NORTH CAROLINA REPORTS

Vol. 265

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1965

FALL TERM, 1965

JOHN M. STRONG

REPORTER

RALEIGH:

BYNUM PRINTING COMPANY

PRINTERS TO THE SUPREME COURT

1965

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6 " "	"	51	"
7 " "	"	52	"
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2 " "	"	55	"
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From the 7th to the 62d volumes, both inclusive, will be found the opinions of the Supreme Court, consisting of three members, for the first fifty years of its existence or from 1818 to 1868. The opinions of the Court, consisting of five members, immediately following the Civil War, are published in the volumes from the 63d to the 79th, both inclusive. From the 80th to the 101st volumes, both inclusive, will be found the opinions of the Court, consisting of three members, from 1879 to 1889. The opinions of the Court, consisting of five members, from 1889 to 1 July 1937 are published in volumes 102 to 211, both inclusive. Since 1 July 1937, and beginning with volume 212, the Court has consisted of seven members.

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1965
FALL TERM, 1965

CHIEF JUSTICE:

EMERY B. DENNY.

ASSOCIATE JUSTICES:

R. HUNT PARKER,
WILLIAM H. BOBBITT,
CARLISLE W. HIGGINS,
CLIFTON L. MOORE,
SUSIE SHARP,
I. BEVERLY LAKE.[1]

EMERGENCY JUSTICES:

J. WALLACE WINBORNE,
WILLIAM B. RODMAN, JR.[2]

ATTORNEY GENERAL:

THOMAS WADE BRUTON.

DEPUTY ATTORNEYS-GENERAL:

HARRY W. McGALLIARD,
PEYTON B. ABBOTT,
RALPH MOODY,
HARRISON LEWIS.[3]

ASSISTANT ATTORNEYS-GENERAL:

CHARLES D. BARHAM, JR.,
CHARLES W. BARBEE, JR.,[4]
JAMES F. BULLOCK,
RAY B. BRADY,[5]
RICHARD T. SANDERS,[6]
PARKS H. ICENHOUR,[7]
ANDREW H. McDANIEL,[7]
WILLIAM W. MELVIN.[7]

DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE COURTS:

J. FRANK HUSKINS.[8]

ADMINISTRATIVE ASSISTANT TO THE CHIEF JUSTICE
AND
ASSISTANT DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE COURTS:

BERT M. MONTAGUE.

SUPREME COURT REPORTER:

JOHN M. STRONG.

CLERK OF THE SUPREME COURT:

ADRIAN J. NEWTON.

MARSHAL AND LIBRARIAN:

RAYMOND M. TAYLOR.

[1]Appointed 30 August 1965 upon the resignation of Mr. Justice Rodman.
[2]Sworn in as Emergency Justice 30 August 1965.
[3]Appointed Deputy Attorney General 6 March 1965.
[4]Resigned 31 August 1965, succeeded by George A. Goodwyn, 16 November 1965.
[5]Resigned 31 August 1965, succeeded by Bernard A. Harrell, 15 October 1965.
[6]Resigned 31 August 1965, succeeded by Millard R. Rich, Jr., 16 November 1965.
[7]Appointed 6 March 1965.
[8]Appointed 1 July 1965.

JUDGES OF THE SUPERIOR COURTS OF NORTH CAROLINA.

FIRST DIVISION

Name	*District*	*Address*
Chester R. Morris[1]	First	Coinjock.
Elbert S. Peel, Jr.	Second	Williamston.
William J. Bundy	Third	Greenville.
Howard H. Hubbard	Fourth	Clinton.
R. I. Mintz	Fifth	Wilmington.
Joseph W. Parker	Sixth	Windsor.
George M. Fountain	Seventh	Tarboro.
Albert W. Cowper	Eighth	Kinston.

SECOND DIVISION

Hamilton H. Hobgood	Ninth	Louisburg.
William Y. Bickett	Tenth-A	Raleigh.
James H. Pou Bailey[2]	Tenth-B	Raleigh.
William A. Johnson	Eleventh	Lillington.
E. Maurice Braswell	Twelfth	Fayetteville.
Raymond B. Mallard	Thirteenth	Tabor City.
C. W. Hall	Fourteenth	Durham.
Leo Carr	Fifteenth	Burlington.
Henry A. McKinnon, Jr.	Sixteenth	Lumberton.

THIRD DIVISION

Allen H. Gwyn	Seventeenth	Reidsville.
Walter E. Crissman	Eighteenth-B	High Point.
Eugene G. Shaw	Eighteenth-A	Greensboro.
Frank M. Armstrong	Nineteenth	Troy.
John D. McConnell	Twentieth	Southern Pines.
Walter E. Johnston, Jr.	Twenty-First-A	Winston-Salem.
Harvey A. Lupton[2]	Twenty-First-B	Winston-Salem.
John R. McLaughlin	Twenty-Second	Statesville.
Robert M. Gambill	Twenty-Third	North Wilkesboro.

FOURTH DIVISION

J. Frank Huskins[3]	Twenty-Fourth	Burnsville.
James C. Farthing	Twenty-Fifth	Lenoir.
Francis O. Clarkson	Twenty-Sixth-B	Charlotte.
Hugh B. Campbell	Twenty-Sixth-A	Charlotte.
P. C. Froneberger	Twenty-Seventh-A	Gastonia.
B. T. Falls, Jr.[2]	Twenty-Seventh-B	Shelby.
W. K. McLean	Twenty-Eighth	Asheville.
J. Will Pless, Jr.	Twenty-Ninth	Marion.
Guy L. Houk	Thirtieth	Franklin.

SPECIAL JUDGES.

