom, supra;* and the cases cited in Annot. 76 A.L.R. 2d 987, § 4. In our opinion, and we so hold, these cases have reached the correct result, are based upon sound and elaborate reasoning and authority, and state the preferable rule, and we adopt that rule as the law in this jurisdiction.

The learned judge's crucial findings of fact do not support his conclusion of law and judgment, and he committed error in making his conclusion of law and in rendering the judgment he did. Based on his crucial findings of fact, he should have concluded as a matter of law that, under the terms of the liability policy here, the defendant, liability insurer, is required to pay interest on the entire judgment of $79,500 rendered in plaintiff's favor against Grier, its insured, from 12 December 1962, the date on which the judgment was entered, until 5 April 1963, the date on which defendant paid $5,000 to the clerk of the superior court of Mecklenburg County to be applied to the judgment obtained by plaintiff against Grier, which was the limit of liability coverage under its policy issued to Grier for bodily injuries to any one person in one accident, and should have ordered and adjudged that plaintiff recover that amount from defendant and that defendant pay the costs. The judgment below is reversed, and the case is remanded to the lower court with direction that based on the crucial findings of fact it make a conclusion of law and enter judgment in accordance with this opinion. *Goodson v. Lehmon*, 225 N.C. 514, 517-18, 35 S.E. 2d 623, 625, 164 A.L.R. 510, 513; 5 Am. Jur. 2d, Appeal and Error, § 959.

Reversed and remanded.

HOWARD CLINTON MOORE, EMPLOYEE v. ADAMS ELECTRIC COMPANY, INC., EMPLOYER; NON-INSURER AND/OR INSURED BY ZURICH INSURANCE COMPANY, CARRIER; GREAT AMERICAN INSURANCE COMPANY, CARRIER.

(Filed 18 June, 1965.)

1. Insurance § 6; Master and Servant § 78—

When a person operating a business as an individual incorporates the business, an insurer for the individual is not an insurer for the corporation, but if the insurer, after incorporation and with knowledge thereof, charges and collects premiums, it waives its right to object to the assignment, and the corporation becomes the insured under the policy.

2. Master and Servant § 80—

While G.S. 97-99 prescribes that notice of cancellation of compensation insurance be by registered or certified mail, the transmission of notice to insured and not the method of its transmission is determinative, and if insured actually receives a thirty-day notice of cancellation the coverage of the policy terminates at the expiration of the thirty-day period, notwithstanding notice is received by ordinary mail.

3. Master and Servant § 94—

Where the Industrial Commission fails to find facts in regard to whether insured received notice by ordinary mail of the cancellation of the policy, but holds that cancellation was ineffective in any event because notice was sent by ordinary mail, the award based upon the misapprehension of the applicable law must be set aside and the cause remanded for a finding of the determinative facts.

4. Insurance § 3—

A "binder" is insurer's acknowledgment of its contract to protect the insured against casualty of a specified kind until a formal policy can be issued or until insurer gives notice of its election to terminate, and where there is a standard policy form specified by statute for the contemplated insurance the binder relates to such standard policy form.

5. Master and Servant § 80—

The requirement of G.S. 97-99(a) of thirty days notice for termination of a policy of compensation insurance applies to a "binder" as well as a formal policy, and an insurer may not terminate the coverage of the binder as to a claim occurring less than thirty days from insured's receipt of notice of termination. G.S. 97-93.

APPEALS by defendants Zurich Insurance Company (Zurich) and Great American Insurance Company (American) from *Johnston, J.*, March 1965 Session of ROCKINGHAM.

Plaintiff, an employee of Adams Electric Company, Inc. (Employer) was, on February 7, 1960, injured when replacing switch boxes in Fieldcrest Mills in Reidsville. The injuries resulted from an accident arising out of and in the course of the employment. Employer and plaintiff

had accepted and were bound by the provisions of the North Carolina Workmen's Compensation Act.

Plaintiff applied to the Industrial Commission for an award of compensation. Based on the facts found, Commissioner Mercer, on October 19, 1961, fixing, in part, the compensation due plaintiff, made an award. The award placed the responsibility of payment on Employer. The findings and conclusions reached by Commissioner Mercer were on appeal approved by the Commission, but reversed on appeal by the Superior Court. It was there adjudged American and Zurich, as insurance carriers, were jointly liable for compensation and medical payments to be made to or for plaintiff. Zurich and American appealed from the judgment rendered by the Superior Court. We reversed, saying in the concluding paragraph of our opinion: "Because, in our opinion, the Industrial Commission failed to find the facts necessary for a determination of the rights of the parties, the judgment of the Superior Court must be reversed in order that it may remand to the Industrial Commission with directions to make necessary findings of fact on which the rights of the parties can be determined." *Moore v. Electric Co.*, 259 N.C. 735, 131 S.E. 2d 356.

On remand to the Industrial Commission, Commissioner Mercer, without taking additional evidence, made findings of fact and conclusions of law. Based on his findings and conclusions, he made an award in favor of plaintiff, holding Employer liable for the payments required to be made. Employer excepted to the findings, conclusions and award, and appealed to the Full Commission.

The findings made by the Commission, pertinent to a determination of these appeals, are summarized or quoted in the opinion. Based on its findings, the Commission concluded that Zurich and American were insurance carriers for Employer and, as such, jointly liable for compensation directed to be paid to plaintiff. Zurich and American excepted to the findings and appealed to the Superior Court. The Superior Court approved the findings and award made by the Commission, and adjudged Zurich and American jointly liable for the moneys owing plaintiff, as fixed by the Commission.

Smith, Leach, Anderson & Dorsett for defendant appellant Great American Insurance Company.

Womble, Carlyle, Sandridge & Rice; Charles F. Vance, Jr., for defendant appellant Zurich Insurance Company.

Bethea, Robinson & Moore for defendant Employer.

RODMAN, J. Neither in these nor in the prior appeals has the right of plaintiff to compensation been challenged by Employer or the in-

surance companies. Each defendant denies liability, insisting that one or both of the remaining defendants are liable to plaintiff.

The Commission found facts which summarily stated or quoted are as follows: From 1930 until July 22, 1959, M. E. Adams "was engaged in doing all types of electrical work and was operating under the trade name of Adams Electric Company." On July 22, 1959, he incorporated his business under the name of Adams Electric Company, Inc. He was the sole stockholder "and continued to operate his business as president of the corporation, rather than as an individual trading in the name of Adams Electric Company."

On March 22, 1959, American issued a workmen's compensation policy to M. E. Adams, t/a Adams Electric Company. The policy was written for a period of one year. American did not, after Adams incorporated his business in July 1959, obligate itself in writing to insure the workmen's compensation liability of the corporate Employer. "However, the incorporation by defendant employer had no effect upon the insurance policy of Great American. An audit was made by Great American for the period 22 March 1959 to 27 December 1959, and additional premium was charged defendant employer by Great American. Such additional premium was paid by defendant employer, as a corporation, to Great American. The billing date of the additional premium was 8 March 1960 and the amount paid as additional premium was $666.55." American carried workmen's compensation and automobile liability insurance for Employer. It elected to cancel all insurance it carried for Employer. To accomplish cancellation of the workmen's compensation insurance, it, on November 25, 1959, "sent a notice of cancellation to defendant employer. Such notice was sent by ordinary mail and was either not received by defendant employer, or was misplaced in the office of defendant employer. No notice of proposed cancellation of Great American's policy was ever sent to defendant employer by certified or registered mail." The notice of cancellation referred to above fixed December 27, 1959 as the date of termination of American's liability under its workmen's compensation insurance policy. American sent a copy of the notice showing its intent to cancel to the Compensation Rating and Inspection Bureau. The Rating Bureau sent notice of American's cancellation to Employer on February 3, 1960. Notice of the intended cancellation was also given to Reliable Insurance Agency, the local agency for American, which issued the policy to M. E. Adams on March 22, 1959.

Kraus, then the owner of Reliable Insurance Agency, upon receipt of the notice of American's intent to cancel the policy issued on March 22, 1959, arranged with Zurich "to go on the risk by means of a binder on a temporary basis, pending investigation of the matter. No agreement

was made as between defendant employer and Zurich Insurance Company as to what type of notice would have to be given to the cancellation of the binder, nor as to the period of time that would elapse between a notice of cancellation and cancellation of the binder. The securing of the binder by Mr. Kraus was done without the knowledge of Mr. M. E. Adams."

Thereafter, Kraus, as agent for Zurich, issued a certificate of insurance "for the purpose of showing to a company in Georgia for which defendant employer was doing work, that defendant employer was properly covered by workmen's compensation insurance * * *. The 'certificate of insurance' also provided that in the event of cancellation of said policies the insurance company would mail notices thereof to the company in Georgia, which was Dundee Mills, Inc. No notice of cancellation of the binder or the 'policies' was ever given in accordance with the 'certificates of insurance.' "

On January 25, Kraus, acting under instructions from Zurich, wrote Employer that Zurich was unwilling to continue coverage and would cease to afford such coverage on January 30, 1960. This letter was not sent by registered or certified mail, but the letter was received by Employer on January 27, 1960.

On January 27, 1960, one C. A. Myers, who had acquired the business of Reliable Insurance Agency, called on M. E. Adams in the attempt to sell insurance to replace the policy cancelled by American. He was informed by Adams that he, Adams, was in contact with another insurance agent who would obtain workmen's compensation insurance. The agent secured workmen's compensation insurance as an assigned risk. The policy so obtained was not issued until February 18, 1960.

"The workmen's compensation insurance policy issued by Great American Insurance Company was not properly canceled and no proper notice of the intent to cancel was given. Such insurance policy was in force at the time of the accident giving rise hereto on 7 February 1960. * * * [T]he requirements of the Statute [G.S. 97-99(a)] that the notice shall be sent by registered or certified mail is a mandatory provision and the insurance company must strictly follow the manner in which the Statute has specified that cancellation can be made; that the requirement that notice be sent by registered or certified mail would be proof that notice was sent to the insured, and it would not be left to speculation and would with definiteness and certainty call attention to the pending cancellation to a busy businessman.

"The workmen's compensation insurance policy or binder agreed to by Zurich Insurance Company contained no provision for cancellation or notice of cancellation contrary from the statutory provisions regard-

ing cancellation of workmen's compensation insurance policies, and no notice of proposed cancellation was properly given; nor was notice of cancellation of the policy given in accordance with the 'certificate of insurance' which had been issued by the agent of Zurich Insurance Company. The Zurich insurance policy or binder was, therefore, also in force at the time of the injury by accident giving rise hereto on 7 February 1960."

Based on its findings, the Commission concluded as a matter of law: "Neither Great American Insurance Company nor Zurich Insurance Company gave notice of an intention to cancel their workmen's compensation insurance policies to defendant employer by registered mail or certified mail, as required by law. Both insurance carriers were, therefore, upon the risk at the time of the injury by accident giving rise hereto, and they are jointly liable for the payment of compensation which is due plaintiff on account of his injury by accident. G.S. 97-99."

It is apparent from the foregoing summary of the Commission's findings that it has intermingled factual and legal conclusions, and incorporated the conclusions so reached as factual findings. The questions presented by the appeals require separate consideration. For orderly treatment, we answer first the questions presented by the appeal of American. The first question American presents is: Did it insure payment of compensation to the employees of Adams Electric Company, Inc.? It insists the answer should be "no."

The policy, in form approved by the Commissioner of Insurance, provided: "Assignments of interest under this policy shall not bind the company until its consent is endorsed thereon." We agree with American's contention that Adams' sale of his business to the corporate entity he created to operate that business did not impose liability on American for injuries sustained by employees of the corporation. *Underwood v. Liability Co.*, 258 N.C. 211, 128 S.E. 2d 577; *Rendelman v. Levitt*, 24 S.W. 2d 211; *Yoselowitz v. Peoples Bakery*, 277 N.W. 221; *State Ins. Fund v. Industrial Commission of Utah*, 205 P. 2d 245; Anno: "Assignment by assured of policy of indemnity or liability insurance, or of rights thereunder," 122 A.L.R. 144; Schneider, Workmen's Compensation, § 2499; Couch, Clycopedia of Insurance Law, § 1450; 45 C.J.S. 49; 29 Am. Jur. 946.

Seemingly, the Commission recognized the fact that Adams, by the mere transfer of his business to a corporate entity, could not enlarge the policy provisions so as to make the corporation an insured, and its employees beneficiaries of the insurance contract issued to M. E. Adams. It found: "The incorporation by defendant employer had no effect upon the insurance policy of Great American."

While the transfer did not impose any obligation on the insurer, nevertheless, if American, with knowledge of the transfer, charged and collected premiums from the corporation, it waived its right to object to the assignment. The corporation, because of the waiver found by the Commission, became an insured under the policy. *Greene v. Spivey,* 236 N.C. 435, 73 S.E. 2d 488; *Pearson v. Pearson, Inc.,* 222 N.C. 69, 21 S.E. 2d 879; *Yoselowitz v. Peoples Bakery, supra; Standard Life & Acc. Ins. Co. v. Bambrick Bros. Const. Co.,* 143 S.W. 845. As said in *Black v. Swetnick,* 120 N.Y.S. 2d 663, "The carrier must be deemed to have intended to insure the enterprise upon whose payroll the premium was based."

American, as compensation insurance carrier for Employer, is obligated for the sums adjudged by the Commission, unless it has, as it asserts, established cancellation of its insurance contract.

Policies issued to employers covering an employer's liability for workmen's compensation insurance must, by express statutory language, G.S. 97-99, conform to a standard approved by the Insurance Commissioner. The statute expressly provides: "No policy form shall be approved unless the same shall provide a 30 day notice of an intention to cancel the same by the carrier to the insured by registered mail or certified mail."

The Commission paramounted the manner of giving notice rather than the fact of notice. It found the notice "was sent by ordinary mail and was either not received by defendant employer or *was misplaced in the office of defendant employer.*" Based on this finding, the Commission concluded: "Neither Great American Insurance Company nor Zurich Insurance Company *gave notice* of an intention to cancel their workmen's compensation policies to defendant employer *by registered mail or certified mail,* as required by law. *Both insurance carriers were, therefore, upon the risk at the time of the injury* * * *."

The statutory requirement of 30 days' notice of intent to cancel was intended to assure an employer sufficient opportunity to procure other insurance. The manner in which notice is given is of secondary importance — it is the fact of notice that is important. If, in fact, Employer had 30 days' notice from American of its intent to terminate its compensation insurance on December 27, 1959, the fact that notice was given by some means other than registered or certified mail would not prevent cancellation.

Because of a misinterpretation by the Industrial Commission of the statutory requirement of 30 days' notice of intent to cancel, it reached the erroneous conclusion that the policy could only be terminated by registered or certified mail. The Commission should have answered this factual question: Did Employer have 30 days' actual notice of Amer-

ican's intent to cancel its insurance policy on December 27, 1959? Until that question has been answered, the liability of American can not be determined. That portion of the judgment of the Superior Court affirming the award made by the Commission against American is reversed. That court will remand the cause to the Commission in order that it may make necessary findings of fact on which it may make an award.

After American had given notice of its intent to cancel its compensation insurance policy issued Employer, and prior to the date fixed for cancellation, Zurich, by "binder," insured Employer's compensation liability. On January 25, 1960, it notified Employer it "would cease to afford such coverage effective 30 January 1960."

The liability of Zurich depends on the sufficiency of the notice to cancel. If required by statute, G.S. 97-99(a), to give 30 days' notice of intent to cancel, Zurich was, on February 7, 1960, the day of the injury, bound by its contract.

In insurance parlance, a "binder" is insurer's bare acknowledgment of its contract to protect the insured against casualty of a specified kind until a formal policy can be issued, or until insurer gives notice of its election to terminate. The binder may be oral or in writing. *Lea v. Insurance Co.*, 168 N.C. 478, 84 S.E. 813; *Distributing Corp. v. Indemnity Co.*, 224 N.C. 370, 30 S.E. 2d 377; 44 C.J.S. 497; Binder, Webster's Third New International Dictionary.

Where a standard form of contract is prescribed by statute, "the law will read into the contract the standard policy as fixed by the statute." *Floars v. Insurance Co.*, 144 N.C. 232, 56 S.E. 915.

Our statute, G.S. 97-99(a), provides for a formal policy approved by the Insurance Commissioner, denying to the Commissioner the right to approve a policy which does not require at least 30 days' notice of intent to cancel, unless cancellation is based on nonpayment of premiums, in which event at least 10 days' notice must be given.

Zurich argues the statute, by express language, is limited to formal policies and does not relate to binders since it contains no provision requiring notice of an intent to cancel a binder.

The contention requires an interpretation of the statutory language. Is the word "policy," used in the statute, limited to the formal written document which insurer executes, or does it comprehend all contracts for workmen's compensation insurance? To correctly interpret a statute, legislative intent must be ascertained since that "is the guiding star in the interpretation of statutes." *State v. Humphries*, 210 N.C. 406, 186 S.E. 473; *Mullen v. Louisburg*, 225 N.C. 53, 33 S.E. 2d 484; *Watson Industries v. Shaw, Comr. of Revenue*, 235 N.C. 203, 69 S.E. 2d 505; *Coach Co. v. Currie, Commissioner of Revenue*, 252 N.C. 181, 113 S.E. 2d 260.

An insurer is not obligated to notify insured of the date specified in the contract for termination; but where termination results from insurer's affirmative action, he must give notice of the date when cancellation will become effective. How much notice shall he give? The statute answers "30 days," if cancellation is not caused by nonpayment of premiums. To hold otherwise would defeat manifest legislative intent that the employer's liability should be insured at all times, G.S. 97-93. Employers may qualify as self-insurers, or they may, if necessary to meet the statutory requirement, obtain assigned risk insurance, G.S. 97-103(b). To qualify as a self-insurer, or to obtain private insurance, the employer must supply the Bureau or an insuring company with information with respect to his business and operations, all of which takes time.

Holding, as we do, that the statute, G.S. 97-99, applies to all workmen's compensation insurance, whether it be evidenced by a binder or by a policy, it follows that the judgment imposing liability on Zurich must be, and is affirmed.

As to American: Reversed and remanded.

As to Zurich: Affirmed.

MRS. BURLEY WOODIE CAUDILL, ADMINISTRATRIX OF THE ESTATE OF DONNIE CAUDILL v. NATIONWIDE MUTUAL INSURANCE COMPANY OF COLUMBUS, OHIO.

(Filed 18 June, 1965.)

1. Insurance § 47.1—

Liability of insurer under a "hit-and-run" provision of a policy of insurance must be predicated upon a collision of the vehicle in which an insured was riding with another vehicle operated by an unidentified driver, which collision was proximately caused by the negligence of such unidentified driver, and the filing by plaintiff with insurer of a report of the accident as required by the policy or as permitted by law.

2. Trial § 21—

Upon motion to nonsuit, defendant's evidence which is not in conflict with that of plaintiff may be considered insofar as it explains or makes clear the evidence of plaintiff.

3. Appeal and Error § 51—

While incompetent evidence admitted without objection must be considered in passing upon the sufficiency of the evidence to overrule nonsuit, the fact of the admission of the incompetent evidence adds nothing to its

weight, and if it is without probative force it cannot warrant a reversing of the nonsuit.

4. Evidence § 35—

The conclusion of a witness who was not present, as to how an accident occurred, is without probative value.

5. Trial § 22—

Where the testimony of the witness is without probative force in establishing the fact in issue, an *ex parte* affidavit by plaintiff based upon the statements of the witness to plaintiff's insurance adjuster, which statements were consistent with the witness' testimony at the trial, cannot constitute evidence sufficient to take the issue to the jury.

6. Insurance § 47.1—

The evidence in this case *is held* insufficient to show that intestate was forced off the highway by the negligent operation of another vehicle by an unidentified driver, and nonsuit should have been entered in plaintiff's action on the "hit-and-run" provision in the policy sued on.

APPEAL by defendant from *McConnell, J.*, January 1965 Regular Civil Session of WILKES.

Action to recover a $5,000.00 death benefit allegedly due under the uninsured-automobile provisions of a family-automobile and comprehensive-liability insurance policy.

These facts are admitted: Plaintiff is the duly appointed administratrix of her son, Donnie Caudill, a member of her household, who died on November 26, 1961, at the age of 19, as the result of injuries sustained on that day while operating a 1947 Ford individually owned by plaintiff. At the time of the accident the Ford was covered by a liability policy containing an Endorsement #644, entitled, "Protection Against Uninsured Motorists Insurance." By the terms of this endorsement defendant agreed, *inter alia,* to pay all sums, not in excess of $5,000.00, which the insured and, while residents of the same household, her relatives, or their legal representatives, should be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of death resulting from bodily injury. The term *uninsured automobile* included a hit-and-run automobile, which was defined in paragraph II(d), as follows:

> (A)n automobile, other than one in which an Insured is a passenger, which is involved in an accident causing bodily injury to an Insured, provided: (i) there cannot be ascertained the identity of either the operator or the owner of such "hit-and-run automobile"; (ii) the Insured or someone on his behalf shall have reported the accident within 24 hours to a police, peace or judicial officer or to the Commissioner of Motor Vehicles, and shall have filed

with the Company within 30 days thereafter a statement under oath that the Insured or his legal representative has a cause or causes of action arising out of such accident for damages against a person or persons whose identity is unascertainable, and setting forth the facts in support thereof; and (iii) at the Company's request, the Insured or his legal representative makes available for inspection any automobile which the Insured was occupying at the time of the accident.

Plaintiff alleges that her intestate, while operating the Ford on County Road No. 1513 in the Miller's Creek section of Wilkes County, was overtaken by an unidentified motorist who, while traveling at an unlawful rate of speed, attempted to pass on intestate's right in violation of G.S. 20-149(a); that in doing so he forced intestate off the road and into a ditch, where his automobile turned over; that intestate was thrown from the car and received the injuries from which he died.

Answering, defendant denied that any motorist other than intestate was involved in the accident. It alleges that the upset which caused intestate's death was caused by his own high speed and failure to keep his vehicle under proper control. In addition to intestate's own negligence, it pled, in bar of plaintiff's right to recover, her failure to file with the company within 30 days of the accident the affidavit required by paragraph II(d).

Plaintiff offered evidence tending to show these facts: On Sunday evening, November 26, 1961, intestate had attended a B. T. U. meeting at Miller's Creek Baptist Church. When it was over at 7:30 p.m., he followed Helen Barfield, his girl friend, on the Miller's Creek Schoolhouse Road (No. 1513) to her home on a dirt road a short distance off the paved highway. He turned around, however, without getting out of his car and drove back west on No. 1513. He and Helen Barfield were "sort of cross at each other." The accident which caused intestate's death occurred shortly before 8:00 at a point between two deep curves about ¼ mile from her home.

A little before 8:00 p.m., Tommy Faw, a witness for plaintiff, was traveling east on No. 1513. As he approached the first curve, he saw what he then thought, because of the position of its unmoving red light, to be a truck across the road. At that time he observed the lights of an unidentified, approaching automobile, traveling at approximately 30 MPH on its right side of the road. He recalled seeing only one set of headlights. It seems to Faw "that the car was pulling around this overturned car when (he) first saw the lights coming from the wreck." He never saw headlights behind the wreck. The unidentified car was on its way toward Faw, rounding the curve, when he first saw it "some-

where near the wrecked car." The moving car passed Faw and went on around the westernmost curve. Faw then went about 200 feet farther, to the place where the Caudill Ford was turned over on the south (intestate's left) side of the road. The Ford was lying on its right side with the engine facing south and its rear end 2-3 feet from the north side of the hard-surface, 16-18 feet wide. "The right side was bruised and the top." Intestate was coming from the back of the car by the top. Stooping forward, he walked toward the side ditch and fell in it. Faw asked intestate whether anybody was with him, and he said "No, I was by myself." Faw's next question was, "How did it happen? Did somebody hit you?" Intestate's reply was, "It just got away from me." By that time cars were beginning to stop. Faw dispatched one to call an ambulance and devoted his attention to intestate.

Early that night Hoyle Reeves picked up the Caudill Ford with his wrecker and hauled it to the storage lot back of his house three miles away. It remained there until the following Wednesday, when intestate's father pulled it to his home. At that time the father observed a tire mark on the right-hand side of the car between the door latch and the fender. The mark had not been there when intestate left home with the car on Sunday evening. On the left rear bumper there was also some dark paint which he had not theretofore observed.

On February 19, 1962, plaintiff gave defendant written notice that she was seeking to hold it liable under Endorsement #644 and enclosed an affidavit purporting to comply with paragraph II(d). She averred, *inter alia*:

> ". . . that while the said Donnie Caudill was operating said motor vehicle along said highway in a careful, prudent and lawful manner, the automobile was overtaken by another automobile. The identity of the operator of the other automobile or the owner of said automobile cannot be ascertained, the unidentified motor vehicle passing the motor vehicle operated by Donnie Caudill and forcing said motor vehicle off the highway onto the shoulder of the road and into the ditch, causing said motor vehicle to overturn as Donnie Caudill endeavored to bring said motor vehicle back onto the highway; that the said motor vehicle operated by Donnie Caudill overturned as a proximate cause *(sic)* of the negligent operation of the unidentified motor vehicle, causing Donnie Caudill to be thrown from the motor vehicle receiving injuries from which he later died; that the accident was duly reported and duly investigated by the North Carolina Highway Patrol and due notice was given to the insurance carrier, Nationwide Mutual Insurance Company, and payments were made under the medical-pay pro-

vision of said policy; that at the time of the accident and subsequent thereto, this affiant had no evidence that her son met his death as a result of the negligent operation of a hit-and-run automobile or an unidentified automobile; that this affiant received evidence of the unidentified or hit-and-run motor vehicle on January 30, 1962, as a result of having had her agent to confer with witnesses with regard to said accident. . . ."

Plaintiff introduced this affidavit into evidence without any objection by defendant or any request to limit its application.

Defendant's evidence tends to show: T. A. Miller, who had also been to the B. T. U. meeting, was riding around with his young cousin. He met intestate coming out of the dirt road to Helen Barfield's home as he went in. They both stopped, and intestate told Miller he was going back to the church. Miller then turned around and went back in that same direction. When he was 500 feet behind him, he saw the Ford turning over in the curve. It turned over more than once. No other car was meeting or passing. Miller helped intestate from his car and asked him whether he was "all right." When he said he thought he was, Miller told him he would go for help, and he went back to the church and had his parents get intestate's parents. Intestate died within the hour. Miller testified: "I didn't hit it (the Caudill Ford). I would be the unidentified driver if I had hit it."

Defendant's motions for judgment of nonsuit were overruled. The judge submitted, and the jury answered, issues as follows:

1. Did the plaintiff's intestate come to his death by the negligence of an unidentified driver of an unidentified automobile?

ANSWER: Yes.

2. If so, did plaintiff's intestate by his own negligence contribute to his death?

ANSWER: No.

3. Did the plaintiff comply with the insurance contract as to Notice?

ANSWER: Yes.

4. What amount, if any, is plaintiff entitled to recover of defendant?

ANSWER: $2,500.00.

From judgment entered on the verdict defendant appeals.

McElwee & Hall and Moore and Rousseau for plaintiff appellee.

Hayes & Hayes for defendant appellant.

SHARP, J. Defendant's one assignment of error made in compliance with the rules of this Court, *Steelman v. Benfield,* 228 N.C. 651, 46 S.E. 2d 829, raises the question of the sufficiency of the evidence to withstand the motion for nonsuit. To recover under the contract of insurance upon which she sues, plaintiff must offer evidence from which the jury could find: (1) that the operator of a hit-and-run automobile, as defined by paragraph II(d) of Endorsement #644, caused bodily injury which resulted in her intestate's death; (2) that plaintiff, as intestate's personal representative, is *legally entitled* to recover damages as for his wrongful death from that operator (this requirement necessitates proof that the operator had breached a duty to intestate, which breach proximately caused his death); and (3) that plaintiff had duly filed with defendant, as required by Endorsement #644 or as permitted by law, a report of the accident and plaintiff's claim arising out of it. The failure to establish any one of these requirements would preclude recovery.

Apparently the theory of plaintiff's case is that the car which Faw met just before he reached intestate's wrecked Ford was operated by a hit-and-run motorist who had negligently passed intestate on his right, had run him off the road, and had caused him to turn over. Faw's testimony indicates that the automobile did pass intestate's Ford on the north side (intestate's right side) of the road. The inference from that testimony, however, is that the Caudill car had already been wrecked when the other car passed it. At any rate, Faw gave no testimony suggesting that he saw anything to indicate that it had forced the Caudill car off the road or had caused it to upset, or that it had come in contact with the Ford. Just how an overtaking motor vehicle, in passing the Caudill Ford, could have left a tire mark on the right side of the Ford between the door handle and the back fender without itself turning over is not apparent to us, and plaintiff makes no effort to explain such a phenomenon. According to the evidence, this tire mark was first observed three days after the accident, after the Ford had been pulled from the scene by a wrecker and after it had been stored in a wrecked-car lot. Under these circumstances the presence of such tire mark is no evidence that a hit-and-run motorist caused intestate to upset.

The car which met and passed Faw was operating normally at a speed of 30 MPH. The record does not suggest that the automobile of defendant's witness Miller showed any sign of contact with the Ford, much less that it, too, had been upset. From all the evidence, it is a fair inference that the car which Faw met was Miller's. In considering a motion for nonsuit, defendant's evidence which is not in conflict with

plaintiff's "may be used to explain, or make clear the evidence of the plaintiff." *Hopkins v. Comer*, 240 N.C. 143, 149, 81 S.E. 2d 368, 373; *accord, Jenkins v. Electric Co.*, 254 N.C. 553, 119 S.E. 2d 767; 4 Strong, N. C. Index, Trial § 21, n. 220 (1961 Ed.).

Plaintiff has offered the testimony of no witness and no physical evidence which tends to show that a hit-and-run automobile caused intestate's accident. Indeed, the testimony of Faw, the witness upon whom plaintiff relies to make out her case, is that intestate himself, when he made the statement that his own vehicle "got away from him," denied that any other vehicle was involved. Notwithstanding this, plaintiff contends that she was entitled to go to the jury on the basis of her affidavit filed with defendant some 80 days after the accident because — astonishing as it may seem — it was admitted into evidence without any objection from defendant's counsel.

The rule is, as plaintiff stressfully contends, that upon a motion for compulsory nonsuit the court must consider incompetent evidence which has been admitted without objection. *Bishop v. DuBose*, 252 N.C. 158, 113 S.E. 2d 309; *Kientz v. Carlton*, 245 N.C. 236, 96 S.E. 2d 14; *Ballard v. Ballard*, 230 N.C. 629, 55 S.E. 2d 316; *Holder v. Mfg. Co.*, 135 N.C. 392, 47 S.E. 481. Although such an item of evidence must be accorded its full probative force, *Ballard v. Ballard, supra* at 635, 55 S.E. 2d at 321, yet it is entitled to no more probative value than it would have had if it had been admissible under established rules of practice. 4 Jones, Evidence, § 984 (5th Ed. 1958). "The admission of such evidence, without objection, does not add any weight to it, if intrinsically it had none, and should have been excluded upon objection. Evidence does not have weight, because it is admitted; but it is admitted, because it deserves to have weight." *Sharp v. Baker*, 22 Tex. 306, 315. Whether, as a matter of law, incompetent evidence admitted without objection is entitled to be considered upon a motion for nonsuit is one question; whether, in fact, it has any probative value is another. The conclusion of a witness who has no personal knowledge of the facts is of no probative value. *Banty v. City of Sedalia*, Mo. App., 120 S.W. 2d 59; *Van Bibber v. Swift & Co.*, 286 Mo. 317, 228 S.W. 69; *Smith v. Lynn*, Tex. Civ. App., 152 S.W. 2d 838; *Sharp v. Baker, supra;* 32A C.J.S., Evidence § 1034 (1964).

The affidavit in question was made by one (plaintiff) who was not a witness to the accident nor was anywhere near the scene when it occurred. Obviously, without first-hand observation, she could not know whereof she speaks. In the affidavit she does not purport to reiterate an account of the accident made to her by one claiming to have been an eyewitness. Attempting to state ultimate facts which would bring her case within the coverage of Endorsement #644, she deposes as if she

herself had seen the accident. The record discloses, however, that her affidavit was based upon information given by her witness Faw to defendant's adjuster when he investigated plaintiff's claim for medical payments due under the policy. Defendant's cross-examination of Faw disclosed no material difference between that information and his testimony at the trial, which latter testimony is totally insufficient to support plaintiff's conclusions that the negligence of an unidentified driver forced intestate off the road and caused his death. It would indeed be an anomaly if, the testimony of a witness himself being insufficient to take a case to the jury, another's affidavit which was merely interpretative of that testimony could constitute evidence sufficient to overcome the motion for nonsuit. Plaintiff's own evidence discloses that the affidavit is without probative value on the first issue. Although admitted generally, at the close of plaintiff's evidence, without any request being made to restrict it, it is obvious that the affidavit was offered and admitted for the only purpose for which it was prepared, *i.e.*, to meet the requirements of paragraph II(d) with reference to notice of plaintiff's claim against defendant. *Clinard v. Trust Co., ante,* 247, 141 S.E. 2d 271.

Since defendant's motion for nonsuit should have been allowed because of plaintiff's failure to offer any evidence tending to show that negligence on the part of a hit-and-run motorist caused intestate's death (first issue), the question whether the affidavit met the requirements of the policy does not arise (third issue).

The judgment of the court below is

Reversed.

STATE v. WALTER WEAVER.

(Filed 18 June, 1965.)

1. Assault and Battery § 17—

Assault with a deadly weapon, G.S. 14-33, carrying a maximum sentence of two years, is a less degree of the offense of an assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death, G.S. 14-32, carrying a maximum sentence of ten years, and, when there is evidence of defendant's guilt of the less offense, the question is properly submitted to the jury.

2. Convicts and Prisoners § 1—

During the period between the pronouncement of the judgment and the vacation of such judgment defendant's *de facto* status is that of a prisoner

serving a sentence; from the vacation of the judgment until judgment is pronounced upon defendant's retrial, defendant having failed to give bond, defendant's status is that of a prisoner under indictment awaiting trial.

3. Criminal Law § 131—

Where defendant's conviction of a felony is vacated after he has served a portion of the sentence, and upon retrial he is convicted of a less degree of the crime, constituting a misdemeanor, judgment imposing the maximum sentence for the misdemeanor must give defendant credit for the time served on the felony, but need not give defendant credit for the time between the vacation of the felony judgment and the imposition of sentence for the misdemeanor.

APPEAL by defendant from *Mallard, J.*, December 1964 Session of ALAMANCE.

Defendant was tried at December 1964 Session of Alamance on a bill of indictment returned at May 1963 Session charging that defendant on March 30, 1963 committed a felonious assault (G.S. 14-32) upon one Thomas J. Rivers. He was then and is now represented by W. R. Dalton, Jr., Esquire, court-appointed counsel. The jury returned a verdict of "Guilty of Assault with a Deadly Weapon." The judgment pronounced (1) imposed a sentence of imprisonment of two years, (2) ordered that defendant pay the costs, and (3) provided, in accord with G.S. 6-46, that defendant "remain in prison after the expiration of the fixed time for his imprisonment until the costs shall be paid or until he shall otherwise be discharged according to law."

An order permitting defendant to appeal *in forma pauperis* was entered. On appeal, defendant's one assignment of error is based on his exception to the judgment.

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

W. R. Dalton, Jr., for defendant appellant.

BOBBITT, J. Defendant does not challenge the validity of the trial and verdict at December 1964 Session. He contends, based on facts narrated below, that the judgment pronounced at said term is erroneous and excessive because it fails to credit on the two-year sentence it imposes the time between the date of the (subsequently vacated) judgment pronounced at May 1963 Session and the date of the judgment pronounced at December 1964 Session.

The minutes of the May 1963 Session show "defendant in person and thru his attorney, W. F. Briley," pleaded *nolo contendere* to felonious assault as charged in the bill of indictment. Judgment, imposing a prison sentence of not less than five nor more than seven years, was

pronounced. The said minutes contain no reference to when or by whom Mr. Briley was employed or appointed. On May 9, 1963 defendant was committed to State's Prison to serve said sentence.

On September 25, 1964, after a *habeas corpus* hearing in the United States District Court for the Middle District of North Carolina, Stanley, Chief Judge, based on findings of fact and conclusions of law set forth in a memorandum opinion, "ORDERED, ADJUDGED AND DECREED that the petitioner's plea of *nolo contendere* entered on May 9, 1963, and the judgment pronounced thereon, are vacated and set aside, and that the petitioner be granted a new trial." It was "FURTHER ORDERED" (1) "that unless the State of North Carolina elects to retry and retries the petitioner within six months from September 25, 1964, an Order will be entered, upon application of petitioner, discharging him from custody," and (2) "that the petitioner be admitted to bond in the sum of $2,500.00 to be approved by the Clerk of the Superior Court of Alamance County, pending his new trial." Apparently, defendant did not make bond and obtain his release "pending his new trial." At his trial at December 1964 Session he testified he had been confined in Alamance County Jail since October 8, 1964.

Defendant was indicted for assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death, the felony created and defined by G.S. 14-32. *S. v. Jones,* 258 N.C. 89, 128 S.E. 2d 1. Upon conviction, the punishment prescribed by the statute is imprisonment "for a period not less than four months nor more than ten years."

Assault with a deadly weapon is a general misdemeanor, punishable by fine or imprisonment or both, "at the discretion of the court," G.S. 14-33, the maximum legal sentence therefor being two years. *S. v. Austin,* 241 N.C. 548, 550, 85 S.E. 2d 924. It is an essential element of the felony created and defined by G.S. 14-32, being an included "less degree of the same crime." G.S. 15-170; G.S. 15-169.

At defendant's trial at December 1964 Session on said felony indictment, there being evidence such included crime of less degree was committed, the court properly instructed the jury that guilty of an assault with a deadly weapon was a permissible verdict. *S. v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545; *S. v. Jones,* 264 N.C. 134, 141 S.E. 2d 27. The jury acquitted defendant of the felony charge but found him guilty of assault with a deadly weapon, a general misdemeanor.

The following distinction is noted: From the pronouncement of judgment at May 1963 Session until said judgment was vacated by Judge Stanley's order of September 25, 1964, defendant's *de facto* status was that of a prisoner serving a sentence. From September 25, 1964 until the pronouncement of judgment at December 1964 Session, defendant's

status was that of a person under indictment awaiting trial and in custody on account of failure to give the appearance bond fixed by Judge Stanley's order.

The Attorney General's position is that, under our decisions in *S. v. Williams,* 261 N.C. 172, 134 S.E. 2d 163; *S. v. White,* 262 N.C. 52, 136 S.E. 2d 205, *cert.* den., 379 U.S. ....., 85 S. Ct. 726, 13 L. Ed. 2d 707; *S. v. Anderson,* 262 N.C. 491, 137 S.E. 2d 823; *S. v. Slade,* 264 N.C. 70, 140 S.E. 2d 723, defendant is not entitled to any credit as a matter of right.

The present case is factually distinguishable from *Williams, White, Anderson* and *Slade* in one respect, namely, that this defendant, when retried on the identical bill of indictment, was not convicted of the identical crime (the felony) but of an included "less degree of the same crime." It is factually distinguishable from *White, Anderson* and *Slade,* but not from *Williams,* in this respect: The judgment pronounced at December 1964 Session, upon defendant's conviction of assault with a deadly weapon, imposed the maximum legal sentence. In *White, Anderson* and *Slade,* the total of the sentence pronounced at retrial and the time served under the vacated judgment was within the legal maximum.

The *Goff* cases, discussed below, bear upon defendant's status during the period from the pronouncement of judgment at May 1963 Session until said judgment was vacated by Judge Stanley's order of September 25, 1964.

At August 1961 Criminal Term of Pitt, Arthur Goff, in Case No. 7752, was indicted and convicted of felonious assault and sentenced to a prison term of not less than seven nor more than ten years. Subsequently, in post-conviction proceedings, the verdict, judgment and commitment were vacated on the ground that, applying retroactively the 1963 decision in *Gideon v. Wainwright,* 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792, 93 A.L.R. 2d 733, which overruled the 1942 decision in *Betts v. Brady,* 316 U.S. 455, 86 L. Ed. 1595, 62 S. Ct. 1252, Goff had been denied his constitutional right to counsel. *S. v. Goff,* 263 N.C. 515, 139 S.E. 2d 695, decided January 15, 1965.

On August 10, 1964, while serving said sentence in Case No. 7752, Goff escaped; and, at January-February 1965 Session of Sampson, he pleaded guilty to said escape and judgment imposing a sentence of six months was pronounced. In *habeas corpus* proceedings, Goff contended his plea and the judgment in said escape case should be vacated on the ground he was not *in lawful custody* when the alleged escape occurred. On *certiorari* to review an order releasing Goff from custody in respect of said sentence for said escape, this Court reversed. Our decision was based on the proposition that the judgment pronounced in Case No. 7752 at August 1961 Criminal Term was not void. It was erroneous,

voidable at the instance of defendant; and an escape *while in custody* pursuant to said judgment was an escape from lawful custody notwithstanding the judgment *was thereafter* vacated in appropriate legal proceedings. *S. v. Goff, ante,* 563, 142 S.E. 2d 142, decided June 2, 1965.

It is well established in this jurisdiction that a judgment imposing a sentence in excess of the legal limit (1) is void as to the excess and (2) erroneous as to the portion within the legal limit. If the time already served by the petitioner equals or exceeds the legal limit, the prisoner is entitled to his discharge in *habeas corpus* proceedings. *S. v. Austin, supra.* If not, the judgment must be vacated and the cause remanded for proper sentencing; and, when proper sentence is pronounced, the defendant is to be given credit for the time he served as a prisoner under sentence pronounced in the vacated judgment. *S. v. Austin, supra; S. v. Templeton,* 237 N.C. 440, 75 S.E. 2d 243; *S. v. Miller,* 237 N.C. 427, 75 S.E. 2d 242; *In re Sellers,* 234 N.C. 648, 68 S.E. 2d 308; *S. v. Green,* 85 N.C. 600. As stated by Barnhill, J. (later C. J.), in *In re Sellers, supra:* "The court below, in pronouncing sentence, should be careful to so condition its judgment as to allow petitioner credit for the time he has served in execution of the sentence hereby vacated."

Decisions of this Court cited in the preceding paragraph appear to be in accord with the weight of authority. There are decisions *contra,* some of which turn upon whether the vacated judgment is considered void or erroneous. See Annotation, "Right to credit for time served under erroneous or void sentence or invalid judgment of conviction necessitating new trial." 35 A.L.R. 2d 1283, particularly § 5, pp. 1288-1291.

In *Lewis v. Commonwealth,* 108 N.E. 2d 922, 35 A.L.R. 2d 1277 (Mass.), which is in accord with our decisions, Qua, C. J., said: "It is hardly realistic to say that nine months in the State prison amount to nothing — that since the petitioner 'should not have been imprisoned as he was, he was not imprisoned at all.' *King v. United States,* 69 App. D.C. 10, 98 F. 2d 291, 293-294. Moreover, since there is no statute of limitation affecting the filing of petitions for writs of error in criminal cases, G.S. (Ter. Ed.) c. 250, § 10, the time served before the reversal of the sentence might in some other case be so long that glaring and intolerable injustice would result if the time served on a first sentence should not be taken into account in imposing a second sentence. It is not even technically correct to say that the first sentence must now be deemed to have been a nullity. It was not a nullity when it was imposed or *while it was being served.* The court had jurisdiction over the crime of robbery and had jurisdiction over the defendant. The sentence was erroneous and voidable for error but was not void until reversed. (Citations.)" (Our italics.)

Time served by defendant as a prisoner under the judgment pronounced at May 1963 Session and that served by him under the judgment pronounced at the December 1964 Session constitute punishment for the same conduct. Under *S. v. Goff, ante,* 563, 142 S.E. 2d 142, the judgment pronounced at May 1963 Session constituted a valid basis for prosecution for escape. It cannot be treated as a nullity in respect of time served as punishment for the conduct charged in the bill of indictment.

In *S. v. Williams, supra; S. v. White, supra; S. v. Anderson, supra;* and *S. v. Slade, supra,* the defendants' original conviction (or plea) and the judgment pronounced thereon were vacated on application of the prisoner-defendant on account of a denial of constitutional rights.

It is noted that *Anderson* and *Slade* were decided on authority of *Williams* and *White.* In *S. v. White, supra,* it is stated: "Defendant having been convicted of the same offense on the second trial on the same indictment a heavier sentence may be imposed than was imposed on the first trial." *S. v. Williams, supra,* and decisions from other jurisdictions, are cited in support of this statement. As to this proposition, the authority of the four cited cases is fully recognized.

In *S. v. Williams, supra,* the *per curiam* opinion closes with these words: "Defendant's contention that the judge was compelled to allow him credit for the period spent in prison before a valid trial was had is also without merit." The fact that the second judgment imposed a maximum prison sentence was not stressed. In *S. v. White, supra,* where the total of the second sentence and the time served under the vacated judgment was within the legal maximum, it was held that the defendant was not entitled as a matter of right to credit on the second sentence for the time he had served under the vacated judgment. It was stated: "There is nothing in the record to indicate whether or not Judge Latham in imposing sentence in the instant case gave or failed to give defendant credit for the time he had served under the original sentence in the first trial."

Decision on this appeal does not necessitate reconsideration of the decision in *White* as applied to the factual situation considered therein or to the later decisions based thereon, to wit, *Anderson* and *Slade.* Here, defendant was punished from May 9, 1963 until September 25, 1964 by his service of a sentence for the felony charged in the bill of indictment, a crime of which he was subsequently acquitted. The fact that the judgment pronounced at December 1964 Session upon defendant's conviction of an assault with a deadly weapon imposed the maximum two-year sentence dispels any suggestion that the trial judge gave defendant credit for the punishment he already had received for the conduct charged in the bill of indictment. The hard fact of his

actual service of sentence from May 9, 1963 until September 25, 1964 cannot be ignored. At December 1964 Session, the maximum permissible sentence, inclusive of the time he had served for the same conduct under the sentence imposed by judgment pronounced at May 1963 Session, was a term of two years. *Little v. Wainwright,* 161 So. 2d 213 (Fla.), and cases cited.

S. v. Williams, supra, to the extent in conflict herewith, is overruled.

Defendant's service of sentence from May 9, 1963 until September 25, 1964 must be considered service on the maximum two-year sentence pronounced at December 1964 Session. Moreover, since his service during this period is deemed an integral part of the two-year sentence, such service must be considered in determining defendant's gained time, if any, on account of good behavior. G.S. 148-13; *In re Swink,* 243 N.C. 86, 92, 89 S.E. 2d 792; *Lewis v. Commonwealth, supra; Little v. Wainwright, supra.*

While there is authority to the contrary, *Tilghman v. Culver, 99* So. 2d 282 (Fla.), we are of opinion, and so hold, that defendant is not entitled as a matter of right to credit for the period from September 25, 1964 until the date of the judgment pronounced at December 1964 Session. During this period, while in custody in default of bond, defendant was not serving a sentence as punishment for the conduct charged in the bill of indictment.