H. L. Riddle, Jr.	Morganton.	Walter E. Brock	Wadesboro.
Hal Hammer Walker[4]	Asheboro.	James F. Latham	Burlington.
Harry C. Martin	Asheville.	Edward B. Clark	Elizabethtown.
J. William Copeland	Murfreesboro.	Hubert E. May	Nashville.

EMERGENCY JUDGES.

H. Hoyle Sink	Greensboro.	Walter J. Bone	Nashville.
W. H. S. Burgwyn	Woodland.	Henry L. Stevens, Jr.	Warsaw.
Q. K. Nimocks, Jr.	Fayetteville.	Hubert E. Olive	Lexington.
Zeb V. Nettles	Asheville.	F. Donald Phillips	Rockingham.
George B. Patton	Franklin.		

[1]Resigned 31 December 1965, succeeded by Walter W. Cohoon. Sworn in as Emergency Judge 1 January 1966.

[2]Appointed 1 July 1965.

[3]Resigned 1 July 1965, succeeded by W. E. Anglin.

[4]Resigned 31 December 1965, succeeded by Fred H. Hasty.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
WALTER W. COHOON[1]	First	Elizabeth City.
ROY R. HOLDFORD, JR.	Second	Wilson.
W. H. S. BURGWYN, JR.	Third	Woodland.
ARCHIE TAYLOR	Fourth	Lillington.
LUTHER HAMILTON, JR.	Fifth	Morehead City.
WALTER T. BRITT	Sixth	Clinton.
WILLIAM G. RANSDELL, JR.	Seventh	Raleigh.
JAMES C. BOWMAN	Eighth	Southport.
LESTER G. CARTER, JR.	Ninth	Fayetteville.
JOHN B. REGAN	Ninth-A	St. Pauls.
DAN K. EDWARDS	Tenth	Durham.
THOMAS D. COOPER, JR.	Tenth-A	Burlington.

WESTERN DIVISION

Name	*District*	*Address*
HARVEY A. LUPTON[2]	Eleventh	Winston-Salem.
L. HERBIN, JR.	Twelfth	Greensboro.
M. G. BOYETTE	Thirteenth	Carthage.
MAX L. CHILDERS	Fourteenth	Mount Holly.
KENNETH R. DOWNS	Fourteenth-A	Charlotte.
ZEB. A. MORRIS	Fifteenth	Concord.
B. T. FALLS, JR.[3]	Sixteenth	Shelby.
J. ALLIE HAYES	Seventeenth	North Wilkesboro.
LEONARD LOWE	Eighteenth	Caroleen.
ROBERT S. SWAIN	Nineteenth	Asheville.
GLENN W. BROWN	Twentieth	Waynesville.
CHARLES M. NEAVES	Twenty-first	Elkin

[1]Resigned 31 December 1965. Succeeded by Herbert Small.
[2]Resigned 1 July 1965, succeeded by Thomas W. Moore, Jr.
[3]Resigned 1 July 1965, succeeded by W. Hampton Childs, Jr.

SUPERIOR COURTS, FALL TERM, 1965.

FIRST DIVISION

First District—Judge Mintz.

Camden—Sept. 27; Dec. 13†.
Chowan—Sept. 13; Nov. 29.
Currituck—Sept. 6; Dec. 6†.
Dare—Oct. 25.
Gates—Oct. 18.
Pasquotank—Sept. 20†; Oct. 11†; Nov. 8†; Nov. 15*.
Perquimans—Nov. 1.

Second District—Judge Parker.

Beaufort—Sept. 6†; Sept. 20*; Oct. 18†; Nov. 8*; Dec. 6†.
Hyde—Oct. 11; Nov. 1†.
Martin—Aug. 9†; Sept. 27*; Nov. 29†; Dec. 13.
Tyrrell—Aug. 23†; Oct. 4.
Washington—Sept. 13; Nov. 15†.

Third District—Judge Fountain.

Carteret—Oct. 13†; Nov. 8. Conflict: Aug. 23†(2); Nov. 29†.
Craven—Sept. 6(2); Oct. 4†(2); Nov. 15; Nov. 29†(2). Conflict: Nov. 1†.
Pamlico—Oct. 25. Conflict: Sept. 20.
Pitt—Aug. 23(2); Sept. 20†(2); Nov. 22; Dec. 13. Conflict: Oct. 11; Oct. 25†; Nov. 1.

Fourth District—Judge Cooper.

Duplin—Aug. 30; Oct. 11; Nov. 8*; Dec. 6†(2). Conflict: Oct. 4†.
Jones—Nov. 1†; Nov. 29. Conflict: Sept. 27.
Onslow—Sept. 27(2); Nov. 15†(2). Conflict: July 19; Oct. 18†(2); Dec. 6.

Sampson—Aug. 9(2); Sept. 6†(2); Oct. 18*; Oct. 25†. Conflict Nov. 29; Dec. 13†.

Fifth District—Judge Morris.

New Hanover—Aug. 9*(2); Aug. 23†(2); Sept. 13†(2); Oct. 18†(2); Nov. 1*(2); Nov. 15†(3); Dec. 6*(2). Conflict: Oct. 4*(2).
Pender—Sept. 6†; Sept. 27; Oct. 4†. Conflict: Nov. 15.

Sixth District—Judge Peele.

Bertie—Sept. 20; Nov. 22(2).
Halifax—Aug. 16(2); Oct. 4†(2); Oct. 25*; Dec. 13.
Hertford—Oct. 18; Dec. 6†. Conflict: July 26.
Northampton—Aug. 9; Nov. 1(2).

Seventh District—Judge Bundy.

Edgecombe—Aug. 16*; Nov. 1†(2); Nov. 15*. Conflict: Sept. 6†; Oct. 4*.
Nash—Aug. 23*; Sept. 13†(2); Oct. 18†-(2); Dec. 13†. Conflict: Oct. 11*; Nov. 22*-(2).
Wilson—July 19*; Aug. 30*(2); Sept. 27†(2); Nov. 22†(2); Dec. 6*. Conflict: Oct. 18*(2).

Eighth District—Judge Hubbard.

Greene—Oct. 11†; Dec. 6. Conflict: Oct. 18*.
Lenoir—Aug. 23*; Sept. 13†(2); Oct. 18†; Oct. 25*(2); Nov. 29†; Dec. 13. Conflict: Aug. 9†(2); Sept. 6; Nov. 15†.
Wayne—Aug. 9*(2); Aug. 30†(2); Sept. 27†(2); Nov. 8*(2). Conflict; Oct. 25†; Dec. 6†(2).

SECOND DIVISION

Ninth District—Judge Mallard.

Franklin—Sept. 20†(2); Oct. 18*; Nov. 29†.
Granville—July 19; Nov. 15(2). Conflict: Oct. 11†.
Person—Sept. 13; Nov. 1; Dec. 6†. Conflict: Oct. 4†(2).
Vance—Oct. 4*; Nov. 8†; Dec. 13†.
Warren—Sept. 6*; Oct. 25†.

Tenth District—Wake.

Schedule A—Judge Hall.—Aug. 9†; Aug. 16*(2); Aug. 30*(2); Sept. 13†(2); Sept. 27†(3); Oct. 25*(2); Nov. 8*(2); Nov. 22†(2); Dec. 6†(2). Conflict: July 12*(2); July 26; Aug. 2*; Oct. 18†.
Schedule B—Judge.......................... —July 12†(2); Aug. 16†(2); Aug. 30†(2); Sept. 13*(2); Sept. 27*(3); Oct. 25†(2); Nov. 8†(2); Nov. 22*(2); Dec. 6*(2). Conflict: Aug. 16; Sept. 13; Oct. 11; Oct. 18†; Nov. 8; Nov. 29.

Eleventh District—Judge Carr.

Harnett—Aug. 16†(2); Aug. 30*; Oct. 11†(2). Conflict: Sept. 13†(2); Nov. 1†; Nov. 15*(2); Dec. 13†.
Johnston—Sept. 27†(2); Oct. 25; Nov. 8†(2); Dec. 6(2). Conflict: Aug. 23; Aug. 30†; Oct. 18†.
Lee—Aug. 2*; Aug. 9†; Sept. 13; Sept. 20†; Nov. 1*; Nov. 29†. Conflict: Aug. 11†.

Twelfth District—Judge McKinnon.

Cumberland—Aug. 9†; Aug. 16*; Aug. 30†(2); Sept. 13†(2); Sept. 27*(2); Oct. 11†; Oct. 25†(2); Nov. 8*(2); Nov. 29†(2); Dec. 13*. Conflict: Aug. 30†(2); Sept. 27†(2); Oct. 18*(2); Nov. 8†(2); Nov. 29*(2).
Hoke—Aug. 23; Nov. 22.

Thirteenth District—Judge Hobgood.

Bladen—Aug. 23; Nov. 15†. Conflict: Oct. 18*.
Brunswick—Aug. 30†; Sept. 20; Oct. 25†; Dec. 6†(2).
Columbus—Aug. 16†; Sept. 6*(2); Sept. 27†(2); Oct. 11*; Nov. 1†(2); Nov. 22*(2). Conflict: Dec. 13†.

Fourteenth District—Judge Bickett.

Durham—July 12*(3); Aug. 30*(2); Sept. 13*(2); Oct. 4*(2); Oct. 18†(2); Nov. 1*(2); Nov. 15†(2); Nov. 29*(2); Dec. 13*. Conflict: July 19†(2); Aug. 30†(2); Sept. 13†(2); Sept. 27†(2); Nov. 22*; Dec. 6†(2).

Fifteenth District—Judge Johnson.

Alamance—Aug. 2†; Aug. 16*(2); Sept. 13†(2); Oct. 18*(2); Nov. 15†(2); Dec. 6*. Conflict: July 19†.
Chatham—Aug. 30†; Sept. 6; Nov. 1†(2); Nov. 29.
Orange—Aug. 9*; Sept. 27†(2); Dec. 13. Conflict: Nov. 15†(2).

Sixteenth District—Judge Braswell.

Robeson—Aug. 16*; Aug. 30†; Sept. 6*(2); Sept. 20†(2); Oct. 11†(2); Oct. 25*(2); Nov. 15†(2); Nov. 29*. Conflict: July 12(2).
Scotland—July 26†; Aug. 23; Oct. 4; Nov. 8†; Dec. 6.

THIRD DIVISION

Seventeenth District—Judge McConnell.
Caswell—Dec. 6†. Conflict: Nov. 1.
Rockingham—Aug. 23*(2); Sept. 20†(2); Nov. 1†; Nov. 22†(2); Dec. 13*. Conflict: Oct. 18(2).
Stokes—Oct. 4. Conflict: Oct. 11.
Surry—Aug. 9*(2); Sept. 6†(2); Oct. 11†(2); Nov. 8*(2). Conflict: Dec. 6.

Eighteenth District—Guilford.
Schedule A—Judge Johnston.
Greensboro Division—July 12*(2); Aug. 30*(2); Sept. 13†(3); Oct. 4*(2); Oct. 18†; Nov. 22*(2); Dec. 13.
High Point Division—Aug. 23†; Oct. 25†; Nov. 8†(2); Dec. 6†.
Schedule B—Judge McLaughlin.
Greensboro Division—July 12*; Aug. 30*(2); Sept. 13*(2); Oct. 4†(2); Oct. 18*(2); Nov. 15; Nov. 22†(2); Dec. 6*(2).
High Point Division—July 19*; Sept. 27*; Nov. 1*.
Schedule C—Judge to be assigned.
Greensboro Division—July 12†(2); July 26; Aug. 2†(2); Aug. 16*; Aug. 30†(2); Sept. 27†(2); Oct. 11; Nov. 1*(2); Nov. 1†(3); Nov. 29*.
High Point Division—Sept. 13†(2); Dec. 13*.