The judgment of the court below should be and is modified by providing that, in accordance with this opinion, defendant is entitled as a matter of right to credit on the two-year sentence imposed by judgment pronounced at December 1964 Session for the time he served as a prisoner, that is, from May 9, 1963 to September 25, 1964, under the (subsequently vacated) judgment pronounced at May 1963 Session. As so modified, the judgment of the court below is affirmed.

Modified and affirmed.

CRAWFORD G. TRULL AND MINNIE LEWIS TRULL v. CAROLINA-VIRGINIA WELL COMPANY, INCORPORATED.

(Filed 18 June, 1965.)

1. Negligence § 24a— Evidence held insufficient to show that damage to house was result of negligence in operation of well digging equipment.

Plaintiff's evidence was to the effect that defendant, pursuant to contract, was digging a well on plaintiff's property in the area pointed out by

plaintiff, that the well digging machinery was powerful and caused vibrations and "quivering" of the house, that when the equipment had dug to a depth of 40 or 50 feet there was sudden cracking of the walls and ceiling of plaintiff's house, and that digging operations were thereafter resumed without further damage. There was no evidence with respect to the type and power of the drill, the manner of its operation, or its suitability for the particular type of work, or that the machine was operated in any unusual or negligent manner, or that the damage was caused by drilling in too close proximity to the house. *Held:* The evidence is insufficient to show damage to plaintiff's house as a result of negligence on the part of defendant.

2. Negligence § 4—

The rule of absolute and strict liability for damages resulting from blasting operations is applicable when the person owning the property damaged is an innocent party and it is shown that the damage resulted from such blasting operations, and therefore this rule of absolute liability cannot be asserted as the basis for recovery of damages coincident with well digging operations when the person whose property is damaged is not a third party but had employed defendant to dig the well, or when it is not shown that the damage resulted from vibrations emanating from the well digging machinery.

3. Same; Negligence § 5—

The rule of absolute liability for damages resulting from a dangerous instrumentality operates regardless of the presence or absence of negligence, while the doctrine of *res ipsa loquitur* is a rule of evidence which operates as *prima facie* proof of negligence, and the two are separate and distinct.

4. Negligence § 5—

The doctrine of *res ipsa loquitur* is not applicable unless defendant has control of all the factors which might have caused the damage and does not apply when more than one inference can be drawn from the evidence as to the cause of the damage.

5. Negligence § 24b—

The doctrine of *res ipsa loquitur* does not apply to damage to plaintiff's house coincident with vibrations set up by the operation of defendant's well digging equipment on plaintiff's property, since in such instance defendant is not in control of all of the factors which might have caused the damage, nor does the doctrine apply when there is no evidence establishing a causal relation between the operation of the drill and the damage to the house.

6. Negligence § 21—

Negligence is not presumed from the mere fact of injury.

APPEAL by plaintiffs from *Gambill, J.*, November 16, 1964, Session of GUILFORD (Greensboro Division).

Younce & Wall by Percy L. Wall and Max D. Ballinger for plaintiffs.

Smith, Moore, Smith, Schell & Hunter and William T. Combs for defendant.

MOORE, J. This is a civil action instituted 9 July 1963 by plaintiffs to recover damages for injury to their dwelling allegedly caused by the negligence of defendant in well-drilling operations on their premises.

Plaintiffs' evidence tends to establish these facts: Plaintiffs' residence is located at 3811 Lawndale Drive, Greensboro. The exterior walls of the house are of "Mt. Airy Granite," the basement walls are cinder block and stone, and the foundation and footings are reinforced concrete. Plaintiffs employed defendant to drill a well for the purpose of supplying water for the house. Mr. Smith, agent of defendant, came to the house, viewed the premises and inquired where the well was to be located. Male plaintiff pointed out an area at the rear of the house and stated, ". . . in this area here where you think best to put it." Mr. Smith said he would put it anywhere plaintiffs wanted it, but that it would have to be 50 feet or more from the ceptic tank. He was told to put it wherever he thought best. The drilling was begun a few days later. The well was located within the area pointed out by male plaintiff and about 15 feet from the house. The instrument used was a "hydraulic drill" mounted on a trailer; it was a "large outfit" and "new looking," and "It was a pretty powerful machine and looked like it was doing the work, . . . going right on down." When the machine was turned on "there was a terrible noise and vibration in the house." The house "quivered." There was a "trembling of the earth" at and around the machine. Later "something like fine gravel falling" was observed in the house, and suddenly cracks appeared in the plaster walls and ceiling in the house — some of them more than an inch wide. The basement and all of the rooms were damaged; mortar fell from between the granite blocks at places in the exterior walls; columns on the front porch cracked. As soon as the damage was discovered the drilling was stopped. At that time the drilling had gone to a depth of 40 to 50 feet. After surveying the damage, plaintiffs decided to permit the drilling to continue. The well when finished was 201 feet deep. No further damage resulted from resumption of the drilling. Mr. Smith presented male plaintiff a bill for the work and was reminded of the damage to the house. He replied, "Well, you don't have to worry about that, it will be taken care of." Thereupon, the bill was paid. The house was damaged to the extent of $20,000. Some damage was beyond repair; such repairs as could be made would cost $10,000.

Defendant offered no evidence and moved for nonsuit. The motion was allowed and judgment was entered dismissing the action. Plaintiffs appeal, assigning as error the allowance of the nonsuit.

Plaintiffs allege that the damage was proximately caused by the negligence of defendant. The specifications of negligence are: (a) defendant selected a site too near to the house "for the type of equipment which was used," defendant knowing that the "extensive vibrations . . . would cause or were likely to cause" damage to the house; (b) "defendant used the wrong type of well-drilling equipment for drilling or constructing a well within a few feet of plaintiffs' house"; and (c) defendant operated the equipment in a careless, negligent and unworkmanlike manner.

The substance of the evidence is that the house was in good condition before the drilling began, the drilling operations caused "trembling" of the earth in and around the machine and noticeable "quivering" of the house, thereafter damage to the structure occurred more or less suddenly, and after this occurrence the completion of the drilling operation caused no further damage. There is no evidence, with respect to the type and power of the drill, its manner of operation, or its suitability for the particular work. The evidence is merely that it was large and mounted on a trailer, "pretty powerful," made a noise and set up vibrations. There is no evidence tending to show that it was customary in the trade to do that type of work with a lighter and less powerful machine, that a less powerful machine was practical for sinking a well to a depth of 200 feet, that the damage would not have occurred if the machine had been operated even at the farthest point from the house within the area designated by plaintiffs, or that the machine was operated in any unusual or negligent manner. It is not reasonable to infer that the parties contemplated that the work should be done by hand or by a machine that would set up no vibrations. That there was a relationship between the operation of the machine and the damage to the house, seems clear. But it is likewise clear that plaintiffs have not proved negligence as specified in the complaint. *Poultry Co. v. Equipment Co.*, 247 N.C. 570, 101 S.E. 2d 458. Furthermore, the direct physical cause of the damage to the house rests in the realm of speculation. The vibrations from the machine caused the "quivering" of the house. But were they responsible for the sudden opening of walls and ceiling? Were the vibrations sufficient to cause the damage? Was the foundation of the house inherently weak? Was the condition of the earth underneath the house such that even normally harmless vibrations would cause it to move or give way? No witness undertakes an explanation of the direct physical cause of the damage. This much we are told — the damage suddenly occurred after the drill had been in operation for some time. The drilling was stopped. When it was resumed, no further damage resulted by reason of vibrations or from any other cause.

Plaintiffs insist, however, that the failure to prove the specifications of negligence does not entitle defendant to a nonsuit, that liability should be imposed without necessity of showing fault on the part of defendant, *i.e.*, that the rule of absolute and strict liability, applicable in cases involving damage from the use of high explosives, is appropriate to the facts in this case. In short, plaintiffs contend that this case is analagous to a blasting case since they have a common factor, vibrations.

The rule referred to is that one who is lawfully engaged in blasting operations is liable without regard to whether he has been negligent, if by reason of the blasting he causes direct injury to neighboring property or premises by casting rocks or debris thereon or by concussion or vibrations set in motion by the blasting. This, because "Blasting is considered intrinsically dangerous; it is an ultrahazardous activity, at least in populated surroundings, or in the vicinity of dwelling places or places of business, since it requires the use of high explosives and since it is impossible to predict with certainty the extent or severity of its consequences." 35 C.J.S., Explosives, § 8a, p. 275. This rule — the rule of liability without allegation and proof of negligence — has been adopted in blasting cases by a majority of the courts and was recently applied in this State. *Insurance Co. v. Blythe Brothers Co.*, 260 N.C. 69, 131 S.E. 2d 900. Absolute liability is imposed because high explosives are so dangerous that their use ought to be at the user's risk. *Exner v. Sherman Power Const. Co.*, 54 F. 2d 510, 80 A.L.R. 686 (CC, 2C). The law casts the risk of the venture on the person who introduces the peril in the community. Blasting operations are dangerous and should pay their own way. *Wallace v. A. H. Guion & Company*, 117 S.E. 2d 359 (S.C.). The theory upon which blasting cases have been tried and decided in this jurisdiction has varied — probably because of the different theories upon which plaintiffs have proceeded. Actions have been grounded on negligence, trespass, nuisance, and finally the rule of absolute liability. *Insurance Co. v. Blythe Brothers Co., supra;* 40 N.C. Law Rev. 640.

Plaintiffs cite no direct authority in support of their contention. In fact, our research has not uncovered any case directly in point with the case at bar. In our opinion the common factor, vibrations, is not sufficient to place the case under consideration in the same category as blasting cases. Machines, motors and instrumentalities which cause vibrations are in such common use in present-day activities and the probability of damage from their use is so variable that the mere fact that all of them cause vibrations is not a reasonable basis for common classification for liability. There are many cases involving damage by vibrations set in motion by instrumentalities other than explosives,

e.g., pile drivers, drills, pavement breakers, etc. The overwhelming majority require allegation and proof of negligence. See *Moneier v. Koebig*, 66 S.E. 2d 465 (S.C.); *Ted's Master Service, Inc. v. Farina Brothers Co., Inc.*, 178 N.E. 2d 268 (Mass.); *Dussell v. Kaufman Constr. Co.*, 157 A. 2d 740, 79 A.L.R. 2d 957 (Pa.). For coverage of this subject, with summaries of cases, see "Anno.: Vibrations — Property Damage — Liability," 79 A.L.R. 2d 979-985.

There are a few exceptions. In Louisiana the rule of absolute and strict liability has been applied in pile-driving cases by reason of a statute prohibiting an owner from doing work on his own land which might cause damage to his neighbor. *Selle v. Kleamenakis*, 112 S. 2d 50. The rule has also been applied (in the absence of statute) in pile-driving cases in England and in Connecticut. *Hoare & Company v. McAlpine*, (1923) 1 Ch. 167, 12 B.R.C. 385; *Caporale v. C. W. Blakeslee and Sons, Inc.*, 175 A. 2d 561. In *Caporale* it is said, "To impose liability without fault, certain factors must be present: an instrumentality capable of producing harm; circumstances and conditions in its use which, irrespective of a lawful purpose or due care, involve a risk of probable injury to such a degree that the activity fairly can be said to be intrinsically dangerous to the person or property of others; and a causal relation between the activity and the injury for which damages are claimed. Defendant actor, even where he uses due care, takes a calculated risk which he, and not the innocent injured party, should bear." In each of the cases, *McAlpine* and *Caporale*, the court considers that the causal relation between the activity and the injury was established, emphasizes the intrinsically dangerous nature of the pile driver and the extensiveness of property damage, and makes the point that the owner of the damaged property was an innocent party. The principal and distinguishing feature of the rule of "liability without fault" is that negligence is not involved, or, rather, that the presence or absence of negligence is immaterial. All that the injured party must show is that the instrumentality is inherently dangerous within the meaning of the rule and that the activity caused the injury. The law then imposes liability on the actor who has introduced and set in motion the harmful force. Thus, the operation of the instrumentality, though used for a lawful purpose and with due care, becomes a legal wrong, against the harmful effect of which the actor is insurer. The innocent property owner is protected.

Whether this Court will extend the rule of absolute and strict liability to vibration cases other than those involving the use of high explosives, is a question that must await another case and another day. Even if we should be inclined to follow *McAlpine* and *Caporale* — the minority view — the rule is not applicable to the facts in the case at

bar. Defendant was drilling a well on plaintiffs' property in furtherance of a contract between plaintiffs and defendant; the activity was sought by plaintiffs and they brought defendant upon their premises to do the very thing he was doing — drilling a well. The plaintiffs are not innocent parties within the meaning of the rule as it has been applied. Here the activity was not upon adjoining or neighboring property or upon an adjoining thoroughfare, nor were the plaintiffs unconcerned with the activity itself. Here the duties of the parties *inter se* are to be determined by what was within their contemplation when they contracted. Furthermore, plaintiffs have not made a *prima facie* showing that the drill was intrinsically harmful or that the proximate cause of the damage were the vibrations set up by the drill.

Plaintiffs contend, in the alternative, that the doctrine of *res ipsa loquitur* is applicable to this case. The rule of absolute and strict liability differs from the doctrine of *res ipsa loquitur* in that the former is a rule of liability which operates regardless of the presence or absence of negligence, while the latter is a rule of evidence which operates as *prima facie* proof of negligence. *Young v. Anchor Co.*, 239 N.C. 288, 79 S.E. 2d 785. The doctrine of *res ipsa loquitur* has been applied in a case in which an exploding boiler caused damage *(Harris v. Mangum,* 183 N.C. 235, 111 S.E. 177), and in a case in which damage resulted when gasoline escaped from storage and was ignited *(Newton v. Texas Co.*, 180 N.C. 561, 105 S.E. 433), on the theory that a boiler will not explode and gasoline will not escape from storage in the absence of neglect of the duties of inspection and proper management. "For the doctrine to apply the plaintiff must prove . . . that the occurrence causing the injury is one which ordinarily does not happen without negligence" and "that the instrumentality which caused the injury was under the exclusive control and management of the defendant." *Jackson v. Gin Co.*, 255 N.C. 194, 120 S.E. 2d 540. It is true that the drill and its operation were under the exclusive control and management of defendant, but the evidence does not establish the causal relation between the operation of the drill and the damage to the house, nor that defendant had control of all factors which might have caused damage. *Res ipsa loquitur* does not apply where more than one inference can be drawn from the evidence as to the cause of the injury. *Springs v. Doll,* 197 N.C. 240, 148 S.E. 251; *Lamb v. Boyles*, 192 N.C. 542, 135 S.E. 464. It has been held in other jurisdictions that the doctrine does not apply in vibration cases. *Ted's Master Service, Inc. v. Farina Brothers Co., Inc., supra; Ockman v. T. L. James & Co., Inc.,* 124 S. 2d 778 (La.).

Defendant owed plaintiffs the duty of due care in the selection and operation of appropriate well-drilling equipment, in the location of the well, and in the inspection of the premises and the adoption of safety

measures, all to the end that in the prosecution of the work the plaintiffs would not suffer injury to their dwelling because of his negligent acts or defaults. *Savannah Asphalt Co. v. Blackburn,* 99 S.E. 2d 511 (Ga.); *Petillo v. Kennedy & Smith,* 31 N.Y.S. 2d 481; *Moneier v. Koebig, supra; Dussell v. Kaufman Constr. Co., supra.* However, plaintiffs have failed to produce evidence of any negligent breach of duty, as specified by them in the complaint, on the part of defendant. Negligence is not presumed from the mere fact of injury. *Lane v. Dorney,* 250 N.C. 15, 108 S.E. 2d 55.

The judgment below is

Affirmed.

ERNEST FLOYD FOSTER v. MARGARET ANN FOSTER.

(Filed 18 June, 1965.)

1. Appeal and Error § 21—

An assignment of error to the signing of the judgment presents for review whether the agreed statement of facts supports the judgment and whether error of law appears on the face of the judgment.

2. Husband and Wife § 9—

The common law disability of spouses to sue each other in tort has been completely removed in this State. G.S. 52-10, G.S. 52-10.1.

3. Parent and Child § 2—

An unemancipated child may not sue the parent for negligent injury, even after becoming of age.

4. Infants § 4; Parent and Child § 4—

Negligent injury to an unemancipated child gives rise to a right of action in the infant to recover for his physical pain and mental suffering and the impairment of earning capacity after majority, and a right of action in the father to recover for loss of services of the infant during minority and other pecuniary expenses incurred or likely to be incurred by the parent as a result of the injury, including expenses of necessary medical treatment.

5. Parent and Child § 4; Husband and Wife § 9—

The husband may maintain an action against the wife to recover the amounts expended by the husband for medical treatment of their child made necessary by the wife's negligent injury to the child since such damages come within the purview of G.S. 56-10.1, imposing liability on husband or wife for damages to a property right of the spouse.

6. Costs § 4—

Upon recovery of judgment in an amount less than one thousand dollars by the husband against the wife for sums expended for medical expenses

made necessary by the wife's negligent injury of their child, the court may allow a sum for the husband's counsel fee to be taxed as part of the costs.

APPEAL by defendant from *Cowper, J.*, October 1964 Special Session of BEAUFORT.

Civil action by husband against his wife to recover medical expenses expended by him on behalf of their minor child for injuries to said child allegedly caused by defendant's actionable negligence in the operation of an automobile, heard upon an agreed statement of facts signed by counsel for both parties, as follows:

"1. Plaintiff and defendant are and were on May 9, 1963, husband and wife.

"2. Pamela Sue Foster is the infant daughter of both plaintiff and defendant.

"3. On May 9, 1963, plaintiff was the owner of a 1959 Buick automobile which he kept and maintained as a family purpose automobile.

"4. On May 9, 1963, defendant while operating said Buick automobile with the consent of plaintiff, collided with an automobile owned and operated by one, Dallas B. Waters.

"5. Said collision was solely and proximately caused by the negligence of the defendant.

"6. Pamela Sue Foster, infant daughter of plaintiff and defendant, was a guest passenger in the automobile being operated by defendant at the time of said collision and said infant sustained certain bodily injuries as a direct and proximate result of said collision and defendant's negligence. The plaintiff was not present at the time of said collision.

"7. That by reason of the said injuries sustained by Pamela Sue Foster, she was hospitalized and received medical attention from Dr. W. E. Swain, M. D.; it was reasonably necessary for the health and welfare of said minor that she receive medical attention and that medical expenses be incurred for her benefit.

"8. The medical expenses aforesaid incurred on behalf of said infant have been paid by plaintiff in the sum of $438.60, which sum is reasonable for the services rendered said infant."

The court, being of opinion that plaintiff is entitled to recover from defendant the sum of $438.60, ordered and decreed that plaintiff recover from defendant the sum of $438.60, and the costs of the action,

which shall include the sum of $100 for plaintiff's counsel fees to be taxed as part of the costs.

From the judgment, defendant appeals.

Carter & Ross for defendant appellant.

Rodman & Rodman by Edward N. Rodman for plaintiff appellee.

PARKER, J. Plaintiff and defendant filed in this Court an additional agreement of facts signed by counsel for both parties, reading as follows:

> "1. That on May 9, 1963, Pamela Sue Foster, daughter of plaintiff and defendant herein, was an unemancipated minor age 4 months and resided in the home of her parents at Route 2, Belhaven, North Carolina.
>
> "2. That at the time of the institution of this action, Pamela Sue Foster was still unemancipated and residing in the home of her parents."

Defendant has one assignment of error, and that is to the signing of the judgment. This presents for review the question as to whether the agreed statement of facts support the judgment and whether error of law appears on the face of the judgment. Strong's N. C. Index, Vol. 1, Appeal and Error, § 21.

Scholtens v. Scholtens, 230 N.C. 149, 52 S.E. 2d 350 (1949), was a case where the husband brought action against his wife to recover damages for personal injuries which he received in an automobile accident allegedly caused by her actionable negligence. The Court held that the husband had no such right of action.

The 1951 General Assembly in effect overruled the holding in the *Scholtens* case in respect to future cases by Chapter 263, 1951 Session Laws, codified as G.S. 52-10.1, which provides as follows: "A husband and wife have a cause of action against each other to recover damages sustained to their person or property as if they were unmarried." 29 N. C. Law Review 395-96. Robert E. Lee, Professor of Law, Wake Forest College, states in his North Carolina Family Law, Vol. 2, p. 473, note 156: G.S. 52-10.1 "was drafted by the writer of this text and designed to change the holding in *Scholtens v. Scholtens,* 230 N.C. 149." The common law disability of the spouses to sue each other in tort actions has been completely removed in North Carolina by G.S. 52-10, 52-10.1. *Cox v. Shaw,* 263 N.C. 361, 139 S.E. 2d 676; Lee, North Carolina Family Law, Vol. 2, § 211, p. 472.

On 9 May 1963, the day she was injured by the actionable negligence of her mother in the operation of an automobile, Pamela Sue Foster,

daughter of plaintiff and defendant, was an unemancipated child, age four months, and was living in the household of her parents. Such being the case, Pamela Sue Foster cannot in North Carolina maintain a tort action against her mother for her personal injuries negligently inflicted by her mother in the operation of an automobile on 9 May 1963. *Cox v. Shaw, supra; 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; Lee, North Carolina Family Law, Vol. 3, § 248, pp. 162-63. It seems that our cases on this specific point are in accord with those in the overwhelming majority of other jurisdictions. Lee, North Carolina Family Law, Vol. 3, § 248, pp. 162-63; Annot. 19 A.L.R. 2d, p. 439 *et seq.* We held in *Small v. Morrison, supra,* decided by a divided Court, that the fact that the particular defendant-parent is protected by insurance does not enable the minor child to maintain the action if he could not otherwise have maintained it. Professor Lee in North Carolina Family Law, Vol. 3, § 248, pp. 169-170, states in effect that most states hold as does North Carolina in *Small v. Morrison, supra.* Pamela Sue Foster cannot maintain an action against her mother for her personal injuries negligently inflicted by her mother during her minority on 9 May 1963 even after she has attained her majority. Annot. 19 A.L.R. 2d, p. 438; Lee, North Carolina Family Law, Vol. 3, p. 163; see *Small v. Morrison, supra.*

In this jurisdiction two causes of action come into existence when a person by reason of his tortious conduct is liable to an unemancipated infant living in the household of his parents for personal injuries: (1) the right of the infant to recover for his mental and physical pain and suffering, and the impairment of earning capacity after attaining majority; and (2) the right of the father to recover for loss of services of the infant during minority, and other pecuniary expenses incurred or likely to be incurred by the parent as a consequence of the injury, including expenses of necessary medical treatment. *Doss v. Sewell,* 257 N.C. 404, 125 S.E. 2d 899; *Ellington v. Bradford,* 242 N.C. 159, 86 S.E. 2d 925; *Smith v. Hewett,* 235 N.C. 615, 70 S.E. 2d 825, 32 A.L.R. 2d 1055; *White v. Comrs. of Johnston,* 217 N.C. 329, 7 S.E. 2d 825; *Williams v. R. R.,* 121 N.C. 512, 28 S.E. 367; Lee, North Carolina Family Law, Vol. 3, § 241.

Williams v. R. R., supra, was heard upon agreed facts showing that the 19-year-old son of plaintiff was employed by defendant without the knowledge or consent of the father, and was injured while so employed, but the injury was not due to the negligence of defendant. The claim of the plaintiff-father was for damages for loss of services of his son after and in consequence of his injury. The trial judge, being of opinion that on the facts agreed the plaintiff-father was not entitled to recover,

ordered and adjudged that plaintiff take nothing. This Court in finding no error said: "For the services the son had rendered, compensation belonged to the father; but as the loss of further services was caused by an injury which was not caused by the fault of the defendant it cannot be held liable for such loss."

The weight of authority seems to be that "a person who, without a parent's consent, knowingly employs a minor child to perform work, or to work in a place, which is dangerous, is liable to the parent for damages accruing to him from an injury resulting to his child, irrespective of whether the injured child could maintain an action for his injuries." Annot. 94 A.L.R., 1214. Among the cases from several jurisdictions cited in the annotation to support the statement is our case of *Haynie v. Power Co.*, 157 N.C. 503, 73 S.E. 198, 37 L.R.A. (N.S.) 580, Ann. Cas. 1913C, 232.

In *Musgrove v. Kornegay*, 52 N.C. 71, 74, Pearson, C.J., speaking for a unanimous Court, said: "A father is entitled to the services of his child until he arrives at the age of 21. He has a right of property in the services * * *."

This is said in 39 Am. Jur., Parent and Child, § 74, p. 719:

> "Although the parent's right of action is sometimes spoken of in legal parlance as a personal injury case, it is not strictly so, but rather, being dependent on the loss of services of the child and other pecuniary loss, is more properly treated as an action for damage to a property right. It has been held to be within a statute imposing liability for 'injuries to person or property.'"

This is said in Annot. 42 A.L.R. 717, 724:

> "A parent suing for loss of his child's services (or medical expenses, etc.), or a husband suing for loss of services and society of his wife, occasioned by an injury, is, in fact as well as established theory, suing for damage to a property right, — a damage to his property, — just as if (to use the classic, but unflattering, simile) his donkey or his oysters had been injured."

In *Psota v. Long Island R. Co.*, 246 N.Y. 388, 159 N.E. 180, the Court held that the words "injuries to person or property" in Highway Law (Consol. Laws, c. 25) § 282-e, making an automobile owner liable for death or "injuries to person or property" resulting from negligence in the operation of a motor vehicle, include a father's action for loss of services of child or wife.

This is said in *Tidd v. Skinner*, 225 N.Y. 422, 122 N.E. 247, 251:

> "The common-law action which a master or parent has for loss of services of a servant or minor child is based upon an injury to a property right. Compensation is allowed for loss of services to which the master or parent is entitled and for the expenses incurred by reason of such injury."

This is said in *Krasner v. O'Dell,* 89 Ga. App. 718, 80 S.E. 2d 852.

> "Medical expenses, incurred for treatment of a minor child's injuries, and the loss of the child's services, when caused by the tortious act of another, are elements of damage to the father's property rights, and give rise to a cause of action in the father."

To the same effect see: *Automobile Underwriters v. Camp,* 109 Ind. App. 389, 32 N.E. 2d 112; *Wilkie v. Roberts,* 91 Fla. 1064, 109 So. 225; *Pritsker v. Greenwood,* 47 R.I. 384, 133 A. 656; *Bioni v. Haselton,* 99 Vt. 453, 134 A. 606.

It seems clear that plaintiff's action to recover necessary medical expenses expended by him for his infant daughter in the instant case is within the fair intent and meaning of G.S. 52-10.1 imposing liability for damages sustained to property.

In Lee, North Carolina Family Law, Vol. 3, § 248, p. 170, it is said: "In North Carolina and most jurisdictions a minor child may maintain an action against the employer of his parent for personal injuries sustained as the result of the parent's negligence within the scope of his employment." Professor Lee cites numerous authorities in support of his statement, including our case of *Wright v. Wright,* 229 N.C. 503, 507-08, 50 S.E. 2d 540, 544. In the *Wright* case it is 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 *respondeat superior* when the injury was inflicted by the servant acting as such."

In *Cox v. Shaw, supra,* the Court held that even though the wife-mother's administrator could not recover for her wrongful death from the estate of her son, he could recover from the husband-father, because of the son's negligence, under the doctrine of *respondeat superior.*

The agreed facts are sufficient to invoke the family car purpose doctrine. In *Smith v. Simpson,* 260 N.C. 601, 133 S.E. 2d 474, it is said: "The very genesis of the family purpose doctrine is agency. The question of liability for negligent injury must be determined in that aspect." It seems clear from the agreed statement of facts that at the time of the injuries to Pamela Sue Foster defendant was the agent of plaintiff, and was acting within the scope of her authority as his agent. It has been held (or assumed) in many cases that, in the absence of waiver or

estoppel on his part, a principal or master has a right of action against the agent or servant for loss or damage resulting to the principal or master which has proximately resulted from the agent's or servant's negligence. 3 C.J.S., Agency, § 286, (a); Annot. 110 A.L.R. 832, where many cases are cited, including one from North Carolina. What was said by Ervin, J., writing the majority opinion in *Rollison v. Hicks,* 233 N.C. 99, 63 S.E. 2d 190, in respect to actions brought by the master against the servant to recover for injuries suffered by the former as a result of the latter's actionable negligence is also applicable to similar actions brought by a principal against his agent. Justice Ervin said:

> "The doctrine of imputed negligence has no application, however, to actions brought by the master against the servant to recover for injuries suffered by the former as a result of the latter's actionable negligence. * * *
>
> "* * * But it would offend justice and right to impute the negligence of a servant to his master and thus exempt him from the consequences of his own wrong-doing where the negligence proximately causes injury to a master who is without personal fault."

According to the agreed facts "plaintiff was not present at the time of the said collision." There is no waiver or estoppel on his part in the instant case. He was not in the automobile at the time of the collision, and that is another reason why his wife's negligence cannot be imputed to him. 65 C.J.S., Negligence, § 168, (f).

In 39 Am. Jur., Parent and Child, p. 718, it is said: "But the parent's right of action, although distinct from the child's right of action, is based upon and arises out of the negligence which causes the injury to the child. Thus, the parent cannot recover unless the child also has a good cause of action." To the same effect, 67 C.J.S., Parent and Child, p. 742; Restatement, Torts, § 703; Annot. 94 A.L.R., "II. General Rule," p. 1211; *Levesque v. Levesque,* 99 N.H. 147, 106 A. 2d 563; *Cavanaugh v. First National Stores,* 329 Mass. 179, 107 N.E. 2d 307. The general rule of law to the effect that as Pamela Sue Foster in the instant case cannot in North Carolina maintain a tort action against her mother for her personal injuries negligently inflicted by her mother in the operation of an automobile, there can be no recovery by plaintiff here, is not the law in this jurisdiction by virtue of the express provisions of G.S. 52-10.1.

By virtue of the express provisions of G.S. 52-10.1, and upon the agreed facts, the court below was correct in holding that plaintiff was entitled to recover from the defendant the medical expenses expended by him on behalf of Pamela Sue Foster for injuries to her caused by defendant's actionable negligence in the operation of an automobile,

and in decreeing that plaintiff recover from the defendant the sum of $438.60 and the costs of the action, which shall include the sum of $100 for plaintiff's counsel's fees to be taxed as part of the costs. As to allowance of counsel's fees here, see G.S. 6-21.1.

The agreed facts support the judgment and no error of law appears on the face of the record. The judgment below is

Affirmed.

STATE OF NORTH CAROLINA v. FRANK JOSEPH RINALDI.

(Filed 18 June, 1965.)

1. Homicide § 20—

Evidence of prior bickering between defendant and his wife, of defendant's financial difficulties, his procurement of insurance on the life of his wife, his attempt to hire a person to kill his wife, and, on the morning she was killed, his statement to the person he had attempted to hire that he had killed his wife himself, and that she was found in their apartment dead from strangulation, etc., *held* sufficient to overrule nonsuit in a prosecution for homicide, notwithstanding defendant's evidence of alibi.

2. Criminal Law § 98—

Evidence permitting conflicting conclusions in regard to the fact in issue must be submitted to the jury, it being the function of the jury to evaluate the evidence and determine the truth or falsity of the testimony.

3. Criminal Law § 34—

In a prosecution of a husband for the murder of his wife, evidence tending to show that prior to the homicide he had made improper sexual advances toward the male witness does not, standing alone, tend to establish defendant's guilt of his wife's murder, and the admission over his objection of the evidence tending to show that he was a sexual pervert, emphasized in the solicitor's argument to the jury, is prejudicial error.

PARKER, J., dissenting.

SHARP, J., Concurs in dissent.

APPEAL by defendant from *Mallard, J.*, November 1964 Special Criminal Session of ORANGE.

Defendant was charged and convicted of the willful and premeditated murder of his wife, Lucille Begg Rinaldi (Deceased), on December 24, 1963. The jury recommended life imprisonment. Judgment imposing punishment, as recommended, was entered. Defendant excepted and appealed.

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

Cooper & Winston; Bryant, Lipton, Bryant & Battle for defendant appellant.

RODMAN, J. Defendant makes two basic contentions: (1) The evidence is not sufficient to establish that he was in any way responsible for his wife's death; and (2) he is, in any event, because of prejudicial error occurring during the trial, entitled to have another jury pass on his guilt or innocence.

The evidence is sufficient for a jury to find these facts: Defendant and Deceased were raised in Waterbury, Connecticut. Their acquaintance dated from high school days. Defendant took her to the Senior Prom.

Defendant, a graduate student in English at Chapel Hill, was, in 1963, 33 years of age; Deceased was about the same age. They became engaged some time during the spring of 1963. Deceased was then living with her family in Waterbury. She was teaching school. Defendant needed money to pay his expenses while at Chapel Hill. Deceased, on at least three occasions, sent defendant checks for $200 or more, money that she had saved from her salary. They were married in Waterbury, Connecticut, the latter part of July 1963.

On July 3, 1963, applications were made to Prudential Life Insurance Company for insurance on their respective lives. The policy insuring the life of Deceased called for a payment of $20,000 on proof of death, with provision for an additional $20,000 in the event of accidental death. Defendant, designated as "fiance," was named as beneficiary. At the same time, defendant applied for and obtained a policy for $10,000 on his life. This policy also provided for double indemnity in the event of accidental death. Deceased was named as beneficiary in that policy.

In the spring of 1963, Deceased had sought and obtained a contract to teach in the public schools in Chapel Hill for the ensuing school year. School opened on September 9. Deceased came to Chapel Hill a few days before school opened. She attended school conferences on two days prior to the opening of school, but was not present when school opened. She returned to her family in Waterbury. On September 16, she wrote school officials offering her resignation, explaining it was necessary because of extreme personal family trouble.

In October 1963, defendant applied for a loan of $2,300 from the University Loan Fund for Students. The loan was approved on October 22. He was advanced $400 on his loan early in November. On December 24, he owed the University this $400. In his application for

the loan, he included among his obligations the sum of $720 for annual life insurance premiums.

On November 1, 1963, defendant obtained a loan of $752.24 from Carolina Bank & Trust Company. The amount owing on that loan was, on December 24, 1963, $720.24.

Not long after the marriage, defendant made inquiries with respect to his right to share in property which he expected his wife to inherit.

Defendant occupied a two bedroom apartment at 105 North Street in Chapel Hill. He and his wife occupied this apartment when she was in Chapel Hill in September. Defendant continued to occupy the apartment after his wife returned to Waterbury. In the summer of 1963, defendant employed Alfred Foushee to do a "general house cleaning job" at the apartment. Not long afterward, defendant got Foushee to go to the apartment on the pretext that another house cleaning was needed. Defendant then sought to hire Foushee to kill his wife, stating he wanted it done in such a way as to make it appear accidental. Foushee declined. Defendant, on subsequent occasions, sought to get Foushee to kill his wife, or, if he would not do it personally, to locate someone who would do it. He offered to pay Foushee $500 if he would locate someone who would murder his wife. Foushee continued to rebuff defendant.

Deceased returned to Chapel Hill on December 21. About 1:45 p.m. on December 24, the police, in response to a telephone call, went to defendant's apartment where they found defendant and John Sipp. The living room was in disarray. Deceased's body was lying face down on the floor. She was clad in pajamas and a housecoat. Her face was bloody; a scarf was knotted around her neck, covering her mouth. Her pocketbook was lying open on the floor; part of the contents were scattered on the rumpled rug. The body was immediately in front of a sofa, on which was a pillow showing blood stains.

In the apartment when the police arrived were defendant and John Sipp. They informed police they had spent the morning in Durham shopping. When they returned from Durham, they stopped at the Post Office a moment, then went to a store, and from there to the apartment. Sipp, at defendant's request, promptly called the police and a priest.

Both Sipp and defendant told the police Sipp had, shortly before 9 a.m., stopped at the apartment to pick up defendant for a trip to Durham, pursuant to arrangements made the preceding night. They had been together from the time defendant left the apartment until they returned shortly before 2:00 p.m.

Foushee testified to seeing defendant in the business section of Chapel Hill about noon, at which time defendant said to Foushee: "It is over, I did it."

An autopsy was performed on the night of December 24. Work began about 8:40 and was completed about 1:00 a.m. Christmas morning. Rigor mortis and livor mortis were estimated at 2 or 3 plus, where 4 plus is maximum. There were lacerations above the eyes; the tissues about both eyes were swollen, a dark blue. A pathologist expressed the opinion that the visible injuries to the head were caused by blows by some blunt instrument. The blows, in his opinion, were not sufficient to cause death, but would have rendered Deceased unconscious. In his opinion, death was caused by "asphyxia or suffocation. That suffocation could have been caused by a scarf tied tightly around her nose and mouth. That asphyxia could have been caused by a pillow being pressed against her face. * * * Based on the autopsy findings, death could have occurred any time between 10:00 A.M. and 5:00 P.M. on December 24, 1963." He further testified: "I do have an opinion satisfactory to myself as to the maximum time which could have elapsed between the blow the decedent received on the back of her head and her death. It is approximately one hour. More likely 30 minutes, certainly no more than one hour. There was not any evidence of skull fracture."

The foregoing is a summary of the evidence tending to support the State's contention that defendant, having meditated the question, wilfully and deliberately killed his wife. The evidence, with the inferences which may be drawn therefrom, if true, is sufficient to support a verdict of guilty of the charge contained in the bill of indictment. Whether entirely true or entirely false, or true in part and false in part, presented questions of fact to be determined by the jury. The truth or the falsity of the evidence was not for the court. The motion to nonsuit was properly overruled.

Defendant offered evidence from which the jury could find that he was not in the vicinity of the apartment between 8:45 a.m., when he and Sipp went to Durham, and 1:40 p.m., when he and Sipp returned to the apartment and found Mrs. Rinaldi dead. The principal witness for the defense was Sipp, who testified at length in support of defendant's claimed alibi. The other witnesses for the defendant corroborated Sipp's testimony, or testified to Sipp's good character. Defendant did not take the stand, nor did he offer evidence as to his character.

Foushee, after testifying as to defendant's effort on the second visit to the apartment to bribe him to kill Mrs. Rinaldi, and his refusal, testified: "Mr. Rinaldi called me a little while after that and told me to come over to where he was sitting at the time. He was sitting on a couch. I was sitting in a chair directly in front of him. * * * Mr.

Rinaldi asked me to come over and when I got over there he reached for my privates, my pants there, and he put his hands there; I pushed them down. * * * He told me to unzip my pants; I wouldn't do it; I pushed him off again, so he said, 'Take it out, and let me see it.' * * * I didn't take it out, so he reached in his pocket and got some money out and handed it to me; I still rejected him, and after I kept rejecting him trying, he then told me he was sorry, he hated he had tried to do anything like that, he was ashamed of himself. After that I left."

Defendant objected to the testimony quoted above. The objections were overruled. The solicitor, in his argument to the jury, made use of the testimony to evaluate defendant's character, a character that would not hesitate to murder. Evidence tending to show that defendant is a sexual pervert does not, standing alone, tend to establish the fact that he is also a murderer. To make such evidence competent, the State would have to show some direct connection between defendant's abnormal propensities and the charge of homicide for which he is then on trial.

The jury should not be prejudiced to defendant's detriment by evidence tending to prove that he is a moral degenerate, prepared to commit the abominable and detestable crime against nature, a felony.

This Court has repeatedly held such evidence incompetent, requiring a new trial. A full statement of the rule, the reasons for the rule, and the limitations on the rule are stated clearly and concisely in the able opinion of Ervin, J. in *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364. He supports his conclusions with copious citations. See also *State v. Gammons,* 258 N.C. 522, 128 S.E. 2d 860; *State v. Stone,* 240 N.C. 606, 83 S.E. 2d 543; *State v. Brady,* 238 N.C. 404, 78 S.E. 2d 126; *State v. Needham,* 235 N.C. 555, 71 S.E. 2d 29; *State v. Fowler,* 230 N.C. 470, 53 S.E. 2d 853; *State v. Page,* 215 N.C. 333, 1 S.E. 2d 887; *State v. Castle,* 133 N.C. 769, 46 S.E. 1; Stansbury's N. C. Evidence, §§ 80 and 104.

The evidence was both prejudicial and incompetent.

In view of our conclusion that defendant is entitled to a new trial because of the admission of incompetent evidence, it is neither necessary nor advisable to discuss defendant's other assignments of error. The asserted errors may not arise in the next trial.

New trial.

PARKER, J., dissenting. The majority opinion holds that defendant is entitled to a new trial by reason of the admission in evidence over his objections and exceptions of testimony of the State's witness Foushee tending to show that defendant was a sex deviate — the testimony is set forth in the majority opinion and is not repeated here. The ma-

jority opinion holds that such evidence was incompetent, prejudicial to defendant, and entitles him to a new trial. The reason assigned is the general rule that in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense. *S. v. McClain,* 240 N.C. 171, 81 S.E. 2d 364.

In *S. v. McClain, supra,* this is stated: "The general rule excluding evidence of the commission of other offenses by the accused is subject to certain well recognized exceptions, which are said to be founded on as sound reasons as the rule itself. 22 C.J.S., Criminal Law, section 683. The exceptions are stated in the numbered paragraphs, which immediately follow." Ervin, J., the writer of the opinion in this case, with his usual clarity and correctness, sets forth eight exceptions, most of which exceptions are supported by superplenary authority. In my opinion, taking into consideration the entire conversation between defendant and Foushee, all the evidence in respect to the relationship between defendant and Foushee, and all the attendant circumstances, this evidence is competent under Judge Ervin's paragraphs 1, 2, 3, and 5. I vote to affirm the judgment below.

SHARP, J., concurs in dissent.

H. V. GLENN, SR., ADMINISTRATOR OF HEBERT VINCENT GLENN, JR., DECEASED v. BRANTLEY SMITH AND HERBERT EUGENE SMITH.

(Filed 18 June, 1965.)

1. Evidence § 42—

The opinion of a witness, even though he may be qualified as an expert, is not admissible as to matters within the ordinary experience of men, since in such instance the jury is capable of deciding such question without the aid of opinion evidence.

2. Same; Automobiles § 38— Expert testimony as to whether vehicle would "fishtail" when suddenly accelerated held incompetent.

The conflicting contentions were whether defendant, in attempting to pass on a left curve a preceding vehicle driven by plaintiff's intestate, collided because of his failure to drive his car completely to the left of the center line, or whether he drove completely to the left of the center line and, as he was passing, intestate accelerated his vehicle, causing the rear of intestate's vehicle to jerk to the left and hit defendant's car. *Held:* Since the question involves many imponderables, such as the respective speed of the vehicles, inflation of tires, condition of road, power used in accelerating,

and the respective positions of the cars at the time, testimony of a witness qualified as a traffic engineer as to whether under such circumstances intestate's car would "fishtail" is incompetent and was properly excluded.

3. Trial § 15—

The rule that objection to the admission of evidence will be considered only upon the ground stated in the objection does not apply when the evidence is excluded by statute.

4. Bill of Discovery § 4—

Testimony elicited on adverse examination in one case is not competent upon the trial of a companion case instituted by a plaintiff who is a stranger to the prior action. G.S. 1-568.14.

APPEAL by plaintiff from *Sink, E.J.*, October Civil Session 1964 of DURHAM.

This is an action for wrongful death. The plaintiff alleged that his intestate, his deceased son, Herbert Vincent Glenn, Jr., was killed on 30 November 1961, in an automobile collision allegedly caused by the negligence of the defendant Brantley Smith in the operation of an automobile owned by his father, Herbert Eugene Smith, his co-defendant.

On the evening of 30 November 1961, at approximately 10:00 P.M., plaintiff's intestate was operating his 1959 Ford automobile in a southerly direction on Guess Road, near the city limits of the City of Durham; that at the same time the defendant, Brantley Smith, was operating a 1954 Lincoln automobile on Guess Road and was also proceeding south on said road, and at the time there were riding with him in said Lincoln automobile Frances Carpenter, Carolyn Carpenter and John Slaughter.

Plaintiff further alleged that the automobile operated by Herbert Vincent Glenn, Jr., in which his wife, Jo Ann Lasater Glenn, was riding as a passenger, was proceeding south on Guess Road in a careful and proper manner; that the automobile operated by the defendant Brantley Smith attempted to overtake and pass the Glenn automobile, and in the course of overtaking it a collision resulted in which both passengers in the Glenn automobile lost their lives.

The plaintiff's evidence tended to show that the defendant Brantley Smith undertook to pass the Glenn car on a left curve without pulling his car completely over to the left side of the road; that the collision occurred before the driver of the Lincoln car pulled it entirely to the left of the center lane of the highway Brantley Smith testified: "When I attempted to pass, I went to the left-hand side of the road and tried to go around him and he sped up when I tried to go around him. When he sped up, my right front was about to his left rear, something like

that. When he sped up, he seemed to get in another gear or something — I don't know what he done — jumped over and brushed me. The car just seemed to jerk up all of a sudden. The car seemed to jump or jerk when I attempted to pass him and sped up. The rear end of the Ford went over on my side of the road, left-hand side. It disappeared all of a sudden. The cars brushed when it came over. When the cars brushed, my car was completely over the left-hand side of the road. After the two cars brushed, his car disappeared * * *."

The evidence tended to show that both cars left the highway about the same time, the Ford going off the highway to the right and the Lincoln car to the left. Both occupants of the Glenn car were killed. No one was injured in the Lincoln car.

Prior to the filing of the complaint in the case of *Mrs. J. R. Lasater, administratrix of the estate of Jo Ann Lasater Glenn v. Brantley Smith, Frances Carpenter, Carolyn Carpenter and John Slaughter,* an examination of the defendant John Slaughter was held pursuant to the provisions of G.S. 1-568.10. The defendant offered this examination in evidence in this case. The plaintiff objected on the ground that John Slaughter at the time lived in Henderson, North Carolina, within forty miles of Durham and, therefore, under the statute, G.S. 8-83(9), his deposition was not admissible. The court overruled the objection, and the plaintiff excepted.

For the purpose of rebutting the testimony of the defendant that the plaintiff's Ford automobile suddenly jerked over on his side of the road, the plaintiff attempted to offer expert testimony that a standard 1959 Ford automobile could not possibly "fishtail." The plaintiff offered an expert in the field of traffic engineering, and the court ruled the witness to be an expert in his field. Whereupon, plaintiff's counsel attempted to ascertain from this witness whether or not he was familiar with a standard 1959 Ford automobile; whether or not he had driven a 1959 Ford automobile; and whether or not in his opinion a 1959 Ford automobile could "fishtail."

The court refused to allow the expert testimony with respect to any of the above-stated questions, and further declined to allow the plaintiff's counsel to even ask such questions for the record out of the presence of the jury. Plaintiff excepted.

The case was submitted to the jury, and the jury answered the issues of negligence and contributory negligence in the affirmative. Judgment was accordingly entered, and the plaintiff appeals, assigning error.

Everett, Everett & Everett for plaintiff appellant.
Bryant, Lipton, Bryant & Battle for defendant appellees.

DENNY, C.J. The appellant assigns as error the refusal of the court below to permit a traffic engineer, who was held by the court to be an expert in his field, to testify concerning his familiarity with a standard 1959 Ford automobile and whether or not he had an opinion as to whether a 1959 Ford automobile would "fishtail" (that is, swing to its left) under the conditions described by the witnesses.

Just what an automobile would or would not do in rounding a left curve involves many imponderables. How fast was the car being operated? Were the tires properly and evenly inflated? How much power was used in accelerating the car? Was the car otherwise in good mechanical condition? What was the condition of the road? Did the road have any loose gravel or stones upon its surface? Were the respective cars in their proper lane immediately prior to the collision? *et cetera.* The evidence with respect to the last question was in sharp conflict.

The plaintiff offered evidence to the effect that the Ford car was never in the left lane of the road, that it never crossed the center line of Guess Road. On the other hand, the defendants offered evidence to the effect that the Ford car, when it was suddenly accelerated, jerked or "fishtailed" to its left and brushed the Lincoln car which was traveling in the left lane, causing the damages sustained by the plaintiff's intestate.

The opinion of a witness, even though he may be competent to testify as an expert, is not admissible as to matters within the ordinary experience of men. The jury is deemed capable of deciding such questions without the aid of opinion evidence. *Great Eastern Casualty Co. v. Kelley* (1917, Tex. Civ. App.), 194 S.W. 172. Most jurors are thoroughly familiar with the operation of automobiles, and are capable of determining what inferences the facts will permit or require. *Tyndall v. Hines Co.*, 226 N.C. 620, 39 S.E. 2d 828.

In *Shaw v. Sylvester*, 253 N.C. 176, 116 S.E. 2d 351, this Court said:

> "* * * A witness who investigates but does not see a wreck may describe to the jury the signs, marks, and conditions he found at the scene, including damage to the vehicle involved. From these, however, he cannot give an opinion as to its speed. The jury is just as well qualified as the witness to determine what inferences the facts will permit or require. *Tyndall v. Hines Co.*, 226 N.C. 620, 39 S.E. 2d 828.
>
> "The qualified expert, the nonobserver, may give an opinion in answer to a proper hypothetical question in matters involving science, art, skill and the like. The plaintiff contends Sgt. Etherage placed himself in this expert category by having investigated more than 400 wrecks. There is no evidence that wrecks follow any set

or fixed pattern. An automobile, like any other moving object, follows the laws of physics; but which door came open first during the movement would depend upon the amount and direction of the physical forces applied, and the place of their application. There was no evidence the witness ever investigated an accident when both doors were open and both occupants thrown out. In this case neither the nonobserver nor the jury could tell who was the driver. *Tyndall v. Hines Co., supra; Everett v. Fischer,* 147 P. 189; *Burwell v. Sneed,* 104 N.C. 118, 10 S.E. 152."

In our opinion, the expert testimony which the plaintiff sought to offer was properly excluded, and we so hold.

The plaintiff also assigns as error the admission of the adverse examination of John Slaughter, which was taken in the case of *Mrs. J. R. Lasater, administratrix v. Brantley Smith, Frances Carpenter, Carolyn Carpenter and John Slaughter,* for the purpose of obtaining information necessary to enable the plaintiff in that case to prepare and file her complaint.

The plaintiff objected to the admission of this examination on the ground that at the time of the trial below John Slaughter was residing in Henderson, North Carolina, within forty miles of Durham. The objection was based upon the provisions of G.S. 8-83, subsection 9. This statute provides that every deposition taken and returned in the manner provided by law may be read on the trial of the action or proceeding, or before any referee, in the following cases, and not otherwise:

"9. If the witness has been duly summoned, and at the time of the trial is out of the State, or is more than seventy-five miles by the usual public mode of travel from the place where the court is sitting, without the procurement or consent of the party offering his deposition."

Ordinarily, an objection made upon certain grounds stated, only those stated can be made the subject of review upon appeal, except where the evidence is excluded by statute. McIntosh, North Carolina Practice and Procedure, 2nd Ed., Vol. II, § 1532, subsection 7, page 63, citing *Presnell v. Garrison,* 121 N.C. 366, 28 S.E. 409.

It is provided in G.S. 1-568.24, "Use of deposition at trial. — (a) Upon the trial of the action or at any hearing incident thereto, any party may offer in evidence the whole, but, if objection is made, not a part only, of any deposition taken pursuant to this article, but such deposition shall not be used as evidence against any party not notified of the taking thereof as provided by G.S. 1-568.14."

G.S. 1-568.14 requires the examining party to give notice to all parties other than the party to be examined. This statute requires the

notice to be delivered to the party five days before the examination or mailed to him ten days before the date of such examination, and the notice shall consist of a copy of the order of examination. There is nothing in the record before us to indicate that the plaintiff herein was a party to the suit in which the examination of Slaughter was procured at the time the order for the examination of the defendant Slaughter was issued. Therefore, since the plaintiff was not a party to such action, and had no opportunity to cross examine Slaughter at the time of his examination, it was error to admit such examination in evidence in the trial of this action, and for such error there must be a new trial.

We call attention, however, to the fact that the trial judge was not informed at the time of the trial below that Slaughter's examination was not taken in the case then being heard. If the trial judge had been informed of this fact, doubtless he would have excluded the examination.

Since there must be a new trial, we deem it unnecessary to discuss the remaining assignments of error which may not recur on the next trial.

New trial.

PEGGY SUE JOLLY, PETITIONER v. J. WILBURN QUEEN AND WIFE, PEARL H. QUEEN, RESPONDENTS.

(Filed 18 June, 1965.)

1. Bastards § 11—

The putative father of an illegitimate child may defeat the right of the child's mother to its custody only by showing that the child's mother, by reason of bad character or special circumstances, is unfit to have its custody, and that therefore the welfare of the child overrides her paramount right to custody.

2. Same—

Where the court finds that the mother of an illegitimate child is a fit and suitable person and is capable of taking care of her child, it may not enter an order awarding custody to the child's father, even upon finding that such award is to the best interest of the child, there being no findings to justify a conclusion that the mother had forfeited her paramount right.

APPEAL by petitioner from *Froneberger, J.,* in Chambers in HENDERSON on October 19, 1964.

This special proceeding, instituted under G.S. 50-13 on August 11, 1964, in McDowell County, is to determine the custody of James William Piercy, sometimes known as James William Queen, the illegitimate child of petitioner and male respondent (Queen).

To detail the evidence in the case would ill serve the child in question. The rudimentary facts are these: The relationship between petitioner and Queen began in the summer of 1954, when petitioner, 17 years old, was employed by Queen, approximately 45, to work for him at his skating rink in Old Fort. Queen was then living with his wife, *feme* respondent (Mrs. Queen), as he is now. In the fall of 1956 petitioner conceived Queen's child, James William Piercy. When petitioner refused to have an abortion, Queen took her to Florida, to conceal her condition from her family and his wife. They lived together there both before and after the child was born on May 11, 1957. In May 1959 petitioner ended the relationship and returned to her mother's home in Old Fort. Shortly thereafter petitioner became seriously ill and was hospitalized at intervals over a five-month period. During her illness Queen began visiting the child in the home of petitioner's parents. Soon he was taking the child to his home to spend the night and, later, weekends.

On October 15, 1960, petitioner married M. N. Jolly, who had full knowledge of her past. On that day, according to petitioner, she agreed with Mrs. Queen that she would leave the child in the Queen home and "give it a try." According to Mrs. Queen, petitioner "gave" the child to her and Queen and promised "to sign legal papers." From time to time thereafter the Queens requested petitioner to sign a consent to their adoption of the child, but this she never did.

After their marriage petitioner and her husband moved to Cabarrus County, where he was employed, but at least once a month she returned to visit the child. He spent Thanksgiving with her, and, when she visited in Old Fort, he spent the days with her. In November 1961 petitioner and her husband moved to Marion. Thereafter, petitioner's evidence tends to show, the boy spent at least one day a week with her. She visited him 2-3 times a week and took him wherever she wished.

On August 28, 1963, a son was born to petitioner and her husband.

In June 1964, according to petitioner, the child signified a desire to spend more time with her. Queen then objected to her seeing the child at all. Whereupon, she decided that the child's best interest required her to take him back into her custody. After consulting an attorney, who advised her that she had the legal right to do so, petitioner did take the child from Mr. and Mrs. Queen in July 1964. With the boy and her brother, petitioner set out on a vacation motor trip to the West Coast. On July 30, 1964, Queen suffered a serious heart attack and was hos-

pitalized. Mrs. Queen requested petitioner to return to McDowell County with the child so that he could comfort his father. Consequently, petitioner returned and delivered the boy to Mrs. Queen with the understanding that he would be re-delivered to her the following morning. When petitioner went for him, however, Mrs. Queen refused to surrender him. This proceeding resulted.

Petitioner is now approximately 28 years old. Her husband is a college graduate. As manager of a finance company in Marion he has an average annual income of $7,600.00. He has expressed the desire to rear the child. Petitioner's evidence and the report of the McDowell Welfare Department show petitioner and her husband to have a stable home and a good house.

Queen is now approximately 56 years old and, at the time of the hearing, was still confined to his home on account of the heart attack. He is a plumber and owns a septic-tank company. Mrs. Queen is about the same age as her husband and holds a responsible position in the office of a nearby hosiery mill. Her maiden sister lives in the home and helps care for the child. The Queens own a comfortable dwelling in Old Fort with about eight acres of ground surrounding it. It is larger and more expensive than that of petitioner and her husband. Respondents' evidence and the report of the Welfare Department show them to have a stable home life and the respect of the community and fellow church members, and the child to be happy and well adjusted with them, and to be a good student.

After a lengthy hearing Judge Froneberger found as a fact that both petitioner and male respondent and their respective spouses are now persons of good character and fit and suitable persons to have the care and custody of the child; that it is in his best interest that his custody be awarded to the Queens for the nine months of the school year and to petitioner for the other three months, with specified visitation privileges to each during the interval custody is in the other. From the order entered upon these findings, petitioner appeals, assigning error in the award of custody to the Queens and the findings upon which it was based.

Paul J. Story for petitioner, appellant.
Walter C. Benson for respondents, appellees.

SHARP, J. "It is well settled law in this State, and it seems to be universally so held, that the mother of an illegitimate child is its natural guardian, and, as such, has the legal right to its custody, care and control, if a suitable person, even though others may offer more material advantages in life for the child," *Browning v. Humphrey,* 241

N.C. 285, 287, 84 S.E. 2d 917, 918; *accord, Wall v. Hardee,* 240 N.C. 465, 82 S.E. 2d 370; *In re Cranford,* 231 N.C. 91, 56 S.E. 2d 35; *In re McGraw,* 228 N.C. 46, 44 S.E. 2d 349; *In re Foster,* 209 N.C. 489, 183 S.E. 744; *In re Shelton,* 203 N.C. 75, 164 S.E. 332; *In re Jones,* 153 N.C. 312, 69 S.E. 217; 10 Am. Jur. 2d, Bastards § 60 (1963); 3 Lee, North Carolina Family Law § 224 (3d Ed. 1963).

> "At common law the right to the custody of legitimate children was generally held to be in the father, but as to illegitimate children the rule was different. As between the putative father and the mother of illegitimate children, it is well established that the mother's right of custody is superior, and the father's right, if any such exists, is secondary." Annot., Right of mother to custody of illegitimate child, 98 A.L.R. 2d 417, 431, citing cases from 20 jurisdictions, including North Carolina.

As against the right of the mother of an illegitimate child to its custody, the putative father may defend only on the ground that the mother, by reason of character or special circumstances, is unfit or unable to have the care of her child and that, for this reason, the welfare, or best interest, of the child overrides her paramount right to custody. In *Dellinger v. Bollinger,* 242 N.C. 696, 89 S.E. 2d 592, this Court held that the putative father of an illegitimate child, even though his right to custody is not primary, has such an interest in the welfare of his child that he can bring a proceeding against the mother under G.S. 50-13 for its custody. After overruling the mother's demurrer to the father's petition, and without giving her an opportunity to answer, the judge awarded the father custody on the basis of his affidavits (a reference to the record shows) that the mother was abusing, mistreating, and starving the 3-year-old child. This court treated the order as awarding custody *pendente lite* only and remanded the case so that the mother might answer the petition and offer her evidence.

In re McGraw, supra, decided prior to the 1949 amendment to G.S. 50-13 (see *In re Cranford, supra*), the putative father, alleging facts which would support the jurisdiction of the Juvenile Court, sued out a *habeas corpus* to take custody of the child from its mother. He based his claim upon an alleged superior right in himself, as father, to the custody of his child. This Court, quoting from *In re Shelton, supra,* and *In re Jones, supra,* regarding the *prima facie* right of the mother to custody, dismissed his appeal from an adverse judgment, saying, *per* Seawell, J.:

> "It is easy to see why the policy of the law, in its development from both circumstance and necessity, has not thus far conferred

> the superior right of custody on the non-legitimate father of a bastard child, at least while the latter remains *nullius filius*. We have not been presented with convincing authority to sustain the jurisdiction of the Superior Court in behalf of the petitioner; and we do not feel that the exigency of decision requires us to discuss that of the Juvenile Court." *Id.* at 47, 44 S.E. 2d at 350.

In this case Queen has taken no steps to legitimate the son whose custody he now claims. Gen. Stats., ch. 49, art. II. Therefore, under our intestacy laws, the child cannot inherit from his father or his father's relatives. Should Queen die, Mrs. Queen, of course, would have no legal obligation to the boy. The child and his lineal descendants can take "by, through and from his mother and his other maternal kindred, both descendants and collaterals, and they are entitled to take from him." G.S. 29-19; 3 Lee, *op. cit. supra* § 252. Should petitioner and her husband desire that he adopt the boy, Queen's consent would be unnecessary. G.S. 48-6(a); *In re Adoption of Doe*, 231 N.C. 1, 9, 56 S.E. 2d 8, 13. The child's domicile is that of his mother, petitioner. *In re Blalock*, 233 N.C. 493, 64 S.E. 2d 848; *Thayer v. Thayer*, 187 N.C. 573, 122 S.E. 307; 3 Lee, *op. cit. supra* § 227. The only legal right which the boy can enforce against his putative father is provided by Gen. Stats., ch. 49, art. I. *(Bastardy)*. But this article is not primarily to benefit illegitimate children but to prevent them from becoming public charges. *Allen v. Hunnicutt*, 230 N.C. 49, 52 S.E. 2d 18.

In the face of all this, it would be anomalous indeed if the law should sanction an award of custody to the putative father when there is a specific finding that the mother "is now of good character and reputation and is a fit and suitable person to have the custody of minor children and is a fit and proper person to have custody of the said James William Piercy (sometimes known as James William Queen)." On this finding establishing her fitness, and the additional finding establishing that of her husband, the award of custody to the putative father, Queen, cannot be sustained. *In re Cranford, supra*. The mother being of good character and able to provide for her child, the finding of the judge that it is in the best interest of the child that he remain in the home of respondents for nine months during the year is not controlling. *In re Shelton, supra*. Conceivably, a judge might find it to be in the best interest of a legitimate child of poor but honest, industrious parents, who were providing him with the necessities, that his custody be given to a more affluent neighbor or relative who had no child and desired him. Such a finding, however, could not confer a right as against such parents who had not abandoned their child, even though they had permitted him to spend much time in the neighbor's home. In other

words, the parents' paramount right to custody would yield only to a finding that they were unfit custodians because of bad character or other, special circumstances. So it is with the paramount right of an illegitimate's mother.

The judgment here contains no finding of fact which would justify the conclusion that petitioner has forfeited her paramount right to the custody and control of the child. If he is eventually to live with his mother, his step-father, and his half-brother, the time to begin is now. Under the law as applied to the findings in this case, petitioner is entitled to the exclusive custody of her child, James William Piercy, and we so hold.

The judgment of the court below is

Reversed.

STATE v. FUNTROY MERRITT.

(Filed 18 June, 1965.)

1. Criminal Law § 173—

A petition to review the constitutionality of a conviction must be filed in the county in which the conviction was entered, and when filed in the Superior Court of another county such court has no jurisdiction, nor may a motion for change of venue to such county be entered therein. G.S. 15-217 *et. seq.*

2. Criminal Law § 169—

Where a conviction is set aside because the prisoner was not represented by counsel at the trial, the prisoner is not entitled to his discharge, and the court, upon vacating the judgment, should order that the indictment upon which the prisoner was convicted be restored to the trial docket for retrial or other disposition as necessity may require.

ON *certiorari* allowing application of the Attorney General to review judgment of *Latham, S. J.*, in post-conviction proceedings at September 14, 1964 Criminal Session of GUILFORD.

This proceeding was begun on October 18, 1963, when Funtroy Merritt, a prisoner in the State Prison System, *in propria persona* filed a petition in Guilford County under G.S. 15-217 *et seq.*, asking a review of the constitutionality of three sentences which had been imposed upon him in that county. Thereafter the court appointed counsel to represent the prisoner, and on March 23, 1964, the prisoner, through counsel, filed in the Superior Court of Guilford County a new petition, in

which he alleged that he was tried and convicted of the following offenses in the counties indicated:

(1) Superior Court — Guilford County — April 20, 1953 Term, Docket No. 1618. Sentence of not less than eight nor more than ten years upon conviction of armed robbery. Service of this sentence began on April 24, 1953, and was completed June 14, 1961.

(2) Superior Court — Guilford County — June 1, 1953 Term. Docket Nos. 1609 and 1610. Sentenced to a term of not less than three nor more than five years upon a plea of guilty on two charges of breaking and entering, larceny, and receiving. Service of this sentence began on June 14, 1961, and the date of expiration of the sentence was posted as August 24, 1963.

(3) Superior Court — Guilford County — June 3, 1953 Term. Docket No. 1617. Plea of guilty to one charge of highway robbery. Sentenced to not less than five nor more than seven years, said sentence to begin at the expiration of the sentence imposed under (2), above.

(4) Recorder's Court of Henderson County — August 13, 1956 Term. Docket No. 2333. Plea of guilty. Sentence of two years in the county jail imposed, charge of destroying property of the State of North Carolina. This sentence was to begin at the expiration of the above sentences.

(5) Superior Court of Henderson County — October 1956 Term. Docket No. 88. Plea of guilty to a charge of escaping from prison. Sentence of eight months in the county jail.

(6) Superior Court of Mitchell County — April 7, 1958 Term. Docket No. 125. Plea of guilty to one charge of escaping prison. Sentenced to from three to five years in State's prison, said sentence to run at the expiration of the sentence or sentences then in effect.

(7) Superior Court of Mitchell County — September 9, 1958 Term. Docket No. 95. Plea of guilty to one charge of escape. Sentenced to two years in State's prison, said sentence to begin at the expiration of any and all sentences then being served by the prisoner.

(8) Superior Court of Haywood County — November 1959 Term. Docket No. 3151. Plea of guilty to one charge of escape. Sentenced to six months in the county jail, said sentence to begin at the expiration of the sentence in other cases above referred to.

The prisoner further alleged that at the time of the various trials he was indigent; that he was not advised of his right to counsel and

had none; that he did not know of this right until March 1963 after the decision of the U. S. Supreme Court in *Gideon v. Wainwright* and therefore the 5-year statute of limitations contained in G.S. 15-217 does not bar his petition. He prays for such relief "as to the court may seem just and proper."

On September 18, 1964, the prisoner, through counsel, filed a petition addressed to Honorable James F. Latham, judge presiding at the criminal session then being held, in which petition he asked for "a change of venue" from Henderson, Mitchell and Haywood counties, to the end that all his sentences be reviewed at one time and place. The solicitors of the Superior Courts of Henderson, Mitchell and Haywood counties and of the Recorder's Court of Henderson County were each notified by registered mail that the petitions had been filed and that a hearing would be held on them on September 24, 1964, in Guilford County. Each was asked to notify the solicitor of Guilford County or counsel for the prisoner if he had "objection to this proceeding" or desired to be heard on the petition. So far as the record discloses, no solicitor acknowledged his notice. On September 25, 1964, Judge Latham heard both petitions. Besides Merritt and his counsel, only the solicitor of Guilford County was present.

The judge found that sentences (1) and (2) as set out in the enumeration above had been completed and the prisoner was now serving sentence (3); that at no time during, before, or after his eight trials did the prisoner have counsel until his present attorney was appointed to represent him in post-conviction proceedings; that no solicitor had objected to granting the prayer for relief in the two petitions. Upon these findings, he ordered: (1) "that the prayer for change of venue from Henderson County Superior Court, General County Court of Henderson County, Superior Court of Mitchell County, and Superior Court of Haywood County, be and the same is hereby granted for the purpose of disposing of this matter in its entirety at this time;" and (2) "that the balance, not having been already served," of sentence (3) imposed at the June 3, 1953 Term of Guilford Superior Court, and the Henderson, Mitchell, and Haywood county sentences, (4) — (8) in the enumeration above, "be and the same are hereby vacated."

Execution of this judgment was stayed so that the Attorney General might petition this Court for *certiorari* to review the judgment. Upon his application, the writ issued.

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

E. D. Kuykendall, Jr., for the prisoner, respondent.

SHARP, J. The first question presented by this appeal is: Did the judge presiding over a session of the Superior Court of Guilford County have authority to hear and pass upon a petition filed in Guilford County under G.S. 15-217 *et seq.* to review the constitutionality of the prisoner's convictions in any county other than Guilford?

The North Carolina Post-Conviction Hearing Act (G.S. 15-217 through 15-222) originated as Sess. Laws of 1951, ch. 1083. Codified as Gen. Stats. ch. 15, art. XXII, it is entitled "Review of the Constitutionality of Criminal Trials." Like the Illinois act on which it was modeled, *Miller v. State,* 237 N.C. 29, 74 S.E. 2d 513 (see *People v. Dale,* 406 Ill. 238, 92 N.E. 2d 761, for the Illinois act), the Act was passed "to replace the ancient and little known or understood writ of error *coram nobis,*" 29 N.C.L. Rev. 390, 391, insofar as the review of the constitutionality of criminal trials is concerned. The remedy afforded by the Act "closely resembles that available under the common-law writ." *People v. Bernatowicz,* 413 Ill. 181, 184, 108 N.E. 2d 479, 481, *cert. den.* 345 U.S. 928, 73 S. Ct. 788, 97 L. Ed. 1358. The writ of error *coram nobis* "is brought for an alleged error of fact, not appearing upon the record, and *lies to the same court,* in order that it may correct the error, which it is presumed would not have been committed had the fact in the first instance been brought to its notice." Battle, J., in *Roughton v. Brown,* 53 N.C. 393, 394. (Italics ours.) This explanation has been widely adopted, *Ernst v. State,* 179 Wis. 646, 192 N.W. 65, 30 A.L.R. 681; 18 Am. Jur. 2d, Coram Nobis and Allied Statutory Remedies § 2 (1965); 5 Wharton, Criminal Law and Procedure § 2252 (Anderson's Ed. 1957). "Error in fact," however, does not mean that guilt or innocence is an issue in *coram nobis* proceedings. "(I)t is not the purpose of the writ to review evidence presented at the trial." 18 Am. Jur. 2d, Coram Nobis and Allied Statutory Remedies § 8 (1965); see *In re Taylor (I),* 229 N.C. 297, 49 S.E. 2d 749; *In re Taylor (II),* 230 N.C. 566, 53 S.E. 2d 857.

"The writ of error *coram nobis* can only be granted in the court where the judgment was rendered," *State v. Daniels,* 231 N.C. 17, 25, 56 S.E. 2d 2, 7; *accord, Latham v. Hodges,* 35 N.C. 267; 18 Am. Jur. 2d, Coram Nobis and Allied Statutory Remedies § 4 (1965), although under the common law of England it would lie in the king's bench from the court of common pleas, *Casteldine v. Mundy,* 4 B. & Ad. 90, 110 Eng. Rep. 389 (K.B.). When the General Assembly undertook to provide a simpler and more effective post-conviction remedy than the common-law writ for convicted persons who, through no fault of their own, had suffered substantial and unreviewed deprivations of constitutional rights in the original trial, it extended the jurisdiction of the Superior Court to one county, Wake, in addition to that in which the conviction took

place. By Sess. Laws of 1959, ch. 21, however, the legislature struck out the reference to Wake County and thereby limited jurisdiction under the Act to the Superior Court in which a prisoner was convicted. The applicable provision of G.S. 15-217 now reads: "The proceeding shall be commenced by filing with the clerk of the superior court of the county in which the conviction took place, a petition with a copy thereof, verified by affidavit." The section also requires the prisoner to serve another copy upon the solicitor "who prosecutes the criminal docket of the superior court of the county in which said petition is filed." Without any doubt this change was dictated by the same considerations which limit relief in common-law *coram nobis* proceedings to the court in which the original error was committed.

In the county of conviction are to be found the records of the trial which the prisoner attacks, as well as the court officials and other persons likely to have any knowledge of the truth or falsity of the prisoner's allegations that he suffered a substantial denial of his constitutional rights. If entries in the minutes are to be corrected or judgments vacated, manifestly this should be done in the county where they are required to be kept. "A writ of that kind *(coram nobis)* can be had only when allowed by the court where the record is. . . ." *Williams v. Edwards*, 34 N.C. 118, 119. The solicitor who prosecuted the prisoner or the solicitor's successor in office has the duty to represent the State and to defend the constitutionality of the trial if, in fact, there has been no violation of the prisoner's constitutional rights. He has a duty, as well, to see that the trial judge, the original defense counsel, and the prosecuting attorney are not misrepresented and falsely accused of malfeasance in office. Too many prisoners these days apparently believe they have nothing to lose and everything to gain by making any charge which has ever been successfully employed by another prisoner, regardless of whether there is any truth in it. Of course, it goes without saying that, if the solicitor has reason to believe that a prisoner's constitutional rights have been violated, he owes equal duties to the prisoner and to the State to disclose that fact to the Court, for "the government wins its case when justice is done." It would be utterly unreasonable and impose an undue obligation to require the solicitors of Mitchell, Haywood, or Henderson counties to attend post-conviction hearings in Guilford and other counties outside their districts.

The answer to the first question posed by this appeal is, No.

That portion of the judgment which purported to vacate sentences imposed upon the prisoner in Henderson, Haywood, and Mitchell counties is reversed. The prisoner may, upon a proper petition, filed with the Clerk of the Superior Court of each of these counties, obtain a review of the proceedings which resulted in his sentence there. *State v.*

Johnson, 263 N.C. 479, 139 S.E. 2d 692. Incidentally, it was curious procedure for the prisoner to move for a change of venue in the county to which he sought removal.

We now come to the second question: Did his Honor err in vacating the prisoner's partially served Guilford County sentence without ordering a new trial upon the original bill of indictment? The answer is, Yes.

Upon Judge Latham's finding that the prisoner was *inops consilii* at the time of this trial for armed robbery in Guilford County, which trial resulted in sentence (3), he properly vacated that sentence. *State v. Goff,* 263 N.C. 515, 139 S.E. 2d 695. The prisoner was not, however, thereby relieved of the charge contained in the bill of indictment in Case No. 1617. The effect of Judge Latham's order was to vacate the entire sentence, not merely the unserved portion. The prisoner is entitled to a new trial, but it will be "a re-trial of the whole case, verdict, judgment, and sentence." *State v. White,* 262 N.C. 52, 54, 136 S.E. 2d 205, 206, *cert. den.* 379 U.S. ....., 85 S. Ct. 726, 13 L. Ed. 2d 707; *accord, State v. Slade, ante,* 70, 140 S.E. 2d 723; *State v. Anderson,* 262 N.C. 491, 137 S.E. 2d 823; *State v. Williams,* 261 N.C. 172, 134 S.E. 2d 163. Furthermore, when the judge vacated the sentence, he should have ordered a new trial. *State v. Goff, supra.* "Failure to appoint counsel goes only to due process, and not to the guilt or innocence of the accused. In no event could he obtain more than a vacation of the judgments against him and a restoration of the indictments to the docket of trial." Stacy, C. J., *In re Taylor (I), supra* at 302, 49 S.E. 2d at 752. If, upon his second trial, the prisoner is again convicted, the matter of punishment will be for the trial judge. Should he think, as Judge Latham apparently did, that the prisoner has served time enough, he can sentence him accordingly. A new trial, however, carries hazards, as well as benefits.

This proceeding is remanded to the Superior Court of Guilford County, with directions that the indictment against the prisoner for armed robbery (Docket No. 1617) be restored to the trial docket and that the solicitor proceed promptly to re-try the prisoner or otherwise, as necessity may require, dispose of the case. That part of the judgment vacating the Guilford County sentence is affirmed, subject to the modification hereinabove specified.

Reversed in part—

Modified and affirmed in part.

WILLIAM J. MATTHEWS v. SHAMROCK VAN LINES, INC.

(Filed 18 June, 1965.)

1. Reformation of Instruments § 4— Answer held to allege affirmative defense for reformation for mutual mistake.

In lessor's action for compensation for the use of equipment as set out in a written lease, defendant alleged that prior to the execution of the lease, incorporated in the answer by reference, the parties had agreed to specified provisions for compensation which were at variance with the provisions of the lease, that the provisions for compensation as set out in the lease were included therein by mutual mistake, and that each party executed the instrument in belief that it embodied the actual agreement between them. *Held:* The answer sufficiently alleges the affirmative defense of reformation for mutual mistake, it not being required that the pleader allege facts as to how and why the mutual mistake came about.

2. Same; Pleadings § 7—

An answer may set forth facts stating the affirmative defense of reformation, and may also allege facts entitling defendant to recover a stated sum under another part of the written agreement not attacked, and objection that the two are inconsistent and repugnant cannot be sustained.

APPEAL by defendant from *Braswell, J.,* February 1965 Civil Session of ALAMANCE.

On May 3, 1961, plaintiff, lessor, and defendant, lessee, entered into a truck-lease agreement, whereby plaintiff leased his truck to defendant for a percentage of the revenue received from it. Plaintiff agreed to devote his services and the leased vehicle exclusively to defendant's business. Plaintiff brought this action on February 26, 1964, to recover the difference between amounts received for unpacking and wardrobe service and the amount allegedly due under the contract. Plaintiff alleges that his remuneration was to be 15% of the unpacking revenue and 100% of that from wardrobe service. He seeks to recover $3,283.02 with interest from August 2, 1963. Answering, defendant denies that it owes plaintiff any sum whatsoever and seeks to reform paragraph 3 of the truck-lease agreement, which is attached to the answer as Exhibit A. In pertinent part, as a Further Defense, defendant alleges:

> 1. That prior to the signing of the paper writing of May 3, 1961, that the complaint mentions the plaintiff and defendant had agreed that the plaintiff would be paid only 80 per cent for wardrobe service and was not to be paid for the unpacking, and the plaintiff understood the said provisions and the defendant understood the said provisions and the said provisions were agreed to by the parties. It was agreed between the plaintiff and defendant that the payments should be as stated above and not as set out in paragraph 3 of the complaint.

2. That by mutual mistake of the plaintiff and the defendant, the provision for 100 per cent for wardrobe service and 15 per cent for unpacking was included in the paper writing by mutual mistake and it did not express the true agreement.

3. That the paper writing was executed in the belief by the plaintiff and defendant that the same embodied the actual agreement theretofore made as hereinabove alleged (and defendant did not learn of the mistake until after the bringing of this suit.)

4. By reason of the mutual mistake the defendant is entitled to have the said paper writing corrected to set forth the true agreement between the parties.

* * *

6. That paragraph 20 of the paper writing which plaintiff refers to in paragraph 3 of the complaint provides that Lessee (the defendant) would advance to Lessor (the plaintiff) 25 per cent of the line-haul revenue of each shipment upon request by Lessor; and that if Lessee advanced an amount in excess of 25 per cent on request of Lessor, that Lessor agreed that the remuneration due him on all shipments handled that particular month should be reduced from 50 per cent to 47 per cent. That Lessor did request and Lessee did advance more than 25 per cent of the line-haul agreement for one or more shipments for 25 months during the time complained of by plaintiff and Lessee is entitled to have the total compensation for the line-haul revenue reduced by 3% for all of said months, which reduction amounts to Sixteen Hundred Fifty-Seven Dollars and fifty-four cents.

Plaintiff moved to strike from the Further Defense paragraphs 1 and 2; that portion of paragraph 3 in parentheses; and paragraphs 4 and 6. The judge, being of the opinion that defendant had not sufficiently alleged mutual mistake, entered an order allowing the motion, which he treated as a demurrer to the Further Defense. From this order defendant appeals.

John D. Xanthos for plaintiff appellee.
Allen & Allen for defendant appellant.

SHARP, J. For reformation of the contract in suit defendant relies upon an allegation of a mistake common to both parties. It makes no attempt to allege fraud or circumstances of imposition. Plaintiff contends, and his Honor held, that defendant has not averred sufficient facts for the court to "determine the source of the alleged mutual mis-

take of fact." The facts alleged as a defense must be set out in an answer with the same precision required in a complaint, *Anderson v. Logan,* 105 N.C. 266, 11 S.E. 361, and, if defendant has not alleged a cause for reformation for mutual mistake as required by our decisions, the court cannot grant relief. *McNeill v. Thomas,* 203 N.C. 219, 165 S.E. 712; *Webb v. Borden,* 145 N.C. 188, 58 S.E. 1083.

The encyclopedias lay down strict rules as to what must be alleged to secure the reformation of an instrument for mutual mistake.

> "In a suit to reform a written instrument, it should appear from the allegations in the pleading what the real agreement was, what the agreement as reduced to writing was, and wherein the writing fails to embody the real agreement, as by showing what part of the real agreement was not reduced to writing or what part of the agreement as written was not embraced in the real agreement. Thus, one who seeks the reformation of an instrument should set it forth in his pleading, or attach it to the pleading as an exhibit, or file a copy of it with the pleading, so that from the instrument and the allegations it may clearly appear that the instrument does not conform to the real agreement made by the parties, and it must be alleged that the parties agreed to the terms of the instrument as sought to be established, and that the agreement sought to be established as the real agreement was made before the writing was signed." 76 C.J.S., Reformation of Instruments § 73 (1952).
>
> "A mistake, in order to authorize the reformation of an instrument, should be pleaded clearly, specifically, with particularity, and with precision, and should be distinctly charged, the particular mistake being set forth, and *how the mistake occurred,* when the mistake occurred, and *why it occurred.* The particular facts or circumstances constituting the mistake must be pleaded; a mere allegation that a mistake was made, without allegation of facts tending to show it, is insufficient. However, the use of the word 'mistake' has been held not necessary, and it is sufficient if the facts alleged, or the inference to be drawn from them, by fair intendment shows mistake. Likewise it has been held that, although a pleading for reformation is not in the accurate and technical form which is desirable, it is sufficient if the question whether there was a mistake is substantially presented, so that it cannot be misapprehended." 76 C.J.S., Reformation of Instruments § 74b (1952). (Italics ours.) *Accord,* 45 Am. Jur., Reformation of Instruments § 100 (1943); 28 L.R.A. (N.S.) 913.

It may be doubted that all the cases cited as authority for the above proposition that the pleader must allege how and why the mistake oc-

curred go that far. The rule in North Carolina, in any event, has never been stated or applied with such strictness as to detail when the gravamen of the complaint is mutual mistake. The rule with us is stated in *Crawford v. Willoughby,* 192 N.C. 269, 271, 134 S.E. 494, 495, and quoted in *Smith v. Smith,* 249 N.C. 669, 674, 107 S.E. 2d 530, 533:

> "The party asking for relief by reformation of a deed or written instrument, must allege and prove, first, that a material stipulation, as alleged, was agreed upon by the parties, to be incorporated in the deed or instrument as written, and second, that such stipulation was omitted from the deed or instrument as written, by mistake, either of both parties, or of one party, induced by the fraud of the other, or by the mistake of the draughtsman. Equity will give relief by reformation only when a mistake has been made, and the deed or written instrument because of the mistake does not express the true intent of both parties. The mistake of one party to the deed, or instrument, alone, not induced by the fraud of the other, affords no ground for relief by reformation."

When the pleader has alleged (1) the terms of an oral agreement made between the parties; (2) their subsequent adoption of a written instrument intended by both to incorporate the terms of the oral agreement but differing materially from it; and (3) their mutual but mistaken belief that the writing contained their true, *i.e.,* the oral, agreement, our cases hold that the pleading will survive a demurrer. *McCallum v. Insurance Co.,* 259 N.C. 573, 131 S.E. 2d 435; *Case v. Arnold,* 215 N.C. 593, 2 S.E. 2d 694; *Alexander v. Bank,* 201 N.C. 449, 160 S.E. 460; *Strickland v. Shearon,* 191 N.C. 560, 132 S.E. 462; *McLamb v. McPhail,* 126 N.C. 218, 35 S.E. 426.

A mere allegation that plaintiff's name was inserted in the instrument sought to be reformed "through error," however, is insufficient, *Smith v. Smith, supra,* to comply with our rule that "mistake as a ground for relief should be alleged with certainty, by stating the facts showing the mistake — either a mutual mistake of the parties or a unilateral mistake with circumstances of imposition." 1 McIntosh, North Carolina Practice and Procedure § 990 (2d Ed. 1956). If there has been uncertainty in our cases on this question, 15 N.C.L. Rev. 154, 160, it no doubt arose because the one end, reformation, can be had either for fraud or for mutual mistake, two distinct gravamina.

We think a requirement that a pleader allege facts as to *how* and *why* a mutual mistake came about is demanding too much. The following hypothetical case from *Wolz v. Venard,* 253 Mo. 67, 83, 161 S.W. 760, 764, illustrates the point. If "*A* (pleader) alleges that *A* agreed to sell to *B* and *B* agreed to buy from *A* a tract of land *X;* that in pur-

suance of that pact *A* attempted to convey *X* to *B*, but by mistake inserted *Y* in the deed, thinking it was *X*, and *B*, by mistake, thinking *Y* was *X*, accepted the deed, and paid the purchase money," nothing else appearing, what matters it how the mistake occurred? In such a situation does common sense or fairness to *B* require *A* to allege how and why the mistake occurred? *A* may not know how it occurred — only that it did occur. So far as he is concerned, it was "just one of those things." Perhaps the mistake was occasioned by an error of the draftsman, but such an allegation "may be viewed as merely supplementary to the mutual mistake" of the parties to the instrument, *Ibid.* In other words, if both parties have actually done what neither intended, the cause of the failure of the written instrument "to express the real agreement between the parties is, in the absence of fraud, not material." *United States v. Hudson*, 269 Fed. 379, 381 (C.C.A., 8th).

The Supreme Judicial Court of Massachusetts in *De Vincent Ford Sales v. First Mass. Corp.*, 336 Mass. 448, 451, 146 N.E. 2d 492, 494, has expressed our views on this question:

> "We think that grounds for equitable relief are here sufficiently set forth by the allegations (1) that the parties intended to include the omitted provision; (2) stating the substance of the omitted provision; (3) stating the provision of the executed lease; and (4) that the omission was by mistake (that is, human failure of performance) of the parties and 'without intention or design' * * * The situation is unlike that which would be presented by an allegation that performance by the plaintiff had been obtained by 'duress' or by 'fraud,' each of which would plainly be inadequate to state a cause of action in the absence of detailed statements of the facts constituting the duress or the fraud. Duress or fraud, in a very real sense, (is a conclusion) . . . of law from other facts; but *mistake, in the omission from a document of a provision intended to be included, is a fact in itself.*
>
> "Doubtless, where practicable, more detailed allegations of the manner in which the mistake occurred as, for example, by the failure of a scrivener to understand and carry out instructions, ought to be made. . . . The allegations in the present case, however, seem sufficient to be good against demurrer and adequately to inform the defendant of the mistake which is alleged to have taken place and the basic facts with respect to it." (Italics ours; citations omitted.)

Attached to defendant's answer in this case and incorporated by reference is a copy of the instrument which was actually executed by the

parties. The paragraphs or parts thereof which were struck from the Further Defense set out the schedule of compensation which defendant alleges was agreed to by the parties and intended to be incorporated in the written lease; defendant specifically states the material differences between the two schedules and positively alleges that the differences were the result of the mutual mistake of the parties. In paragraph 7 (not set out herein), defendant further avers that plaintiff worked under the oral agreement between them; that he received statements and accepted checks based upon it; and that it learned of the mistake in the written contract only after he brought this action.

If defendant can establish the allegations in paragraphs 1, 2, 3, and 4 of its Further Defense by evidence clear, strong, and convincing, *Isley v. Brown*, 253 N.C. 791, 117 S.E. 2d 821, it will be entitled to the reformation it seeks. These allegations were improperly struck, as was, also, paragraph 6, which relates to paragraph 20 of the lease. Defendant does not seek to reform paragraph 20. Even had these portions of the Further Defense been properly struck, defendant would have been entitled to prove the facts alleged in paragraph 6 as a set-off to plaintiff's claim. The reasoning in plaintiff's contention that paragraph 6 "is inconsistent, repugnant with other allegations of the defendant and therefore . . . neutralized" is inapparent to us. The claim for set-off has to do with a part of the contract unrelated to those parts which defendant seeks to reform.

The order of the court below allowing plaintiff's motion to strike paragraphs 1 and 2; part of paragraph 3; and paragraph 4 and 6 of defendant's Further Defense is

Reversed.

JAMES A. SCRIVEN, ADMINISTRATOR OF THE ESTATE OF ANTHONY GLENN SCRIVEN, DECEASED v. SAMUEL McDONALD AND PRISCILLA McDONALD.

(Filed 18 June, 1965.)

1. Death § 6—

The statute creating the right of action for wrongful death provides for the recovery of compensation for the pecuniary injury resulting from the death, devoid of sentiment, and the rule applies when the deceased is an infant. G.S. 28-174.

2. Same—

The burden is upon plaintiff in an action for wrongful death to prove pecuniary loss, and when plaintiff's evidence, together with defendant's

evidence not in conflict therewith, discloses that intestate was a mentally retarded boy, handicapped to the extent that he would continue to be a dependent person and could never earn a livelihood, nonsuit must be granted.

APPEAL by defendants from *Nimocks, E. J.*, September 1964 Session of ROBESON.

Plaintiff administrator instituted this action to recover damages for the alleged wrongful death of his intestate, Anthony Glenn Scriven, hereafter called Anthony.

Plaintiff alleged Anthony, an eleven-year-old boy, was walking north on the east side of RUPR 1710 about 11:45 a.m. on May 4, 1963, when a Ford car was being operated south on said rural unpaved road by defendant Priscilla McDonald; and that, on account of Priscilla's negligent operation thereof, the Ford struck, knocked down, ran over and fatally injured Anthony.

Answering, defendants denied all of plaintiff's essential allegations; and, as a further defense, alleged that the parents of Anthony, a mentally retarded child, were contributorily negligent in permitting him to walk, unattended, along a much-traveled roadway.

It was stipulated that defendant Samuel McDonald was the owner of the Ford and was liable, under the family purpose doctrine, for the actionable negligence, if any, of defendant Priscilla McDonald. It was stipulated further that Anthony was the illegitimate child of Mrs. Willie Mae (Glenn) Scriven; and that James A. Scriven, the administrator, was not the father of Anthony.

Evidence was offered by plaintiff and by defendants.

Issues as to the alleged negligence of defendants and as to the alleged contributory negligence of Anthony's mother and sole beneficiary were answered in favor of plaintiff. The jury awarded damages in the amount of $5,750.00. Judgment for plaintiff, in accordance with the verdict, was entered. Defendants excepted and appealed.

Marion C. George, Jr., and Johnson, McIntyre, Hedgpeth, Biggs & Campbell for plaintiff appellee.

Henry & Henry for defendant appellants.

BOBBITT, J. Defendants contend the action should have been nonsuited on the ground the evidence fails to show pecuniary loss on account of Anthony's death. The plaintiff's evidence pertinent to this contention, summarized except when quoted, is set forth below.

Anthony's mother and James Scriven, his step-father, were married the day after Anthony's first birthday. They had children. Anthony

took the name of "Scriven" and was reared as a member of this family until his death on May 4, 1963.

Anthony was born December 20, 1951. On the day of his death, his age was eleven years, four months and fourteen days. His height was four feet and ten inches.

Anthony had not been in any public school. When he was about eight, he was taken to Duke Hospital. Acting upon the recommendation of the doctors at Duke, Anthony was taken to O'Berry School at Goldsboro, N. C. He was in O'Berry School for about nine months. According to his mother, Anthony did not want to stay longer, "resented" the O'Berry School and she "couldn't bear to let him stay there."

The Scrivens' two older daughters, ages nine and seven, attended the public schools of Robeson County. These girls could dress themselves. Anthony "could not do as well as they." His mother testified: "(Anthony) could dress himself, but there were a few things he could not do, couldn't fasten buttons; could put on his shoes but couldn't tie them." James Scriven testified: "Anthony was the sort of child which you might group as a slow to learn, retarded; but he could do some things for himself." Again: "He was slower than other children. He wasn't able to apprehend *(sic)* and wasn't able to do things they could. The other children were nine, seven, six and five. Anthony could do about the same things as the five-year-old child could."

Anthony was "a very friendly child." He went to Sunday school and church with the family and got along well with all the children. His mother testified: "Anthony played around in the yard and with the rest of the kids." He had not done any work to make money. He did very well in responding to requests around the house. Members of the family had no difficulty "communicating with him."

Mrs. Williams, sister of Anthony's mother, testified: "(Anthony) was a slow learner, did learn but slower than the average child. He could sing almost any song he heard any choir singing. To pick up a book and read, he did not have this ability. . . . His ability and grasp of things improved as he grew older. His speech was better than it had been for two or three years and could walk better than he had for the past three years. He was able to communicate with us verbally. I was able to give him directions during his life. He carried out the instructions which I gave to him."

Mrs. Glenn, mother of Mrs. Scriven and of Mrs. Williams, testified she visited Anthony while he was at O'Berry School but "only saw him when attendants would bring him to us." On such a visit Anthony cried until he was told "we were going to take him home." Then he talked and laughed. His mother brought him home for the Thanksgiving holidays, 1961. He was never taken back. During the last year

of his life, at home, "his condition improved." She testified: "I am sure he couldn't come up to what we would call a normal child, but he could learn. His attitude and ability to learn was about eight, nine or ten. At the time of his death would be about on level of about age eight. I was able to talk with him and he with me. He was able to speak in complete sentences. . . . We had never tried to teach him letters much. He had begun to try to write his name. He had gotten 'A' and 'T' pretty good, but not all of them. He was toilet trained when he came from the school. He had receded a lot, but it didn't take but a little while to pick up when he found he was loved."