Nineteenth District—Judge Gambill.
Cabarrus—Aug. 23*; Aug. 30†; Oct. 11 (2); Dec. 13†. Conflict. Nov. 8†(2).
Montgomery—July 12; Oct. 4.
Randolph—Sept. 6*; Oct. 25†(2); Nov. 8†(2); Nov. 29*. Conflict: July 19†(3); Sept. 20†(2); Dec. 6†(2).
Rowan—Sept. 13(2); Sept. 27†; Dec. 6*. Conflict: Oct. 25†(2); Nov. 29†.

Twentieth District—Judge Gwyn.
Anson—Sept. 20*; Sept. 27†; Nov. 22†.
Moore—Sept. 6†(2); Nov. 15. Conflict: Aug. 16*.
Richmond— July 19†; July 26*; Oct. 4†; Oct. 11*; Dec. 6†(2). Conflict: Aug. 30†; Nov. 8†.
Stanly—July 12; Oct. 18†; Nov. 29.
Union—Aug. 30; Nov. 1(2). Conflict: Aug. 23†.

Twenty-First District—Forsyth.
Schedule A—Judge Shaw.—July 12†(2); July 26(2); Sept. 6†(3); Sept. 27†(2); Oct. 11(2); Oct. 25†(3); Nov. 22(2); Dec. 6(2). Conflict: Aug. 30†#; Nov. 15†#.
Schedule B—Judge —July 26†(2); Aug. 9(2); Aug. 30(2); Sept. 13 (2); Oct. 11†(2); Nov. 1(2); Nov. 15†(3); Dec. 6†(2).

Twenty-Second District—Judge Crissman.
Alexander—Sept. 27.
Davidson—Aug. 23; Sept. 13†(2); Oct. 11†; Nov. 8†; Nov. 15(2); Dec. 13†. Conflict: July 19†(2); Sept. 27; Oct. 25†; Dec. 6†.
Davie—Aug. 2; Oct. 4†. Conflict: Nov. 8.
Iredell—Aug. 30; Sept. 6†; Oct. 25(2); Nov. 29†(2). Conflict: Oct. 18†.

Twenty-Third District—Judge Armstrong.
Alleghany—Oct. 4.
Ashe—July 19; Oct. 25.
Wilkes—Aug. 16(2); Sept. 20†(2); Oct. 11; Nov. 1†(2); Dec. 6.
Yadkin—Sept. 6*; Nov. 15†(2); Nov. 29.

FOURTH DIVISION

Twenty-Fourth District—Judge Froneberger.
Avery—Oct. 18(2). Conflict: July 12(2).
Madison—Aug. 30†(2); Oct. 4*; Nov. 1†; Dec. 6*.
Mitchell—Sept. 13(2).
Watauga—Sept. 27; Nov. 15†.
Yancey—Aug. 9; Aug. 16†(2); Nov. 29.

Twenty-Fifth District—Judge McLean.
Burke—Aug. 16; Oct. 4; Oct. 18; Nov. 22(2).
Caldwell—Aug. 23(2); Sept. 20†(2); Oct. 25†(2); Dec. 6(2).
Catawba—Aug. 2(2); Sept. 6†(2); Nov. 8(2).

Twenty-Sixth District—Mecklenburg.
Schedule A—Judge Pless—Aug. 2*(2); Aug. 16†; Aug. 23†; Aug. 30†; Sept. 6†(2); Sept. 20†(2); Oct. 4*(2); Oct. 25†(2); Nov. 8†(2); Nov. 22†(2); Dec. 6*(2).
Schedule B—Judge Houk.—Aug. 16†(3); Sept. 6*(2); Sept. 20†(2); Oct. 4†(3); Nov. 1*(3); Nov. 22†(2); Dec. 6†(2).
Schedule C—Judge to be assigned. July 12*(2); Aug. 2*(2); Aug. 16†(2); Aug. 30†(2); Sept. 6*(2); Sept. 13†(2); Oct. 4*; Oct. 4†(2); Oct. 18†(2); Nov. 1*(2); Nov. 15†(3); Dec. 6†(2); Dec. 6*(2).
Schedule D—Judge to be Assigned. July 12*(2); Aug. 16†(2); Aug. 30†(2); Sept. 13†(2); Oct. 4†(2); Oct. 18†(2); Nov. 1†(2); Nov. 15†(3); Dec. 6†(2).

Twenty-Seventh District.
Schedule A—Judge Huskins.
Cleveland—Nov. 1*; Nov. 29†(2).
Gaston—July 12*; July 19†(2); Aug. 2*; Sept. 6†(2); Sept. 27†(2); Oct. 11*; Nov. 8*; Nov. 15†(2).
Schedule B—Judge...................................
Cleveland—July 12(2); Sept. 27†(2).
Gaston—Aug. 2†; Aug. 30*(2); Oct. 11†; Oct. 18†(2); Nov. 1†(2); Nov. 29*(2); Dec. 13†.
Lincoln—Sept. 13(2).

Twenty-Eighth District—Judge Farthing.
Buncombe—Aug. 9†(2); Aug. 23*(2); Sept. 6†(2); Sept. 20†(2); Oct. 4†(3); Oct. 25*(2); Nov. 8†(2); Nov. 22*; Nov. 29†; Dec. 6†(2). Conflict: July 12*(2); July 26†(2); Aug. 9†#; Aug. 23†(2); Sept. 20*(2); Oct. 4†#; Oct. 25†(2); Nov. 15†#; Nov. 22†; Dec. 13*.