Defendant offered in evidence the deposition of Dr. Vernon P. Mangum, Superintendent of the O'Berry School, admittedly a medical expert, specializing in the field of pediatrics and psychiatry. He testified that Anthony had been admitted to "O'Berry Center" on January 24, 1961; that, although he "did the initial examination on him when he came in," he remembered the boy vaguely; and that his testimony was based largely on the medical record made by him and by other physicians at the O'Berry School. He testified, *inter alia,* as follows: "When he was admitted, he was observed to be a well-developed nine-year-old male with extreme infantile behavior." Again: "He was found to be in too low a level to be included in any training program other than the self-help program in the cottage that all children are involved." In a test conducted August 17, 1961, "he earned an I. Q. score of thirty, which would put him in a severely retarded range." The psychologist who gave the test noted a comment "that he thought the child was capable of functioning at a slightly higher level, but certainly not a level that could be included in an academic setting." Again: "A person with this I. Q. required total supervision all his life." Again: "We give total supervision to this group; we don't allow any of them to be out of sight of an attendant at any time, and the home situation actually needs the same. They are actually not responsible for their own safety. They can do simple tasks with a great deal of training. They would not be expected to be self-sufficient in a social sense or an economical sense. It is too nebulous to say directly what the lowest I. Q. rating a person could have and be expected to earn a living, but very few individuals below an I. Q. of fifty are able to make an independent adjustment in society, very few, and to my knowledge none functioning at an I. Q. of thirty and below are able to." Anthony "went home for Christmas (1961) vacation . . ." He was not returned to O'Berry School.

Under our statute conferring a right of action for wrongful death, G.S. 28-173, "(t)he plaintiff in such action may recover such damages as are a fair and just compensation for the *pecuniary* injury resulting

from such death." (Our italics.) G.S. 28-174. "It does not provide for the assessment of punitive damages, nor the allowance of nominal damages in the absence of *pecuniary* loss." (Our italics.) *Armentrout v. Hughes*, 247 N.C. 631, 101 S.E. 2d 793, 69 A.L.R. 2d 620; *Hines v. Frink*, 257 N.C. 723, 127 S.E. 2d 509.

In *Hines v. Frink, supra*, this Court affirmed a nonsuit of the counterclaim (cross action) of Frink, Administrator, for the alleged wrongful death of Gore, his intestate, on the ground he had failed to show any pecuniary loss resulting to the estate of Gore from Gore's death, the record being "devoid of any evidence as to the age, health, habits, or earning capacity of Gore."

The oft-stated rule for determining the basis and extent of the damages recoverable in a wrongful death action, namely, "the pecuniary injury resulting from such death," is well established. *Lamm v. Lorbacher*, 235 N.C. 728, 71 S.E. 2d 49, and cases cited. Moreover, notwithstanding greatly increased difficulty in application, decisions of this Court hold the same rule applicable when the deceased is an infant. *Russell v. Steamboat Co.*, 126 N.C. 961, 36 S.E. 191; *Gurley v. Power Co.*, 172 N.C. 690, 90 S.E. 943, and cases cited: *Comer v. Winston-Salem*, 178 N.C. 383, 100 S.E. 619; *Bumgardner v. Allison*, 238 N.C. 621, 78 S.E. 2d 752.

The present action is distinguishable from the cases cited in that here plaintiff's evidence discloses affirmatively that Anthony was mentally retarded and thereby seriously handicapped. Moreover, plaintiff's evidence is that, after examining Anthony, the recommendation of the doctors at Duke was that he enter the O'Berry School, a mental institution under the North Carolina Hospital Board of Control; and that no material improvement resulted from his stay of nine or ten months in the O'Berry School.

The evidence, when considered in the light most favorable to plaintiff, discloses that Anthony was friendly, played with other children, was capable, subject to limitations, of dressing himself and was able to understand and carry out simple directions.

Mindful of the rule that defendant's evidence may be considered only "to the extent that it is not in conflict with plaintiff's evidence and tends to make clear or explain plaintiff's evidence," Strong, N. C. Index, Trial § 21, p. 316, we have refrained from setting forth portions of Dr. Mangum's testimony in conflict with the testimony of plaintiff's witnesses.

Plaintiff's evidence and portions of Dr. Mangum's testimony not in conflict therewith confront us with the fact that Anthony, from birth until death, was mentally retarded and thereby seriously handicapped. Absent substantial evidence, medical or otherwise, tending to show a

reasonable probability Anthony could or might overcome his handicap, the only reasonable conclusion to be drawn from the evidence is that he would continue to be a dependent person rather than a person capable of earning a livelihood. The burden of proof is upon plaintiff to show pecuniary loss to the estate on account of Anthony's death. In our view, plaintiff's evidence negatives rather than shows such pecuniary loss. Hence, the court erred in denying defendants' motion for judgment of involuntary nonsuit.

The statute, G.S. 28-174, leaves no room for sentiment. It confers a right to compensation only for pecuniary loss. Be that as it may, it seems appropriate to say that the mental picture gained from a reading of the record is one of tenderness and consideration for a beloved but seriously retarded and handicapped boy.

It is noted that the briefs do not cite decisions from other jurisdictions. In those considered in our research, none involves a factual situation sufficiently analogous to render the decision of persuasive significance.

In view of the ground of decision, it is unnecessary to discuss other questions raised by defendants' assignments of error.

Reversed.

BEULAH W. SLAUGHTER v. J. H. SLAUGHTER, JR.

(Filed 18 June, 1965.)

1. Negligence § 1—

A person injured as the result of heedless flight from fright engendered by a practical joke may recover for such injury if injury could have been foreseen by the perpetrator of the prank, notwithstanding that the perpetrator was not motivated by personal animosity or desire to inflict injury.

2. Damages § 3—

While damages may not be recovered for mere fright alone, damages are recoverable if the fright is accompanied by contemporaneous physical injury.

3. Negligence § 7—

It is not required that defendant be able to foresee the particular injury resulting, but only that in the exercise of reasonable care he could have foreseen that some injury would result from his conduct or that consequences of a generally injurious nature might ensue, and foreseeability is ordinarily a question for the jury.

4. Negligence § 24a—

Evidence tending to show that at a season when fireworks were not customarily discharged, defendant, as a practical joke to frighten his children, exploded firecrackers outside the window of the dimly lighted room in which his mother was watching television with his children, that the children became frightened and that his mother, thinking the unexplained explosions were gun fire, became hysterical, attempted to take flight, and stumbled to her injury, *held* sufficient to be submitted to the jury in the mother's action to recover for such injury.

5. Negligence § 28—

The charge in this case *is held* to have correctly instructed the jury in respect to foreseeability as an element of proximate cause.

APPEAL by defendant from *Hall, J.*, December 1964 Session of SCOTLAND.

Action by plaintiff to recover damages for injuries suffered by her when, frightened by the exploding of firecrackers outside a window of the room she was occupying, she attempted to flee from the room and fell. The firecrackers were exploded by defendant, son of plaintiff. Plaintiff was a guest in defendant's home at the time of the occurrence. It was the purpose of defendant to play a practical joke and thereby frighten his children who were in the room with plaintiff.

The jury found that defendant's negligence caused plaintiff's injuries and that plaintiff was not contributorily negligent. Substantial damages were awarded. Judgment in favor of plaintiff was entered in accordance with the verdict.

Mason, Williamson and Etheridge for plaintiff.
Henry & Henry for defendant.

MOORE, J. The appeal raises two questions for decision.

(1) Is plaintiff's evidence, when considered in the light most favorable to her, sufficient to withstand defendant's motion for nonsuit?

Plaintiff was 67 years of age and resided at Graham, N. C. At the time of the accident in question, 30 January 1964, she was visiting in the home of defendant, her son, at Laurinburg, N. C., and had been a guest there for about two weeks. Defendant and his wife planned to go out to dinner; plaintiff was to stay with the children. About 7:30 P.M., plaintiff and the two children, ages two and nine years, were seated on the sofa in the den, 6 to 8 feet from a large window, watching television. The drapes at the lower part of the window were drawn; at the top they were open. It was dark outside. There was a dim light in the den.

Plaintiff describes the occurrences thus: "Johnny (defendant) came into the room (den); I knew he was going out and I asked him to adjust the T-V. He stayed in the room just long enough to adjust the T-V. . . . While I was sitting there looking at T-V, I heard a noise that sounded like a shotgun; the children began to scream a little . . . You could tell they were frightened. It wasn't long until I heard a second noise. The second noise sounded like the first noise, sounded like a shotgun, real loud. The second time the children started screaming and I began to get a little bit panicky. Then the third time there was another noise. By that time I was emotionally upset. I didn't know what to do. . . . I remember taking one step and am sure I must have tried to take another step. I believe that is when I fell. . . . When I heard this third noise, I was hysterical, so highly emotional, I didn't know where I was. These noises came from the window on my right about 6 to 8 feet away. . . . The little girl was up on the sofa screaming. They were both screaming, 'Somebody is shooting at us; Somebody is shooting at us!' When I left the sofa, I was just kinda bent over; I didn't stand in erect position. I was trying to escape the firing, I felt that if I would stand up I would be shot. . . . It must have been some little object in my way. . . . Johnny and his wife came in the room while I was still lying on the floor. Johnny wanted to know if I was hurt and said he was playing a joke on the children and that firecrackers caused the noise. He said he was the one who shot the firecrackers. He said he was playing a joke on the children to frighten them."

Defendant's wife, alarmed by the explosions and the screaming of the children, ran outside. She found defendant "standing on the walk in front of the den window, maybe four feet away. There was bluish looking smoke all in the shrubbery." Defendant told her "he shot firecrackers to frighten the baby. He said he threw them over near the den window."

Plaintiff suffered a "fracture of the left hip" and "fracture of proximal end of the left fibula," requiring surgical treatment. Other serious injuries and conditions also resulted from plaintiff's fall. She incurred surgical, medical, hospital, nursing and equipment expenses totalling $3,886.97. She underwent much pain and suffering.

Defendant offered no evidence.

In a recent case, *Langford v. Shu*, 258 N.C. 135, 128 S.E. 2d 210, this Court speaking through Sharp, J., stated these principles which are in accord with the weight of authority: ". . . the fact that it is a practical joke which is the cause of an injury does not excuse the perpetrator from liability for the injuries sustained. 52 Am. Jur., Torts, Sec. 90; 86 C.J.S., Torts, Sec. 20. Where voluntary conduct breaches a duty and

causes damage it is tortious although without design to injury. 62 C.J., Torts, Sec. 22." Further: "If an act is done with the intention of bringing about an apprehension of harmful or offensive conduct on the part of another person, it is immaterial that the actor is not inspired by any personal hostility or desire to injure the other. See Annotation, Right of Victim of Practical Joke to Recover Against its Perpetrator, 9 A.L.R. 364." See also: *Farr v. Cambridge Co-operative Oil Company,* 81 N.W. 2d 597 (Neb.); *Kiener v. Steinfeld,* 61 A. 2d 305 (N.J.); *Nickerson v. Hodges,* 84 S. 37, 9 A.L.R. 361 (La.); *Great Atlantic & Pacific Tea Co. v. Roch,* 153 A. 22 (Md.); *Parker v. Enslow,* 102 Ill. 272.

As a general rule, damages for mere fright are not recoverable, but if there is a contemporaneous physical injury resulting from defendant's conduct there may be a recovery. 11 A.L.R., Anno. — Fright Resulting in Physical Injury, pp. 1119-1144, supplemented by 40 A.L.R. 983, 76 A.L.R. 681, and 98 A.L.R. 402. See also *Williamson v. Bennett,* 251 N.C. 498, 112 S.E. 2d 48; *Kirby v. Stores Corp.,* 210 N.C. 808, 188 S.E. 625.

Defendant does not dispute the validity or applicability of the foregoing general statements of law. He centers his attack upon a single element of actionable negligence — foreseeability. He contends that plaintiff's fall and resulting injuries were not, as a matter of law, reasonably foreseeable, that they were unusual and unlikely results of his conduct and that it imposes "too heavy a responsibility to hold him bound . . . to guard against what is unusual and unlikely to happen, or what, as it is sometimes said, is only remotely and slightly probable." *Herring v. Humphrey,* 254 N.C. 741, 745, 119 S.E. 2d 913. Defendant cites no case, factually analogous, in which comparable injury from comparable conduct is held to be unforeseeable as a matter of law. He relies on general principles relating to foreseeability.

It is sufficient if by the exercise of reasonable care the defendant might have foreseen that some injury would result from his conduct or that consequences of a generally injurious nature might have been expected. *Bondurant v. Mastin,* 252 N.C. 190, 113 S.E. 2d 292. Usually the question of foreseeability is one for the jury. *McIntyre v. Elevator Co.,* 230 N.C. 539, 545, 54 S.E. 2d 45.

The decided cases do not seem to sustain defendant's thesis. *Langford v. Shu, supra,* is in point. Two small boys had a box labeled "Danger, African Mongoose, Live Snake Eater"; the box was so contrived that a fox tail would be released by a spring when the lid was opened. When plaintiff, a neighbor, came to visit, the boys induced her near the box and suddenly released the fox tail, causing plaintiff, in attempting to escape what she thought was a wild animal, to stumble against a brick wall, resulting in personal injury. Defendant, mother of the boys,

was present, had knowledge of the practical joke, helped set the stage for perpetration of the joke on plaintiff by her answers to plaintiff's questions concerning the box, and generally entered into the fun. This Court declared: ". . . in the exercise of due care defendant could have reasonably foreseen that if a furry object came hurtling from the box toward plaintiff she would become so frightened that she was likely to do herself some bodily harm in headlong flight." We call attention also to the following cases in which injuries suffered in the course of flight engendered by fearsome practical jokes were held to be sufficiently foreseeable to justify submission for jury determination: *Johnston v. Pittard et al,* 8 S.E. 2d 717 (Ga.); *Lewis v. Woodland,* 140 N.E. 2d 322 (Ohio). These cases are summarized in *Langford v. Shu, supra.*

From the evidence in the case at bar the jury could find these facts. It was night and the room occupied by plaintiff and the children was dimly lighted. They were watching television. Defendant had left the room sometime before and he and his wife were to go out to dinner. It is a matter of common knowledge that this was not a season for shooting firecrackers. The children were under plaintiff's protection. Defendant intended to frighten the children by exploding the firecrackers outside the window, and did frighten them. Plaintiff had not been forewarned. She thought the sudden and unexpected explosions outside the window, only a few feet away, were gunfire. She was frightened, became hysterical, attempted to take flight, stumbled and fell to her injury. In our opinion it was for the jury to determine whether defendant, who acted secretly and with express intent to frighten the children, could reasonably foresee that his conduct would also frighten his elderly mother in whose protective care the children had been placed, and that she would react to fright in some manner that would probably cause her harm.

(2) "Did the Court err in its charge to the jury, both in omission and commission and particularly in regard to the charge on proximate cause and foreseeability? G.S. 1-180."

Defendant lists six exceptions to the charge and specifies his challenge thus: The judge " did not correctly explain the law of foreseeability as it relates to what is foreseeability," and he "failed to instruct the jury upon foreseeability in the relationship of the plaintiff's location and that of defendant's location." We have carefully studied the charge in the light of these objections and find the objections untenable. The judge correctly and fully charged the jury with respect to foreseeability and its application as an essential element of proximate cause, applied the law to the evidence, gave the parties' contentions with respect to foreseeability, and made it clear that a finding of reasonable foreseeability, by the greater weight of the evidence, was one of the

requisites of a verdict favorable to plaintiff. *Bondurant v. Mastin, supra; Adams v. Board of Education,* 248 N.C. 506, 103 S.E. 2d 854; *Boone v. R. R.,* 240 N.C. 152, 81 S.E. 2d 380.

No error.

STATE OF NORTH CAROLINA v. JOHN BLEASE STEVENS.

(Filed 18 June, 1965.)

1. Searches and Seizures § 1; Criminal Law § 79—

Where officers, investigating an assault with a gun, go to a suspect's house and enter and find him in his bedroom and also find in the house loaded buckshot shells and a shotgun, *held,* the conditions were such as to require a search warrant, and it was error to admit in evidence over defendant's objection the shells and shotgun, and the statute also renders incompetent testimony of an expert that, from his examination of the gun, empty shells found near the scene of the crime were fired from the gun. G.S. 15-27.1.

2. Criminal Law § 169—

The admission of incompetent evidence does not entitle defendant to judgment of compulsory nonsuit, since upon the subsequent trial the State may be able to offer sufficient competent evidence to carry the case to the jury.

APPEAL by defendant from *Crissman, J.,* 30 November 1964 Mixed Session of STANLY.

Criminal prosecution on an indictment charging that defendant on 2 August 1964 in a secret manner did maliciously and feloniously commit an assault and battery with a deadly weapon, to wit, a shotgun, upon Annette Cagle, Jeffrey Stevens, Clara Stevens, and Lonnie Smith by waylaying and otherwise, with intent to kill Annette Cagle, Jeffrey Stevens, Clara Stevens, and Lonnie Smith. G.S. 14-31.

Plea: Not guilty. The State alone offered evidence.

From a judgment of imprisonment, defendant appeals.

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

Blackwell M. Brogden for defendant appellant.

PARKER, J. The State's evidence shows these facts: Clara Stevens and defendant, her husband, separated on 27 July 1964. Three children were born of their marriage — Jo Anne, age 8 years; Johnny, age 5 years; and Jeffrey, age 3 years. Clara Stevens had a daughter, Annette

Cagle, age 18 years, born of a prior marriage. On 2 August 1964 Clara Stevens and her three children born of her marriage with defendant were living with her father, Lonnie Smith, in a five-room frame house at 837 Mill Street in the town of Albemarle.

About 1:30 a.m. on 2 August 1964, Clara Stevens was asleep in a bed in a bedroom in her father's house. This bedroom has one glass window in wood fronting toward Love Street, and her bed was about 12 feet from the window. In bed with her was her son Johnny, who was asleep. In the same room, Annette Cagle and Jeffrey Stevens were in a bed situate on the left side of the window, on the other side of the room from the bed in which Clara Stevens and Johnny were. Annette was awake. Next to this room was a bathroom with one window fronting toward Love Street, and next to this was a little room with two windows fronting toward Love Street, in which Lonnie Smith was asleep in a bed. Jo Anne and her maternal grandmother were in another part of the house.

Clara Stevens testified: "On the night of August 2, 1964, I woke up and heard shots and glass a-breaking and —this was around 1:30 o'clock a.m. I heard five (5) real loud shots, one firing right after another. The glass was breaking from my bedroom window that was facing Love Street. * * * The glass fell in the room. * * * The shot [*sic*] came through the bed and into the doors and then on into the wall behind the door. I don't know how many came in, but they were buckshot and they spread." Clara got out of bed and called the police. Neither Clara nor her son Johnny was hit by a shot.

Annette Cagle testified to this effect: She was lying in bed with Jeffrey sleeping by her side. She heard four shots, real loud, one right after the other. The shots broke the glass in the window and glass was all over the room. She felt glass hit her leg, which "brought blood to the surface." Jeffrey waked, and jumped out of bed. She jumped out of bed, and they lay on the other side of the bed until the police came.

Lonnie Smith testified: "* * * I heard shots at one o'clock a.m. or about 1:30 o'clock a.m. I heard five shots. The next day I observed eight or nine bullet holes in my room."

A few minutes after the shooting a police officer of the town of Albemarle arrived at Lonnie Smith's house. About 2 a.m. on 2 August 1964 three police officers of the town of Albemarle went to the home of defendant, which is situate about 300 or 400 feet from the home of Lonnie Smith. They had no warrant for his arrest, and no search warrant for his premises. The screen door was closed, the inside door was open, and the house was dark. They knocked two or three times and received no answer. Two of them opened the screen door and walked into the house hollering for defendant. One officer went in a side door.

In a little bedroom next to the kitchen they found defendant, wearing Bermuda shorts and a shirt, lying on a bed. They turned him over on his side and shook him. He turned on his back, and asked what they were doing there. They said they thought he might have had something to do with the shooting at the Smith house. He denied doing any shooting there. Over defendant's objections and exceptions, the officers were permitted to testify that they found on a dresser in his bedroom eight loaded double ought buckshot shells, 12 gauge, and standing up behind the kitchen door, about five or six feet from where defendant was found in bed, an unloaded 12 gauge Remington automatic shotgun. Over defendant's objections and exceptions, the State was permitted to offer these shells and this shotgun in evidence; the shotgun was marked State's Exhibit 10, and the empty shells were marked State's Exhibit 11. Over defendant's objections and exceptions, the officers were permitted to testify that in the bedroom were defendant's shoes which had wet grass and dirt on them. The officers arrested defendant in his home without a warrant, and carried him to jail.

Later, a police officer of the town of Albemarle found across Love Street on a bank in Mr. Freeman's yard, which is about 45 feet from the window of the bedroom where Clara Stevens and three other persons were that night, four empty double ought buckshot shells, 12 gauge. He found another similar shell off this bank in a ditch.

Over defendant's objections and exceptions, John Boyd, a special agent with the State Bureau of Investigation assigned to and in charge of the firearms and ballistics section of its crime laboratory, and whom the court found as a fact was an expert in ballistics, was permitted to testify to the following effect: Frank Blalock, a police officer of the town of Albemarle, delivered to him in his office in Raleigh on 3 August 1964 a 12 gauge Remington automatic shotgun, which is State's Exhibit 10, and five fired double ought buckshot shells, 12 gauge, which are State's Exhibit 11. He ran a ballistic test on this automatic shotgun to determine whether or not it was the weapon that fired the five empty double ought buckshot shells, 12 gauge, delivered to him by Blalock, and that in his opinion all five of these shells were fired by this shotgun. Officer Blalock delivered to him eight double ought buckshot shells, 12 gauge, which had not been fired. He fired six of these shells for examination purposes.

Defendant assigns as errors the admission in evidence over his objections and exceptions of the 12 gauge Remington automatic shotgun and of the eight 12 gauge loaded double ought shotgun shells found in his home by the officers and of their testimony in respect to these articles and in respect to his shoes found in his house. The assignment of errors is good.

The General Assembly by Chapter 644, 1951 Session Laws, amended G.S. 15-27 by adding a proviso in express and explicit words reading as follows: "Provided, no facts discovered or evidence obtained without a legal search warrant in the course of any search, made under conditions requiring the issuance of a search warrant, shall be competent as evidence in the trial of any action." It would seem that this amendment to G.S. 15-27 by the General Assembly was enacted by reason of the decision by a divided Court in *S. v. McGee,* 214 N.C. 184, 198 S.E. 616 (28 September 1938). 29 N. C. Law Review 396 (1951); 32 N. C. Law Review 114 *et seq.* (1953).

The General Assembly, Chapter 496, 1957 Session Laws, amended Article 4, Chapter 15 of the General Statutes by adding a new section immediately following § 15-27, to be numbered § 15-27.1, and reading as follows:

> "The provision of this article shall apply to search warrants issued for any purpose including those issued pursuant to the provisions of G.S. 18-13. No facts discovered or evidence obtained by reason of the issuance of an illegal search warrant or without a legal search warrant in the course of any search, made under conditions requiring a search warrant, shall be competent as evidence in the trial of any action."

In *S. v. Coffey,* 255 N.C. 293, 121 S.E. 2d 736, the Court, after quoting the second sentence of G.S. 15-27.1, said:

> "To render evidence incompetent under the foregoing section, it must have been obtained (1) 'in the course of . . . search,' (2) 'under conditions requiring a search warrant,' and (3) without a legal search warrant. The purpose of this and similar enactments (G.S. 15-27) was 'to change the law of evidence in North Carolina, and not the substantive law as to what constitutes legal or illegal search.' Therefore a search that was legal without a warrant before these enactments is still legal, and evidence so obtained still competent. 30 N. C. Law Review 421. It will be noted that the statutes use the phrase 'under conditions requiring a search warrant.' No search warrant is required where the officer 'sees or has absolute personal knowledge' that there is intoxicating liquor in an automobile. *State v. Giles,* 254 N.C. 499, 119 S.E. 2d 394; *State v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133. No search warrant is required where the owner or person in charge consents to the search. *State v. McPeak,* 243 N.C. 243, 90 S.E. 2d 501."

There is no evidence that defendant consented to or invited a search of his home. There is no evidence that the search was incident to a law-

ful arrest. The search of defendant's home by the three officers, upon the facts in the instant case, without a search warrant was "made under conditions requiring a search warrant," and consequently the facts discovered and the evidence obtained were rendered incompetent by statute and improperly admitted in evidence. *S. v. McMilliam,* 243 N.C. 771, 92 S.E. 2d 202; *In re Walters,* 229 N.C. 111, 47 S.E. 2d 709; *Agnello v. United States,* 269 U.S. 20, 70 L. Ed. 145; Wharton's Criminal Law and Procedure, Anderson Ed. (1957), Vol. IV, § 1535; 79 C.J.S., Searches and Seizures, § 66(d); 47 Am. Jur., Searches and Seizures, § 16.

Defendant assigns as error the admission in evidence over his objections and exceptions of the testimony of John Boyd to the effect that he ran a ballistic test on the 12 gauge Remington automatic shotgun, which is State's Exhibit 10, to determine whether or not it was the weapon that fired the five empty double ought buckshot shells, 12 gauge, which are State's Exhibit 11, and that in his opinion all five of these shells were fired by this shotgun. This assignment of error is good, for the reason that this testimony of John Boyd was in respect to the shotgun and empty shells which were rendered incompetent by statute and improperly admitted in evidence. To hold his testimony competent under the facts here would be to nullify the express and explicit provisions of G.S. 15-27.1.

The record does not contain the verdict of the jury. Neither does the court's minutes. However, it seems plain the jury rendered a verdict of guilty for two reasons: (1) Defendant so states in his brief; and (2) the court's judgment of imprisonment. The omission of the jury's verdict in the court's minutes and in the record shows the necessity for the trial judge's reading the minutes before he signs them.

Defendant is not entitled to a judgment of compulsory nonsuit. At the next trial the State may be able to offer sufficient competent evidence to carry the case to the jury. *S. v. Hall, ante,* 559, 142 S.E. 2d 177; *S. v. McMilliam, supra.* For error in the admission of incompetent evidence, defendant is entitled to a

New trial.

STATE OF NORTH CAROLINA v. ROBERT CLIFTON WHITLEY.

(Filed 18 June, 1965.)

1. Indictment and Warrant § 12; Criminal Law § 26—

An indictment for escape specifying that the escape occurred on a date antecedent the date sentence was imposed is fatally defective on its face, since it avers an impossibility, and therefore the indictment is not subject to amendment as to date, G.S. 15-155, and the trial court's action in withdrawing a juror and ordering a mistrial amounts to a quashal of the indictment, and the circumstances will not support a plea of former jeopardy upon the subsequent trial upon an indictment correctly specifying the respective dates.

2. Prisons § 2—

The director of prisons, or his duly authorized agents or representatives, has authority to designate the places of confinement of prisoners within the State prison system. G.S. 148-4.

3. Escape § 1—

A prisoner hired by the State Highway Commission to work on the State highways is within the State prison system when an agent of the Commission has been designated to receive and work such prisoner, and therefore the escape of a prisoner from the custody of the gang foreman while working on the public roads is an escape from the State prison system. G.S. 148-45(a).

PETITION for writ of *certiorari* allowed by this Court 23 March 1965.

The petitioner was brought to trial at the October Mixed Session 1964 of the Superior Court of JOHNSTON County upon an indictment reading as follows:

"THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Robert Clifton Whitley, late of the County of Johnston, on the 1 day of June, in the year of our Lord one thousand nine hundred and sixty-three, with force and arms at and in the County aforesaid, while he, the said Robert Clifton Whitley, was then and there lawfully confined in the North Carolina State Prison System in the custody of R. G. Lane, Superintendent of N. C. State Prison Camp #044, and while then and there serving a sentence for the crime of Breaking and entering and Larceny, a misdemeanor, under the laws of the State of North Carolina, imposed at the January 22, 1964, Term of the Superior Court of Wake County, then and there did unlawfully, willfully, and feloniously escape from the said R. G. Lane, Superintendent, this being his second offense, having been convicted of escape at the April 14, 1964, Term of the Selma District Recorder's Court, Johnston County,

North Carolina, against the form of the statute in such case made and provided and against the peace and dignity of the State."

The petitioner entered a plea of not guilty to the charge. After the jury was sworn and impaneled to make true deliverance in the case, it was called to the attention of the lower court that the indictment should have alleged that the offense occurred on 1 June 1964 instead of on 1 June 1963. Defendant's counsel objected to the amendment of the bill of indictment, which objection was sustained by the court. Whereupon, the court in its discretion withdrew a juror and ordered a mistrial.

After the mistrial was ordered on the original bill of indictment, the solicitor sent another bill to the grand jury at the October Mixed Session 1964, charging the petitioner with feloniously escaping from the State prison system on 1 June 1964, and a true bill was returned at said October Session, this bill of indictment being identical with the first bill except as to the date on which the escape is alleged to have occurred.

The petitioner was brought to trial on the second bill of indictment at the December Criminal Session 1964 of the Superior Court of Johnston County. He entered a plea of former jeopardy, which was denied. He then entered a plea of not guilty. From the conviction and judgment entered at the December Mixed Session 1964 of the Superior Court of Johnston County, the petitioner gave notice of appeal to the Supreme Court. The appeal was not perfected. Later, court-appointed counsel filed a petition for writ of *certiorari*, seeking a review of the trial below. The writ was allowed.

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

Wallace Ashley, Jr., for petitioner.

DENNY, C.J. In our opinion, the petitioner raises only two questions that merit discussion and determination. (1) Did the lower court commit error in denying petitioner's plea of former jeopardy? (2) Does escape by a prisoner from the custody of a gang foreman employed by the North Carolina State Highway Commission while at work on the public roads, constitute "escape from the State prison system" within the meaning of G.S. 148-45(a)?

The pertinent part of G.S. 148-45(a) reads as follows:

"Any prisoner serving a sentence imposed upon conviction of a misdemeanor who escapes or attempts to escape from the State prison system shall for the first such offense be guilty of a misdemeanor and, upon conviction thereof, shall be punished by im-

prisonment for not less than three months nor more than one year. Any prisoner serving a sentence imposed upon conviction of a felony who escapes or attempts to escape from the State prison system shall for the first such offense be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than six months nor more than two years. Any prisoner convicted of escaping or attempting to escape from the State prison system who at any time subsequent to such conviction escapes or attempts to escape therefrom shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than six months nor more than three years. * * *"

In *S. v. Jordan*, 247 N.C. 253, 100 S.E. 2d 497, in pointing out the defects in the bill of indictment involving escape, Bobbitt, J., speaking for the Court, said:

"We do not undertake on this appeal to specify the exact averments prerequisite to a valid warrant or bill of indictment based on G.S. 148-45. Suffice to say, the bill of indictment on which defendant was tried is fatally defective. There is no averment of any kind, even in general terms that the alleged escape of January 9, 1957, occurred while defendant was serving a sentence imposed upon his conviction of any criminal offense. In order to charge the offense *substantially in the language* of G.S. 148-45, it would be necessary to allege that the escape or attempted escape occurred when defendant was serving a sentence imposed upon conviction of a misdemeanor or of a felony, irrespective of whether the presently alleged escape or attempted escape is alleged to be a first or a second offense. * * *

"It is noted that arrest of judgment on the ground that the bill of indictment is fatally defective does not bar further prosecution for a violation of G.S. 148-45, if the solicitor deems it advisable to proceed on a new bill. * * *"

The petitioner was charged in the original bill of indictment with having escaped on 1 June 1963 while serving a sentence imposed in January 1964, which sentence was imposed nearly eight months after the date the petitioner is alleged to have escaped.

We are not inadvertent to the provisions of G.S. 15-155 with respect to dates in a bill of indictment, and if the date of the alleged escape had been after the petitioner had been committed to prison and while he was serving a prison sentence pursuant to such commitment, although the alleged date of the escape was erroneous, the indictment would not be defective by reason of the insertion of such erroneous date. However,

where the indictment on its face negatives any possibility of a showing that at the time of the alleged escape the petitioner was serving a sentence in prison, we think such indictment was fatally defective, that the action of the court below in ordering a mistrial was tantamount to quashing the bill of indictment, which the trial court had the right to do *ex mero motu*, and that the petitioner's conviction on the second bill of indictment is valid and the plea of former jeopardy was properly overruled.

Unquestionably, G.S. 148-4 gives the Director of Prisons or his duly authorized agents or representatives the authority to designate the places of confinement within the State prison system where the sentences of prisoners shall be served. This statute expressly provides:

> "* * * Employees of departments, institutions, agencies, and political subdivisions of the State hiring prisoners to perform work outside prison confines may be designated as the authorized agents of the Director of Prisons for the purpose of maintaining control and custody of prisoners who may be placed under the supervision and control of such employees, including guarding and transferring such prisoners from place to place in the State as their duties might require, and apprehending and arresting escaped prisoners and returning them to prison. * * *"

Certainly, prisoners hired by the State Highway Commission to work on the highways of the State are within the prison system when the agents of the Highway Commission have been designated to receive and work such prisoners. Likewise, G.S. 148-6 provides in substance that convicts after their commitment to the Prison Department remain under the actual management, control and care of the department, and this applies to convicts employed on farms of the State, or elsewhere or otherwise.

It is also prescribed in G.S. 148-26(e): "* * * All contracts for the employment of prisoners shall provide that they shall be fed, clothed, quartered, guarded, and otherwise cared for by the Prison Department."

We think the second question posed must be answered in the affirmative. We assume that the State established the fact that the party or parties having custody of the prisoners, including the defendant at the time he escaped, were agents of the Prison Department. The record before us does not contain the evidence adduced in the trial below, therefore, it will be presumed that the evidence was sufficient to support the verdict.

In the trial below, we find

No error.

STATE v. WILLIAM LAYTON HARWARD.

(Filed 18 June, 1965.)

1. Crime Against Nature § 1—

The crime against nature is sexual intercourse contrary to the order of nature.

2. Crime Against Nature § 2—

Evidence in this case held sufficient to sustain conviction of defendant of committing the crime against nature with a male person.

3. Same—

Upon the trial of an indictment charging defendant with committing the crime against nature, defendant may be convicted of an attempt to commit the offense, which is an infamous act within the meaning of G.S. 14-3 and is punishable as a felony.

4. Crime Against Nature § 1—

G.S. 14-202.1 does not repeal G.S. 14-177 but is supplementary thereto and was enacted for the purpose of providing even broader protection to children.

APPEAL by defendant from *Braswell, J.*, March 1965 Criminal Session of ALAMANCE.

Criminal action tried on an indictment charging defendant with "the abominable and detestable crime against nature" with a named male person.

Plea: Not guilty. Verdict: Guilty "of attempt to commit the crime against nature." Judgment: Imprisonment in State prison for not less than four nor more than eight years.

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

W. R. Dalton, Jr., for defendant.

MOORE, J. Defendant assigns as error the denial of his motion in arrest of judgment.

The crime against nature is sexual intercourse contrary to the order of nature. It includes acts with animals and acts between humans *per anum* and *per os*. *State v. Fenner*, 166 N.C. 247, 80 S.E. 970. ". . . our statute is broad enough to include in the crime against nature other forms of the offense than sodomy and buggery. It includes all kindred acts of a bestial character whereby degraded and perverted sexual desires are sought to be gratified." *State v. Griffin*, 175 N.C. 767, 94 S.E. 678. "Proof of penetration of or by the sexual organ is essential to conviction." *State v. Whittemore*, 255 N.C. 583, 585, 122 S.E. 2d 396. The

crime against nature is a felony. G.S. 14-177; *State v. Jernigan,* 255 N.C. 732, 122 S.E. 2d 711.

The evidence is sufficient to make out a *prima facie* case against defendant of that crime with a male person *per os.* The jury returned a verdict of guilty of an attempt to commit the crime. The record does not show the ages of the actors, but during the oral argument in Supreme Court it was disclosed that both were over the age of sixteen years.

Upon the trial of an indictment for the crime against nature the accused may be convicted of the offense charged therein, or the attempt to commit the offense. G.S. 15-170; *State v. Savage,* 161 N.C. 245, 76 S.E. 238. An attempt to commit the crime against nature is an infamous act within the meaning of G.S. 14-3 and is punishable as a felony. *State v. Mintz,* 242 N.C. 761, 89 S.E. 2d 463; *State v. Spivey,* 213 N.C. 45, 195 S.E. 1.

Defendant's motion in arrest of judgment is based on the proposition that G.S. 14-202.1, a statute passed in 1955 and codified under the title "Taking Indecent Liberities with Children," repealed, by implication, the offense of attempt to commit the crime against nature, or at least reduced it from a felony to a misdemeanor.

In the opinion, delivered by Parker, J., in *State v. Lance,* 244 N.C. 455, 94 S.E. 2d 335, the construction which defendant now urges for G.S. 14-202.1 was considered directly and rejected by this Court. Defendant would have us reconsider and overrule *Lance.* The gist of the *Lance* opinion is:

> "The court has the right to look to the title of an ambiguous statute for the purpose of determining the meaning thereof and the legislative intent. *S. v. Keller,* 214 N.C. 447, 199 S.E. 620; *S. v. Woolard,* 119 N.C. 779, 25 S.E. 719; 50 Am. Jur., Statutes, sec. 311."
>
> "Ch. 764, Session Laws 1955, now codified as G.S. 14-202.1, is captioned 'An Act to provide for the protection of children from sexual psychopaths and perverts,' and reads: 'Section 1. Any person over 16 years of age who, with intent to commit an unnatural sexual act, shall take, or attempt to take, any immoral, improper, or indecent liberties with any child of either sex, under the age of 16 years, or who shall, with such intent, commit, or attempt to commit, any lewd or lascivious act upon or with the body, or any part or member thereof, of such child, shall, for the first offense, be guilty of a misdemeanor and for a second or subsequent offense shall be guilty of a felony, and shall be fined or imprisoned in the

discretion of the court. Sec. 2. All laws and clauses of laws in conflict with this Act are hereby repealed.'

"It is manifest that G.S. 14-202.1 does not repeal, and was not intended to repeal, in its entirety G.S. 14-177. . . . To hold otherwise would lead to the absurdity of imputing to the legislative body a purpose to abolish the statute condemning crimes against nature."

"G.S. 14-202.1 is not repugnant to G.S. 14-177 so as to work a repeal in part of G.S. 14-177, intentionally or otherwise. The two acts are complementary rather than repugnant or inconsistent. G.S. 14-177 condemns crimes against nature whether committed against adults or children. G.S. 14-202.1 condemns those offenses of an unnatural sexual nature against children under 16 years of age by persons over 16 years of age which cannot be reached and punished under the provisions of G.S. 14-177. G.S. 14-202.1, of course, condemns other acts against children than unnatural sexual acts. The two statutes can be reconciled, and both declared to be operative without repugnance."

Rodman, J., in *State v. Whittemore, supra,* refers to *Lance* with approval in these terms:

"An article entitled "The Law of Crime Against Nature" was published in 32 N. C. Law Rev. 312 in 1954. The author traces the history of the statute, takes note of the few times this Court had been called upon to interpret the statute and the need of additional legislation to specifically define criminal sexual conduct. The Legislature, at the session following the publication of this article, enacted c. 764 S. L. 1955, now G.S. 14-202.1. That Act supplements G.S. 14-177. *S. v. Lance,* 244 N.C. 455, 94 S.E. 2d 335."

Thereafter, in *State v. Wright,* 263 N.C. 129, 139 S.E. 2d 10, a case involving a charge of the crime against nature with a thirteen-year-old boy, this Court upheld a judgment based on a verdict of guilty of attempt to commit the crime against nature.

It is our considered judgment that the arguments advanced by defendant for overruling the *Lance* decision are not valid. Indeed, substantially the same arguments were made by defendant in the *Lance* case; they were then considered, discussed in the opinion, and rejected. We have fully reconsidered the matter in the light of our own research, and we find no valid reason for reversing our former opinion. The article in 32 N. C. Law Review 312 (April 1954), entitled "The Law of Crime Against Nature," advocated the drafting and enactment by the General

Assembly of a law covering the entire subject of unnatural intercourse as a substitute for the common law principles recognized and applied in this jurisdiction, and it set out provisions to be embodied in the law, including one covering molestation of children under the age of sixteen. Since G.S. 14-202.1 (passed at the 1955 Session) embodies some of the language of the Law Review article, it is reasonable to infer that the General Assembly fully considered the recommendations made. It did not rewrite or revise the crime against nature laws. Action was limited to the passage of G.S. 14-202.1. It is clear that there was no legislative intent to repeal the law respecting the crime against nature in any aspect; the intent was to supplement it and to give even broader protection to children.

No error.

SAFECO INSURANCE COMPANY OF AMERICA, PLAINTIFF v. NATIONWIDE MUTUAL INSURANCE COMPANY, DEFENDANT.

(Filed 18 June, 1965.)

Insurance § 66.1; Execution § 3; Judgments § 43—

Where insurer for the original defendant pays plaintiff's judgment he becomes by operation of law an assignee of the original defendant's judgment against the additional defendants for contribution, and when execution against the additional defendants, issued in the name of the original defendant, is returned unsatisfied, insurer for the original defendant may maintain an action on the judgment against insurer for the additional defendants.

APPEAL by plaintiff from *Bone, E.J.*, March 8, 1965 Session of WAKE.

Defendant demurred to the complaint for failure to state a cause of action. The demurrer was sustained.

Summarily stated, the complaint alleges these facts: On May 2, 1962, defendant issued to William Elliott an assigned risk automobile liability insurance policy affording protection to those insured thereby, to the extent required by G.S. 20-279.21, against liability resulting from the operation of the Ford automobile therein described.

On December 22, 1962, Otis Davis Blue, while operating the Ford described in the policy issued to Elliott, was involved in a collision with an automobile operated by Joe Harold Parnell. Blue was operating the Ford in the presence of and with the consent of Elliott. He was, because of such consent, an insured protected by the policy.

Billy Ray Phillips was injured when the automobiles collided. Phillips, alleging his injuries were caused by Parnell's negligence, instituted an action in the Superior Court of Sampson County to recover damages for the injuries sustained. Parnell caused Elliott and Blue to be made parties for contribution, as permitted by G.S. 1-240.

The jury, when the cause was tried, found Phillips was injured by the negligence of Parnell. It fixed his damage at $3,500. It also found plaintiff was injured and damaged by the joint and concurring negligence of Blue and Elliott, as alleged in the cross action. (See *Phillips v. Parnell*, 261 N.C. 410, 134 S.E. 2d 676.) Based on the verdict, judgment was entered in Phillips' favor against Parnell for $3,500 and costs. It was further adjudged "that upon the payment by or on behalf of defendant Joe Harold Parnell of the sum of THREE THOUSAND FIVE HUNDRED DOLLARS ($3,500.00) to the Clerk of Superior Court of Sampson County in satisfaction of the judgment of plaintiff, defendant Joe Harold Parnell have and recover of additional defendants Otis Davis Blue and William Elliott, the sum of ONE THOUSAND SEVEN HUNDRED FIFTY ($1,750.00) DOLLARS. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the costs of this action be taxed against defendant Joe Harold Parnell, and that upon payment thereof defendant Joe Harold Parnell have judgment against additional defendants Otis Davis Blue and William Elliott for one-half of the amount thereof."

Prior to December 1962, plaintiff insured Parnell against liability resulting from the negligent operation of his automobile, one of the vehicles involved in the collision causing injury to Phillips. Plaintiff, acting as required by the policy issued Parnell, on October 2, 1963, paid and had cancelled of record the judgment obtained by Phillips against Parnell. The amount paid, including costs, amounted to $3,597.10. Because of the payment so made, plaintiff, as a matter of law and by express language of its policy, became subrogated to the rights of Parnell against Blue and Elliott.

Plaintiff caused execution to issue in Parnell's name, to enforce the judgment liability of Blue and Elliott, as fixed by the judgment rendered in Phillips' action against Parnell. The execution was returned unsatisfied.

Plaintiff, because of its payment of the judgment against its insured, was subrogated to its insured's rights. Defendant, by the express provisions of the policy issued Elliott, was obligated to discharge the judgment liability of Blue and Elliott.

Teague, Johnson & Patterson; Robert M. Clay for plaintiff appellant.

Dupree, Weaver, Horton & Cockman; F. T. Dupree, Jr. and Jerry S. Alvis for defendant appellee.

RODMAN, J. It has been judicially established that the negligent operation of a motor vehicle by Blue and Elliott, coupled with the negligent operation of another motor vehicle by Parnell, resulted in injuries to Phillips. The amount of compensation to which he is entitled has been judicially determined. Phillips elected to look to Parnell for compensation. Parnell, as permitted by G.S. 1-240, had Blue and Elliott made parties for contribution. The judgment which Phillips obtained against Parnell also adjudged Blue and Elliott liable to Parnell for their proportionate part of the compensation for which Parnell was adjudged liable. The Phillips' judgment has been paid. That payment made Parnell a judgment creditor of Blue and Elliott. They have not challenged the judgment declaring their liability.

If Parnell had used his funds to pay Phillips, he could have collected his judgment by execution against his judgment debtors if they had property sufficient to satisfy the execution, G.S. 1-302.

Parnell could assign his judgment against Blue and Elliott. When assigned, execution thereon would issue in Parnell's name — not in the name of the assignee. *Winberry v. Koonce*, 83 N.C. 351; *Jones v. Franklin Estate*, 209 N.C. 585, 183 S.E. 732; 49 C.J.S. 973. If, however, the assignee elected to sue on the judgment, the action could only be maintained in the name of the assignee, G.S. 1-57. *Moore v. Nowell*, 94 N.C. 269; *Burgess v. Trevathan*, 236 N.C. 157, 72 S.E. 2d 231; *Herring v. Jackson*, 255 N.C. 537, 122 S.E. 2d 366; *Parnell v. Insurance Co.*, 263 N.C. 445, 139 S.E. 2d 723; *Shambley v. Heating Co.*, 264 N.C. 456, 142 S.E. 2d 18.

Plaintiff, Parnell's insurer, having discharged Parnell's liability to Phillips, became by operation of law an equitable assignee. As such, it acquired Parnell's rights to enforce payment from Blue and Elliott. *Cunningham v. R. R.*, 139 N.C. 427, 51 S.E. 1029; *Pittman v. Snedeker*, 264 N.C. 55, 140 S.E. 2d 740; *Shambley v. Heating Co., supra.*

The fact that plaintiff, as subrogee of Parnell, can by execution or action enforce the judgment liability of Blue and Elliott imposes no obligation on defendant. That obligation, if it exists, results from the contract which defendant made for the benefit of Blue and Elliott. Plaintiff alleges defendant contracted:

> "To pay on behalf of the insured [Blue and Elliott] all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the ownership, maintenance, or use of the automobile.

"ACTION AGAINST COMPANY: No action shall lie against the company, unless as a condition precedent thereto, the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant, and the company.

"Any person or organization or legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy."

There can be no reasonable doubt that the contract, as alleged, was intended to protect Blue and Elliott from judgments imposing liability on them for the negligent operation of a motor vehicle. Plaintiff, as an equitable assignee of Parnell, succeeding to his rights, can compel defendant to perform its contract. This is true by the express language of the contract, as well as by numerous decisions of this Court. *Potter v. Water Co.*, 253 N.C. 112, 116 S.E. 2d 374; *Lammonds v. Manufacturing Co.*, 243 N.C. 749, 92 S.E. 2d 143; *Trust Co. v. Processing Co.*, 242 N.C. 370, 88 S.E. 2d 233.

The facts alleged, and admitted by the demurrer, establish defendant's liability. The admissions are, however, conditional. Defendant may, by answer, controvert any of the facts alleged by plaintiff.

Reversed.

GREAT AMERICAN INSURANCE COMPANY v. SNEED HIGH, COMMISSIONER OF REVENUE, AND EDWIN S. LANIER, COMMISSIONER OF INSURANCE.

AND

EMPLOYERS MUTUAL FIRE INSURANCE COMPANY v. SNEED HIGH, COMMISSIONER OF REVENUE, AND EDWIN S. LANIER, COMMISSIONER OF INSURANCE.

(Filed 18 June, 1965.)

1. Firemen's Pension Fund Act—

The 1961 statutes providing for a Firemen's Pension Fund, making a specific line item appropriation to the fund not related to nor dependent upon taxes paid by insurance companies, and levying a tax by act passed in conformity with Art. II, § 14 of the State Constitution are valid, and insurance companies are not entitled to recover amounts paid under protest under the taxing statute. Chapters 833, 980, 783 of the Session Laws of 1961.

2. Statutes §§ 7, 11—

Where a statute is void because its machinery violates certain constitutional directives but the statute is within the legislative power to enact, the statute may be amended so as to obviate the constitutional objection and such amendment has the effect of re-enacting the statute with the amendment incorporated in it so that the statute is rendered valid by the amendment so far as its prospective operation is concerned.

APPEALS by plaintiffs from *Copeland, S.J.*, December 1964 Civil Session of WAKE.

Plaintiffs, in 1962 and 1963, reported: "The amounts collected on contracts of insurance applicable to fire and lightning coverage (marine and automobile policies not being included)." G.S. 105-228.5. They paid under protest a tax computed at one per cent on the sums shown in their reports. The tax so paid was in addition to all other taxes imposed by the statute. Their demands for a refund were refused. In apt time, they instituted these actions to recover the sums paid under protest. They base their right to refund on their assertions that there is no valid statute imposing tax liability.

The actions were consolidated for trial. The parties waived jury trial. At the conclusion of plaintiffs' evidence, defendants moved for nonsuit. The motion was allowed. Plaintiffs appealed.

The Attorney General moved in this Court to substitute I. L. Clayton, acting Commissioner of Revenue, for Sneed High, the former Commissioner of Revenue. This motion was allowed April 6, 1965.

Joyner & Howison; Allen, Steed & Pullen for plaintiff appellants.

Attorney General Bruton; Assistant Attorney General Barham for defendant appellees.

RODMAN, J. These actions add another chapter in the litigation revolving around the right of the State to appropriate public moneys to a fund created for the purpose of pensioning firemen, and the right of the State to tax insurance companies. Prior cases arising out of legislative attempts to accomplish these purposes are: *Assurance Co. v. Gold, Comr. of Insurance,* 248 N.C. 288, 103 S.E. 2d 344; *Insurance Co. v. Gold, Comr. of Insurance,* 248 N.C. 293, 103 S.E. 2d 348; *Bizzell v. Insurance Co.,* 248 N.C. 294, 103 S.E. 2d 348; *In re Rating Bureau,* 249 N.C. 466, 106 S.E. 2d 879; *Insurance Co. v. Gold, Commissioner of Insurance,* 254 N.C. 168, 118 S.E. 2d 792; *Insurance Co. v. Johnson, Comr. of Revenue,* 257 N.C. 367, 126 S.E. 2d 92.

The cited cases establish legislative authority and limitation on its power. It is now settled law that: (1) The Legislature may appropriate public funds to pension local firemen, employees of State agencies and

subdivisions; (2) the Legislature may not tax a particular class for the sole benefit of a particular group; (3) chs. 1211, 1212 and 1273, S.L. 1959, were in substance a single piece of legislation, attempting to do by indirection that which could not be done directly; (4) the tax authorized by ch. 1211 was intended for the sole benefit of a particular group, collection for that purpose was constitutionally prohibited; (5) the proviso at the end of the Taxing Act (see ch. 1211, S.L. 1959) reading: "provided, that this tax shall not be levied on contracts of insurance written on property in unprotected areas," was not so vague as to render the act void.

Plaintiffs, in *Insurance Co. v. Johnson, Comr. of Revenue, supra,* sought a refund of the taxes paid under the 1959 Act, asserting the Taxing Statute (ch. 1211, S.L. 1959) was void for two reasons: (1) It was too vague to be interpreted; and (2) it was part of a legislative plan to do indirectly that which could not be done directly.

Proponents of legislation to pension firemen convinced the 1961 Legislature that the 1959 statutes should be amended to overcome the objections which insurance companies had advanced to invalidate those statutes. To that end, the 1961 Legislature made these changes in the 1959 statutes relating to the Firemen's Pension Fund: (1) The 1961 Appropriations Act (ch. 833) made a line item appropriation to the North Carolina Firemen's Pension Fund. This appropriation was specific, in no way related to or dependent on taxes paid by insurance companies. The appropriation made by ch. 1273, S.L. 1959, was conditional, expressly dependent on taxes collected from insurance companies.

Ch. 980, S.L. 1961, amended the Pension Fund Act (ch. 1212, S.L. 1959) by deleting § 2, and the other portions of that Act which limited payment to the Pension Fund to collections from insurance companies. Ch. 783, S.L. 1961, amended the Tax Act of 1959 (ch. 1211) by deleting the proviso.

Defendants argued, in *Insurance Co. v. Johnson, Comr. of Revenue, supra,* that the amendments made by the 1961 Legislature validated the tax levy made against plaintiffs under the 1959 Act. We said, in response to that contention: "The legislation enacted in 1961 relating to taxes on insurance companies and pensions for firemen is not relevant to the present controversy. Plaintiffs' rights are to recover the taxes levied and paid under the 1959 statutes."

This action is to recover taxes paid pursuant to the provisions of the Tax Act, as amended in 1961. Plaintiffs contend, since the 1959 Tax Act was void, life cannot be given to it by an amendment. To accept that argument as valid here would do violence to manifest legislative intent, denying to the Legislature the power to act because of a mere formality. It completely overlooks the basic reason which invalidated

the taxing statute. The statute was not void *per se*. It was void only because of association with the other statutes relating to the Firemen's Pension Fund.

The 1961 Acts have totally disassociated taxes on insurance premiums from the appropriation which the State makes to the Firemen's Pension Fund. The appropriation is neither diminished nor increased by the amount received from the tax levied on insurance companies. The appropriation made to that fund stands on an equal footing with all other appropriations.

Ch. 783, S.L. 1961, which amended the Taxing Act (ch. 1211, S.L. 1959), had its origin in Senate Bill 297. When introduced, it was referred to the Committee on Finance. It passed its second and third readings by roll call votes on separate days. When sent to the House, it was referred to the Committee on Finance. It received a favorable report. It passed its second and third readings in the House by roll call votes on separate days. Its passage by the Legislature meets the requirements of Art. II, § 14. of the North Carolina Constitution.

Decisions touching the power of the Legislature to validate an unconstitutional statute by amendment are not in agreement. Whether the Legislature has such power depends, we think, upon the nature of the defect. If the defect is one which cannot be removed by amendment, manifestly, the Legislature cannot validate it. Where the defect is one that can be corrected, the Legislature may do so by referring to the earlier statute, showing its intent to enact a statute which will conform to the amendment. The amendment creates a new statute which operates prospectively. *State v. Moon,* 178 N.C. 715, 100 S.E. 614. This rule has been recognized and applied by this Court. *Reeves v. Board of Education* 204 N.C. 74, 167 S.E. 452; *Range Co. v. Carver,* 118 N.C. 328, 24 S.E. 352. Our holdings accord with the decisions of the majority of the courts.

As stated in 16 Am. Jur. 2d 406: "The true rule seems to be that where a statute is invalid by reason of an absence of power in the legislature in the first instance under the constitution to enact the law, it is not possible for that body to confirm or render the same valid by amendment; but where the obnoxious features of the statute may be removed or essential ones supplied by a proper amendment, so that had the law been primarily thus framed it would have been free from the objections existing against it, then the statute may be rendered valid by amendment, so far as its future operation may extend." Sutherland Statutory Construction, 3rd Ed., Vol. I, § 1904, and 16 C.J.S. 474 draw similar conclusions from decided cases.

It follows that the judgment denying plaintiffs' claim to refund must be, and is

Affirmed.

APPENDIX.

AMENDMENT TO RULES OF PRACTICE IN THE SUPREME COURT.

Rule 5 is hereby amended by adding the Eighth, the Twenty-fourth and Twenty-fifth Districts to those included within the proviso.

This the 18th day of June, 1965.

SHARP, J.
For the Court.

WORD AND PHRASE INDEX

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ANALYTICAL INDEX

ACTIONS.

§ 3. Moot Questions.

Even when a probated will devises land in satisfaction of a debt, the claimant may maintain an action on the claim against the administrator, and the contention that the cause of action against the administrator would not arise unless and until the will was set aside in caveat proceedings is untenable, since payment is an affirmative defense and until the will is upheld in the caveat proceedings its provision for payment is conditional and not final. *Hargrave v. Gardner*, 117.

ADMINISTRATIVE LAW.

§ 4. Appeal, Certiorari and Review.

A court will not substitute its discretion for that vested in an administrative board and will not disturb the discretionary order of such board in the absence of fraud, manifest abuse of discretion, or conduct in excess of lawful authority. *Freeman v. Board of Alcoholic Control*, 320.

No appeal from Utilities Commission direct to Supreme Court. *Utilities Comm. v. Finishing Plant*, 416.

ADOPTION.

§ 6. Operation and Effect of Adoption.

Adoption statute does not apply to bequest to a class when the will discloses an intent that only blood kin take thereunder, *Trust Co. v. Andrews*, 531.

ALTERATION OF INSTRUMENTS.

Words in handwriting in the body of a typewritten instrument are alterations apparent on its face, but an erasure or interlineation is not in law an alteration if made before the instrument is executed, and an alteration in a deed made after its execution and delivery is good if made with the knowledge and consent of grantor, and before registration a deed may be changed in any way that may be agreed upon between the parties thereto, so far as it affects them. *Bowden v. Bowden*, 296.

The burden is upon the party attacking a deed on account of erasures or interlineations appearing on its face to prove by the greater weight of the evidence that the interlineations or other alterations were made after execution of the deed. *Ibid.*

Where it has been established that alterations were made after execution and delivery of a deed, the burden is upon those claiming under the altered deed to prove that the alterations were made with the knowledge and consent of the grantor. *Ibid.*

Evidence *held* to show that words "and wife" were written by hand in granting clause of typewritten instrument so as to convey to grantee and his wife by entireties, although instrument as registered was to grantee alone with recital of consideration from grantee and wife. *Ibid.*

APPEAL AND ERROR.

§ 1. Nature and Grounds of Jurisdiction of Supreme Court in General.

The jurisdiction of the Supreme Court is conferred and defined by the Constitution, and the statute providing for appeals from Utilities Commission direct to Supreme Court is unconstitutional. *Utilities Comm. v. Finishing Plant*, 416.

APPEAL AND ERROR—*Continued.*

The verdict of the jury upon conflicting evidence is conclusive, the jurisdiction of the Supreme Court being limited to matters of law and legal inference. *Jones v. Horton*, 549; *Lucas v. Britt*, 601.

§ 2. Supervisory Jurisdiction of Supreme Court.

Even though an appeal be technically premature, the Supreme Court, in the exercise of its supervisory jurisdiction, may determine the question sought to be presented to obviate a wholly unnecessary and circuitous course of procedure. *Askew v. Tire Co.*, 169.

In dismissing an attempted appeal direct from the Utilities Commission, the Supreme Court, in the exercise of its supervisory jurisdiction, may order that the appeal be entered in the Superior Court in the same manner as though it were filed originally in that Court in apt time, subject to the right of any party to appeal from the judgment of the Superior Court to the Supreme Court as provided in G.S. 62-96. *Utilities Comm. v. Finishing Plant*, 416.

§ 3. Judgments Appealable.

An appeal from a ruling on a motion for a change of venue under G.S. 1-77 is not premature. *Coats v. Hospital*, 332.

§ 4. Parties Who May Appeal; Party Aggrieved.

Where plaintiff's action is dismissed upon the jury's verdict answering the issues of negligence and contributory negligence both in the affirmative, defendant is not the party aggrieved by the judgment and may not appeal for the purpose of presenting his contention that the court erred in refusing to nonsuit plaintiff's action, but may appeal from nonsuit of his counterclaim against plaintiff. *Hughes v. Vestal*, 500.

§ 19. Form of and Necessity for Exceptions and Assignments of Error in General.

An assignment of error which is not supported by an exception duly noted will not be considered. *Tyndall v. Homes*, 467.

An assignment of error must disclose the question sought to be presented without the necessity of going beyond the assignment of error itself. *Brown v. Brown*, 485.

§ 20. Parties Entitled to Object and Take Exception.

One defendant is not prejudiced by the order of the court staying execution against the other defendant pending retrial of the issues against the first defendant, and the first defendant has no standing to challenge the stay of execution. *Kesler v. Stokes*, 357.

§ 21. Assignment of Error to Judgment or to Signing of Judgment.

An exception to the judgment presents the question whether the facts found are sufficient to support the judgment. *Ins. Co. v. Motors*, 444.

An exception to the judgment does not present for review the evidence upon which the findings of the court are based, but does present the question whether error or law appears on the face of the record proper, including whether the facts found are sufficient to support the judgment and whether the judgment is regular in form. *Board of Architecture v. Lee*, 602; *Mayberry v. Ins. Co.*, 658; *Foster v. Foster*, 694.

§ 22. Exceptions and Assignments of Error to Findings of Fact.

An exception to the failure of the court to find certain facts is untenable when appellant fails to introduce evidence in the record which would sustain such findings. *Pittman v. Snedeker*, 55.

APPEAL AND ERROR—*Continued.*

Where there are no exceptions to the findings of fact they are presumed to be supported by evidence and are binding on appeal. *Keeter v. Lake Lure*, 252.

§ 24. Exceptions and Assignments of Error to Charge.

An assignment of error must present but a single question of law, and exceptions may be gathered under a single assignment only if each relates to the single question sought to be presented, and it is contrary to the Rules to gather under a single assignment of error to the charge a large number of exceptions upon which appellants undertake to raise various and sundry questions. *S. v. Hamilton*, 277.

An exception to a long excerpt from the charge must fail if any portion of the charge excepted to is correct. *Ibid.*

It is not sufficient that an assignment of error to the charge refer merely to the exception number and the page number of the record where the exception appears, but it is required by mandatory rule of practice which must be observed to present the matter on appeal that the assignment of error set forth the portion of the charge to which the exception relates. *Samuel v. Evans*, 393.

Assignments of error to the charge based upon exceptions appearing nowhere in the record but under the assignments of error are ineffective. *S. v. Dunn*, 391.

An assignment of error which refers to the exception number and the page of the record at which the exception is noted, and asserts that the court erred in its explanation of the law on the subject, is ineffectual, since it fails to disclose the question sought to be presented within the assignment itself, and since it is a broadside assignment of error in failing to point out any particular part of the charge objected to. *Brown v. Brown*, 485.

An exception to the entire charge, assigned as error for that the court failed to explain the evidence and declare the law arising thereon and failed to recapitulate the evidence as required by law, is ineffectual. *Light Co. v. Smith*, 581.

§ 38. Abandonment of Exceptions by Failure to Discuss in the Brief.

A theory of liability alleged in the complaint, but not pursued upon the trial and in support of which no argument is advanced in the brief, will be deemed abandoned. *Board of Architecture v. Lee*, 602.

§ 39. Burden of Showing Error.

The burden is on appellant not only to show error but also that the alleged error is prejudicial. *Burgess v. Construction Co.*, 82.

§ 40. Harmless and Prejudicial Error in General.

A new trial will not be awarded for mere technical error which could not affect the result. *Norburn v. Mackie*, 480.

Where the facts are stipulated or admitted so that the rights of the parties upon such facts are questions of law, a directed verdict in accordance with the rights of the parties upon such facts cannot be prejudicial, even though the directed verdict is in favor of the parties having the burden of proof and fails to direct the jury to answer to the contrary if they failed to find the facts as all the evidence tended to show. *Bowden v. Bowden*, 396.

§ 41. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

The exclusion of a death certificate from evidence is not prejudicial when the party offering the certificate has the benefit of unimpeached testimony establishing all he was entitled to prove by the certificate. *Weeks v. Ins. Co.*, 140.

APPEAL AND ERROR—*Continued.*

Where the only evidence as to speed of the car driven by defendant is the competent testimony of an eyewitness and the inferences arising from the physical facts at the scene, the exclusion of the testimony of the witness must be held for prejudicial error notwithstanding it was before the jury over a day before the court excluded it, since it cannot be assumed that the jury failed to comply with the court's instruction not to consider the testimony. *Wilkerson v. Clark*, 439.

Exclusion of evidence cannot be held prejudicial when the record fails to show what the answer of the witness would have been had he been permitted to reply. *Board of Architecture v. Lee*, 602.

§ 42. Harmless and Prejudicial Error in Instructions.

The inadvertent use of the phrase "beyond a reasonable doubt" in charging upon the *quantum* of proof in a civil action must be held for prejudicial error, notwithstanding that in other portions of the charge the court correctly states the *quantum* of proof required. *McNair v. Goodwin*, 146.

§ 49. Review of Findings or Judgments on Findings.

Findings of fact made by the court are conclusive on appeal if supported by evidence. *Ins. Co. v. Motors*, 444; *Mayberry v. Ins. Co.*, 658.

Where the evidence does not support the critical findings of the court necessary to support the court's conclusions of law, such conclusions cannot stand. *Horton v. Redevelopment Comm.*, 1.

Where there are no specific findings or request therefor, it will be presumed that the court found facts supporting its judgment. *Tyndall v. Homes*, 467.

Ordinarily, when the court fails to find a fact essential to support the judgment the cause must be remanded, but where the record discloses that appellee had the burden of proof and failed to carry such burden by introduction of evidence sufficient to support a finding in his favor on the crucial fact, remand would be futile, and the Supreme Court may allow the conclusions of law to stand as a directed verdict. *Arnold v. Charles Enterprises*, 92.

Where, in the trial by the court under agreement of the parties, the judgment of the court erroneously includes an item not recoverable as damage and fails to consider certain evidence relative to waiver because of a misapprehension of the applicable law, a new trial will be awarded. *Leasing Corp. v. Hall*, 110.

A conclusion of law of the lower court is reviewable on appeal notwithstanding it is denominated a finding of fact. *Casualty Co. v. Funderburg*, 131.

Where a legal conclusion of the trial court is not supported by its findings of fact, the judgment must be modified by eliminating such conclusion. *Board of Architecture v. Lee*, 602.

Where the findings of the trial court do not support the court's conclusion of law and judgment, the cause must be remanded for the proper conclusion of law and judgment upon the facts found. *Mayberry v. Ins. Co.*, 658.

§ 51. Review of Judgments on Motions to Nonsuit.

While incompetent evidence admitted without objection must be considered in passing upon the sufficiency of the evidence to overrule nonsuit, the fact of the admission of the incompetent evidence adds nothing to its weight, and if it is without probative force it cannot warrant a reversing of the nonsuit. *Caudill v. Ins. Co.*, 674.

§ 53. Petitions to Rehear.

A petition to rehear may be granted in order to clarify a decision of the

APPEAL AND ERROR—*Continued.*

court which the parties concerned misconstrue. *Highway Comm. v. Farmer's Market*, 139.

§ 54. New Trial and Partial New Trial.

Whether the Court will grant a partial new trial rests in its sound discretion, and in this case a new trial is awarded on all of the issues, notwithstanding prejudicial error is determined upon the issue of damages alone. *Jenkins v. Hines Co.*, 83.

§ 59. Force and Effect of Decision of Supreme Court.

A statement in a decision of the Supreme Court that a party might move to amend a particular pleading for a specific purpose does not import that such party may amend as a matter of right at any time, but only that such party may move for permission to amend in accordance with set procedure. *Service Co. v. Sales Co.*, 79.

Decision of the Supreme Court that whether the act of the Highway Commission amounted to a "taking" of a property right by eminent domain presented on the record a question of law and fact for the court, does not purport to impair either party's right to jury trial on the other issues. *Highway Comm. v. Farmer's Market*, 139.

§ 60. Law of the Case and Subsequent Proceedings.

Decision on appeal that the evidence is sufficient to be submitted to the jury is the law of the case and precludes nonsuit in a subsequent trial upon substantially the same evidence. *Norburn v. Mackie*, 479.

APPEARANCE.

§ 2. General Appearance.

Where a person files a motion to vacate a judgment *in personam* entered without service of process and an opportunity for him to plead, he makes a general appearance, and while the judgment should be set aside on his motion, the court acquires jurisdiction and should fix a reasonable time for him to plead. *Bowman v. Malloy*, 396.

ARCHITECTURE.

Trustee for church holding legal title in common with other trustees is not owner entitled to draw construction plans, but when Board of Architecture waits some nine years before proceeding, it is barred by laches. *Board of Architecture v. Lee*, 602.

Where a person at the time of drawing plans for the construction of a building has title to some of the component tracts in himself and title to some in himself and his wife as tenants by the entireties, he comes within the meaning of the exception contained in G.S. 83-12, and does not violate the law in drawing such plans, even though he is not a licensed architect, and this result is not affected by the fact that prior to the completion of the construction of the building he sells an interest therein to another *Ibid.*

The fact that a building is constructed for the purpose of leasing it for commercial uses does not preclude the owner of the land from drawing the plans for such building even though he is not a licensed architect, since the exemption of G.S. 83-12 is broad and comprehensive and is not limited. *Ibid.*

ARREST AND BAIL.

§ 2. Deputized Citizens and Aid to Officers.

A warrant charging defendant with wilfully refusing to aid an officer in

ARREST AND BAIL—*Continued.*

arresting a person having committed the crime of trespass fails to charge an offense, since G.S. 15-41, as rewritten in 1955, withdrew the authority of an officer to call bystanders to his aid, and G.S. 15-45 does not include trespass as one of the offenses for which an officer may summon help to make an arrest, and the right to require aid in making an arrest for a simple trespass does not exist under the common law. *S. v. Brown*, 191.

§ 3. Right of Officer to Arrest Without Warrant.

Where police officers have been advised by the proprietor of a store that there had been a robbery at his business and that he had seen at the scene three men, two on foot and one driving an automobile of a specified make and color with license plates of a specified state, an officer may arrest without a warrant three men apprehended by him in the described vehicle. *S. v. Hamilton*, 277.

Where officers are called and arrived at the scene of the robbery within ten minutes of its commission and are given a description of the men and the peculiar weapon used in committing the offense, and, pursuant to information from a "reliable informer," pay a morning visit to a certain address, where they find one of the suspects in bed with the cover tucked under his chin protesting he did not know another suspect who was then under the cover by his side, and find the third suspect in an adjoining bedroom, the officers are in possession of such facts as to justify them in taking the three into custody for investigation without a warrant. *S. v. Egerton*, 328.

§ 6. Resisting Arrest.

The failure of a warrant for resisting arrest to aver, even in a general way, the manner in which defendant resisted or obstructed the officer, is fatal. *S. v. Maness*, 358.

ARSON.

§ 4. Sufficiency of Evidence and Nonsuit.

In a prosecution under G.S. 14-67, evidence tending to show that defendant set fire under the sill of the house in question, together with evidence of motive, *held* to make out a *prima facie* case sufficient to take the issue to the jury, notwithstanding defendant's testimony that he was too intoxicated at the time to form the necessary criminal intent, there being testimony of the State that immediately after the act defendant though intoxicated, was able to walk, although he staggered, and was able to speak sufficiently distinctly to be understood. *S. v. Arnold*, 348.

ASSAULT AND BATTERY.

§ 14. Sufficiency of Evidence and Nonsuit.

Evidence that defendant's wife, after separation, came to the home, armed with a box of lye, to get some personal belongings, that an altercation ensued, that defendant had an open knife in his hand and that when he came toward her she told him to let her out, whereupon defendant immediately unlocked the door, and that the wife then threw the lye upon him and he ran out the door and left, without any evidence that he menaced or threatened her with the knife, or that he intended or did restrain her, *is held* insufficient to be submitted to the jury in a prosecution for assault. *S. v. Johnson*, 598.

§ 16. Conviction of Less Degree of Crime.

Assault with a deadly weapon, G.S. 14-33, carrying a maximum sentence of two years, is a less degree of the offense of an assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death, G.S. 14-32,

ASSAULT AND BATTERY—*Continued.*

carrying a maximum sentence of ten years, and, when there is evidence of defendant's guilt of the less offense, the question is properly submitted to the jury. *S. v. Weaver*, 681.

ATTORNEY AND CLIENT.

§ 1. Office of Attorney.

An attorney occupies a dual relationship as an employee of his client and as an officer of the court. *Smith v. Bryant*, 208.

§ 5. Representation of and Liabilities to Client.

The fact that the attorney for condemnor is also a defendant in the proceeding as trustee in a deed of trust on the land is not in itself ground for disturbing the judgment fixing the amount of compensation, it appearing that no objection was made by the owners of the equity of redemption until after verdict, and that the *cestue que trust* made no objection at any time, and that the remaining land was a great deal more than sufficient security for the amount of the debt. *Light Co. v. Smith*, 581.

§ 6. Withdrawal of Attorney from Case.

An attorney of record may withdraw from the case only for cause after reasonable notice to the client and with the permission of the court. *Smith v. Bryant*, 208.

While an attorney may be justified in withdrawing from the case upon refusal of the client to pay or to secure payment of proper fees upon reasonable demand, the attorney must still give reasonable notice to the client and, in discharging his duties to the court, perfect his withdrawal in time to obviate a continuance of the case. *Ibid.*

AUTOMOBILES.

§ 4. Title, Certificates of Title and Transfer.

Under the 1961 amendment to G.S. 20-72(b) no title to a motor vehicle passes to the purchaser until the certificate of title has been assigned, delivered to the purchaser and application made for a new certificate. *Bank v. Motor Co.*, 568.

Chattel mortgage registered prior to acknowledgment of assignment of title creates no lien. *Ibid.*

§ 6. Safety Statutes and Ordinances in General.

Municipal corporations have authority to enact ordinances regulating the right of way at street intersections. *Cogdell v. Taylor*, 424.

§ 7. Attention to Road, Look-out and Due Care in General.

The duty of a motorist to exercise due care to avoid colliding with another vehicle is not limited to other vehicles being operated as required by law, since reasonable prudence requires a motorist who sees another vehicle being operated in a negligent manner to take all the more care to avoid collision. *McNair v. Goodwin*, 146.

A motorist is required not merely to look but to keep a lookout in his direction of travel so as to avoid collision with vehicles or persons on or near the highway, and will be held to the duty of seeing what he ought to have seen. *Greene v. Meredith*, 178.

§ 8. Turning and Turn Signals.

Before making a left turn from a highway, a driver is required to first as-

AUTOMOBILES—*Continued.*

certain that the movement can be made in safety and, when the movement may affect any other vehicle, to give the statutory signal for the turn, and his failure to perform either duty is negligence *per se*, and is actionable when a proximate cause of injury. *Oil Co. v. Miller*, 101.

The statutory signal required before a motorist may turn from a straight line must be given for a sufficient distance and length of time to enable the driver of a following vehicle to observe it and understand therefrom what movement is intended. *Ibid.*

G.S. 20-154 must be given a realistic interpretation and does not preclude a left turn unless the movement is absolutely free from danger but only requires that a motorist not turn left without exercising reasonable care under the circumstances to ascertain that such movement can be made in safety. *Ibid.*

§ 9. Stopping, Parking, Signals and Lights.

A temporary or momentary stopping on the highway because of the exigencies of traffic is not parking on the highway within the meaning of G.S. 20-161(a). *Saunders v. Warren*, 200.

Stopping on a highway in violation of G.S. 20-161 is negligence *per se*, but whether such violation is the proximate cause of injury in a particular case is ordinarily a question for the jury. *Hughes v. Vestal*, 500.

§ 10. Following Vehicles and Hitting Vehicles Ahead.

The violation of the statutory requirement that a motorist not follow a preceding vehicle more closely than is reasonable and prudent under the circumstances is negligence *per se*, and ordinarily the mere fact of a collision with the vehicle ahead furnishes some evidence that the motorist to the rear was not keeping a proper lookout or that he was following too closely. *Burnett v. Corbett*, 341.

§ 11. Lights.

The lights required by G.S. 20-129 on an automobile operated at night are to enable the operator to see what is ahead of him and to inform others of the approach of his vehicle, and the operation of a vehicle at night without lights or with improper lights is negligence. *Reeves v. Campbell*, 224.

§ 13. Skidding.

Operation of an automobile in a manner which would be harmless on a clear, dry highway may well be the proximate cause of injuries on an icy highway, and the question of whether such operation is negligent must be judged in view of the circumstances confronting the driver. *Saunders v. Warren*, 200.

When the condition of a road is such that skidding may be reasonably anticipated, the driver of a vehicle must exercise care commensurate with the danger, and while the mere skidding of a vehicle does not imply negligence, if the skidding is due to the fault of the driver amounting to negligence, it may form the basis of recovery. *Webb v. Clark*, 474.

§ 14. Following Vehicles and Passing Vehicles Traveling in Same Direction.

Yellow lines are designed primarily to prevent collision between an overtaking and a passing automobile and a vehicle approaching from the opposite direction, and the crossing of a yellow line may be an evidential detail in the totality of circumstances on the question of negligence. *Oil Co. v. Miller*, 101.

A party may not rely upon the violation of G.S. 20-150(e) by his adversary when he does not allege the violation of the statute or allege any fact showing such violation or, even though his adversary crossed a yellow line in his lane

of travel, does not show that the highway was marked by the Highway Commission so as to indicate that passing should not be attempted. It is a matter of common knowledge that the words "Do Not Pass" are posted on portions of the State highways. *Ibid.*

§ 15. Right Side of Road and Passing Vehicles Traveling in Opposite Direction.

G.S. 20-148 is not applicable to three lane highway. *S. v. Duncan*, 123.

§ 17. Right of Way at Intersections.

In construing the municipal ordinances in question dealing with automatic traffic control signals at intersections and the right of way of funeral processions, *it is held* the funeral procession ordinance applies to all intersections within the municipality, whether having automatic traffic control signals or not, and supersedes the rules based on traffic lights, so that if a motorist knows or should know that a funeral procession is proceeding through an intersection, the motorist should yield the right of way to vehicles in the funeral procession, notwithstanding that he is faced with a green traffic control light. *Cogdell v. Taylor*, 242.

Fact that vehicles in procession have lights burning is not in itself conclusive that procession is funeral procession. *Ibid.*

§ 18. Passing at Intersections.

A private driveway is not an intersecting highway within the meaning of G.S. 20-150(c), and in order for provisions of the statute to apply there must be not only an intersection of highways but such intersection must be marked by appropriate signs by the duly constituted authorities. *Oil Co. v. Miller*, 101.

§ 19. Sudden Emergencies.

Motorist whose negligence contributes to emergency is not entitled to rely on doctrine of sudden emergency. *Jones v. Horton*, 549.

§ 21. Defects in Vehicles.

Evidence that accident was result of worn catch on door of plaintiff's car *held* for jury. *Gooding v. Tucker*, 142.

§ 37. Relevancy and Competency of Evidence in General.

Witness may testify from inspection of vehicle that latching mechanism was so worn that door would not stay closed, and, there being evidence of such defect, another witness may testify that on prior occasions he had seen owner driving with the door open. *Gooding v. Tucker*, 142.

Defendant contended that plaintiff driver was attempting to light a cigarette at the time of the accident. Testimony that some two days after plaintiff's vehicle had been moved to a town some ten miles from the accident, a lightly burned cigarette was found on the floorboard of plaintiff's vehicle is too removed in time and place to have any probative value and should have been excluded. *Brewer v. Garner*, 384.

§ 38. Evidence of Speed and Opinion Evidence as to Physical Facts.

It is prejudicial error to admit evidence of defendant's excessive speed some two miles from the collision when there is no evidence that defendant continued to maintain such speed to the scene of the collision. *Greene v. Meredith*, 178.

Where it is made to appear that the witness observed the lights of a car approaching from the opposite direction at night for a distance of some 130 yards, and saw that the car was "swaying back and forth" because of its speed,

it is competent for the witness to testify that its speed was in excess of 60 miles per hour, the weight and credibility of the testimony being for the jury. *Jones v. Horton*, 549.

Opinion evidence that the vehicle in question shortly before the accident was "going about 60 to 65" will not be held to be without probative force because the witness failed to use the phrase "miles per hour," it being apparent from the context that the witness was testifying the vehicle was traveling 60 to 65 miles per hour. *Rector v. Roberts*, 324.

Whether speeding car seen by witness was that driven by defendant and whether speed was continued to accident held for jury. *Wilkerson v. Clark*, 439.

A chart or table of distances required to bring automobiles traveling at particular speeds to a stop, even though prepared by the Department of Motor Vehicles as an aid to driver education, is incompetent in evidence, even as a guide, to show at what distance the particular plaintiff could have stopped his car under the particular circumstances of the accident in suit. *Hughes v. Vestal*, 500.

Expert testimony as to whether vehicle would "fishtail" when suddenly accelerated held incompetent. *Glenn v. Smith*, 706.

§ 41a. Sufficiency of Evidence of Negligence and Nonsuit in General.

Negligence is not presumed from the mere fact of an accident, nor does the doctrine of *res ipsa loquitur* apply thereto, but it is not necessary that negligence be established by direct or positive evidence, it being sufficient if it be established by circumstantial evidence, either alone or in combination with direct evidence. *Crisp v. Medlin*, 314.

Actionable negligence may be established by evidence of facts and circumstances from which negligence may be inferred as the more reasonable probability. *Wilkerson v. Clark*, 439.

In order for circumstantial evidence to be sufficient to be submitted to the jury on the issue of negligence it is required that the facts from which negligence may be inferred be established by direct evidence and not be based upon other inferences or presumptions, and that the evidence be sufficient to raise the legitimate inference of negligence from these established facts and not leave the matter in the realm of conjecture. *Crisp v. Medlin*, 314.

Circumstantial evidence in this case held insufficient to be submitted to the jury. *Ibid.*

Evidence tending to show that the wreck occurred immediately after a 9 degree curve to the driver's left, that the road was crooked and rough, that the vehicle was seen some 200 yards from the wreck being driven some 60 to 65 miles per hour, together with evidence of physical facts as to the condition of the vehicle after the wreck and that the passengers were thrown therefrom and fatally injured, *held* sufficient to be submitted to the jury on the issue of the negligence of the driver in driving at an unreasonable and imprudent speed in violation of G.S. 20-141(a). *Rector v. Roberts*, 324.

Evidence that defendant had exceeded the speed limit in a 20 mile per hour zone prior to the accident is irrelevant when the accident does not occur in a 20 mile per hour speed zone and there is no evidence that defendant was exceeding the speed limit in the zone in which the accident occurred, since only negligence which proximately causes or contributes to the injury in suit is of legal import. *Webb v. Clark*, 474.

Evidence tending to show that defendant drove off the highway at a slight curve, bounced down a drainage ditch some 484 feet before bringing the truck to a stop in an undamaged and upright position, that defendant's passenger was

thrown from the truck to his fatal injury and that shortly after the accident defendant was too intoxicated to walk unaided, *held* sufficient to sustain plaintiff's allegations that defendant was guilty of reckless driving, G.S. 20-140, constituting negligence *per se*. *Bank v. Lindsey*, 585.

§ 41f. Sufficiency of Evidence and Nonsuit on Question of Negligence in Following too Closely and in Hitting Vehicle Ahead.

Issue of negligence in skidding on snow into vehicle stopped on highway held for jury under the evidence. *Saunders v. Warren*, 200.

Evidence that defendant's car, headed west, was parked, with the parking lights burning, on the south side of the highway, extending 4 to 4½ feet onto the hard surface, that it could be seen some 300 feet to the west from which plaintiff approached, and that plaintiff's vehicle left skid marks for some 145 feet before impact in such manner as to indicate loss of control, and collided with defendant's car, *held* sufficient to be submitted to the jury on the issue of plaintiff's negligence upon defendant's counterclaim for damages to his car. *Hughes v. Vestal*, 500.

§ 41g. Sufficiency of Evidence and Nonsuit on Question of Negligence at Intersection.

Evidence favorable to plaintiff tending to show that defendant approached the intersection with the traffic control signal on green, in heavy fog, in a 35 mile per hour zone, at a speed of some 35 to 50 miles per hour, and, upon seeing plaintiff's car, which had approached from the opposite direction, making a left turn, applied her brakes and skidded for a distance of some 93 feet and collided with the right front of plaintiff's car, which had turned left into defendant's lane of travel, *held* sufficient to be submitted to the jury on the issue of defendant's negligence. *Greene v. Meredith*, 178.

Testimony of the driver on a dominant highway that he entered an intersection at 40 miles per hour after seeing the driver on a servient highway stop before the intersection, and that he traveled 100 feet without again observing the car stopped at the intersection, *is held* sufficient to be submitted to the jury on the issue of the negligence of the driver along the dominant highway in an action to recover for injuries resulting from a collision of the cars in the intersection. *Samuel v. Evans*, 393.

Evidence *held* for jury on issue of negligence in failing to yield right of way at intersection. *Cogdell v. Taylor*, 424.

Evidence held for jury on question of whether excessive speed in entering intersection was proximate cause of collision. *Jones v. Horton*, 549.

§ 41h. Sufficiency of Evidence of Negligence in Turning.

Plaintiff's evidence tending to show that defendant driver saw a tractor-tanker, driven by plaintiff, following him when it was some 300 or 400 feet behind him on a straight highway, that after driving some distance defendant attempted to turn left into a private driveway without again looking back or exercising any care to see that the movement could be made in safety, that notwithstanding plaintiff driver, in attempting to pass, blew his air horn three or more times, defendant continued to turn left, and that the collision occurred on the driver's left side of the highway, *held* sufficient to be submitted to the jury on the issue of defendent's negligence. *Oil Co. v. Miller*, 101.

§ 41j. Sufficiency of Evidence of Negligence in Skidding.

Evidence tending to show that the highway in the area of the skidding was dry except at the intersection of a rural road where something had "run across

the road" or water had drained from the rural road, and that plaintiff passenger did not see the ice until just before the accident, and that the driver, operating the vehicle at lawful speed, lost control when the vehicle skidded on the ice, resulting in the injury in suit. *held* insufficient, without evidence that the skidding was due to negligent default, to be submitted to the jury on the issue of negligence. *Webb v. Clark*, 474.

§ 41l. Sufficiency of Evidence of Negligence Striking Pedestrian.

Evidence tending to show that defendant was operating his vehicle at night without lights, or with improper lights, that he saw a bus which he knew was returning children to their homes after a basketball game stopped to the right of the highway, that defendant continued to travel at a speed of about 45 miles per hour, did not see plaintiff, a fifteen year old girl, who had alighted from the bus and was crossing the highway in front of the bus toward an intersecting rural road, until she was some three car lengths away, and that defendant's car left skid marks some 32 feet before impact and some 90 feet thereafter, *held* sufficient to be submitted to the jury on the issue of defendant's negligence. *Reeves v. Campbell*, 224.

Evidence tending to show that an hour to an hour and a half prior to the incident in question intestate was seen in a normal condition some three hundred yards away from the scene, that intestate was 35 years old and in good health, and that intestate was lying prostrate on the highway in defendant's lane of travel when his body was run over by the car driven by defendant, *held* insufficient to be submitted to the jury in an action for wrongful death, since the evidence leaves in mere conjecture whether intestate was alive at the time he was struck by defendant's car. *Sanders v. Polk*, 309.

§ 41p. Sufficiency of Evidence of Identity of Driver.

Testimony of statement of defendant after the accident recounting what happened at the time of the accident while be was driving the car *held* sufficient to be submitted to the jury on the question of the identity of defendant as the driver, notwithstanding defendant's testimony that another was driving. *S. v. Duncan*, 123.

The identity of the driver of the vehicle at the time of an accident may be established by circumstantial evidence, but the evidence in this case *held* insufficient to be submitted to the jury on the question of whether defendant's intestate was driving at the time. *Crisp v. Medlin*, 314.

Testimony that a named person was seen driving the car on five or more occasions during the four hours or so prior to the wreck, the last occasion being within a few minutes of the time of the accident, *held* sufficient to be submitted to the jury on the question of whether the named person was driving at the time of the accident. *Rector v. Roberts*, 324.

Circumstantial evidence of defendant's identity as the driver of the car at the time in question, *held* sufficient to be submitted to jury. *S. v. Wilson*, 373.

§ 42c. Nonsuit for Contributory Negligence in Stopping or Parking.

Evidence that plaintiff, driving in light snow on a highway having ice and snow in spots thereon, stopped on his right side with his left wheels on the hard-surface because stalled vehicles blocked his lane of travel, and left his truck so standing for a period of some five minutes while he rendered aid to the operators of the stalled vehicles, there being lights on the truck burning throughout the period, and was hit as he returned to his vehicle and was ready to move forward, *held* not to show that such stopping was a proximate cause of injuries

AUTOMOBILES—*Continued.*

sustained when defendant's vehicle skidded into the rear of plaintiff's vehicle. *Saunders v. Warren*, 200.

§ 42d. Nonsuit for Contributory Negligence in Hitting Vehicle Ahead.

Evidence tending to show that defendant's truck, approaching from the opposite direction, suddenly ran to its left across the highway in front of the vehicle preceding plaintiff, that the driver of the vehicle preceding plaintiff was able to stop without hitting the truck, but that plaintiff was unable to stop before hitting the preceding vehicle, *held* sufficient to show that plaintiff was following the preceding vehicle too closely and that she was not keeping a proper lookout, constituting contributory negligence as a matter of law. *Burnett v. Corbett*, 341.

§ 42e. Nonsuit for Contributory Negligence in Following and Passing Vehicle Traveling in Same Direction.

Evidence held not to show that plaintiff was guilty of contributory negligence as a matter of law in crossing yellow line to pass preceding vehicle. *Oil Co. v. Miller*, 101.

§ 42g. Contributory Negligence in Failing to Yield Right of Way at Intersection.

Evidence *held* not to show contributory negligence as a matter of law on part of plaintiff. *Cogdell v. Taylor*, 424.

§ 42h. Nonsuit for Contributory Negligence in Turning.

Evidence tending to show that plaintiff faced with a green traffic control signal, approached an intersection in heavy fog, that before attempting to make a left turn at the intersection he stopped and looked down the highway and, seeing no approaching car, put his automobile in low gear and entered the intersection at a speed of 10 miles per hour, and that, as he was attempting to make a left turn into the intersecting street, he was struck by defendant's car which had approached from the opposite direction at excessive speed, *is held* not to show contributory negligence on the part of plaintiff as a matter of law. *Greene v. Meredith*, 178.

§ 42k. Nonsuit for Contributory Negligence of Pedestrians.

Evidence tending to show that plaintiff pedestrian could see a car approaching from the west for a distance of some 800 feet, that she stopped before attempting to cross the highway toward an intersecting rural road, that she failed to see defendant's car approaching from the west because it did not have lights burning or had improper lights, and that she was struck by defendant's car in the north traffic lane, *held* not to disclose contributory negligence as a matter of law on the part of plaintiff. *Reeves v. Campbell*, 224.

§ 43. Sufficiency of Evidence of Concurring Negligence and Nonsuit for Intervening Negligence.

Evidence that a third vehicle entered an intersection from defendant's right and turned right, causing defendant to lose control and collide with plaintiff's vehicle, which approached from the opposite direction, *held* not to insulate defendant's negligence in approaching the intersection at excessive speed, nor does it entitle defendant to rely upon the doctrine of sudden emergency if defendant's excessive speed contributed to the emergency and was the proximate cause of defendant's inability to control his vehicle. *Jones v. Horton*, 549.

§ 46. Instructions in Auto Accident Cases.

It is error for court to charge law having no pertinency to facts in evidence. *S. v. Duncan*, 123.

AUTOMOBILES—*Continued.*

§ 49. Contributory Negligence of Passenger.

Evidence held to disclose contributory negligence as a matter of law on part of passenger voluntarily riding and continuing to ride with intoxicated driver. *Bank v. Lindsey*, 585.

§ 52. Liability of Owner for Driver's Negligence in General.

The owner present in the car as a passenger is ordinarily liable for the negligence of the driver, and this rule extends to a person permitted to drive by the owner's agent who is present in the car. *Rector v. Roberts*, 324.

§ 54f. Sufficiency of Evidence and Nonsuit on Issue of Respondeat Superior.

The presumption created by G.S. 20-71.1 merely takes the issue of agency to the jury and does not alter the burden of proof or warrant a directed verdict. *Moore v. Crocker*, 233.

§ 55. Family Purpose Doctrine.

Where the son is using the automobile provided by his father for family purposes and, being present as a passenger in the car, permits another to drive, the son is liable for the driver's negligence under the doctrine of agency and the father is liable therefor under the family purpose doctrine. *Rector v. Roberts*, 324.

§ 55.1. Action by Owner to Recover for Damages to Vehicle.

In the owner's action against the driver of the other car, G.S. 71.1 does not warrant nonsuit on the ground that the negligence of the driver of the owner's car is imputed to him when there is evidence that the driver had borrowed the car on a purely personal mission. *Moore v. Crocker*, 233.

§ 59. Sufficiency of Evidence and Nonsuit in Homicide Prosecutions.