Twenty-Ninth District—Judge Campbell.
Henderson—Aug. 16†(2); Oct. 18.
McDowell—Sept. 6(2); Oct. 4†(2).
Polk—Aug. 30.
Rutherford—Sept. 20†*(2); Nov. 8*†(2). Conflict: Aug. 16*†.
Transylvania—Oct. 25(2).

Thirtieth District—Judge Clarkson.
Cherokee—Aug. 2; Nov. 8(2).
Clay—Oct. 4.
Graham—Sept. 13.
Haywood—July 12(2); Sept. 20†(2); Nov. 22(2).
Jackson—Oct. 11(2).
Macon—Aug. 9, Dec. 6(2).
Swain—July 26; Oct. 25.

Numerals following dates indicate number of weeks term may hold. No numeral for one week terms.

* For criminal cases.
† For civil cases.
# Indicates non-jury term.

UNITED STATES COURTS FOR NORTH CAROLINA.

EASTERN DISTRICT

Judges

ALGERNON L. BUTLER, *Chief Judge*, CLINTON, N. C.
JOHN D. LARKINS, JR., TRENTON, N. C.

U. S. Attorney

ROBERT H. COWEN, RALEIGH, N. C.

Assistant U. S. Attorneys

WELDON A. HOLLOWELL, RALEIGH, N. C.
ALTON T. CUMMINGS, RALEIGH, N. C.
GERALD L. BASS, RALEIGH, N. C.
GEORGE E. TILLETT, RALEIGH, N. C.
WILLIAM S. McLEAN, RALEIGH, N. C.

U. S. Marshal

HUGH SALTER, RALEIGH, N. C.

Clerk U. S. District Court

SAMUEL A. HOWARD, RALEIGH, N. C.

Deputy Clerks

WILLIAM A. KOPP, JR., RALEIGH, N. C. (Chief Deputy)
MRS. MAUDE S. STEWART, RALEIGH, N. C.
MRS. ELSIE LEE HARRIS, RALEIGH, N. C.
MRS. BONNIE BUNN PERDUE, RALEIGH, N. C.
MISS NORMA GREY BLACKMON, RALEIGH, N. C.
MISS CORDELLIA R. SCRUGGS, RALEIGH, N. C.
MRS. JOYCE W. TODD, RALEIGH, N. C.
MRS. NANCY H. COOLIDGE, FAYETTEVILLE, N. C.
MRS. ELEANOR G. HOWARD, NEW BERN, N. C.
R. EDMON LEWIS, WILMINGTON, N. C.
L. THOMAS GALLOP, ELIZABETH CITY, N. C.

MIDDLE DISTRICT

Judges

EDWIN M. STANLEY, *Chief Judge*, GREENSBORO, N. C.
EUGENE A. GORDON, WINSTON-SALEM, N. C.

Senior Judge

JOHNSON J. HAYES, WILKESBORO, N. C.

U. S. Attorney

WILLIAM H. MURDOCK, Greensboro, N. C.

Assistant U. S. Attorneys

HENRY MARSHALL SIMPSON, Greensboro, N. C.
R. BRUCE WHITE, JR., Greensboro, N. C.

U. S. Marshal

E. HERMAN BURROWS, Greensboro, N. C.

Clerk U. S. District Court

HERMAN AMASA SMITH, Greensboro, N. C.

Deputy Clerks

MRS. JOAN E. BELK, Greensboro, N. C.
MRS. SUE L. BUMGARNER, Wilkesboro, N. C.
MRS. RUTH R. MITCHELL, Greensboro, N. C.
MRS. BOBBIE D. WYANT, Greensboro, N. C.
WAYNE N. EVERHART, Greensboro, N. C.
MRS. DEANE J. SMITH, Greensboro, N. C.
ALBERT L. VAUGHN, Greensboro, N. C.

WESTERN DISTRICT

Judges

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1965

NELLO L. TEER COMPANY v. NORTH CAROLINA STATE HIGHWAY COMMISSION.

(Filed 23 July, 1965.)

1. Highways § 9; State § 4—

The Highway Commission, as an agency of the State, is subject to suit, in contract or in tort, only in accordance with statutory authorization, subject to the exception that where it takes private property for a public purpose 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.

2. Same—

Statutes authorizing suit against the State or a State agency are in derogation of the sovereign right of immunity and are to be strictly construed.

3. Highways § 8.1; Contracts § 12—

The statutory requirement for competitive bids for contracts let by the Highway Commission for construction work in excess of the designated amount constitutes a prerequisite to the exercise of the power of the Highway Commission to let such contracts, and persons dealing with the Commission are presumed to know and are bound by the law with respect to the requirement of competitive bidding.

4. Highways § 9—

A Board of Review appointed pursuant to G.S. 136-29 to settle controversies between the Highway Commission and a contractor for work done under a construction contract has the status of a quasi-judicial body and

not that of a board of arbitration, and in the exercise of its judicial functions and authority is empowered to determine what amount, if any, the contractor is entitled to recover as a matter of legal right under the contract, and any recovery must be based upon the terms and provisions of the contract.

5. Same—

Where it appears that a Board of Review acting under G.S. 136-29 to determine a contractor's claim for additional compensation did not relate its decision to the contract as required by the statute but reviewed the contractor's entire operation and devised a formula to give the contractor, in its judgment, an appropriate return, *held,* the Board acted under a misapprehension of the applicable law, and the Superior Court on appeal should vacate all of the Board's findings of fact and conclusions and decision, and remand the proceedings for further hearing in light of the applicable legal principles.

6. Same—

Where a contractor files within the 60 day period a claim for additional compensation, the Highway Commission is not entitled to dismissal because the claim fails to assert the right to recovery under the correct legal theory, since the statute contains no provisions as to pleadings but simply provides for the filing of the claim within the time specified.

7. Same—

The fact that a member of the Board of Review, under the impression that it was appropriate for him to make any investigations that might be of assistance in rendering a decision, engaged in conversations and inquiries with representatives of the contractor when the Board of Review was not in session, will not be held to disqualify him from further service as a member of the Board when immediately the matter was called to his attention he limited his consideration to matters offered before the Board.

8. Same—

Where it appears that a claim for additional compensation for a highway construction contract was not filed as required by law within the 60 days from payment of the final estimate, the claim is barred.

9. Appeal and Error § 34—

Where an appeal is determined on matters appearing on the face of the record, the question whether the appeal is subject to dismissal because the evidence was set forth in question and answer form becomes academic. Rule of Practice in the Supreme Court No. 19(4).

Cross appeals by Teer Company and by Highway Commission from *Martin, S. J.,* October 1964 Session of WAKE.

Nello L. Teer Company (Teer) and the State Highway Commission of North Carolina (Highway Commission) entered into a contract dated July 8, 1958 in which Teer is designated Contractor and the Highway Commission is designated Commission.

The contract, in part, provides:

"Article One. The Contractor shall and will provide and furnish all the materials, machinery, implements, appliances and tools, and perform the work and required labor to construct and complete a certain project known as State Highway Project No. 8.13438 located in Cumberland County, in the State of North Carolina, Surfacing on Relocation of U.S. 301 From a Point Near Eastover, Northeast of Fayetteville, Northeast to Harnett County Line, for the unit prices bid by the Contractor in his proposal and according to the proposal, plans and specifications prepared by said Commission, which proposal, plans and specifications show the details covering this project and . . . become a part of this contract.

"The Contractor shall begin work 20 days after the date the contract is mailed from the Raleigh office for execution . . . and shall complete the contract within 300 working days."

The project, also referred to as "Federal Project I-95-2(10)55," involved paving, specified preparations therefor and incidental items in connection with the construction of 14.55 miles of dual-lane highway. This statement appears on the plans: "The rough grading and structures on this project have been done or is now being done under a previous contract. This contract will include Fine Grading Subgrade, Shoulders and Ditches, Soil Type Base Course, Bituminous Concrete Base Course (Modified), Bituminous Concrete Surface Course and other necessary items to complete the project."

Bids submitted in response to the Highway Commission's publicly advertised invitation for bids were in terms of "Approximate Quantities" and "Unit Prices" in each of thirty-one classifications. With reference to each of six classifications, Teer's bid, in terms of quantity, description, unit price and (extended) total, is shown below.

(1) 153,500 cubic yards borrow excavation (shoulder construction) at 60¢ per cubic yard	$ 92,100.00
(2) 2,200,000 cubic yards overhaul (special) one-half mile at 3¢ per cubic yard	$ 66,000.00
(3) 199,100 cubic yards soil type base course at 65¢ per cubic yard	$129,415.00
(4) 172,510 square yards bituminous surface treatment at 32¢ per square yard	$ 55,203.20
(5) 157,700 tons bituminous concrete base course at $5.50 per ton	$867,350.00
(6) 51,800 tons bituminous concrete surface course at $6.20 per ton	$321,160.00

These items ($1,531,228.20) comprise approximately 94.3% of Teer's total bid (based on "Unit Prices" for "Approximate Quantities") of $1,623,837.70.

Included in Teer's said bid was a bid of $1.00 per cubic yard (unit price) for two thousand (approximate quantity) cubic yards of "Unclassified Excavation."

When the bids were opened on June 3, 1958, it was determined that Teer had submitted the lowest bid. Its bid was accepted and the formal contract of July 8, 1958 was executed.

The time for commencement of the work was postponed, by mutual consent, until the Highway Commission by letter of July 6, 1959 notified Teer to proceed. The project was completed by Teer in 254 working days and accepted on October 14, 1960.

Prior to Teer's commencement of work on or about July 21, 1959, the Highway Commission notified Teer it was necessary to make two grade changes which involved "approximately 10,800 cubic yards borrow" and "1,425 cubic yards soil type base course," and Teer agreed to do "the work requested at our unit contract prices, although this is part of another contractor's work."

In undertaking to perform its contract, Teer was frequently unable to proceed as planned on account of the prior contractor's failure to perform properly the rough grading, drainage and shoulder work covered by the prior (No. 8.13437) project.

The difficulties encountered by Teer included the presence of approximately 168 soft-yielding areas of varying size in the subgrade and shoulders due to the presence of stumps, roots, matted vegetation, and other unsuitable material. Before Teer could proceed with the work required under its paving contract, it was necessary to remove such unsuitable material (undercutting) and to replace it with suitable (borrow) material.

Teer, as directed by the Highway Commission's engineers, proceeded to do the required remedial work. The estimates paid by the Highway Commission to Teer during the period of performance included payment for undercutting at the rate prescribed in the contract for "Unclassified Excavation" ($1.00 per cubic yard) and for replacement at the rate prescribed in the contract for "Borrow Excavation" (60¢ per cubic yard) and for "Overhaul" (3¢ per cubic yard). Teer's evidence tends to show: While it was agreed said rates should apply to small quantities involved during the earliest stages of performance, as soon as the magnitude of this required remedial work became known, Teer contended these rates under existing circumstances were grossly inadequate; and that, under the pressure of circumstances, it was agreed

that final determination and adjustment for this required remedial work would be made upon completion of Teer's contract.

In November 1959 the Highway Commission's Resident Engineer instructed Teer to bring the project up to "Interstate 95 Standard." These instructions referred specifically to required remedial work on pipe lines and catch basins over the entire project and also to the removal of stumps, root mat, etc., from all subgrade not theretofore paved. Teer was instructed to do "the above work" under the direction of the Highway Commission's Resident Engineer "on Force Account in accordance with State Specifications."