Evidence held sufficient to be submitted to jury on issue of culpable negligence and identity of defendant as driver of car. *S. v. Duncan*, 123.

Evidence that defendant, while highly intoxicated, drove his truck off the highway into a ditch and that the truck proceeded along the ditch some 544 feet before striking a bank and stopping, that defendant and his companion were thrown out of the vehicle some 75 feet before it stopped, resulting in fatal injury to the passenger, *held* sufficient to be submitted to the jury and sustain a conviction of involuntary manslaughter, notwithstanding defendant's explanation that he "believed" the steering rods became loose, there being no evidence that the steering mechanism or the brakes were defective. *S. v. Lindsey*, 588.

§ 64. Elements of Offense of Reckless Driving.

The violation of G.S. 20-140 either by driving upon a highway without due caution and circumspection, or by driving at a speed or in a manner so as to endanger any person or property, is culpable negligence, but the mere unintentional violation of a statute governing the operation of a motor vehicle, unless accompanied by excessive speed or a heedless disregard of the safety and rights of others, does not constitute reckless driving. *S. v. Dupree*, 463.

§ 65. Prosecutions for Reckless Driving.

Evidence tending to show merely a collision resulting from defendant's act in veering to the left of the center line of the highway and colliding with a vehicle traveling in the opposite direction, without evidence of unlawful speed or any other act of negligence except the violation of G.S. 20-148, is insufficient to be submitted to the jury in a prosecution for reckless driving. *S. v. Dupree*, 463.

AUTOMOBILES—*Continued.*

§ 72. Sufficiency of Evidence and Nonsuit in Prosecutions for "Drunken Driving."

Evidence that defendant was alone in an automobile, and was found in the car in a yard some four miles from the club he had left, is sufficient to raise the inference that defendant had driven the car on a public highway. *S. v. Graham*, 228.

Evidence tending to show that defendant was seen driving his truck some 30 minutes before a highway patrolman reached the scene of the accident, that defendant had then been arrested and was in the custody of a deputy sheriff, that defendant was in a highly intoxicated condition and that no intoxicating liquor was found in or about the vehicle, *is held* sufficient to support an instruction in regard to the law if defendant at the time of the accident was driving while under the influence of intoxicating liquor. *S. v. Lindsey*, 588.

§ 71. Competency of Evidence in Prosecutions for "Drunken Driving."

Evidence of results of breathalyzer test *held* competent. *S. v. Powell*, 73.

§ 76. "Hit and Run" Driving.

In a prosecution on an indictment charging that defendant was the driver of a car involved in a collision resulting in injury and death to six named persons, and failed to stop at the scene of the accident in violation of G.S. 20-166(a), and failed to give his name and address and license number to the six persons injured and killed, G.S. 20-166(c), *held*, the fact that none of the persons injured in the accident dies as a result thereof does not disclose a fatal variance, it being sufficient to sustain conviction on both counts if the State introduces evidence that the persons named were injured. *S. v. Wilson*, 373.

Evidence of defendant's identity as driver of "hit and run" car held for jury. *Ibid.*

G.S. 20-166(b) is not limited to streets or highways, and therefore the failure of a warrant or indictment for this offense to aver the street or highway where the collision occurred is not fatal. *S. v. Smith*, 575.

The requirement of G.S. 20-166(b) that a motorist whose vehicle is involved in an accident resulting in property damage must stop is not limited to a motorist at fault in causing the accident, the purpose of the statute being to require a motorist to stop and identify himself to facilitate investigation. *Ibid.*

BANKS AND BANKING.

§ 10. Liability of Bank in Paying Checks.

A bank paying a forged check may not recover such payment from the payee unless the payee is at fault in taking or negotiating the paper. *Ins. Co. v. Motors*, 444.

Evidence held sufficient to show that payee of check was put on inquiry as to whether signature was forgery. *Ibid.*

The relationship between a bank and a depositor is that of debtor and creditor, and, upon the death of the depositor, title to the account vests in the depositor's personal representative for collection and administration, and the bank is under duty to see that payment of the deposit is made to the duly appointed legal representative of the deceased depositor, G.S. 28-172, and the bank's payment otherwise does not discharge the bank's liability to the estate. *Monroe v. Dietenhoffer*, 538.

BASTARDS.

§ 5. Competency of Evidence in Prosecutions for Wilfull Refusal to Support.

Married woman may not testify as to nonaccess of husband to bastardize her child. *S. v. Wade*, 144.

BASTARDS—*Continued.*

§ 11. Right to Custody.

The putative father of an illegitimate child may defeat the right of the child's mother to its custody only by showing that the child's mother, by reason of character or special circumstances, is unfit to have its custody, and that therefore the welfare of the child overrides her paramount right to custody. *Jolly v. Queen*, 711.

Where the court finds that the mother of an illegitimate child is a fit and suitable person and is capable of taking care of her child, it may not enter an order awarding custody to the child's father, even upon finding that such award is to the best interest of the child, there being no findings to justify a conclusion that the mother had forfeited her paramount right. *Ibid.*

BILL OF DISCOVERY.

§ 1. Examination of Adverse Party in General.

In an action by a passenger against the carrier to recover for injuries in an accident, the passenger is not entitled to compel an agent of the carrier in an adverse examination prior to trial, G.S. 8-89, to disclose information on the driver's report of the accident upon which the carrier based its report to the I.C.C., since to do so would render meaningless the provisions of 49 U.S.C.A. § 320(f), providing that the I.C.C. report should not be admitted in evidence in any suit or action for damages. *Craddock v. Coach Co.*, 380.

In an action by a passenger against the carrier to recover for injuries in an accident, the passenger is entitled to require the carrier to disclose the names of other passengers on the bus at the time of the accident. *Ibid.*

§ 4. Introduction of Examination in Evidence.

Testimony elicited on adverse examination in one case is not competent upon the trial of a companion case instituted by a plaintiff who is a stranger to the prior action. *Glenn v. Smtih*, 706.

BURGLARY AND UNLAWFUL BREAKINGS.

§ 2. Breakings Other Than Burglarious.

G.S. 14-54, as amended, constitutes unlawful breaking or entering a building a felony when such breaking or entering is done with intent to commit a felony or other infamous crime therein and a misdemeanor in the absence of such felonious intent, and constitutes the misdemeanor a less degree of the offense. *S. v. Jones*, 134.

§ 2.1. Indictment.

An indictment for an unlawful breaking with intent to steal should designate precisely and accurately the occupant of the building and the owner of the personal property therein. *S. v. Jones*, 134.

§ 4. Sufficiency of Evidence and Nonsuit.

Evidence of defendant's guilt as aider and abettor held for jury. *S. v. Bryant*, 64.

§ 5. Instructions.

Where there is evidence that defendant unlawfully broke into and entered a building, but the only evidence of any felonious intent in doing so is entirely circumstantial, it is the duty of the court to submit the question of defendant's guilt of the misdemeanor of breaking and entering without felonious intent, this being a less degree of the crime presented by the evidence. *S. v. Jones*, 134.

CANCELLATION AND RESCISSION OF INSTRUMENTS.

§ 10. Sufficiency of Evidence, Nonsuit and Directed Verdict.

Evidence held insufficient to be submitted to jury in wife's action to rescind conveyances made pursuant to deed of separation on ground of fraud or duress. *Joyner v. Joyner*, 27.

CARRIERS.

§ 6. Common Use of Facilities and Lease of Equipment.

Evidence held for jury on question of whether lessor or lessee carrier was operating vehicle at time in question. *Grissom v. Haulers*, 450.

§ 18. Liability for Injury to Passengers.

In an action by a passenger against the carrier to recover for injuries in an accident, the passenger is not entitled to compel an agent of the carrier in an adverse examination prior to trial, G.S. 8-89, to disclose information on the driver's report of the accident upon which the carrier based its report to the I.C.C., since to do so would render meaningless the provisions of 49 U.S.C.A. § 320(f), providing that the I.C.C. report should not be admitted in evidence in any suit or action for damages. *Craddock v. Coach Co.*, 380.

In an action by a passenger against the carrier to recover for injuries in an accident, the passenger is entitled to require the carrier to disclose the names of other passengers on the bus at the time of the accident. *Ibid.*

CHATTEL MORTGAGES AND CONDITIONAL SALES.

§ 1. Form, Requisites and Construction in General.

Instrument held lease agreement and not conditional sale. *Leasing Corp. v. Hall*, 110.

§ 12. Liens and Priorities.

Where the purchaser of a motor vehicle executes a chattel mortgage which is registered prior to the acknowledgment of the assignment of the certificate of title by the seller and the forwarding of an application for a new certificate to the Department of Motor Vehicles, the chattel mortgage does not create a lien on the vehicle, since the purchaser, at the time it was executed, did not have title, and the instrument can operate only as a contract to execute a chattel mortgage upon the acquisition of title. *Bank v. Motor Co.*, 568.

CONSPIRACY.

§ 3. Nature and Elements of Criminal Conspiracy.

A conspiracy to commit a felony is a felony. *S. v. Alston*, 398.

One person alone may not be guilty of the crime of conspiracy, and therefore when all but one of the conspirators named is granted a new trial for the admission of incompetent evidence a new trial must be awarded as to all, and if upon the retrial insufficient competent evidence is introduced against the others and they are acquitted, the conviction of the lone defendant may not be allowed to stand. *S. v. Littlejohn*, 571.

§ 5. Relevancy and Competency of Evidence.

In a prosecution for conspiracy to commit larceny, a declaration of one of the alleged conspirators narrating the conspiracy and the part taken by each, which declaration is made after the commission of the larceny and the sale of the stolen property, is incompetent and prejudicial as to the others as an *ex parte* declaration, the acts and declarations of one conspirator being competent as against the others only when made during the existence of the conspiracy

CONSPIRACY—*Continued.*

and in the furtherance of the common design, and when the existence of the conspiracy is established by evidence *aliunde*. *S. v. Littlejohn*, 571.

§ 6. Sufficiency of Evidence and Nonsuit.

Where there is evidence that one defendant stole certain tires, transported them in the vehicle of another defendant and sold them, statements by the other defendants that on the alleged date they accompanied the first defendant to sell the tires and received a certain amount each, but that they had no part in the theft of the tires, does not amount to an admission of conspiracy to commit the crime of larceny. *S. v. Littlejohn*, 571.

§ 8. Verdict and Judgment.

Sentence for conspiracy to commit murder cannot exceed 10 years. *S. v. Alston*, 398.

CONSTITUTIONAL LAW.

§ 1. Supremacy of Federal Constitution.

The Supreme Court of North Carolina is the supreme arbiter in the construction of the State Constitution and laws but must accept the interpretation of the Supreme Court of the United States with regard to a defendant's rights under the Federal Constitution; nevertheless, Federal Courts inferior to the United States Supreme Court have no authority to review and reverse the decisions of the State Supreme Court, even in regard to questions arising under the Federal Constitution. *S. v. Barnes*, 517.

§ 4. Right to Attack Constitutionality of Statute or Ordinance.

While ordinarily the constitutionality of a criminal statute may not be tested by injunction proceedings, this rule is subject to exception if the enforcement of a statute or ordinance would result in irremedial injury to property or personal rights. *Surplus Co. v. Pleasants*, 650.

§ 5. Separation of Powers.

The jurisdiction of the Supreme Court is conferred and defined by the Constitution, and G.S. 62-99, providing that an appeal from an order of the Utilities Commission approving an increase in the rates and charges of a public utility should be direct to the Supreme Court, is unconstitutional as being in conflict with the provisions of Article IV of the Constitution of North Carolina, both before and after the 1962 Amendment. *Utilities Comm. v. Finishing Plant*, 416.

§ 6. Legislative Powers.

While the legislature may create a presumption to be applied in the construction of instruments executed prior to the enactment of the statute, its power to create such presumptions or inferences is not unlimited but it may create only those presumptions or inferences which have some reasonable relation to the facts upon which they arise. *Trust Co. v. Andrews*, 531.

§ 18. Right to Peacefully Assemble.

Citizens have the right to assemble peacefully for a lawful purpose; nevertheless, even though an assembly be lawful initially it may become a riot if at any time its members act with common intent in committing unlawful or disorderly acts in such a manner as to threaten a breach of the peace. *S. v. Leary*, 51.

§ 23. Vested Rights and Due Process.

If a cause of action is barred it cannot be revived by legislative act extending the period of limitation. *Jewell v. Price*, 459.

CONSTITUTIONAL LAW—*Continued.*

The General Assembly may not diminish a vested interest by artificially increasing the class in which the estate has vested. *Trust Co. v. Andrews*, 531.

§ 24. What Constitutes Due Process in General.

Creation of metropolitan sanitary district composed of sanitary districts and municipalities upon a vote of the governing bodies of the districts and the municipalities, and without a vote of the residents, does not violate constitutional guarantees. *Scarborough v. Adams*, 631.

§ 33. Self-Incrimination.

Introduction of results of breathalyzer tests does not violate right not to incriminate self. *S. v. Powell*, 73.

§ 36. Cruel and Unusual Punishment.

Sentence within that allowed by statute cannot be cruel or unusual in the Constitutional sense. *S. v. Slade*, 70.

CONTEMPT OF COURT.

§ 3. Wilful Refusal to Obey Lawful Order of Court.

In order to support a commitment for contempt for failure to pay into court sums directed by prior order, the court must find facts in regard to defendant's assets and liabilities and his ability to pay and work, sufficient to support a finding that the failure to pay was wilful. *Gorrell v. Gorrell*, 403.

CONTRACTS.

§ 4. Consideration.

Where the parties make reciprocal promises and one of the parties fulfills his promise, the law will not permit the other promisor to avoid his obligation on the ground that he received no consideration. *Casualty Co. v. Funderburg*, 131.

§ 6. Contracts Against Public Policy.

The fact that a contract between a metropolitan district and the municipalities and sanitary districts within its boundaries in regard to the operation, control, and financing of the metropolitan sanitary district provides that the contract should continue in force so long as the district's disposal system remains in existence and operation, is valid and is not against public policy, since the very nature and exigencies of the problem require contracts continuing for an indefinite time. *Scarborough v. Adams*, 631.

§ 12. General Rules of Construction.

Where the terms of a contract are not ambiguous no question of legal interpretation arises. *Arnold v. Charles Enterprises*, 92.

A contract will be construed to give effect to the intent of the parties as ascertained from the language used considered in the light of the subject matter, the end in view, the purpose sought, and the situation of the parties at the time. *Sell v. Hotchkiss*, 185.

Ambiguity in a contract will be resolved against the party who prepared the instrument. *Ibid.*

Where no time is fixed for the termination of a contract it will continue for a reasonable time, taking into account the purposes the parties intended to accomplish. *Scarborough v. Adams*, 631.

§ 14. Third Party Beneficiaries.

A stranger to a contract may not assert any rights thereunder unless he is

CONTRACTS—*Continued.*

a third party beneficiary, and the test of whether he is the third party beneficiary is whether the parties to the agreement intended he should receive a benefit therefrom which might be enforced in the courts. *Products Corp. v. Sanders*, 234.

§ 20. Impossibility of Performance as Excusing Nonperformance.

Where a contract excuses performance upon the happenings of certain contingencies, it is the duty of the parties to exercise reasonable care to obviate the happenings of such contingencies. *Arnold v. Charles Enterprises*, 92.

Defendants' evidence held insufficient to show the exercise of care to avoid contingency rendering performance on their part impossible. *Ibid.*

Plaintiff manufactured pursuant to contract certain plywood products to defendant's specifications for use in defendant's manufacturing operations. *Held:* The occurrence of a fire destroying defendant's manufacturing plant so that defendant no longer needed the plywood is no defense to plaintiff's action to recover damages for defendant's refusal to pay the account. The doctrine of frustration applies when the subject matter of the contract is destroyed by fire, occurring without fault, rendering performance impossible. *Sechrest v. Furniture Co.*, 216.

§ 25. Burden of Proof in Actions on Contracts.

The burden is on the party failing to discharge a contractual obligation to prove that such failure came within the provisions of the contract excusing nonperformance. *Arnold v. Charles Enterprises*, 92.

Nonperformance of a valid contract is a breach thereof and subjects the party failing to perform to liability unless he carries the burden of showing a legal excuse for nonperformance. *Sechrest v. Furniture Co.*, 216.

§ 29. Measure of Damages for Breach of Contract.

Where the contract provides that each party should be entitled to 50% of the proceeds of the ticket sales for the contemplated concert, the measure of damages for breach of the contract is 50% of the value of the tickets sold, without deductions for any unexpended promoting or advertising costs, the gross receipts and not the net profit being the determinative figure under the contract. *Arnold v. Charles Enterprises*, 92.

CONVICTS AND PRISONERS.

§ 1. Statutes.

During the period between the pronouncement of the judgment and the vacation of such judgment defendant's *de facto* status is that of a prisoner serving a sentence; from the vacation of the judgment until judgment is pronounced upon defendant's retrial, defendant having failed to give bond, defendant's status is that of a prisoner under indictment awaiting trial. *S. v. Weaver*, 681.

COSTS.

§ 4. Items of Costs.

Upon recovery of judgment in an amount less than one thousand dollars by the husband against the wife for sums expended for medical expenses made necessary by the wife's negligent injury of their child, the court may allow a sum for the husband's counsel fee to be taxed as part of the costs. *Foster v. Foster*, 694.

COUNTIES.

§ 1. Powers in General.

Neither counties nor municipalities have any inherent powers and have power to enact police regulations only pursuant to statutes delegating to them, respectively, a portion of the State's police power, and therefore the power of counties and the power of municipalities to enact such regulations, being derived from separate statutes, are not the same. *Surplus Co. v. Pleasants*, 650.

§ 3.1. Ordinances.

Statute permitting designated counties to enact Sunday ordinances held void as special act relating to trade. *Surplus Co. v. Pleasants*, 650.

§ 5. Fiscal Management and Debt.

G.S. 153-324 expressly provides that all general or special laws inconsistent therewith are inapplicable, and G.S. 153-310 specifically permits the bond resolution of a sanitary district to contain provisions for the use and disposition of the revenues of the system and the creation and maintenance of reserves and sinking funds, and therefore the provisions of Ch. 4 Public-Local Laws of 1937 that the Sinking Fund Commission of Buncombe County should have custody and management of the sinking, revolving or other funds for the payment or retirement of bonded indebtedness is not applicable to the bonds of a metropolitan sanitary district. *Scarborough v. Adams*, 631.

COURTS.

§ 2. Jurisdiction in General.

A challenge to jurisdiction may be made at any time, even in the Supreme Court. *Askew v. Tire Co.*, 168.

§ 13. Terms of Inferior Courts.

Where the length of the term of an inferior court is not specifically stated by statute other than it shall continue until the business before it is disposed of, the term cannot last beyond the time fixed for the next succeeding term unless a trial is then actually in progress, and in any event the term terminates when the judge leaves the bench, and therefore where judgment is entered on Christmas Eve the term expires on that day upon the court leaving the bench for the Christmas holidays. *S. v. Lawrence*, 220.

§ 20. What Law Governs — Law of This and Other States.

The law of this State governs all matters of procedure in an action brought here on a contract executed in another state and calling for performance in a third state. *Arnold v. Charles Enterprises*, 92.

Where there is no difference between the law of the state in which the contract was executed and the law of the state in which it was to be performed, there is no necessity of determining which law should be applied. *Ibid.*

Ordinarily, the law of the forum controls as to the burden of proof. *Ibid.*

Where state in which accident occurs does not permit wife to sue husband in tort, she may not do so in action instituted here, nor may original defendant join him for contribution. *Petrea v. Tank Lines*, 230.

CRIME AGAINST NATURE.

§ 1. Elements and Essential of the Offense.

The crime against nature is sexual intercourse contrary to the order of nature. *S. v. Harward*, 746.

G.S. 14-202.1 does not repeal G.S. 14-177 but is supplementary thereto and

CRIME AGAINST NATURE—*Continued.*

was enacted for the purpose of providing even broader protection to children. *Ibid.*

§ 2. Prosecution and Punishment.

Evidence in this case held sufficient to sustain conviction of defendant of committing the crime against nature with a male person. *S. v. Harwood*, 746.

Upon the trial of an indictment charging defendant with committing the crime against nature, defendant may be convicted of an attempt to commit the offense, which is an infamous act within the meaning of G.S. 14-3 and is punishable as a felony. *Ibid.*

CRIMINAL LAW.

§ 2. Intent; Wilfullness.

"Intent" and "wilfulness" are mental attitudes which are seldom capable of direct proof but must ordinarily be established by circumstances from which they may be inferred. *S. v. Arnold*, 348.

"Wilful" as used in criminal statutes means the wrongful doing of an act without justification or excuse. *Ibid.*

§ 9. Aiders and Abettors.

In order for a person who is present at the scene of the crime to be guilty as an aider and abettor there must be some evidence tending to show that such person, by word or deed, gave active encouragement to the perpetrator, or by his conduct made it known to the perpetrator that he was standing by to render assistance when and if it should be necessary. *S. v. Bruton*, 488.

§ 18. Jurisdiction of Superior Court on Appeal.

Where the statute establishing a county court so provides, an appeal to the Superior Court by a defendant charged with forcible trespass and assault with a deadly weapon, misdemeanors beyond the final jurisdiction of a magistrate or a mayor, must be tried upon a bill of indictment. *S. v. Stevens*, 364.

§ 19. Jurisdiction Upon Transfer of Cause Upon Demand for Jury Trial.

Upon transfer of a cause from a municipal-county court to the Superior Court upon defendant's demand for a jury trial, the Superior Court acquires jurisdiction of the offense charged in the warrant, but the trial in the Superior Court must be upon an indictment, notwithstanding statutory provision that it be upon the warrant. *S. v. Smith*, 575.

§ 21. Preliminary Proceedings.

Assignment of error that defendants were not permitted to examine the S.B.I. reports and notes prior to trial cannot be sustained when defendants do not contend at any time that access to such reports was necessary for the preparation of their defense. *S. v. Hamilton*, 277.

§ 23. Plea of Guilty.

Where it appears at a post conviction hearing that during the course of the trial the court informed defendant's counsel that the court was of the opinion that the jury was going to convict and, if the jury did so, the court felt inclined to give a long sentence, that defendant was informed of the statement of the court, and that defendant knew that his companion in the commission of the offenses, when awarded a new trial, was given a suspended sentence, and that defendant thereupon changed his plea of not guilty to guilty, *held* the circumstances disclose that the plea of guilty was not voluntarily made, and a new trial must be awarded. *S. v. Benfield*, 75.

CRIMINAL LAW—*Continued.*

Where the court finds, upon supporting evidence, that defendant, represented by counsel, signed a plea of guilty voluntarily and understandingly, the findings are conclusive and defendant's contention that his attorney entered the plea without his knowledge or consent and that neither the court nor the attorney informed him of the effect of his signing the paper writing, is untenable. *S. v. Alston*, 398.

§ 26. Former Jeopardy.

Where a warrant for escape fails to charge effectively that the offense was a second escape, the doctrine of former jeopardy precludes a subsequent prosecution for the felony. *S. v. Lawrence*, 220.

Where indictment for escape charges date of escape antecedent date of sentence, the indictment is fatally defective and will not support a plea of former jeopardy. *S. v. Whitley*, 742.

§ 32. Burden of Proof and Presumptions.

Drunkenness is an affirmative defense upon which defendant has the burden of proof, and a person who drinks after forming the purpose to commit a crime is not excused by voluntary drunkenness. *S. v. Arnold*, 348.

§ 33. Facts in Issue and Relevant to Issues in General.

Every circumstance calculated to throw light upon the commission of the offense charged is competent, the weight of such evidence being for the jury. *S. v. Hamilton*, 277.

§ 34. Evidence of Defendant's Guilt of Other Offenses.

In a prosecution of a husband for the murder of his wife, evidence tending to show that prior to the homicide he had made improper sexual advances toward the male witness does not, standing alone, tend to establish defendant's guilt of his wife's murder, and the admission over his objection of the evidence tending to show that he was a sexual pervert, emphasized in the solicitor's argument to the jury, is prejudicial error. *S. v. Rinaldi*, 701.

§ 55. Blood and Breath Tests.

Where the person making the test is shown to be qualified as an expert in the field and the manner in which the test is made meets the requirements of G.S. 20-139.1, the testimony of such person as to the results of a breathalyzer test made on defendant some one-half hour after he was apprehended driving a motor vehicle on a highway is competent. *S. v. Powell*, 73.

§ 71. Confessions and Admissions.

Incriminating statements made by defendant are not rendered incompetent because of the fact that at the time of making them defendant was intoxicated, when there is no evidence that defendant's intoxication amounted to mania or that any intoxicants were furnished to him by officers or officials, since defendant's intoxication goes to the weight and credibility to be accorded the statements and not their competency. *S. v. Graham*, 228.

Where officers arrest defendants for an investigation of a robbery in response to a description given by the victim and from information received from an informer, and warn each defendant that any admission made by him would be used against him, confessions made by defendants voluntarily within some two hours after arrest are competent against each respectively, notwithstanding defendants were not then represented by counsel, the evidence disclosing that a telephone was available to them and that neither requested that he be represented by counsel. *S. v. Edgerton*, 328.

After officers had served a warrant upon defendant for receiving stolen goods, defendant voluntarily engaged in a conversation with the officers in respect to the merchandise he was charged with receiving, and in the course of the conversation made incriminating admissions, *held* there being evidence that the admissions were freely and voluntarily made without inducement by promises, threats or coercion, the admission of the admissions will not be held for error, notwithstanding defendant was not warned that anything he said might be used against him or that he had a right to employ counsel. *S. v. Upchurch*, 343.

Findings of fact upon conflicting evidence as to whether a confession was voluntary are conclusive, there being competent evidence to support the findings. *S. v. Mitchell*, 352.

Where police officers in booking defendant informed him that he had the right to remain silent and that anything he said might be used against him, a voluntary, incriminating admission by defendant that he was at the scene of the crime on the date it was committed, *held* competent. *S. v. Fletcher*, 482.

A free and voluntary confession is admissible in evidence. *S. v. Barnes*, 517.

It is not required that a statement be volunteered in order to be voluntary. *Ibid.*

When the findings of fact by the trial court with regard to the voluntariness of a confession are supported by competent evidence they are conclusive on appeal to the courts, both State and Federal, although the conclusions of law to be drawn from the facts found are not binding on the reviewing courts. *Ibid.*

Where defendant challenges the voluntariness of a confession it is the duty of the trial court, in the absence of the jury, to make a full investigation, record the evidence, and find the facts in regard to the circumstances surrounding the making of the incriminating statements in order that its conclusions as to whether the confession was free and voluntary may be reviewed and the prisoner's rights protected under both the State and Federal Constitutions, and when the court admits a confession in evidence over defendant's objection without setting forth the predicate facts, a new trial must be awarded. *Ibid.*

Where a confession is obtained from defendant after confronting him with stolen property recovered from his home in an unlawful search without a warrant, the court must find whether such confession was actually free and voluntary or whether it was triggered by the use of the articles obtained by the illegal search. *S. v. Hall*, 559.

§ 74. Acts and Declarations of Companions and Codefendants.

Where the State's evidence tends to show that defendant was on the outside of a filling station, presumably endeavoring to repair his companion's car while his companion was breaking into the filling station with intent to commit larceny, testimony elicited by the State on cross-examination of the companion that he did not intend to commit larceny when he entered the building but that when he saw the cash register he attempted to open it and, upon being unable to do so, undertook to take it to the automobile, *held* competent as tending to throw light on the relationship and understanding between the two. *S. v. Bryant*, 64.

§ 79. Evidence Obtained by Unlawful Means.

The wife has no authority to consent to a search of the home in regard to the possessions of the husband, and therefore stolen property recovered from the home while the husband was lodged in jail is incompetent in evidence against him. *S. v. Hall*, 559.

CRIMINAL LAW—*Continued.*

Where stolen property is obtained by the unlawful search of defendant's home without a warrant, and, upon confrontation, defendant admits he stole the property found and also admits that he stole other property to which he directs the officers, such other property is discovered by reason of defendant's admissions and not as the result of the search, and evidence in respect to such other property is not subject to objection of want of a search warrant. *Ibid.*

Where person in possession of automobile consents to search, evidence obtained by the search is competent against him and the occupants of the car notwithstanding the absence of a search warrant. *S. v. Hamilton*, 277.

Search of house of suspect without warrant renders incompetent not only gun and shells found in the house, but also testimony that shells found at the scene of the crime had been shot from the gun. *S. v. Stevens*, 737.

§ 84. Corroboration and Impeachment of Witnesses.

Statements made by the prosecuting witness shortly after the crime, which statements are substantially in accord with his testimony at the trial, are competent for the purpose of corroboration, and slight variations in the statements go to their weight and not their competency. *S. v. Norris*, 470.

§ 85. Rule That Party is Bound by Own Evidence.

The introduction of exculpatory statements of defendant does not preclude the State from showing the facts to be otherwise. *S. v. Wilson*, 373.

Where officers take the defendant to the cell of a confederate for the purpose of having defendant repeat certain incriminating statements in the presence of the confederate, and the officers permit defendant to interrogate the confederate, eliciting exculpatory statements, whereupon the officers stop the questioning, defendant is justified in declining to make any further statements in the presence of the confederate, and the State is bound by the exculpatory statements in the absence of evidence of other facts or circumstances tending to show them to be false. *S. v. Bruton*, 488.

§ 86. Time of Trial and Continuance.

The refusal of a continuance more than a month after the indictments were returned against defendants having counsel will not be disturbed. *S. v. Hamilton*, 277.

§ 87. Consolidation of Counts for Trial.

Where three defendants are charged in separate indictments with larceny of specified personalty from a specified store and with breaking and entering and safe-breaking at said store, the court may properly consolidate for trial, the offenses charged being of the same class and so connected in time and place that evidence at the trial upon one would be competent and admissible at the trial of the others. *S. v. Hamilton*, 277.

§ 90. Admission of Evidence Competent for Restricted Purpose.

Where the confession of each defendant is admitted solely against the defendant making it, it will not be assumed that the jury ignored the court's instruction in this regard. *S. v. Egerton*, 328.

§ 93. Custody of Defendant or Witnesses.

Motion to sequester the State's witnesses is addressed to the discretion of the trial court, and the court's refusal of the motion will not be disturbed in the absence of a showing of abuse. *S. v. Hamilton*, 277.

§ 98. Function of Court and Jury in General.

Evidence permitting conflicting conclusions in regard to the fact in issue

CRIMINAL LAW—*Continued.*

must be submitted to the jury, it being the function of the jury to evaluate the evidence and determine the truth or falsity of the testimony. *S. v. Rinaldi*, 701.

§ 99. Consideration of Evidence on Motion to Nonsuit.

Where the State introduces evidence tending to establish each essential element of the offense charged, the fact that defendant introduces evidence at variance therewith cannot justify nonsuit. *S. v. Maness*, 358.

On motion to nonsuit, the evidence for the State together with so much of defendant's evidence as tends to clarify or explain the State's evidence and which is not inconsistent therewith, must be considered in the light most favorable to the State, and defendant's evidence which tends to contradict or impeach the State's evidence must be disregarded. *S. v. Dupree*, 463.

On motion to nonsuit, the court will consider not only defendant's evidence which explains or makes clear that offered by the State but also defendant's evidence which rebuts the inference of guilt when it is not inconsistent with the State's evidence. *S. v. Bruton*, 488.

§ 101. Sufficiency of Evidence to Overrule Nonsuit.

Circumstantial evidence establishing by direct evidence facts raising the reasonable inference of defendants' guilt of the offense charged is properly submitted to the jury. *S. v. Hamilton*, 277; *S. v. Wilson*, 595.

Nonsuit is properly denied if there is substantial evidence of defendant's guilt of every essential element of the offense charged, and it is immaterial whether such evidence is direct or circumstantial, or both. *S. v. Bruton*, 488.

A *prima facie* case takes the issue to the jury, and nonsuit cannot be granted on an affirmative defense. *S. v. Arnold*, 348.

Exculpatory statements introduced by the State do not warrant nonsuit when the State introduces evidence tending to show the facts to have been otherwise. *S. v. Wilson*, 373.

Evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction is sufficient to be submitted to the jury, but evidence which raises a mere suspicion or conjecture in regard to the issue is insufficient. *S. v. King*, 578.

§ 104. Directed Verdict.

Upon motion of defendant for a directed verdict, all the evidence upon the whole record tending to sustain conviction will be considered in the light most favorable to the State. *S. v. Bruton*, 488.

§ 107. Instructions — Statement of Evidence and Application of Law Thereto.

It is error for the court to charge upon a principle of law having no pertinency to the facts in evidence in the case. *S. v. Duncan*, 123.

It is the duty of the court to charge the jury upon each substantial and essential feature of the case arising upon the evidence notwithstanding the absence of prayer for special instructions. *S. v. Todd*, 524.

§ 109. Instructions — Submission of Guilt of Less Degrees of Crime Charged.

It is error for the court to fail to submit the question of defendant's guilt of a less degree of the crime charged when any aspect of the evidence will support a conviction of such less degree. *S. v. Jones*, 134.

But when there is no evidence of defendant's guilt of less degrees of the crime the court is not required to submit the question of defendant's guilt of such less degrees. *S. v. Fletcher*, 482.

CRIMINAL LAW—*Continued.*

§ 125. Motions for New Trial for Newly Discovered Evidence.

Repudiation by one witness of his testimony at the trial is not a sufficient basis to invoke the court's discretionary power to order a new trial for newly discovered evidence when the testimony of such witness at the trial was merely cumulative or corroborative of testimony given by other witnesses. *S. v. Morrow*, 77.

A motion for a new trial for newly discovered evidence is addressed to the sound discretion of the trial court, and the court's determination thereof will not be disturbed in the absence of a showing of abuse of discretion. *Ibid.*

§ 131. Severity of Sentence.

Where a new trial is awarded upon defendant's own application, the fact that the sentence upon conviction at the second trial exceeds the sentence imposed upon conviction at the first is not ground for legal objection. *S. v. Slade*, 70.

Where defendant is convicted of a felony on one count and of a misdemeanor on another, the fact that sentence imposed is excessive for conviction of a misdemeanor is immaterial when but one sentence is entered on the verdict of guilty on both counts and the sentence imposed is within that provided by statute for conviction of the felony. *Ibid.*

A life sentence imposed upon defendant's plea of conspiracy to murder must be vacated, but the vacation of the sentence does not affect the plea, and the cause must be remanded to the Superior Court for proper sentence, which must provide credit for time served by defendant in execution of the vacated sentence. *S. v. Alston*, 398.

Where defendant's conviction of a felony is vacated after he has served a portion of the sentence, and upon retrial he is convicted of a less degree of the crime, constituting a misdemeanor, judgment imposing the maximum sentence for the misdemeanor must give defendant credit for the time served on the felony, but need not give defendant credit for the time between the vacation of the felony judgment and the imposition of sentence for the misdemeanor. *S. v. Weaver*, 681.

§ 133. Concurrent and Cumulative Sentences.

The trial judge has no discretion to make the sentence for escape run concurrently with the prisoner's other sentences, it being mandatory under the statute that the sentence for escape begin at the expiration of any and all of the sentences theretofore imposed upon the defendant. G.S. 148-45, and the sequence of sentences is a matter for the Prison Department, it not being required that the court show in the judgment the docket number. *S. v. Harper*, 354.

§ 134. Sentence for Repeated Offenses.

The warrant or indictment must allege that defendant had theretofore been convicted of a like offense and the time and place of such conviction in order to support the imposition of a greater punishment under the statute. *S. v. Lawrence*, 220.

Upon a warrant or indictment properly charging a second offense, defendant may be convicted or plead guilty to the specific violation charged or he may be convicted or plead guilty as in case of a second offense. *Ibid.*

Where the warrant for escape contains the words "second offense" but is insufficient to charge the felony, a sixty day sentence is for the specific misdemeanor of escape. *Ibid.*

CRIMINAL LAW—*Continued.*

§ 136. Revocation of Suspension of Sentence.

The fact that a criminal prosecution for possession of intoxicating liquor results in a verdict of not guilty upon the suppression of evidence obtained without a search warrant does not preclude the court from activating a prior sentence suspended on condition that defendant not have on his premises any quantity of intoxicating beverage and that he permit a search of his premises without a warrant. *S. v. White*, 600.

§ 137. Modification and Correction of Judgment in Trial Court.

The court is without authority to vacate or modify a judgment after the expiration of the term, and therefore when sentence for escape is imposed on Christmas Eve the court is without authority thereafter to vacate or modify the judgment, and its action in doing so in order that defendant might be tried on an indictment charging a second offense of escape must be set aside. *S. v. Lawrence*, 220.

§ 139. Nature and Grounds of Appellate Jurisdiction in Criminal Cases in General.

The Supreme Court will take notice of a fatal defect appearing upon the face of the warrant. *S. v. Brown*, 191.

§ 149. Certiorari.

An "appeal" docketed in apt time after adjudication at a post conviction hearing will be treated as a *certiorari*. *S. v. Benfield*, 75.

§ 152. Form and Requisites of Transcript.

The setting out of practically all of the evidence in question and answer form is not a compliance with Rules. *S. v. Hamilton*, 277.

§ 154. Form and Requisites of Exceptions and Assignments of Error in General.

An assignment of error not supported by an exception will not be considered. *S. v. Maness*, 358; *S. v. Dunn*, 391.

An assignment of error must disclose the question sought to be presented without the necessity of going beyond the assignment itself. *S. v. Wilson*, 373.

While several exceptions may be grouped under a single assignment of error when all relate to but a single question of law, exceptions presenting different questions of law may not be grouped under a single assignment, since the assignment of error must present but a single question for consideration by the appellate court. *Ibid.*

§ 156. Exceptions and Assignments of Error to Charge.

An assignment of error must present but a single question of law, and exceptions may be gathered under a single assignment only if each relates to the single question sought to be presented, and it is contrary to the Rules to gather under a single assignment of error to the charge a large number of exceptions upon which appellants undertake to raise various and sundry questions. *S. v. Hamilton*, 277; *S. v. Wilson*, 373.

An exception to a long excerpt from the charge must fail if any portion of the charge excepted to is correct. *Ibid.*

§ 159. The Brief.

Assignment of error in support of which no authority is cited in the brief is deemed abandoned. *S. v. Hamilton*, 277.

CRIMINAL LAW—*Continued.*

§ 164. Whether Error Relating to One Count Is Prejudicial.

Where concurrent sentences are imposed, error relating to one count alone is not prejudicial. *S. v. Wilson*, 595.

§ 169. Determination and Disposition of Appeal.

Where the Supreme Court determines that incompetent evidence was admitted, the cause must be remanded for a new trial, and in such instance defendant is not entitled to a dismissal even though there is insufficient competent evidence in the record to sustain a conviction, since upon the retrial the State may be able to offer sufficient competent evidence to go to the jury. *S. v. Hall*, 559.

The admission of incompetent evidence which is prejudicial necessitates a new trial, but defendants are not entitled to dismissal even though there is insufficient competent evidence in the record to sustain conviction, since if the incompetent evidence had not been admitted the State might have introduced competent evidence upon the point. *S. v. Littlejohn*, 571; *S. v. Stevens*, 737.

Where a conviction is set aside because the prisoner was not represented by counsel at the trial, the prisoner is not entitled to his discharge, and the court, upon vacating the judgment, should order that the indictment upon which the prisoner was convicted be restored to the trial docket for retrial or other disposition as necessity may require. *S. v. Merritt*, 716.

§ 173. Post Conviction Hearing.

A petition to review the constitutionality of a conviction must be filed in the county in which the conviction was entered, and when filed in the Superior Court of another county such court has no jurisdiction, nor may a motion for change of venue to such county be entered therein. *S. v. Merritt*, 716.

DAMAGES.

§ 3. Compensatory Damages for Injury to the Person.

The party injured by the negligence of another is entitled to recover the amount which will fairly compensate him for his injuries, without considering payments received by the injured person under the provisions of the Workmen's Compensation Act or insurance procured by himself or his employer. *Spivey v. Wilcox Co.*, 387.

While damages may not be recovered for mere fright alone, damages are recoverable if the fright is accompanied by contemporaneous physical injury. *Slaughter v. Slaughter*, 732.

§ 14.1. Argument to Jury.

Where plaintiff testified that her injury no longer caused pain in her finger but that she had only a drawn feeling amount to discomfort, argument of counsel to the effect that her life expectancy amounted to so many minutes and that compensation for her *pain* at one cent per minute of such time would amount to a specified figure, *is held* improper as not being justified factually or legally upon the evidence. *Jenkins v. Hines Co.*, 83.

DEATH.

§ 6. Expectancy of Life and Damage.

The statute creating the right of action for wrongful death provides for the recovery of compensation for the pecuniary injury resulting from the death, devoid of sentiment, and the rule applies when the deceased is an infant. *Scriven v. McDonald*, 727.

DEATH—*Continued.*

The burden is upon plaintiff in an action for wrongful death to prove pecuniary loss, and when plaintiff's evidence, together with defendant's evidence not in conflict therewith, discloses that intestate was a mentally retarded boy, handicapped to the extent that he would continue to be a dependent person and could never earn a livelihood, nonsuit must be granted. *Ibid.*

DEEDS.

§ 12. Estates Conveyed by Construction of Instrument.

As a general rule where two clauses in a deed are repugnant the first in order will be given effect and the latter rejected. *Bowden v. Bowden*, 296.

The granting clause is the very essence of the contract, and in the event of repugnancy between the granting clause and the *habendum* clause and other recitals, the granting clause will prevail. *Ibid.*

EMINENT DOMAIN.

§ 1. Nature and Extent of Power.

An agency may not condemn land unless it has either the money on hand, or the present authority to obtain the money, for payment of just compensation. *Horton v. Redevelopment Comm.*, 1.

The requirement of compensation is self-executing, so that if no adequate remedy is afforded by statute the owner may maintain an action at common law to obtain just compensation. *Sherrill v. Highway Comm.*, 643.

§ 2. Acts Constituting a "Taking."

Where a municipality, pursuant to an urban redevelopment plan, seeks to condemn the right to construct a plaza over the tracks of a railroad company, and the construction of the plaza entails the removal of the railway's passenger station, the operation of trains through a tunnel, and the lessening of the width of the right of way in some instances, the city must condemn something more than a mere easement for light and air. *Horton v. Redevelopment Comm.*, 1.

Maintenance of culvert under street so that waters of stream wash against bank and undermine plaintiff's wall constitutes a "taking." *Sherrill v. Highway Comm.*, 643.

Allegations to the effect that the Highway Commission maintained a culvert under a highway in such manner as to cause the waters of a creek, after a heavy rain, to wash away the foundation of the building leased by petitioners, causing the destruction of the wall of the building, resulting in damage to petitioners' stock of goods, extra expense, and loss of profits, *held* insufficient to state a cause of action for a "taking", since no allowance may be had for damage to personal property as distinguished from fixtures. *Lyerly v. Highway Comm.*, 649.

§ 7a. Proceedings.

Redevelopment commission may not proceed to condemn property until it has modified defective plan so as to include the sums realistically necessary to pay for all easements and rights necessary to be condemned. *Horton v. Redevelopment Comm.*, 1.

§ 11. Actions to Access Compensation.

Trial in the Superior Court upon appeal from the Commissioners' report in condemnation is *de novo*, and respondents are not entitled to have the commissioners testifying for them also testify that they had been appointed by the clerk, since the good character of a witness may be established by general repu-

EMINENT DOMAIN—*Continued.*

tation only, and not by the esteem in which he is held by a particular person. *Light Co. v. Smith*, 581.

§ 14. Persons Entitled to Compensation.

Upon condemnation of leased land the lessee is entitled to compensation for and resulting diminution in the value of its leasehold estate, and lessor is entitled to compensation for any diminution in the value of its property. *Horton v. Redevelopment Comm.*, 1.

EQUITY.

§ 2. Laches.

Where the N. C. Board of Architecture waits for some nine years before instituting action against defendant for defendant's violation of G.S. 83-12 in drawing plans for the construction of a building costing in excess of twenty thousand dollars, such action is correctly dismissed for laches, since courts of equity discourage delay in the enforcement of rights. *Board of Architecture v. Lee*, 602.

ESCAPE.

§ 1. Elements of the Offense and Prosecutions.

A warrant charging that the defendant named did unlawfully escape from a named prison in charge of a named official while the defendant was serving a sentence for a specified crime upon conviction at a specified term of the Superior Court of a named county, *held* sufficient and not subject to objection on the ground that the warrant failed to state the length of the sentence defendant was serving, the number of the defendant's commitment, or the trial docket number of the case in which the commitment was issued. *S. v. Harper*, 354.

A prisoner escaping while serving a sentence is not immune to punishment for the escape even though the sentence he was serving at the time of the escape was irregular or voidable and is set aside and a new trial ordered after the escape but prior to imposition of sentence for escape, since a prisoner serving a sentence imposed by authority of law may not defy that authority but must seek redress in compliance with due process. *S. v. Goff*, 563.

A prisoner hired by the State Highway Commission to work on the State highways is within the State prison system when an agent of the Commission has been designated to receive and work such prisoner, and therefore the escape of a prisoner from the custody of the gang foreman while working on the public roads is an escape from the State prison system. *S. v. Whitley*, 742.

ESTOPPEL.

§ 4. Equitable Estoppel.

The fact that grantees accept rents from grantors' lessees under an unregistered ten year lease does not estop grantees from denying that the unregistered lease was binding on them, since lessees did not perform or omit the performance or any act or change their position in reliance upon the conduct of grantees, and grantees were entitled to rent so long as the lessees remained in possession. *Bourne v. Lay & Co.*, 33.

EVIDENCE.

§ 3. Judicial Notice of Facts Within Common Knowledge.

The courts will take judicial notice that releases and covenants not to sue are ordinarily prepared by the insurer of the releasee or covenantee, and that they are intended for use in the several States. *Sell v. Hotchkiss*, 185.

EVIDENCE—*Continued.*

While the courts may take judicial notice of reaction time of motorists and the distance at which a vehicle traveling at a given speed can be stopped, the courts can do so only within recognized judicial limits with respect to whether a particular result is possible or impossible as a matter of common knowledge, but the courts cannot take judicial notice of precise reaction times or stopping distances set forth in a chart or published table. *Hughes v. Vestal*, 500.

Matters of which a court will take judicial notice are necessarily uniform or fixed, and a disputable matter cannot be classified as common knowledge. *Ibid.*

§ 15. Relevancy and Competency of Evidence in General.

Evidence so far removed in time and place from the incident under judicial investigation that it has no probative value, is incompetent. *Brewer v. Garner*, 384.

§ 16. Experimental Evidence; Similar Facts and Transactions.

It is prejudicial error to admit evidence of defendant's excessive speed some two miles from the collision when there is no evidence that defendant continued to maintain such speed to the scene of the collision. *Greene v. Meredith*, 178.