Other required remedial work included a "benching" operation involving the extension of the width of the shoulders. A disagreement as to whether Teer should be compensated for this work at $2.854 per cubic yard as it contended or at 97½¢ per cubic yard as the Highway Commission contended had not been resolved at the time the project was completed and accepted.

Teer started work on or about July 21, 1959. It received payments, in accordance with twenty-five estimates, aggregating $2,001,525.81. Payment of $19,916.86, the amount of the final estimate, was made September 13, 1961.

It appears that Teer, prior to November 4, 1961, submitted to the Highway Commission an additional claim "in the approximate sum of $400,000.00," and that, after conference between Teer's representatives and the Highway Commission's representatives, Teer was asked "to submit a more detailed claim in writing."

Teer initiated this proceeding by filing its letter of November 4, 1961, referred to therein as "our formal claim," for additional payment for its work on said project. Its claim was denied by the Highway Commission's Chief Engineer on May 28, 1962. Upon its appeal to the Highway Commission, the Highway Commission's Chairman requested that Teer's claim "be heard before a Board of Review as provided by statute." Thereafter, a Board of Review was constituted as provided by the statute *then* in force and codified as G.S. 136-29, G.S. Vol. 3B, 1958 Replacement. (Note: This statute was repealed in 1963 (S.L. 1963, c. 667). G.S. 136-29 in G.S. Vol. 3B, 1964 Replacement, is a codification of the 1963 Act.) The Board of Review was composed of (1) Mr. Kenneth Wooten, Jr., selected by the Chairman of the Highway Commission; (2) Mr. Thomas D. Dopler, selected by Teer; and (3) Mr. John D. Watson, who was selected by Messrs. Wooten and Dopler and was elected Chairman.

The basis of Teer's "formal claim" of November 4, 1961, as stated therein, is as follows:

"We began construction on July 21, 1959, and immediately encountered stumps, root mat, and other debris in the subgrade. Immediately after beginning hauling operations, failures in the subgrade developed, making it entirely impossible to continue our operations. We immediately advised your representatives and after a careful study of the existing conditions, it was agreed that the previous contract had been constructed in utter disregard of the plans, specifications and special provisions. The existence of these conditions prompted your office to issue instructions for our firm to perform certain remedial work in an effort to bring the previous contractor's work within acceptable tolerances and standards and allow us to continue the items of work included in our contract even though it was apparent to all concerned that the entire concept of our original contract had been changed, revised and breached, thereby eliminating all possibilities of performing the work originally contemplated under our contract within the economic tolerances of our contract bid unit prices."

The following is *a summary* of the items for which additional payment was requested:

"Force Account	$ 40,192.70
Clearing and Grubbing	4,951.05
Unclassified Excavation:	
Stripping Pits	45,556.00
Roadway Excavation	49,357.35
Borrow and Overhaul	263,593.42
Soil Type Base Course	343,646.10
Fine Grading Side Roads & Ditches	44,405.99
Delays	8,330.86
Hauling Rejected Aggregate	3,456.09
TOTAL	$803,489.96."

Hearings were held by the Board of Review on each of thirty days during the period beginning March 27, 1963 and ending July 1, 1963. Evidence was offered by Teer and by the Highway Commission. Upon the opening of the hearing on March 27, 1963, the Highway Commission, on grounds considered in the opinion, moved to dismiss Teer's claim and excepted to the Board's denial of its motion. At the conclusion of Teer's evidence and also at the conclusion of all the evidence, the Highway Commission moved for judgment of nonsuit and excepted to the denial of its motions.

During the hearing, to wit, on April 24, 1963, before the Board of Review, Teer moved to amend the figure opposite "Delays" by in-

creasing it from $8,330.86 to $291,524.31, thereby increasing its total claim from $803,489.96 to $1,086,683.41. Thereafter, by voluntary reductions in other items, including the withdrawal of the item "Hauling Rejected Aggregate $3,456.09," Teer's asserted "over-all claim" was then for a total of $1,075,618.12.

A decision and award, based on extensive findings of fact, including comments as to considerations that impelled such findings, was filed March 20, 1964 by the Board of Review based on the vote of a majority of its members, to wit, Messrs. Watson and Dopler. Mr. Wooten filed a dissenting opinion.

In rendering what it considered "a fair and equitable decision and award in favor of the Teer Company and against the Commission," the Board of Review made two separate awards, to wit, (1) a "General Award to the Teer Company" in the amount of $385,270.77 with interest at 6% per annum from the date of award and for the costs Teer had sustained "by reason of the arbitration proceedings," and (2) a "Special Award to Teer Company," to wit, an award to Teer for the benefit of Brown Paving Company in the amount of $99,312.50 with interest at 6% per annum from the date of award.

Teer's claim in behalf of Brown Paving Company was first asserted during the progress of the hearings before the Board of Review, and it appears to be what Teer had in mind when, on April 24, 1963, Teer moved to amend the figure in its "formal claim" of November 4, 1961 opposite "Delays" by increasing it from $8,330.86 to $291,524.31.

With reference to the basis of its "General Award to the Teer Company," the decision of the Board of Review contains the following statement:

"In considering the award the Board finds that, from an examination of the evidence, the Teer Company in allocating its claim to the several classifications of work, fails to set forth with a degree of certainty that the nature of the expense claimed is properly chargeable in every instance to the phase of work to which it is assigned, and that the allocation is in some respects lacking in specific detail. The Board concludes that the Teer Company's division of its claim does not indicate that the entire award based upon such allocation would be fair and equitable to either the Teer Company or the Commission. The Board further concludes that a determination of the appeal by such allocation as the Teer Company has presented is not wholly required inasmuch as other evidence proves that all features of work subject to the claim were adversely affected by the failure of the Commission, and the total loss can be established with certainty in order to provide fair and equitable relief to the injured party.