In an action to recover for injuries resulting when plaintiff could not fasten the protective bar over the seat of the amusement ride in question and the machinery was put in motion by the attendant without ascertaining that the bars were fastened and the riders secure, testimony of other patrons to the effect that they rode on the device before and after the accident and that they found it difficult to fasten the protective bars, and that the attendant did not assist them in closing the protective bars, *held* competent as tending to show a prevailing defect in the mechanism and continuing negligence in the method of operation. *Dockery v. Shows*, 406.

A chart of distances at which motor vehicles traveling at given speeds can be stopped is not competent in evidence as experimental evidence, since an experiment ordinarily involves the re-enactment of the occurrence under investigation under substantially similar circumstances, and must ordinarily be introduced in evidence by the testimony of the experimenter. *Hughes v. Vestal*, 500.

§ 19. Evidence at Former Trial or Proceeding.

Where the parties admit that the transcript of the testimony of a witness at a former trial was correct and it is made to appear on the second trial that the witness lived some distance away, was in ill health, and was at least 65 years old, and the court finds that it would be detrimental to his health to make the witness appear, the ruling of the court admitting the transcript of his testimony will not be disturbed on appeal. *Norburn v. Mackie*, 479.

§ 24. Public Records and Documents.

Even a competent public record or document must be properly identified, verified or authenticated by some recognized method before it may be introduced in evidence. *Hughes v. Vestal*, 500.

A duly certified death certificate is competent in evidence and establishes *prima facie* the facts stated therein. *Weeks v. Ins. Co.*, 140.

An original instrument may be introduced in evidence whether recorded or not, and where it is introduced in evidence with a certificate of the register of deeds appearing thereon G.S. 8-18 has no application, and the contention that the instrument is not admissible until properly identified by the register of deeds is without foundation. *S. v. Dunn*, 391.

EVIDENCE—*Continued.*

§ 25. Accounts, Ledgers and Private Writings.

A ledger account sheet identified by the creditor as containing entries made in the regular course of business by his secretary, is competent. *S. v. Dunn*, 391.

§ 27. Parol Evidence Affecting Writings.

It will be presumed that all prior negotiations are merged in the written instrument, and parol evidence is not admissible to contradict, add to, take from, or vary the terms of the writing. *Leasing Corp. v. Hall*, 110; *Fox v. Southern Appliances*, 267.

But the parol evidence rule does not preclude testimony that the execution of the instrument was procured by fraud, since such testimony does not challenge the accuracy of the terms of the writing but the validity of the writing itself. *Fox v. Southern Appliances*, 268.

Stipulation in a contract for the sale of land that it was subject to the restrictions appearing in the chain of title does not preclude parol evidence of misrepresentations by the seller that the only restrictions binding the property were regulations zoning it for neighborhood business. *Ibid.*

Where a written lease of equipment agreement between carriers has blanks for the date and hour of delivery of equipment to the lessee and a place for the lessee to sign as evidence of delivery, and such blanks are not filled in, the lessee's testimony that he had not leased the truck on the occasion in question does not come under the prohibition of the parol evidence rule, since the writing itself was not to be effective until the blanks had been appropriately filled in. *Grissom v. Haulers*, 450.

§ 28. Hearsay Evidence in General.

The conclusion of a witness who has no personal knowledge of the facts is without probative value. *Caudill v. Ins. Co.*, 674.

§ 36. Testimony Constituting "Shorthand" Statement of Fact.

The statement of a witness that plaintiff "could not close" the door to his car *held* not incompetent as an expression of opinion by the witness when in context it appears that the statement referred to the condition of the door of which the witness had personal knowledge, and therefore was a "shorthand statement of fact." *Gooding v. Tucker*, 142.

§ 42. Expert Testimony in General.

The opinion of a witness, even though he may be qualified as an expert, is not admissible as to matters within the ordinary experience of men, since in such instance the jury is capable of deciding such question without the aid of opinion evidence. *Glenn v. Smith*, 706.

§ 55. Evidence Competent for Purpose of Corroboration.

A party may establish the character of a witness by general reputation only, and a witness may not testify that the clerk had appointed him a commissioner to appraise the value of the property in suit. *Light Co. v. Smith*, 581.

§ 58. Cross-Examination.

Where defendant's witness testifies that the merchandise in question was defective and not marketable, it is competent for the seller's attorney to elicit on cross-examination that the witness had appeared as a witness in another like suit and that the witness had known the purchaser over a number of years and was raised in the same town, and the court correctly instructs the jury that such testimony was admitted for the purpose of showing bias, if it did so show. *Junior Hall, Inc. v. Fashion Center*, 81.

EVIDENCE—*Continued.*

In an action to recover the contract price of an advertising sign erected for defendant, it is competent upon cross-examination to question defendant concerning a prior transaction in which defendant did not pay plaintiffs for a sign until suit was brought, the question being within the bounds of permissible cross-examination as bearing on credibility. *Kornegay v. Warren*, 148.

A party has an absolute right to cross-examine a witness in regard to an inconsistant statement made by the witness. *Brewer v. Garner*, 384.

EXECUTORS AND ADMINISTRATORS.

§ 2. Appointment and Tenure of Administrator.

The authority of an administrator continues until properly revoked, and the presentation of a paper writing to the clerk for probate does not revoke such authority, nor does the order of the clerk directing the administrator to suspend further proceedings except for the preservation of the property and the collection of debts and the payment of liens, pending the decision of the issue in the will contest, prevent the administrator from suing and being sued. *Hargrave v. Gardner*, 117.

§ 6. Title to and Control of Assets.

Upon the death of a depositor, title to the account vests in the depositor's personal representative, and the bank cannot discharge its obligation to the estate by payment to anyone else. *Monroe v. Dietenhoffer*, 538.

§ 18. Filing of Claims, Allowance or Refusal and Limitations.

Claimant may maintain action notwithstanding probate of paper writing providing payment, final payment being merely affirmative defense. *Hargrave v. Gardner*, 117.

Judgment dismissing claimant's suit "without prejudice" cannot affect running of statute of limitations. *Ibid.*

Allegations that plaintiff paid a securities dealer a stated sum for particular stock and that the dealer failed to purchase and deliver the stock prior to his death, states a cause of action against the estate of the dealer *ex contractu* based on matters occurring prior to the dealer's death and determinable as of that time. *Monroe v. Dietenhoffer*, 538.

§ 22. Claims Based on Acts or Transactions of Personal Representative.

Action against personal representative for wrongful distribution of assets prior to her qualification cannot be joined with action against bank for wrongfully paying deposit to other than legally appointed personal representative. *Monroe v. Dietenhoffer*, 538.

FIREMEN'S PENSION FUND.

The 1961 statutes providing for a Firemen's Pension Fund, making a specific line item appropriation to the fund not related to nor dependent upon taxes paid by insurance companies, and levying a tax by act passed in conformity with Art. II, § 14 of the State Constitution are valid, and insurance companies are not entitled to recover amounts paid under protest under the taxing statute. *Ins. Co. v. High*, 752.

FOOD.

§ 1. Liability of Manufacturer to Consumer.

Evidence permitting inference that bottled drink exploded in plaintiff's hand because of defect in bottle held to take case to jury *Jenkins v. Hines Co.*, 83.

FOOD—*Continued.*

Evidence of the breaking of another bottle prepared by defendant *held* competent upon evidence showing substantially similar circumstances and reasonable proximity in time. *Ibid.*

FRAUD.

§ 5. Reliance on Misrepresentation and Deception.

Whether the purchaser of realty has the right to rely upon the representation of the seller's agent that the only building restrictions applicable to the property were municipal zoning regulations limiting it to office and institutional use, without investigating the chain of title which would disclose that the property was subject to residential restrictions, must be determined upon the facts upon the basis of whether the representation was of such character as to induce a person of ordinary prudence to rely thereon, and ordinarily the question may not be determined on demurrer prior to the introduction of evidence. *Fox v. Southern Appliances*, 267.

§ 8. Pleadings.

Allegations that the purchaser desired to purchase property for business purposes, that the seller's agent knew or pretended to know what restrictions on the use of the property were applicable, and for the purpose of inducing the purchase, represented that the only restrictions were zoning regulations restricting use of the property to office and institutional purposes, and that the purchaser executed the contract of purchase in reliance upon such representation, which was material and false in fact, *held* sufficient to allege all the elements essential to constitute actionable fraud. *Fox v. Southern Appliances*, 268.

§ 10. Competency and Relevancy of Evidence.

Parol evidence to show that a written contract was procured by fraud is competent and does not come within the purview of the rule that parol evidence is not competent to vary or contradict the terms of a writing, since the evidence of fraud does not challenge the accuracy of the terms of the writing but the validity of the writing itself. *Fox v. Southern Appliances*, 267.

Mere reference in contract to sell land that land was subject to restrictions appearing in the chain of title does not preclude reliance on representation that land was subject only to zoning regulations. *Ibid.*

§ 11. Sufficiency of Evidence and Nonsuit.

Evidence that defendant sold chattel to a leasing corporation for lease to plaintiff and that plaintiff was induced to lease the equipment by defendant's misrepresentation that it had been reconditioned, *held* sufficient to be submitted to jury on issue of fraud. *Leasing Corp v. Hall*, 110.

FRAUDS, STATUTE OF.

§ 6c. Leases.

Lease of more than three years must be in writing. *Bourne v. Lay & Co.*, 33.

GAMES AND EXHIBITIONS.

§ 2. Liability of Proprietor to Patrons.

A general concessionaire who invites the public to visit a place of amusement or who shares in the proceeds of the admission fees, or who retains and exercises a measure of control over the premises, is ordinarily under the duty to inspect the premises and devices and to exercise oversight and supervision over

GAMES AND EXHIBITIONS—*Continued.*

their operation, and he will be held directly liable for injuries resulting from the failure to perform such duty, notwithstanding the apparatus causing the injury is operated by a sub-concessionaire. *Dockery v. Shows*, 406.

The owner of a general concession is not an insurer of the safety of his patrons and is not required to guard against unlikely or unknown conditions or unforeseeable conduct of a patron, and ordinarily is not responsible for casual or isolated acts of negligence of a sub-concessionaire, but is under duty to exercise reasonable care commensurate with the perils and likelihood of injury to his patrons. *Ibid.*

Testimony of patrons who rode the amusement ride before and after plaintiff's accident that attendant did not fasten protective bars and that they were difficult to fasten *held* competent as tending to show prevailing negligence in method of operation and defect in mechanism. *Ibid.*

HABEAS CORPUS.

§ 3. To Determine Custody of Minor Child.

Where the court finds upon supporting evidence that the best interest of the child requires that her care and custody be awarded the father with the physical possession to be in the home of the paternal grandparents, such findings are conclusive and support the award of the custody to the child's father with visitation rights to the mother, no abuse of discretion being shown. *In re Custody of Bowman*, 590

HIGHWAYS.

§ 1. Powers and Functions of Highway Commission in General.

The State Highway Commission is an agency of the State and ordinarily is not subject to suit except in the manner expressly authorized by statute. *Sherrill v. Highway Comm.*, 643.

But where there is no statutory remedy, an owner whose property has been taken under the power of eminent domain may sue at common law to recover just compensation. *Ibid.*

§ 4. Ways that Are State Highways.

When a city street becomes a part of the State highway system, the Highway Commission becomes responsible for its condition thereafter to the same extent as if originally constructed by it, and this rule applies to fills and culverts as well as to the surface areas of the highway. *Sherrill v. Highway Comm.*, 643.

§ 7. Liability of Contractor for Injury to Motorists.

Where evidence shows that barricade causing injury was made and placed by Commission, nonsuit of highway contractor is proper. *Moss v. Tate*, 544.

HOMICIDE.

§ 12. Pleas.

Under his plea of not guilty defendant may present evidence that he acted in self-defense or that the shooting was accidental, or both, since defendant may rely upon more than one defense and is not required to make an election. *S. v. Todd*, 524.

§ 13. Presumptions and Burden of Proof.

Defendant's contention that the fatal shooting of deceased was purely an accident is not an affirmative defense but is a denial of guilt, and therefore

HOMICIDE—*Continued.*

places no burden upon defendant but leaves the burden upon the State to show beyond a reasonable doubt all the essential elements of the offense, including intent, and the presumptions arising from the use of a deadly weapon do not obtain unless and until the jury finds beyond a reasonable doubt that defendant intentionally shot deceased. *S. v. Phillips*, 508.

Where defendant makes no judicial admission that he intentionally shot deceased, but the State introduces evidence of an intentional killing with a deadly weapon, it is for the jury to determine whether they are satisfied from the evidence beyond a reasonable doubt that the killing with a deadly weapon was intentional, in which event the law will presume that the killing was unlawful and that it was done with malice, constituting murder in the second degree. *S. v. Todd*, 524.

Where an intentional killing with a deadly weapon is admitted or proved by the State's evidence, the defendant has the burden of showing to the satisfaction of the jury legal provocation negating malice and thus reducing the offense to manslaughter, or of establishing self-defense exculpating defendant altogether, legal provocation and self-defense being affirmative pleas. *Ibid.*

§ 20. Sufficiency of Evidence and Nonsuit.

Evidence held insufficient to show that defendant participated in, or was even present at immediate scene when highway patrolman was murdered. *S. v. Bruton*, 488.

Evidence of prior bickering between defendant and his wife, of defendant's financial difficulties, his procurement of insurance on the life of his wife, his attempt to hire a person to kill his wife, and, on the morning she was killed, his statement to the person he had attempted to hire that he had killed his wife himself, and that she was found in their apartment dead from strangulation, etc., *held* sufficient to overrule nonsuit in a prosecution for homicide, notwithstanding defendant's evidence of alibi. *S. v. Rinaldi*, 701.

§ 23. Instructions on Presumptions and Burden of Proof.

Where defendant contends that the fatal shooting of deceased was purely accidental, an instruction to the effect that if the jury found beyond a reasonable doubt that defendant intentionally shot deceased with a deadly weapon defendant would be guilty of murder in the second degree unless defendant established to the satisfaction of the jury that the killing was the result of misadventure or accident, must be held for prejudicial error. *S. v. Phillips*, 508.

§ 27. Instructions on Defenses.

Where defendant contends upon supporting evidence that he was without fault in bringing on the difficulty, that deceased was holding a pistol pointed toward him and his wife and child, and that he advanced on deceased keeping himself between deceased and his wife and child for the protection of his wife and child and, because of threats made by deceased and his reputation for violence, feared that deceased would inflict great bodily harm or death upon himself or his wife or child, and shot deceased, the evidence requires the court to declare and explain defendant's right to kill in defense of self or his wife and child upon necessity, real or apparent. *S. v. Todd*, 524.

HOSPITALS.

§ 3. Liability of Hospital to Patients.

Evidence held insufficient to show injury from broken thermometer was result of negligence. *Payne v. Garvey*, 593.

HUSBAND AND WIFE.

§ 2. Disabilities of Coveture.

The relationship of husband and wife does not prevent the statute of limitations from running in his favor against a cause of action accruing to her. ***Fulp*** *v. Fulp*, 20.

§ 9. Liability to Spouse for Negligent Injury.

Where state in which accident occurs does not permit wife to sue husband in tort, he may not be held liable in action here, even for contribution. *Petrea v. Tank Lines*, 230.

The common law disability of spouses to sue each other in tort has been completely removed in this State. *Foster v. Foster*, 694.

Husband may sue wife to recover expenditures for medical treatment of their child made necessary by negligent injury inflicted by wife. *Ibid.*

§ 12. Revocation of Deeds of Separation.

The resumption of the marital relationship revokes the executory provisions of a prior deed of separation but does not affect those provisions which have been executed, and cannot give to the wife the right to recover personal property transferred to him pursuant to the deed of separation or the right to recover damages for its retention, there being no allegation or proof that the husband withheld any property which had been allocated to her or that subsequent to its execution he had transferred or agreed to transfer any interest to her in that portion allotted to him in the division. *Joyner v. Joyner*, 27.

Where the wife has conveyed her interest in land to her husband pursuant to a deed of separation executed in accordance with G.S. 52-12, the action of the husband in tearing up the papers subsequent to a reconciliation does not affect the title. *Ibid.*

§ 14. Creation of Estates by Entireties.

Where the granting clause in a deed is to a person named "and wife" the deed conveys as estate by the entireties notwithstanding the name of the wife nowhere appears in the deed and the habendum is solely to the named person. *Bowden v. Bowden*, 296.

§ 15. Nature and Incidents of Estates by Entireties.

In a tenancy by the entirety both the husband and wife own the entire estate, but the husband has the absolute and exclusive right to control, use, and receive the income from the lands, and does not have to account to his wife therefor. *Board of Architecture v. Lee*, 602.

INDEMNITY.

§ 1. Nature and Requisites of Agreements.

Execution of surety bond after execution of indemnity agreement furnishes consideration for the indemnity agreement. *Casualty Co. v. Funderburg*, 131.

INDICTMENT AND WARRANT.

§ 8. Joinder of Defendants and Counts.

Where the evidence indicates that each of three defendants was present and actively participated with the others in the commission of an armed robbery, and the evidence of guilt as to each is exactly the same except as to their confessions, the three defendants are properly charged in one bill, and the defendants' contention that each was entitled to a separate trial is untenable. *S. v. Egerton*, 328.

INDICTMENT AND WARRANT—*Continued.*

§ 9. Charge of Crime.

Ordinarily an indictment for a statutory offense may charge the offense in the language of the statute, but if the statute does not set forth with sufficient certainty all of the essential elements necessary to constitute the offense so as to inform defendant of the exact charge, enable him to prepare his defense, support a plea of former jeopardy to a subsequent prosecution for the same offense, and enable the court upon conviction to pronounce sentence, the language of the statute must be supplemented so as to provide this certainty. *S. v. Hord*, 149.

Where a prosecution for violating G.S. 20-166(b), a misdemeanor in the exclusive jurisdiction of a municipal-county court, is transferred to the Superior Court upon defendant's demand for a jury trial, the jurisdiction of the Superior Court is limited to the charge in the warrant, and therefore the warrant constitutes an essential part of the record, so that any failure of the indictment to identify the property damaged and the owner thereof is cured when the warrant supplies this information and thus affords defendant protection against another prosecution for the same offense. *S. v. Smith*, 575.

§ 12. Amendment.

An indictment for escape specifying that the escape occurred on a date antecedent the date sentence was imposed is fatally defective on its face, since it avers an impossibility, and therefore the indictment is not subject to amendment as to date, G.S. 15-155, and the trial court's action in withdrawing a juror and ordering a mistrial amounts to a quashal of the indictment, and the circumstances will not support a plea of former jeopardy upon the subsequent trial upon an indictment correctly specifying the respective dates. *S. v. Whitley*, 742.

§ 17. Variance.

Even though defendant in this case relied upon an alibi, the variance of one day in the indictment and proof as to the date the offense was committed *held* not prejudicial upon the facts of the particular case, it being apparent that the defendant was not ensnared or deprived of an opportunity to adequately present his defense, and that the court gave a full, complete and correct charge upon his defense of alibi. *S. v. Wilson*, 373.

Discrepancies in the name used in referring to the occupant of the building and the owner of the chattels stolen will not justify nonsuit for variance when it is apparent that all witnesses were talking about the same corporate person. *S. v. Wilson*, 595.

INFANTS.

§ 1. Protection and Supervision of Courts.

The right of an infant to recover for a tort done him cannot be precluded by a covenant not to sue executed by his parent, since a settlement of an infant's tort claim becomes effective only upon judicial examination and adjudication. *Sell v. Hotchkiss*, 185.

§ 4. Right of Infant to Recover for Torts.

Negligent injury to an unemancipated child gives rise to a right of action in the infant to recover for his physical pain and mental suffering and the impairment of earning capacity after majority, and a right of action in the father to recover for loss of services of the infant during minority and other pecuniary expenses incurred or likely to be incurred by the parent as a result of the injury, including expenses of necessary medical treatment. *Foster v. Foster*, 694.

INSURANCE.

§ 3. General Rules of Construction of Insurance Contracts.

While ambiguities in a policy of insurance will be construed against insurer, policies, like all other written contracts, must be given a reasonable interpretation, and if the meaning of the parties from the language used is plain and unambiguous such meaning must be given effect. *Huffman v. Ins. Co.*, 335.

While punctuation is ineffective to control the construction of a policy as against the plain meaning of its language, when the sense of the contract has been gathered from its words, punctuation may be used more readily to point out the division in the parts of the sentences. *Ibid.*

A "binder" is insurer's acknowledgment of its contract to protect the insured against casualty of a specified kind until a formal policy can be issued or until insurer gives notice of its election to terminate, and where there is a standard policy form specified by statute for the contemplated insurance the binder relates to such standard policy form. *Moore v. Electric Co.*, 667.

§ 6. Assignment of Policies.

When individual incorporates his business, an insurer for the business does not become an insurer for the corporation, but if insurer accepts a premium with knowledge of the incorporation it waives its right to object to the assignment and the corporation becomes the insured under the policy. *Moore v. Electric Co.*, 667.

§ 17. Avoidance of Life Policy for Misrepresentation or Fraud.

Insurer's evidence as to the health of insured at the time of application held not so categorical as to entitle insurer to a directed verdict on the issue. *Weeks v. Ins. Co.*, 140.

§ 22. Notice and Proof of Death.

As a general rule, when failure on the part of the beneficiary to give notice and furnish proof of death of insured within the time specified is due to ignorance of the existence of the policy, and the beneficiary is without negligence or fault in failing to discover the policy, such delay will not warrant avoidance of the policy when notice and proof of death are given within a reasonable time after the discovery of the existence of the policy in the exercise of due diligence. *Clinard v. Trust Co.*, 247.

Evidence held to raise issue of fact whether failure to give notice and proof of death within the time limited was excusable. *Ibid.*

§ 36. Limitation of Time Between Accident and Loss.

Provision of a policy that if insured sustained personal injury "effected solely through external, violent and accidental means . . ., and which results . . . in any of the losses enumerated in the schedule of losses and indemnities, which appears below, within 90 days thereafter, the company will pay . . .," *held* not to cover the loss of a foot suffered more than 90 days after accidental injury, the time limitation being valid and the policy being unambiguous that the loss must occur within the time specified after injury and not that insurer would pay within such time. *Huffman v. Ins. Co.*, 335.

§ 47. Automobile Personal Injury Policies.

The policy in suit provided medical payments for the treatment of injuries to insured or any other person while occupying insured's vehicle with permission of the insured, and defined occupying the vehicle as being "in or upon or entering into or alighting from" the vehicle. The evidence tended to show that plaintiff was driving the car with insured's permission, that the motor failed, and that plaintiff was attempting to push the car onto the shoulder of the road

and had his right hand on the steering wheel and his feet on the ground when he jumped away from the car in an effort to avoid being hit by a car approaching from his rear at a high rate of speed, and was seriously injured. *Held:* The injuries arose out of the "use of the automobile" within the coverage of the policy. *Whisnant v. Ins. Co.*, 303.

§ 47.1. Insurance Against Damage from Uninsured Vehicles or "Hit and Run" Drivers.

Liability of insurer under a "hit-and-run" provision of a policy of insurance must be predicated upon a collision of the vehicle in which an insured was riding with another vehicle operated by an unidentified driver, which collision was proximately caused by the negligence of such unidentified driver, and the filing by plaintiff with insurer of a report of the accident as required by the policy. *Caudill v. Ins. Co.*, 674.

The evidence in this case *is held* insufficient to show that intestate was forced off of the highway by the negligent operation of another vehicle by an unidentified driver, and nonsuit should have been entered in plaintiff's action on the "hit-and-run" provision in the policy sued on. *Ibid.*

§ 54. Vehicles Insured.

The policy in suit covered insured and members of his family while riding in a vehicle owned or operated by insured, but excluded coverage if insured was operating a non-owned vehicle furnished for the regular use of insured. *Held:* The exclusion does not apply to injuries occasioned in the emergency use of a vehicle by insured on a purely personal mission while on vacation, even though such vehicle was furnished by insured's employer on a regular basis solely for the performance of the duties of the employment, such occasion being an isolated and casual use of the vehicle by the insured for a personal mission. *Whisnant v. Ins. Co.*, 195.

§ 61. Whether Liability Policy Is in Force at Time of Accident.

Where loan company advancing premium is agent authorized to cancel, insurer has no right to ignore its direction to cancel. *Griffin v. Indemnity Co.*, 212.

§ 66.1. Payment and Subrogation.

An insurer compensating its insured for loss sustained by the wrong of a third person is subrogated to the rights of insured against such third person. *Pittman v. Snedeker*, 55; *Ins. Co. v. Ins. Co.*, 749; and may proceed against the insurer of such third person upon return of execution unsatisfied. *Ins. Co. v. Ins. Co.*, 749.

Insurer for original defendant may pay plaintiff's judgment entirely, have it marked paid, and then issue execution against additional defendant to enforce contribution. *Ibid.*

The limits of insurer's liability under a policy must be determined by an analysis and examination of its provisions, and insurer may be obligated to pay costs or interest on a judgment recovered against insured even though such payment brings the total payments of insurer beyond the stated policy limit. *Mayberry v. Ins. Co.*, 658.

Where a policy of automobile liability insurance obligates insurer to pay "* * * and all interest accruing after entry of judgment until the company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability * * *," insurer's liability for interest is not limited to interest on that part of the judgment within the stated limit of liability, but insurer is obligated to pay interest on the entire judgment re-

INSURANCE—*Continued.*

covered against insured from the date of the judgment until the amount of the policy limit has been tendered, offered or paid. *Ibid.*

§ 73. Property Insured.

A policy covering loss of personal property located in the building "occupied by the insured" insures the property in the building occupied by the insured at the time the policy was issued and nowhere else, and even though the policy stipulates the building was situated on the south side of a named street of a municipality the terms of coverage cannot be enlarged to include also property stored by insured in an additional building on the south side of the named street when insured had no property in the second building at the time the policy was issued. *Parker v. Ins. Co.*, 339.

§ 86. Payment and Subrogation.

An action must be prosecuted by the real party in interest, and where insurer has paid insured the entire loss, an action against the third person tort-feasor cannot be maintained in the name of the insured, regardless of any contractual agreement between insured and insurer. *Shambley v. Heating Co.*, 456.

INTOXICATING LIQUOR.

§ 1. Operation and Construction of Control Statutes.

In a county which has not elected to come under the Alcoholic Beverage Control Act, the Turlington Act as modified by the provisions of the Alcoholic Beverage Control Act is applicable. *S. v. Bell*, 350.

The Alcoholic Beverage Control Act permits a person, even in a county which has not elected to come under the Act, to possess in his home any quantity of taxpaid whiskey solely for the personal consumption of himself, his family and *bona fide* guests, and therefore an instruction in a prosecution in such county that it is unlawful to transport or *to possess* more than one gallon of taxpaid whiskey, must be held for prejudicial error. *Ibid.*

§ 2. Beer and Wine Licenses.

The State Board of Alcoholic Control is vested with the authority to hear proceedings to revoke a retail beer permit, G.S. 18-78, with right in the licensee, after exhausting his administrative remedies, to appeal to the Superior Court, G.S. 143-309, where review is before the judge, G.S. 143-314, with right of further appeal to the Supreme Court, G.S. 143-316. *Freeman v. Board of Alcoholic Control*, 320.

In proceedings for the revocation of a retail beer permit, it is the duty of the Board of Alcoholic Control to weigh the evidence and find facts, and its findings are conclusive if supported by material and substantial evidence. *Ibid.*

Verdict of not guilty in criminal action does not preclude revocation of license for selling whiskey. *Ibid.*

§ 13c. Sufficiency of Evidence and Nonsuit on Charge of Possession.

Circumstantial evidence of defendant's constructive possession of intoxicating liquor held insufficient for jury. *S. v. King*, 578.

JUDGMENTS.

§ 1. Nature and Requisites of Judgments in General.

A judgment *in personam* entered without jurisdiction of the person of defendant is a nullity, but the making of a motion to set it aside is a general appearance giving the court jurisdiction, and the court should then require defendant to plead. *Bowman v. Malloy*, 396.

JUDGMENTS—*Continued.*

§ 13. Judgments by Default in General.

The court may not enter a judgment by default and inquiry while defendant's motion to strike is pending, since if the motion to strike is made in apt time it is made as a matter of right, G.S. 1-153, while if it is not made in apt time it is addressed to the discretion of the court, G.S. 1-152, and in either event it is error for the court to rule that as a matter of law plaintiff was entitled to judgment by default for want of an answer, since defendant is not required to answer until after the motion to strike has been passed on. *McDaniel v. Fordham*, 62.

§ 22. Setting Aside for Surprise and Excusable Neglect.

Upon the hearing of a motion to set aside a default judgment for surprise and excusable neglect, controverted facts are to be decided by the court, but the court, in the absence of a specific request therefor, is not required to make specific findings, and in the absence of specific findings it will be presumed that the court found facts supporting its factual conclusions. *Tyndall v. Homes*, 467.

§ 29. Parties Concluded.

Adjudication in an action between the drivers of two vehicles involved in a collision that each was guilty of negligence constituting a proximate cause of the collision is *res judicata* as between the drivers upon the subsequent hearing of an action by a passenger in one of the vehicles against the driver of the other, in which action the passenger's driver is joined for contribution, and the original defendant is entitled to introduce such judgment to establish his claim for contribution. *Sisk v. Perkins*, 43.

§ 47. Payment and Discharge of Judgment.

The fact that plaintiff's judgment is marked paid and satisfied upon payment by original defendant's insurer does not extinguish judgment in favor of original defendant against additional defendant for contribution. *Pittman v. Snedeker*, 55; *Ins. Co. v. Ins. Co.*, 749.

LARCENY.

§ 1. Elements and Essentials of the Offense.

Since larceny by breaking and entering a building is a felony, without regard to the value of the stolen property, the admission of evidence in regard to the value of the property cannot be prejudicial. *S. v. Wilson*, 595.

§ 7. Sufficiency of Evidence and Nonsuit.

Evidence *held* sufficient to be submitted to the jury on the issue of defendant's guilt of larceny. *S. v. Mitchell*, 352.

LEASE OF EQUIPMENT.

§ 1. Nature and Requisites.

Instrument held lease agreement and not conditional sale. *Leasing Corp. v. Hall*, 110.

§ 2. Construction and Operation of Lease Agreements.

Where a lease of business equipment makes no provision that lessee might recover damages because of any defect in the equipment at the time of delivery and that lessee should give lessor written notice of any defect within five days or it would be conclusively presumed that the equipment was delivered in good repair, lessee is not entitled to damages or replacement as against lessor for an asserted defect or misrepresentation as to the condition of the machinery at

LEASE OF EQUIPMENT—*Continued.*

the time of delivery, no notice of any defect having been given lessor as required by the instrument. *Leasing Corp. v. Hall*, 110.

LIMITATION OF ACTIONS.

§ 3. Statutory Changes in Period of Limitation.

If a cause of action has become barred by a statute of limitations, it may not be revived by an act of the legislature, although the legislature may extend the time for bringing actions not already barred. *Jewell v. Price*, 459.

§ 7. Fraud, Mistake and Ignorance of Cause of Action.

An action to recover loss caused by a fire resulting from the faulty installation of a furnace by defendant accrues at the time of the completion of the work of installation, notwithstanding plaintiff has no knowledge of the defects until the accrual of damages, G.S. 1-52(1), G.S. 1-52(5), since statutes of limitation are inflexible and a cause of action accrues at the time legal rights are invaded, even though at such time only nominal damages have been sustained. *Jewell v. Price*, 459.

§ 9. Death and Administration.

G.S. 1-24 does not suspend the running of the statute of limitations against a claim against an estate during controversy on probate of a will when an administrator has been appointed for the estate and the claim has been duly filed with and rejected by the administrator. *Hargrave v. Garner*, 117.

§ 11. Disabilities.

Marriage does not prevent the running of the statutes of limitation in favor of the husband against the wife's cause of action. *Fulp v. Fulp*, 20.

§ 18. Sufficiency of Evidence, Nonsuit and Directed Verdict.

Nonsuit is properly entered upon the plea of the applicable statute of limitations by defendant when plaintiff fails to carry the burden of showing that the statute had not run against his cause of action. *Fulp v. Fulp*, 20; *Jewell v. Price*, 459.

MASTER AND SERVANT.

§ 3. Distinction Between Employee and Independent Contractor.

An independent contractor is one who contracts to do a piece of work according to his own judgment and methods and who is not subject to the employer except as to the result of the work and who has the right to employ and direct the acts of other workmen without interference or right of control on the part of the employer, and whether a particular person is an employee or an independent contractor must be determined upon the varying factual elements of each particular case. *Askew v. Tire Co.*, 168.

§ 18. Liability of Principal Employer to Employee of Independent Contractor.

Issues of negligence and contributory negligence held for jury in this action by employee of independent contractor to recover for fall down manhole on property. *Spivey v. Wilcox Co.*, 387.

§ 20. Liability of Principal Employer for Injuries to Third Persons.

Where an activity is inherently dangerous unless precautionary measures in regard to the condition of the device and its operation are taken, public policy requires that the employer be held directly liable for injuries proximately resulting from the failure to take the necessary precautions, notwithstanding that

MASTER AND SERVANT—*Continued.*

the device is under the control of an independent contractor. *Dockery v. Shows*, 406.

§ 47. "Employees" Within Purview of the Act in General.

The existence of the employer-employee relationship is prerequisite to the application of the Compensation Act. *Askew v. Tire Co.*, 168.

§ 48. Independent Contractors.

Findings to the effect that claimant did not hold himself out as a painting contractor and consistently worked for others for fixed hourly wages, except upon a single prior instance, and that he contracted to paint the inside of defendant's building for a stipulated hourly wage, with defendant to furnish the paint and claimant to furnish the brushes, ladders and other equipment, etc., *held* sufficient to support a finding that claimant was an employee and not an independent contractor, notwithstanding other evidence sufficient to support a contrary finding. *Askew v. Tire Co.*, 168.

§ 54. Causal Relation Between Employment and Injury in General.

Evidence *held* to sustain findings that the injury occurred while claimant was performing work for his own purposes without permission of the employer, and therefore that injury did not arise out of and in the course of the employment. *Jones v. Desk Co.*, 401.

§ 72. Compensation for Disfigurement.

Prior to amendment no compensation for loss of sense of smell and taste can be awarded when injury causing loss does not result in any disfigurement. *Arrington v. Engineering Corp.*, 38.

§ 78. Construction as to Coverage of Compensation Insurance.

When a person operating a business as an individual incorporates the business, an insurer for the individual is not an insurer for the corporation, but if the insurer, after incorporation and with knowledge thereof, charges and collects premiums, it waives its right to object to the assignment, and the corporation becomes the insured under the policy. *Moore v. Electric Co.*, 667.

§ 80. Cancellation of Compensation Policies.

While G.S. 97-99 prescribes that notice of cancellation of compensation insurance be by registered or certified mail, the transmission of notice to insured and not the method of its transmission is determinative, and if insured actually receives a thirty-day notice of cancellation the coverage of the policy terminates at the expiration of the thirty-day period, notwithstanding notice is received by ordinary mail. *Moore v. Electric Co.*, 667.

The requirement of G.S. 97-99(a) of thirty days notice for termination of a policy of compensation insurance applies to a "binder" as well as a formal policy, and an insurer may not terminate the coverage of the binder as to a claim occurring less than thirty days from insured's receipt of notice of termination. *Ibid.*

§ 82. Nature and Extent of Jurisdiction of Industrial Commission in General.

The existence of the employee-employer relationship is jurisdictional to the application of the Workmen's Compensation Act. *Askew v. Tire Co.*, 168.

§ 86. Common Law Right of Action Against Third Person Tort-Feasor.

In an action by an employee against a third person tort-feasor to recover for negligent injury, any reference to workmen's compensation benefits received by the plaintiff is incompetent, G.S. 97-10.2(e). *Spivey v. Wilcox Co.*, 387.

MASTER AND SERVANT—*Continued.*

§ 93. Review of Award in Superior Court.

Review of an award in the Superior Court is limited to questions of law and legal inference, the findings of fact by the Industrial Commission being conclusive if supported by competent evidence, even though there be evidence that would support findings to the contrary. *Jones v. Desk Co.*, 401.

Jurisdictional findings of the Industrial Commission are not binding on the Superior Court upon appeal, but the Superior Court has the power and duty to consider all of the evidence in the record and make its own findings in regard to jurisdictional questions. *Askew v. Tire Co.*, 168.

It is error for the Superior Court, if aptly requested to do so, to fail to find the jurisdictional facts on appeal from the Industrial Commission and set them out in the judgment, but the Superior Court may by reference adopt the findings of the Commission as its own. *Ibid.*

§ 94 Judgment of Superior Court, Disposition of Appeal, and Appeal to Supreme Court.

Where on appeal to the Superior Court from the Industrial Commission there is no request for independent findings of the jurisdictional facts and the judgment affirms the findings of the Commission without incorporating therein independent findings of such facts, it will be presumed on further appeal, unless it clearly appears to the contrary from the record, that the Superior Court reviewed the evidence in the light of its authority and duty to make the jurisdictional findings, and its affirmance of the Commission's findings will be deemed an adoption by it of such findings of the Commission. *Askew v. Tire Co.*, 168.

The jurisdictional findings of the Superior Court which are supported by competent evidence are binding on the Supreme Court upon further appeal. *Ibid.*

Where the Industrial Commission fails to find facts in regard to whether insured received notice by ordinary mail of the cancellation of the policy, but holds that cancellation was ineffective in any event because notice was sent by ordinary mail, the award based upon the misapprehension of the applicable law must be set aside and the cause remanded for a finding of the determinative facts. *Moore v. Electric Co.*, 667.

§ 105. Right to Unemployment Compensation in General.

Where the work of an employee is terminated by reason of the curtailment of the employer's operations, and the employer immediately offers the employee another job of a substantially lower classification in respect of skill and compensation, the holding of the Commission that the substitute job was not "suitable employment" within the purview of G.S. 96-14(1) cannot be held erroneous as a matter of law, since whether such job was suitable may depend upon the length of time the employee remains unemployed and his prospect of obtaining employment at his prior rating and compensation, and the employee should be given a reasonable time within which to find work at the higher skill. *In re Troutman*, 289.

§ 108. Appeal and Review of Orders of Employment Security Commission.

Where the chairman of the Employment Security Commission hears an appeal from a claims deputy and enters a decision and order in respect to the right of a claimant to recover unemployment benefits, and appeal is taken therefrom directly to the Superior Court, G.S. 96-4(a), the decision and order may be deemed the decision and order of the Commission. *In re Troutman*, 289.

MONEY RECEIVED.

Wife may recover funds provided by her for improvements on husband's real estate upon his oral promise to convey her half interest, but her action therefor is barred after three years from his categorical disavowal of his promise. *Fulp v. Fulp*, 20.

MORTGAGES AND DEEDS OF TRUST.

§ 1. Equitable Liens.

An equitable lien is not an estate in land and does not entitle the lienee to a conveyance of any interest therein but is solely a charge on specific property declared by equity to provide a more effective method of enforcing an obligation. *Fulp v. Fulp*, 20.

§ 19. Right to Foreclose and Defenses.

Where at the time of foreclosure an installment of the debt was due and in default, the right to foreclose may not be denied for an asserted oral agreement between the trustor and trustee, entered into after the execution of the instrument, that no payment of the debt would be required until after the completion of a contemplated house on the property, since such agreement is not supported by any consideration. *Products Corp. v. Sanders*, 234.

§ 26. Notice and Advertisement of Sale.

Notice of foreclosure under the deed of trust is sufficient if given by advertisement in compliance with the statute, and no personal notice is required to be given *cestui* or the holder of a second lien. *Products Corp. v. Sanders*, 234.

§ 31. Report of Sale, Confirmation and Execution of Deed to Purchaser.

Where foreclosure sale is held in accordance with provisions of the deed of trust and preliminary report of the foreclosure is filed in the office of the clerk as required by G.S. 45-21.26 and no upset bid is filed, confirmation of the sale by the clerk is not prerequisite to the execution of a deed by the trustee to the last and highest bidder. *Products Corp. v. Sanders*, 234.

§ 39. Suits to Set Aside Foreclosure.

The fact that the *cestui* in a purchase money deed of trust knows that the trustor had begun the construction of a house on the property and orally promised the trustor that no payment need be made on the deed of trust until the completion of the house, and then foreclosed prior to the completion of the house, confers no right upon subsequent lienees to attack the foreclosure on the ground of such inequitable conduct, since the promise of forebearance was not for the benefit of subsequent lienees. *Products Corp. v. Sanders*, 234.

Inadequacy of the purchase price alone is insufficient to upset foreclosure under the power contained in a deed of trust, and G.S. 45-21-34, providing the right to enjoin consumation of a foreclosure for inadequacy of the purchase price, does not apply after foreclosure has been consumated in conformity with law. *Ibid.*

MUNICIPAL CORPORATIONS.

§ 4. Legislative Control and Powers of Municipalities in General.

A municipal corporation has only such powers as are granted to it by its charter and by the general law, together with such powers as are necessarily implied from those given. *S. v. Hord*, 149; *Keeter v. Lake Lure*, 252; *Surplus Co. v. Pleasants*, 650.

A redevelopment commission may not acquire property until the governing body of the municipality has approved the redevelopment plan, which approval

is a commitment of the city to a course of action. *Horton v. Redevelopment Comm.*, 1.

The redevelopment plan in question contemplated the construction of a plaza over the tracks of a railroad company, which tracks were in a cut traversing the blighted area. *Held:* The area of the railroad right of way is not a "blighted area" as defined by G.S. 160-456(2). *Ibid.*

A municipality may not be empowered by statute to do anything which is not for a public purpose, but a purpose is a public purpose of a municipality if it has a reasonable connection with the convenience and necessity of the public within the particular municipality, but it is not required that the purpose be for the use and benefit of every citizen in the community or confer upon each an equal benefit, it being sufficient if it be for the use and benefit of the citizens of the municipality in common. *Keeter v. Lake Lure*, 252.

Purchase of recreational lake held for a public purpose under facts of this case. *Ibid.*

§ 7. Officers and Agents.

A municipal corporation is delegated power to appoint police officers having the same authority to make arrests and execute criminal process within the municipal limits as is vested by law in a sheriff. *S. v. Hord*, 149.

Chief of police and police officers are public officers. *Ibid.*

§ 10. Liability for Torts in General.

The operation of a public library is a governmental function, and governmental agencies and their officers are protected against liability in tort for alleged negligence in the maintenance of such library. *Seibold v. Library*, 360.

§ 12. Injuries from Defects in Streets and Sidewalks.

Plaintiff's evidence tending to show that she knew of the existence of a hole in the asphalt in the street adjoining the concrete curb in front of her house and that she stepped into the hole and fell on returning at night from a neighboring house, *is held* to disclose contributory negligence as a matter of law, since if the hole constituted a hazard plaintiff's failure to remember it was inexcusable. *Walls v. Winston-Salem*, 232.

§ 24. Nature and Extent of Police Power and Construction of Ordinances in General.

Subject to the basic rule that a municipal ordinance must be construed to effectuate the intent of the municipal legislative body, an ordinance will be given a reasonable interpretation and, if possible, its provisions will be reconciled and harmonized with other legislative enactments. *Cogdell v. Taylor*, 424.

§ 25. Zoning Ordinances.

Where second application for rezoning is materially different from that of first, governing body of city may grant the second request notwithstanding it denied the first; zoning lines need not coincide with property lines. *Armstrong v. McInnis*, 616.

§ 26. Review of Orders of Zoning Boards.

Review is upon questions of law, and jury trial is not required; courts will not interfere with regulation unless it is arbitrary, and burden is upon party attacking ordinance to show that regulation was arbitrary to such an extent as to amount to abuse of discretion. *Armstrong v. McInnis*, 616.

§ 27. Sunday Ordinances.

Statute authorizing certain counties to enact Sunday ordinances, with per-

MUNICIPAL CORPORATIONS—*Continued.*

missive power of municipalities to elect to come under the county regulations, *held* void as special statute relating to trade. *Surplus Co. v. Pleasants*, 650.

§ 28. Authority Over Streets.

A municipality has authority to enact an ordinance relating to automatic traffic control signals at intersections and to the right of way of funeral processions, G.S. 20-160, and when automatic traffic control signals are installed pursuant to an ordinance, the respective rights of motorists depend upon the provisions of the particular ordinance. *Cogdell v. Taylor*, 424.

§ 29. Parking Ordinances.

Where the evidence is sufficient to sustain findings to the effect that defendant municipality had a public need to construct off-street parking in the city, it may issue bonds for this purpose to be paid exclusively from the revenue derived from such off-street parking facilities upon its compliance with the provisions of Article 34 of G.S. 160. *Horton v. Redevelopment Comm.*, 1.

§ 34. Attack of Ordinances.

The proprietor of a mercantile establishment doing a large percentage of its business on Sunday may maintain an action to enjoin the enforcement of an ordinance prohibiting the sale of merchandise on Sunday. *Surplus Co. v. Pleasants*, 650.

NEGLIGENCE.

§ 1. Acts and Omissions Constituting Negligence in General.

A person is required to exercise that degree of care which a reasonably prudent person would exercise under like circumstances, the standard of care being constant while the degree of care varies with the exigencies of the occasion. *Greene v. Meredith*, 178.

A person injured as the result of heedless flight from fright engendered by a practical joke may recover for such injury if injury could have been foreseen by the perpetrator of the prank, notwithstanding that the perpetrator was not motivated by personal animosity or desire to inflict injury. *Slaughter v. Slaughter*, 732.

§ 4. Dangerous Substances or Instrumentalities.

The rule of absolute and strict liability for damages resulting from blasting operations is applicable when the person owning the property damaged is an innocent party and it is shown that the damage resulted from such blasting operations, and therefore this rule of absolute liability cannot be asserted as the basis for recovery of damages coincident with well digging operations when the person whose property is damaged is not a third party but had employed defendant to dig the well, or when it is not shown that the damage resulted from vibrations emanating from the well digging machinery. *Trull v. Well Co.*, 687.

§ 5. Res Ipsa Loquitur.

The rule of absolute liability for damages resulting from a dangerous instrumentality operates regardless of the presence or absence of negligence, while the doctrine of *res ipsa loquitur* is a rule of evidence which operates as *prima facie* proof of negligence, and the two are separate and distinct. *Trull v. Well Co.*, 687.

The doctrine of *res ipsa loquitur* is not applicable unless defendant has control of all the factors which might have caused the damage and does not apply when more than one inference can be drawn from the evidence as to the cause of the damage. *Ibid.*

NEGLIGENCE—*Continued.*

§ 7. Proximate Cause.

Nominal damages may be recovered in an action based on negligence. *Jewell v. Price*, 459.

Only negligence which proximately causes or contributes to the injury in suit is of legal import. *Webb v. Clark*, 474.

It is not required that defendant be able to foresee the particular injury resulting, but only that in the exercise of reasonable care he could have foreseen that some injury would result from his conduct or that consequences of a generally injurious nature might ensue, and foreseeability is ordinarily a question for the jury. *Slaughter v. Slaughter*, 732.

§ 8. Concurring and Intervening Negligence.

Where the jury answers the issue of negligence in the affirmative as to one defendant and in the negative as to the other in a suit instituted by plaintiff against both as joint tort-feasors, the one defendant may not complain that the other was exonerated, since the author of negligence proximately causing injury is liable therefor irrespective of the liability of others. *Jones v. Horton*, 549.

§ 9. Primary and Secondary Liability and Indemnity.

A party compelled to pay for an injury solely under the doctrine of *respondeat superior* may recover indemnity against his agent whose negligence caused the injury. *Sell v. Hotchkiss*, 185.

§ 21. Presumptions and Burden of Proof.

Each party is charged with the duty of exercising such care as the exigencies and circumstances of the occasion may require, and there is no difference in the *quantum* of proof necessary to establish either party's failure to exercise such care, the only difference being that plaintiff has the burden on the issue of defendant's negligence and defendant has the burden upon the issue of plaintiff's contributory negligence. *R. R. v. Woltz*, 58.

Negligence is not presumed from the mere fact of injury. *Trull v. Well Co.*, 687.

§ 22. Competency and Relevancy of Evidence.

In an action by an employee against the third person tort-feasor, any reference to insurance or workmen's compensation benefits is incompetent. *Spivey v. Wilcox Co.*, 37.

§ 24a. Sufficiency of Evidence and Nonsuit on Issue of Negligence in General.

A party whose proof shows his adversary was guilty of actionable negligence is entitled to go to the jury unless he defeats his own cause by showing that he was guilty of contributory negligence as a matter of law. *R. R. v. Woltz*, 58.

Conflicting evidence on the issue takes the question to the jury. *Ibid.*

Negligence may be established by circumstantial evidence, but an inference of negligence must be based upon facts established by direct testimony and may not be based upon another inference or presumption. *Watt v. Housing Authority*, 127.

Evidence held insufficient to show that damage to house was result of negligence in operation of well digging equipment. *Trull v. Well Co.*, 687.

Evidence tending to show that at a season when fireworks were not customarily discharged, defendant, as a practical joke to frighten his children, exploded firecrackers outside the window of the dimly lighted room in which his mother was watching television with his children, that the children became

frightened and that his mother, thinking the unexplained explosions were gun fire, became hysterical, attempted to take flight, and stumbled to her injury, *held* sufficient to be submitted to the jury in the mother's action to recover for such injury. *Slaughter v. Slaughter*, 732.

§ 26. Nonsuit for Contributory Negligence.

Conflicting evidence takes the issue to the jury. *R. R. v. Woltz*, 58; *Oil Co. v. Miller*, 101.

Nonsuit for contributory negligence is proper only when plaintiff's evidence, considered in the light most favorable to him, discloses contributory negligence so clearly that no other reasonable conclusion can be drawn therefrom. *Greene v. Meredith*, 178; *Stone v. Ashley*, 555.

§ 30. Verdict.

It is error for the court to refuse to accept a verdict answering the issues of negligence and contributory negligence in the affirmative and awarding damages to plaintiff, and the refusal to accept such verdict invalidates all subsequent proceedings. *Jordan v. Flake*, 362.

§ 37a. Definition of Invitee.

An employee of an independent contractor on the premises in the performance of his duties is an invitee of the contractee. *Spivey v. Wilcox Co.*, 387.

§ 37b. Duties to Invitees.

A store proprietor is not an insurer of the safety of his patrons and a patron, in order to recover for injury sustained on the premises, must introduce evidence tending to establish actionable negligence on the part of the proprietor, the doctrine of *res ipsa loquitur* not being applicable. *Hamilton v. Parker*, 47.

The proprietor of a business has the duty to persons visiting the premises for business purposes to exercise ordinary care to keep the premises in a reasonably safe condition and to give warning of hidden perils or unsafe conditions insofar as they can be ascertained by reasonable inspection. *York v. Murphy*, 453.

While each case must be determined on its own particular facts, the existence of a step on the premises because of a difference between levels, in the absence of some unusual condition, does not violate any duty to invitees. *Ibid.*

§ 37f. Sufficiency of Evidence and Nonsuit in Actions by Invitees.

The evidence tended to show that defendant maintained swinging entrance and exit doors with panel glass, that plaintiff was familiar with the doors, and that as plaintiff was entering the righthand door she saw the bag boy rushing toward the exit door, and that the exit door struck her on the rebound after having been opened by the boy. There was no evidence that the doors were improperly constructed, had any mechanical defect, were improperly maintained, or that they were not of the usual type. *Held:* Involuntary nonsuit was properly entered. *Hamilton v. Parker*, 47.

Evidence *held* insufficient for jury on issue of negligence of landlord in failing to discover and remove can of caustic cleaner from apartment house premises. *Watt v. Housing Authority*, 127.

Evidence tending to show that plaintiff had previously been on the premises on several occasions, that on the occasion in suit she arrived at the premises just before dark, that after a conference she left defendant in his office, walked some eight feet from the door along a concrete walk and fell when she did not see a step from the walk to the parking lot because it had become dark and no

NEGLIGENCE—*Continued.*

lights had been turned on, *held*, insufficient to be submitted to the jury on the issue of defendant's negligence. *York v. Murphy*, 453.

NUISANCE.

§ 10. Abatement of Public Nuisance.

The abatement of a public nuisance is not *in rem* but *in personam*, and the party charged with the operation of such nuisance has the right to notice and an opportunity to be heard and, if he traverses the factual allegations of the complaint, to a jury trial, and therefore such person is entitled to have a judgment that the premises be padlocked and the personalty sold set aside when such judgment is entered without personal service. *Bowman v. Malloy*, 396.

PARENT AND CHILD.

§ 1. The Relationship.

While a married woman may testify as to illicit sexual relations during coverture in an action directly involving the parentage of her child, she may not testify as to nonaccess of the husband when such testimony tends to bastardize her child begotten or born during the existence of the marriage. *S. v. Wade*, 144.

§ 2. Liability of Parent for Injury to Child.

A child who, because of mental incompetency, is unable to support or care for herself, and who at all times has been supported and cared for by her parent, may not maintain an action against the parent in tort, even though the child is over the age of 21 years. *Warren v. Long*, 137.

An unemancipated child may not sue the parent for negligent injury, even after becoming of age. *Foster v. Foster*, 694.

§ 4. Right of Parent to Recover for Negligent Injury to Child.

The husband may maintain an action against the wife to recover the amounts expended by the husband for medical treatment of their child made necessary by the wife's negligent injury to the child. *Foster v. Foster*, 694.

PARTIES.

§ 2. Parties Plaintiff.

An action must be prosecuted by the real party in interest. *Shambley v. Heating Co.*, 456.

§ 8. Amendment of Parties.

Where an action to recover a loss entirely compensated by insurance is brought in the name of insured, the court is without authority to allow an amendment to permit the insurer to be made an additional party plaintiff and be permitted to adopt the complaint, since the court may not allow an amendment effecting a substitution or entire change of parties. *Shambley v. Heating Co.*, 456.

PAYMENT.

§ 1. Transactions Constituting Payment.

Provision in will for devise in satisfaction of debt constitutes only provisional payment even after probate of will in common form, and does not extinguish the debt until after will is upheld in caveat proceedings. *Hargrave v. Gardner*, 117.

PHYSICIANS AND SURGEONS.

§ 11. Nature and Extent of Liability to Patients.

Evidence tending to show that as a student nurse was shaking down a thermometer it broke and mercury and glass hit plaintiff's eye, causing injury, *held*, to disclose an accidental injury for which neither the hospital nor the physician having plaintiff admitted to the hospital may be held responsible, there being no evidence of negligence in furnishing the equipment, or in failing to make reasonable inspection of it, or in failing to properly instruct the nurse. *Payne v. Garvey*, 593.

PLEADINGS.

§ 2. Statement of Cause of Action in General.

A pleading should allege the ultimate and not the evidentiary facts. *Fox v. Southern Appliances*, 267.

§ 3. Joinder of Causes.

Action against pastor to enjoin him from occupying pulpit is improperly joined with action against faction of congregation for control of property, since defendants are not affected by each cause. *Conference v. Piner*, 67.

§ 7. Form and Contents of Answer.

An answer may set forth facts stating the affirmative defense of reformation, and may also allege facts entitling defendant to recover a stated sum under another part of the written agreement not attacked, and objection that the two are inconsistent and repugnant cannot be sustained. *Matthews v. Van Lines*, 722.

§ 9. Verification of Answer.

The rule that a verified pleading requires that subsequent pleadings be also verified, G.S. 1-144, may be waived except in those cases where the form and substance of verification is made an essential part of the pleading. *Sisk v. Perkins*, 43.

§ 12. Office and Effect of Demurrer.

The complaint must be liberally construed upon demurrer, and the facts alleged and relevant inferences of facts deducible therefrom must be taken as true, without considering matters *dehors* the pleading. *Hargrave v. Gardner*, 117.

A demurrer admits for its purposes the truth of the facts well pleaded. *Fox v. Southern Appliances*, 267.

§ 18. Demurrer for Misjoinder of Parties and Causes.

Demurrer for misjoinder of parties and causes held properly sustained. *Monroe v. Dietenhoffer*, 538.

§ 19. Demurrer for Failure of Pleading to State Cause of Action or Defense.

A pleading will be liberally construed upon demurrer, and where the facts pleaded include all of the essential elements of the purported cause of action, the courts are not permitted to draw inferences contrary thereto. *Fox v. Southern Appliances*, 267.

§ 21.1. Judgments Upon Demurrer.

If separate causes are not separately stated in the complaint, demurrer must be sustained without prejudice to plaintiff's right to move for leave to amend, G.S. 1-131, but if there is a misjoinder of parties and causes of action the action should be dismissed as to the demurring defendant. *Monroe v. Dietenhoffer*, 538.

PLEADINGS—*Continued.*

§ 24. Amendment of Pleadings.

A motion to be allowed to amend is addressed to the discretion of the court, and the court's decision thereon is not subject to review in the absence of a showing of abuse of discretion. *Service Co. v. Sales Co.*, 79.

§ 28. Variance Between Allegation and Proof.

Plaintiff must make out his case *secundum allegata* and recovery must be predicated upon allegations of the complaint. *Products Corp. v. Sanders*, 234.

§ 29. Issues Raised by Pleadings and Necessity for Proof.

Admissions in a pleading are judicial admissions binding on the party making them. *Rector v. Roberts*, 324.

PRISONS.

§ 2. Custody and Control of Prisoners.

The director of prisons, or his duly authorized agents or representatives, has authority to designate the places of confinement of prisoners within the State prison system. *S. v. Whitley*, 742.

PROCESS.

§ 4. Proof of Service.

The sheriff's return of summons establishes service *prima facie* and places the burden upon defendant to show want of service when relied upon by him. *Tyndall v. Homes*, 467.

§ 11. Service on Domestic Corporations.

Service of process on a named corporation by delivering a copy of the summons to its managing officer is valid service. *Tyndall v. Homes*, 467.

PUBLIC OFFICERS.

§ 1. Who Are Public Officers.

The essential difference between a public office and a mere employment is that the incumbent of a public office is charged with duties involving the exercise of some portion of the sovereign power. *S. v. Hord*, 149.

Chief of police and police officers of a municipality are public officers. *Ibid.*

§ 7. De Facto Officers.

A person who by proper authority is admitted and sworn into a public office is a *de facto* officer and has authority to discharge the duties of the office until he is removed in accordance with statutory procedure. *Armstrong v. McInnis*, 616.

§ 11. Criminal Liability of Public Officers.

Validity of warrants against chief of police and policemen for failure to perform duties as public officers. *S. v. Hord*, 149; *S. v. Stogner*, 163; *S. v. McCall*, 165; *S. v. Hucks*, 160.

RAILROADS.

§ 5. Accidents at Crossings.

Evidence of a railroad company that a driver drove upon the tracks in daylight in front of the company's train, which was traveling some 35 to 40 miles per hour, without observing the approach of the train, which could easily have been seen, and that the train crew had insufficient time to avoid the collision

RAILROADS—*Continued.*

after seeing the driver when he entered upon the tracks, *is held* sufficient to be submitted to the jury on the issue of the driver's negligence in the railroad's action to recover for damages to its engine caused by the collision. *R. R. v. Woltz*, 58.

Evidence permitting the inference that a railway train was stopped 35 to 40 feet north of the crossing, that the driver of the car stopped 12 feet from the northbound track, observed the stationary train which gave no indication of moving, and that as the driver undertook to cross the tracks the train suddenly started and collided with the automobile before the driver could clear the crossing, *is held* to take the case to the jury on the issue of the railroad company's negligence. *Ibid.*

RECEIVING STOLEN GOODS.

§ 2. Indictment.

An indictment charging defendant with receiving, with knowledge they had been stolen, a specified number of cartons of cigarettes and cases of beer and a case of sardines belonging to a named person, *held* sufficiently definite and not subject to arrest of judgment for failure to aver the brand names of the goods. *S. v. Upchurch*, 343.

§ 5. Sufficiency of Evidence and Nonsuit.

Evidence tending to show that certain goods were stolen and carried to defendant's place of business by the thieves and that the thieves sold the goods to defendant at about half of the wholesale price, and that defendant knew the goods had been stolen, *held* sufficient to take the issue of defendant's guilt to the jury. *S. v. Upchurch*, 343.

REFORMATION OF INSTRUMENTS.

§ 4. Pleadings.

In alleging mutual mistake, it is not required that the pleader allege how or why the mistake occurred. *Matthews v. Van Lines*, 722.

REGISTRATION.

§ 1. Necessity for Registration.

A lease for more than three years must, to be enforceable, be in writing, and to protect it against creditors or subsequent purchasers for value, the lease must be recorded. *Bourne v. Lay & Co.*, 33.

§ 3. Registration as Notice.

The fact that after the description a deed contains a statement that there was a previous lease of the land for a period of ten years to a named lessee and that the warranty excluded such leasehold, *held* not to render the unregistered lease binding on grantees. *Bourne v. Lay & Co.*, 33.

§ 5. Effect of Registration.

Registration is for the protection of purchasers for value and creditors, and the rights of the original parties or their heirs and devisees are not dependent upon the terms of the instrument as recorded but upon the terms of the original investment, and the original deed is admissible to correct mistakes in the recordation, and, as between such parties, the correction of an error of registration neutralizes all presumptions in favor of the prior recordation. *Bowden v. Bowden*, 296.

RELIGIOUS SOCIETIES AND CORPORATIONS.

§ 3. Actions.

Action against pastor to enjoin him from occupying pulpit is improperly joined with action against faction of congregation for control of Church property. *Conference v. Piner*, 67.

RIOT.

§ 1. Nature and Elements of Offense.

Citizens have the right to assemble peacefully for a lawful purpose; nevertheless, even though an assembly be lawful initially it may become a riot if at any time its members act with common intent in committing unlawful or disorderly acts in such a manner as to threaten a breach of the peace. *S. v. Leary*, 51.

§ 2. Prosecutions.

Where the indictment charges that defendants, with others, participated in a riot, it is not necessary to show that defendants acted in concert with each other in committing breaches of the peace, it being sufficient if the evidence show that each defendant acted with other members of the crowd in committing the offense. *S. v. Leary*, 51.

Evidence of defendant's guilt of participating in riot held sufficient to be submitted to jury. *Ibid.*

ROBBERY.

§ 1. Nature and Elements of the Offense.

Common law robbery is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear, with the felonious intent to deprive the other of his property permanently, and the commission of this offense by the use or threatened use of firearms or other dangerous weapon whereby the life of a person is endangered or threatened, warrants increase in the punishment under the provisions of G.S. 14-87. *S. v. Norris*, 470.

Force as an element of the offense of robbery may be actual or constructive, and if the threatened use of force is sufficient under the circumstances to put a man of reasonable firmness in fear and induce him to give up his property to avoid apprehended injury, there is sufficient constructive force. *Ibid.*

§ 4. Sufficiency of Evidence and Nonsuit.

Evidence that shortly after an affray with the prosecuting witness and after the prosecuting witness had left the scene, defendant sought him out, and, with open pocket knife in his hand, demanded and took from the prosecuting witness money and goods, *held* sufficient to be submitted to the jury on the question of defendant's guilt of armed robbery. *S. v. Norris*, 470.

§ 5. Instructions.

Where all of the evidence shows that property was feloniously taken from the person of the prosecuting witness by the use of a dangerous weapon, with evidence of the identity of defendant as the perpetrator of the offense, the court is not required to submit the question of defendant's guilt of less degrees of the crime. *S. v. Fletcher*, 482.

SALES.

§ 15. Actions or Counterclaims for Fraud.

Upon the statement of the original defendant that he would rather lease

SALES—*Continued.*

than purchase the business equipment in question, the additional defendant sold it to plaintiff and plaintiff leased it to the original defendant. Evidence of the original defendant that he was induced to execute the agreement by the misrepresentation of the additional defendant that the equipment had been reconditioned *is held* sufficient to support findings against the additional defendant on the original defendant's cross action. *Leasing Corp. v. Hall*, 110.

§ 16. Actions for Injuries from Defects.

Evidence held sufficient to be submitted to jury on issue of negligence of distributor in failing to exercise degree of care commensurate with known hazards in discharge of duty to inspect and service gasoline tobacco curer, but also to show contributory negligence as matter of law on part of user in lighting match after draining pipes himself. *Stone v. Ashley*, 555.

SANITARY DISTRICTS.

§ 1. Creation and Existence.

Creation of metropolitan sanitary district comprised of sanitary districts and municipalities held valid and provisions that a district should have authority to cut-off water to those delinquent in sewerage account is valid, and fact that contract is for indefinite duration is not fatal. *Scarborough v. Adams*, 631.

SEARCHES AND SEIZURES.

§ 1. Necessity for Search Warrant.

Where an officer making a lawful arrest requests permission to search the car which had been driven by one of the persons arrested, and the officer, in reply to the driver's interrogation as to whether he had a search warrant, states that he did not but that he could obtain one, whereupon the driver consents to the search and hands over the keys to the car, *held* the consent to the search dispenses with the necessity for a search warrant and renders competent evidence obtained in a search of the car. *S. v. Hamilton*, 277.

Passengers in a car may not object to incriminating evidence found in the car upon search without a warrant when the person having possession and control of the car consents to the search. *Ibid.*

Protection against unlawful searches extends to the guilty as well as to the innocent, and an unlawful search without a warrant does not become lawful by the discoveries which result from it. *S. v. Hall*, 559.

Wife may not consent to search of husband's possessions. *Ibid.*

Where officers, investigating an assault with a gun, go to a suspect's house and enter and find him in his bedroom and also find in the house loaded buckshot shells and a shotgun, *held*, the conditions were such as to require a search warrant, and it was error to admit in evidence over defendant's objection the shells and shotgun, and the statute also renders incompetent testimony of an expert that, from his examination of the gun, empty shells found near the scene of the crime were fired from the gun. *S. v. Stevens*, 737.

STATE.

§ 4. Actions Against the State.

While ordinarily an agency of the State is not subject to suit unless the right to sue is granted by statute, where an agency of the State takes a property right by eminent domain and there is no adequate statutory remedy for

STATE—*Continued.*

the recovery of compensation, the owner may maintain an action at common law. *Sherrill v. Highway Comm.*, 643.

STATUTES.

§ 1. Enactment by Reference.

Where a statute specifically refers to a prior enactment and stipulates that provisions of such prior statute should be controlling, the prior statute becomes an integral part of the enactment. *Keeter v. Lake Lure*, 252.

§ 2. Constitutional Requirements in Enactment.

A statute delegating to counties the power to prohibit the sale of merchandise on Sunday is a statute pertaining to the regulation of trade within the purview of Art. II, § 29, of the State Constitution, notwithstanding that its ultimate purpose is to protect the public welfare rather than the regulation of trade. *Surplus Co. v. Pleasants*, 650.

A statute is either general or local within the purview of Art. II, § 29 of the State Constitution, depending upon whether or not it operates uniformly throughout the State within all areas coming within its purview, and a statute is general notwithstanding its application is limited to areas or subjects coming within classifications therein set out, provided the classifications are reasonable and based on rational difference of situation or condition. *Ibid.*

§ 5. General Rules of Construction.

The interpretation given a statute by the officer or agency charged with its administration will be given due consideration by the courts, but is not controlling. *Arrington v. Engineering Corp.*, 38.

A criminal statute must be strictly construed in favor of the accused. *S. v. Brown*, 191.

Where the language of a statute is clear and unambiguous the courts must declare such meaning and are without power to interpolate or superimpose provisions and limitations not contained therein. *Board of Architecture v. Lee*, 602.

§ 7. Construction of Amendments.

Where a statute has two distinct subsections dealing with related matters, an amendment to one of the subsections will not ordinarily be construed to apply to the other also, since it will be presumed that if the Legislature intended it to apply to both it would have expressed such intent. *Arrington v. Engineering Corp.*, 38.

An amendment has the effect of re-enacting the statute with the amendment incorporated. *Ins. Co. v. High*, 752.

§ 11. Repeal and Revival.

Where a statute is void because its machinery violates certain constitutional directives but the statute is within the legislative power to enact, the statute may be amended so as to obviate the constitutional objection so that the statute is rendered valid by the amendment so far as its prospective operation is concerned. *Ins. Co. v. High*, 752.

TAXATION.

§ 4. Limitation on Debt.

Bonds to be paid solely from revenue of facility to be purchased are not a debt of the municipality. *Keeter v. Lake Lure*, 252.

TAXATION—*Continued.*

§ 6. Necessary Expenses and Necessity for Vote.

Bonds to be paid solely from revenue of facility to be purchased are not a debt of the municipality. *Keeter v. Lake Lure*, 252.

§ 7. Public Purpose.

While legislative declarations will be given great weight in determining whether a proposed municipal bond issue is for a public purpose, such declarations are not conclusive, since the question is for judicial determination. *Keeter v. Lake Lure*, 252.

Purchase of recreational lake, dam and electric generating plant by municipality held for a public purpose under the facts of this particular case. *Ibid.*

§ 28. Assessment of Income Taxes.

Loans to a taxpayer do not constitute taxable income and should not be included as gross income on his income tax return, G.S. 105-141, and repayment of loans may not be allowed as a deduction from taxable income. *In re Fleishman*, 204.

§ 29. Assessment of Sales, Use and Excise Taxes.

Seller of storage tanks to companies permitting customers to use them upon payment of installation fee, held liable for sales tax. *Manufacturing Co. v. Johnson*, 12.

Where it appears that a taxpayer turning its inventory over once a month on the average, used the "purchase invoice method" over a period of years in computing the amount of sales tax due, and was advised that, because of a change in the tax laws removing exemptions theretofore accorded, the "purchase invoice method" would no longer be permitted, *held*, during the month for which the taxpayer pays the tax on its actual sales, it is entitled to a credit for the tax paid on its entire taxable inventory on hand on the date the change in the method of computation became effective. *Park-N-Shop v. Clayton*, 218.

TORTS.

§ 4. Right to Contribution.

The fact that insurer for the original defendant pays plaintiff's judgment against its insured, and plaintiff's judgment is marked paid and satisfied, does not extinguish or affect the judgment in favor of the original defendant against the additional defendant for contribution, G.S. 1-240, and if the additional defendant does not pay same, the original defendant is entitled to enforce the judgment by issuance of execution. *Pittman v. Snedeker*, 55.

An original defendant may bring into the action for the purpose of enforcing contribution only a joint tort-feasor whom plaintiff could have sued originally in the same action. *Petrea v. Tank Lines*, 230.

Where the laws of the state in which the accident occurred do not permit the wife to sue the husband in tort, a defendant sued by the wife for negligent injury in an action instituted in this State may not have the husband joined for contribution under G.S. 1-240. *Ibid.*

§ 7. Releases and Covenants Not to Sue.

Passengers in a car involved in a collision executed a covenant not to sue in favor of the driver of the other car involved in the collision, his agents, successors and assigns, and "all other persons, firms, or corporations for whose acts or to whom they or any of them might be liable" and expressly reserved the right to proceed against all others. *Held:* The phrase "for whose acts or to whom" the covenantees might be liable may be given significance only by con-

struing it with reference to the principal-agent relationship and the right to indemnity arising therefrom, and such construction is also necessary in order to give any effect to the reservation of rights against others, and therefore the covenant not to sue does not preclude the passengers from thereafter instituting an action to recover for the negligence of the driver of the car in which they were riding. *Sell v. Hotchkiss*, 185.

TRIAL.

§ 3. Time of Trial and Continuance.

Where defendant's attorney of record announces his withdrawal from the case at the time the case is called for trial, it is error for the court to treat the withdrawal as a *fait accompli* and acquiesce in the withdrawal, refuse a continuance, and set the trial for the following morning. *Smith v. Bryant*, 208.

§ 11. Argument and Conduct of Counsel.

While counsel is entitled to argue the whole case, the law and the facts, to the jury, G.S. 84-14, it is error for the court to permit counsel to argue matters without factual or legal justification upon the evidence. *Jenkins v. Hines Co.*, 83.

§ 15. Objections and Exceptions to Evidence and Motions to Strike.

The rule that objection to the admission of evidence will be considered only upon the ground stated in the objection does not apply when the evidence is excluded by statute. *Glenn v. Smith*, 706.

§ 18. Province of Court and Jury in General.

The task of weighing conflicting evidence is for the jury and not the court. *R. R. v. Woltz*, 58.

It is the province of the jury to weigh the credibility of the testimony, with the right to believe any part or none of it, and therefore where the testimony of the wife in her action for alimony without divorce would permit the jury to answer the issue either for or against her as they found the facts to be from her testimony, the verdict against her is conclusive on appeal, notwithstanding the defendant offered no evidence. *Brown v. Brown*, 485.

§ 21. Consideration of Evidence on Motion to Nonsuit.

On motion to nonsuit, plaintiff's evidence must be considered in the light most favorable to plaintiff, and defendant's evidence which is favorable to plaintiff must also be considered in such light. *Jenkins v. Hines Co.*, 83; *Greene v. Meredith*, 178; *Clinard v. Trust Co.*, 247.

Discrepancies in plaintiff's evidence are for the jury to resolve and do not warrant nonsuit. *Cogdell v. Taylor*, 424.

Defendant's evidence in conflict with that of plaintiff, or which tends to show facts at variance with plaintiff's evidence, is not to be considered on motion to nonsuit. *Moss v. Tate*, 544.

Upon motion to nonsuit, defendant's evidence which is not in conflict with that of plaintiff may be considered insofar as it explains or makes clear the evidence of plaintiff. *Caudill v. Ins. Co.*, 674.

§ 22. Sufficiency of Evidence to Overrule Nonsuit in General.

Evidence which raises a mere speculation or conjecture is insufficient to be submitted to the jury. *Watt v. Housing Authority*, 127; *Crisp v. Medlin*, 314.

Discrepancies and contradictions, even in plaintiff's evidence, do not warrant nonsuit. *Greene v. Meredith*, 178; *Saunders v. Warren*, 200; *Clinard v. Trust Co.*, 247.

TRIAL—*Continued.*

Where the testimony of the witness is without probative force in establishing the fact in issue, an *ex parte* affidavit by plaintiff based upon the statements of the witness to plaintiff's insurance adjuster, which statements were consistent with the witness' testimony at the trial, cannot constitute evidence sufficient to take the issue to the jury. *Caudill v. Ins. Co.*, 674.

§ 31. Directed Verdict and Peremptory Instructions.

The court may always direct a verdict against the party who has the burden of proof if he fails to introduce evidence, or if the evidence offered and taken to be true fails to make out a case in his favor. *Arnold v. Charles Enterprises*, 92.

§ 33. Statement of Evidence and Application of Law Thereto.

Where appellant fails to bring the matter to the court's attention in apt time, a slight inaccuracy of the court in recapitulating the testimony of a witness does not warrant a new trial. *Brown v. Brown*, 485.

§ 45. Acceptance or Rejection of Verdict by the Court.

It is error for the court to refuse to accept a sensible verdict. *Jordan v. Flake*, 362.

Where a poll of the jury reveals that the verdict was not unanimous, the court correctly refuses to accept it and properly directs the jury to deliberate further, and properly accepts a unanimous verdict reached after redeliberation. *Norburn v. Mackie*, 480.

§ 48. Power of Court to Set Aside Verdict.

The court has the discretionary power to set aside the verdict as against one defendant while refusing to set it aside against the other defendant, and its orders doing so are not subject to review. *Kesler v. Stokes*, 357.

Where the court refuses to accept a permissible verdict and then orders a mistrial for the jury's inability to reach a verdict, upon remand for acceptance of the verdict the parties against whom the verdict is rendered may move to set it aside, notwithstanding such motion must ordinarily be made at the trial term. *Jordan v. Flake*, 362.

§ 56. Trial and Hearing by the Court.

In a trial by the court under agreement of the parties the rules of evidence are not so strictly enforced as in a jury trial, and it will be presumed that the judge disregarded any incompetent evidence that may have been admitted unless it affirmatively appears that he was influenced thereby. *Mayberry v. Ins. Co.*, 658.

TRUSTS.

§ 13. Resulting and Constructive Trusts.

No resulting or constructive trust arises when a husband makes improvements on land owned by him with money furnished by himself and wife, even though he obtains his wife's money by promising her to convey to her a half interest, since the husband did not acquire title to the realty with the use of her money or obtain title thereto in breach of a confidential relationship. *Fulp v. Fulp*, 20.

UTILITIES COMMISSION.

§ 1. Nature and Functions of Commission in General.

The utilities Commission is an administrative agency of the State and as such is *ex vi termini* distinguished from courts within the purview of Section 3,

UTILITIES COMMISSION—*Continued.*

Article IV of the Constitution of North Carolina. *Utilities Comm. v. Finishing Plant*, 416.

§ 9. Appeal and Review.

No appeal from Utilities Commission direct to Supreme Court. *Utilities Comm. v. Finishing Plant*, 416.

VENUE.

§ 4. Actions Against Municipal Corporations and Public Officers.

A county hospital, G.S. 131-126.20, 21(a), 28, comes within the purview of G.S. 1-77, and an action against it for labor and materials furnished arises in the county in which the hospital is located, and when brought in another county is properly removed. *Coats v. Hospital*, 332.

§ 9. Hearings and Orders on Motions for Change of Venue.

Where defendant, in an action brought in the recorder's court of the county of plaintiff's residence, moves to dismiss on the ground that the action could be instituted only in the county of defendant's residence under G.S. 1-77, and, upon refusal of the motion, defendant appeals to the Superior Court, the Superior Court properly treats the motion to dismiss as a motion for change of venue, and properly removes the action to the county of defendant's residence, notwithstanding that the recorder's court could not have so removed the action. *Coats v. Hospital*, 332.

WILLS.

§ 27. General Rules of Construction.

The intent of testator, as gathered from a consideration of the four corners of the instrument interpreted in the light of the conditions surrounding him at the time of its execution, must be given effect unless contrary to some rule of law or at variance with public policy. *Weston v. Hasty*, 432.

When the intent of testator can be ascertained with assurance from the language used, there is no need for presumptions or extrinsic evidence, and the court must give effect to the testamentary intent. *Trust Co. v. Andrews*, 531.

§ 39. Devises with Power of Disposition.

Devisee of life estate who is given power of testamentary disposition does not take fee and may transfer title only by will and not by deed, *Weston v. Hasty*, 432.

§ 47. Whether Adopted Children Take as Members of Class.

Where the trust provides benefits for named blood relatives of testator with provision that this number could be increased only in the event great nieces and great nephews were born within 21 years after testator's death, the will clearly indicates testator's intent to exclude children adopted by his nieces and nephews from the benefits, and therefore Chapter 967, Session Laws of 1963 (G.S. 48-23) by its express language, does not apply, and the children adopted by testator's nieces and nephews do not take under the will. *Trust Co. v. Andrews*, 531.

GENERAL STATUTES, SECTIONS OF, CONSTRUED.

G.S.

1-24. Does not suspend running of statute against claim against estate during controversy on probate of will when administrator had been appointed. *Hargrave v. Gardner*, 117.

1-52. Action against trustee accrues upon disavowal of trust. *Fulp v. Fulp*, 20.

1-52(1), 1-52(5). Action to recover loss from fire from installation of furnace accrues at time of completion of contract of installation regardless that damage occurs thereafter. *Jewell v. Price*, 459.

1-97(1). Service of process on corporation by delivering copy to its managing officer is valid. *Tyndall v. Homes*, 467.

1-123(1). Demurrer for misjoinder of parties and causes held properly sustained. *Monroe v. Ditenhoffer*, 538.

1-131. If separate causes are not separately stated, demurrer must be allowed. *Monroe v. Ditenhoffer*, 538.

1-144. Requirement of verification may be waived. *Sisk v. Perkins*, 43.

1-152; 1-153. Court may not enter judgment by default and inquiry while defendant's motion to strike is pending. *McDaniel v. Fordham*, 62.

1-240. Payment of plaintiff's judgment against original defendant does not affect insurer's right under judgment in favor of original defendant against additional defendant. *Pittman v. Snedeker*, 55.
Original defendant may have additional defendant joined for contribution only if plaintiff could have sued original defendant initially. *Peatrea v. Tank Lines*, 230.

1-568.14. Testimony elicited on adverse examination in one case is not competent in trial of companion case by plaintiff who is a stranger to the prior action. *Glenn v. Smith*, 706.

8-18. Original instrument may be introduced in evidence whether recorded or not. *S. v. Dunn*, 391.

8-89. Passenger not entitled to compel agent of carrier to disclose information on the driver's report. *Craddock v. Coach Co.*, 380.

14-2. Conspiracy to murder is infamous offense. *S. v. Alston*, 398.

14-33, 14-32. Assault with deadly weapon is less degree of offense of assault with deadly weapon with intent to kill inflicting serious injury not resulting in death, and when there is evidence of less degree court must submit question to jury. *S. v. Weaver*, 681.

14-54. As amended constitutes unlawful breaking or entering a building a felony when done with intent to commit a felony, and a misdemeanor in the absence of such intent. *S. v. Jones*, 134.

14-67. Evidence of guilt held sufficient to make out *prima facie* case for jury. *S. v. Arnold*, 348.

14-87. Evidence of guilt held sufficient to be submitted to jury. *S. v. Norris*, 470.

14-202.1. Does not repeal G.S. 14-177. *S. v. Harward*, 746.

14-230. Police chief and policemen are public officers and may be prosecuted for malfeasance. *S. v. Hord*, 149. Validity of indictment of police officers for violating duties. *S. v. Hord*, 149; *S. v. Hucks*, 160; *S. v. Stogner*, 163; *S. v. McCall*, 166.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

15-27.1. Evidence obtained by unlawful search as well as evidence based on articles found by search held incompetent. *S. v. Stevens*, 737.

15-41. Officers held entitled to arrest defendants on facts of these cases. *S. v. Hamilton*, 277; *S. v. Egerton*, 328.

15-41, 15-45. Officer may not summon help to arrest simple trespasser. *S. v. Brown*, 191.

15-147. Indictment must allege time and place of prior conviction. *S. v. Lawrence*, 220.

15-152. Indictment charging defendants with larceny of specified personalty from specified store and with breaking and entering may be consolidated for trial. *S. v. Hamilton*, 277.

15-155. Indictment charging escape occurring prior to the date of sentence is fatally defective and is not subject to amendment. *S. v. Whitely*, 742.

15-170. Court must submit question of less degree of crime when supported by evidence. *S. v. Jones*, 134; *S. v. Weaver*, 681.

15-217. Post conviction petition must be filed in Superior Court in county in which conviction was entered. *S. v. Merritt*, 716.

18-78, 143-314, 143-316. Board of Alcoholic Control is authorized to hear proceeding to revoke beer license with right to appeal in licensee, and with further right of appeal to Supreme Court. *Freeman v. Board of Alcoholic Control*, 320.

19-1. Abatement of public nuisance is *in personam* and party charged has right to notice and opportunity to be heard, and therefore judgment cannot be entered without personal service. *Bowman v. Malloy*, 396.

20-71.1. Merely takes issue of agency to jury. *Walls v. Winston-Salem*, 232.

20-72(b). No title to motor vehicle passes until certificate of title has been assigned and delivered and application made for new certificate. *Bank v. Motor Co.*, 568.

20-129. Operation of vehicle at nighttime without lights required by statute is negligence. *Reeves v. Campbell*, 224.

20-139.1. Testimony of results of breathalyzer tests held competent. *S. v. Powell*, 73.

20-140. Unintentional violation of a statute governing operation of motor vehicle, without more, does not constitute reckless driving. *S. v. Dupree*, 463.
Allegations held sufficient to allege violation of statute. *Bank v. Lindsey*, 585.

20-141(a). Evidence of negligence and proximate cause held for jury. *Rector v. Roberts*, 324.

20-141(b)(c). Evidence held for jury on question of whether excessive speed in entering intersection was proximate cause of collision. *Jones v. Horton*, 549.

20-141(c). Duty to exercise due care to avoid collision is not limited to other vehicles being operated lawfully. *McNair v. Goodwin*, 146.

20-148. Is not applicable to three-lane highway. *S. v. Duncan*, 123.
Inadvertent veering to left of highway, causing accident, does not alone constitute reckless driving. *S. v. Dupree*, 464.

20-150(c). Private driveway is not intersecting highway. *Oil Co. v. Miller*, 101.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

20-150(e). Party may not rely on violation of statute when he does not allege violation; mere fact of crossing yellow line is not sufficient but it is required that party show highway had been duly marked. *Oil Co. v. Miller*, 101.

20-154. Requires only that a motorist not turn left without exercising reasonable care to ascertain that movement can be made in safety. *Oil Co. v. Miller*, 101.

20-155(b). Evidence of negligence in violating statute held for jury. *Greene v. Meredith*, 178.

20-161. Stopping on highway in violation of statute is negligence *per se*. *Hughes v. Vestal*, 500.

20-161(a). Stopping on highway because of exigencies of traffic is not parking. *Saunders v. Warren*, 200.

20-166(a), 20-166(c). Fact that indictment charges defendant with collision resulting in injury and death, and evidence shows that no person died as a result of the collision is not fatal variance. *S. v. Wilson*, 373.

20-166(b). Is not limited to motorist at fault in causing accident and warrant or indictment need not aver the street or highway where collision occurred. *S. v. Smith*, 575.

20-169. Municipality may enact ordinance giving right of way at intersection to funeral procession. *Cogdell v. Taylor*, 424.

20-311. Insured in an assigned risk policy has the right to cancel and he may authorize lender of premium to do so. *Griffin v. Indemnity Co.*, 212.

28-112. Court may not waive a party's right to plead statute of limitations. *Hargrave v. Gardner*, 117.

28-172. Bank must see that sum in deceased's account is paid to deceased legal representative. *Monroe v. Ditenhoffer*, 538.

28-174. Action lies only if there is a pecuniary loss from death. *Scriven v. McDonald*, 727.

31-36. Presentation of paper writing to clerk for probate does not revoke authority of administrator duly appointed for the estate. *Hargrave v. Gardner*, 117.

39-33. Where donee of power of disposition conveys property by deed to strangers to donor's blood who are not beneficiaries under his will, deed of donee does not constitute release or estoppel. *Weston v. Hasty*, 432.

45-21. No confirmation is necessary to foreclosure under power contained in deed of trust when no upset bid is filed. *Products Corp. v. Sanders*, 234.

48-23. Does not apply where testator clearly indicates intent to exclude adopted children. *Trust Co. v. Andrews*, 531.

52-10, 52-10.1. Common law disability of spouses to sue each other in tort has been completely removed. *Foster v. Foster*, 694.

52-10.1. Husband may maintain action against wife to recover amount spent for medical treatment of child made necessary by wife's negligence. *Foster v. Foster*, 694.

52-12. Deed of separation properly executed is not rescinded by act of one of the parties in tearing up the paper. *Joyner v. Joyner*, 27; Evidence held insufficient to establish fraud in procuring deed of separation. *Ibid.*

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

62-96. Appeal entered in Supreme Court from Utilities Commission directed to be entered in Superior Court with right of appeal. *Utilities Comm. v. Finishing Plant*, 416.

62-99. No appeal from Utilities Commission to Supreme Court. *Utilities Comm. v. Finishing Plant*, 416.

83-12. Person constructing building on lands owned by himself and wife by entireties comes within exceptions, but fact that he is trustee of church lands does not bring him within exception. *Board of Architecture v. Lee*, 603. Board held barred by laches. *Ibid.*

84-14. Court may not permit counsel to argue matters without factual or legal justification upon the evidence. *Jenkins v. Hines Co.*, 84.

97-10.2(e). In an action against third person tort-feasor reference to compensation insurance is prejudicial. *Spivey v. Wilcox Co.*, 387.

97-14(1). Whether offer of job requiring less skill and paying lower wage is "suitable" depends on circumstances. *In re Troutman*, 289.

97-31. The 1963 amendment has no retroactive effect; statute does not authorize compensation for injury to internal organ of the head when such injury does not result in any disfigurement. *Arrington v. Engineering Corp.*, 38.

97-93. Requirement of notice applies to "binder" as well as formal policy. *Moore v. Electric Co.*, 667.

97-99. Notice to insured and not method of its transmission is determinative. *Moore v. Electric Co.*, 667.

105-141. Repayment of loan may not be allowed as deduction. *In re Fleishman*, 204.

105-142(a). State is not required to allow deduction allowed by Federal Government. *In re Fleishman*, 204.

105-164.7, 105-164.28. Retail seller of propane gas tank to gas company, which tank gas company installed for flat fee under contract requiring customer to buy gas only from gas company, held liable for sales taxes. *Mfg. Co. v. Johnston, Comr. of Revenue*, 12.

105-266; 105-266.1. Error in entering loan as income must be adjusted within time limited. *In re Fleishman*, 204.

130-73. Duly certified death certificate is competent in evidence. *Weeks v. Ins. Co.*, 140.

130-124. Creation without vote of metropolitan district comprised of sanitary districts and municipalities held valid. *Scarborough v. Adams*, 631.

131-126.20, .21(a), .28, 1-77. Hospital is public officer within venue statutes. *Coats v. Hospital*, 332.

136-66.1. When city street becomes part of State highway system, the Highway Commission becomes responsible for maintenance, including fills and culverts. *Sherrill v. Highway Comm.*, 643.

143-215(e)(f). Creation of metropolitan district comprised of sanitary districts and municipalities held valid. *Scarborough v. Adams*, 631.

148-4. Prison authorities may designate place of confinement. *S. v. Whitley*, 742.

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148-45. Sentence for misdemeanor of escape precludes subsequent prosecution for the felony of a second escape based on same act. *S. v. Lawrence*, 220. Sentence for escape must begin at expiration of any and all sentences theretofore imposed. *S. v. Harper*, 354.

148-45(a). Escape of prisoner from custody from gang foreman while working on public road is an escape from prison. *S. v. Whitley*, 742.

153-295. Creation of metropolitan district comprised of sanitary districts and municipalities held valid. *Scarborough v. Adams*, 631.

160-20; 160-21. Municipality may appoint police officers having same authority within city limits as sheriff. *S. v. Hord*, 149.

160-172. Zoning regulations upheld. *Armstrong v. McInnis*, 616.

160, Art. 34. Requirements for off-street parking plan. *Horton v. Redevelopment Comm.*, 1.

160-463. Redevelopment Commission may not acquire property until municipality has approved plan; area of railroad right of way is not "blighted area." *Horton v. Redevelopment Comm.*, 1.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

Art. I, § 1. Purchase of recreational lake by municipality held for public purpose under facts of this case. *Keeter v. Lake Lure*, 252.

Creation of metropolitan district comprised of sanitary districts and municipalities held valid. *Scarborough v. Adams*, 631.

Art. I. § 12. Original trial in Superior Court must be upon indictment. *S. v. Stevens*, 364.

Art. I, § 15. Wife may not consent to search of husband's possessions. *S. v. Hall*, 559.

Art. I, § 17. Abatement of public nuisance is *in personam* and party charged has right to notice and opportunity to be heard, and therefore judgment cannot be entered without personal service. *Bowman v. Malloy*, 396.

Purchase of recreational lake by municipality held for public purpose under facts of this case. *Keeter v. Lake Lure*, 252.

Creation of metropolitan district comprised of sanitary districts and municipalities held valid. *Scarborough v. Adams*, 631.

General Assembly may not diminish a vested interest by artificially increasing class in which the estate is vested. *Trust Co. v. Andrews*, 531.

Art. I, § 19. Abatement of public nuisance is *in personam* and party charged has right to notice and opportunity to be heard, and therefore judgment cannot be entered without personal service. *Bowman v. Malloy*, 396.

Art. II, § 14. Statute creating Firemen's Pension Fund held constitutional. *Insurance Co. v. High*, 752.

Art. II, § 29. Statute permitting designated counties to enact Sunday ordinances held void. *Surplus Co. v. Pleasants*, 650.

Art. IV, § 3. No appeal from Utilities Commission direct to Supreme Court. *Utilities Comm. v. Finishing Plant*, 416.

Art. IV, § 8. Jurisdiction of Supreme Court is limited to matters of law and legal inference. *Jones v. Horton*, 549.

Art. IV, § 10. Supreme Court in exercise of supervisory duties may determine question sought to be presented to obviate unnecessary and circuitous procedures. *Askew v. Tire Co.*, 169.

Art. IV, § 12. Abatement of public nuisance is *in personam* and party charged has right to notice and opportunity to be heard, and therefore judgment cannot be entered without personal service. *Bowman v. Malloy*, 396.

Art. V, § 4. Bonds to be paid solely from revenue of facility to be purchased are not debts within constitutional limitations. *Keeter v. Lake Lure*, 252.

Art. VII, § 6. Bonds to be paid solely from revenue of facility to be purchased are not debts within constitutional limitations. *Keeter v. Lake Lure*, 252.

Art. IX, § 1. Operation of public library is governmental function. *Seibold v. Library*, 360.

CONSTITUTION OF THE UNITED STATES, SECTIONS OF, CONSTRUED.

Fourth Amendment. Wife may not consent to search of husband's possessions. *S. v. Hall*, 559.

Fifth Amendment. Wife may not consent to search of husband's possessions. *S. v. Hall*, 559.

Fourteenth Amendment. General Assembly may not diminish a vested interest by artificially increasing class in which estate is vested. *Trust Co. v. Andrews*, 531.