"The Board reaches a decision that the formula for determining a fair and equitable award to the Teer Company shall be based upon establishing and allowing the appropriate financial return to which it was entitled to receive, as follows:

1. An allowance of the expense of performing the work.

2. An allowance of a reasonable cost for general overhead which the Board finds to be five (5%) percent of expenses.

3. An allowance of a fair profit, which the Board finds to be ten (10%) percent of expense plus overhead.

4. A reduction of the sum of the above item by the amount already paid by the Commission to the Teer Company.

5. An allowance of interest at the rate of six (6%) percent per annum upon the amount of this award from the date of this decision until the award is paid.

6. An allowance of all costs sustained in connection with the arbitration proceedings before this Board."

Teer appealed to the superior court, basing its appeal on two exceptions in which it asserted the Board of Review erred (1) in failing to make sufficient allowance for rented equipment in computing Teer's costs, and (2) in failing to allow interest from October 14, 1960, the date Teer had completed the project.

The Highway Commission appealed to the superior court, basing its appeal on 177 exceptions to the "FINDINGS OF FACTS, CONCLUSIONS OF LAW, DECISION AND AWARD OF THE BOARD OF REVIEW." Upon hearing in the superior court Judge Martin, in connection with the Highway Commission's appeal, sustained, in whole or in part, 27 of the Highway Commission's exceptions and overruled the remainder thereof; and, with reference to Teer's appeal, Judge Martin overruled Teer's two exceptions.

Judge Martin struck items aggregating $125,700.67 from said "General Award to the Teer Company" made by the Board of Review and entered judgment that Teer recover of the Highway Commission the sum of $259,570.10 without interest from date of judgment or otherwise.

Judge Martin's judgment also provided "that the Nello L. Teer Company have and recover nothing of the State Highway Commission for the benefit of the Brown Paving Company on the matters arising in this proceeding."

Other provisions of Judge Martin's judgment are not pertinent to decision on this appeal.

Both Teer and the Highway Commission appealed. The Highway Commission's 23 assignments of error are based on exceptions to Judge Martin's rulings. Teer's 39 assignments of error are based on exceptions to Judge Martin's rulings.

By order of Judge Martin, separate statements of case on appeal, one filed by Teer and the other by the Highway Commission, are included in the record on appeal.

Nye, Winders & Mitchell for plaintiff.

Attorney General Bruton; Assistant Attorney General Harrison Lewis; William W. Melvin, Trial Attorney; and Manning, Fulton & Skinner, Associate Counsel for defendant.

BOBBITT, J. Decision on this appeal requires construction of the statute under which Teer initiated this proceeding. This statute, while no longer a part of our statutory law, is applicable to the present litigation. It must be considered and construed in the context of well established legal principles stated below.

Absent waiver, the State is immune from suit. *Smith v. Hefner,* 235 N.C. 1, 6, 68 S.E. 2d 783; *Ferrell v. Highway Commission,* 252 N.C. 830, 833, 115 S.E. 2d 34. It is noted that the provisions of Section 9, Article IV, of the Constitution of North Carolina of 1868, relating to claims against the State, by virtue of the comprehensive amendment of Article IV in 1961 are now a part of Section 10, Subsection 1, of Article IV of the Constitution of North Carolina.

The Highway Commission is an unincorporated agency of the State. Except as provided in the Tort Claims Act, G.S. 143-291 *et seq.,* the Highway Commission is not subject to suit in tort. *Schloss v. Highway Com.,* 230 N.C. 489, 492, 53 S.E. 2d 517; *Floyd v. Highway Commission,* 241 N.C. 461, 85 S.E. 2d 703. Nor is the Highway Commission, unless otherwise provided by statute, subject to suit on contract or for breach thereof. *Dalton v. Highway Com.,* 223 N.C. 406, 27 S.E. 2d 1. Moreover, under our decisions, acts permitting suit, being "in derogation of the sovereign right of immunity," are to be "strictly construed." *Floyd v. Highway Commission, supra.*

The basic rule is that the Highway Commission is not subject to suit except in the manner expressly provided by statute. *Sherrill v. Highway Commission,* 264 N.C. 643, 646, 142 S.E. 2d 653, and cases cited; *Ferrell v. Highway Commission, supra,* and cases cited. An exception to this basic rule is well established, to wit: 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. *Sherrill v. Highway Commission, supra,* and cases cited; *Ferrell v. Highway Commission, supra,* and cases cited.

G.S. 136-28, at all times pertinent to decision herein, contained the following provision: "All contracts over one thousand dollars that the Commission may let for construction, or any other kinds of work necessary to carry out the provisions of this chapter, shall be let, after public advertising, under rules and regulations to be made and published by the State Highway Commission, to a responsible bidder, the right to reject any and all bids being reserved to the Commission; except that contracts for engineering or other kinds of professional or specialized services may be let after the taking and consideration of bids or proposals from not less than three responsible bidders without public advertisement." G.S. Vol. 3B, 1958 Replacement. It is noted that G.S. 136-28 was amended in 1963 (S.L. 1963, c. 525) by substituting "five thousand dollars ($5,000.00)" for "one thousand dollars." G.S. Vol. 3B, 1964 Replacement.

By the weight of authority, a statutory requirement for competitive bids constitutes "a jurisdictional prerequisite to the exercise of the power of a public corporation to enter into a contract." *Fonder v. City of South Sioux Falls,* 71 N.W. 2d 618, 53 A.L.R. 2d 493 (S.D.), and cases cited.

This statement, supported by cited cases, appears in 135 A.L.R. 1266: "In general, but subject to certain limitations and exceptions which are considered in subsequent subdivisions of this annotation, statutes requiring the letting of public contracts to the lowest bidder are regarded as rendering invalid and unenforceable subsequent agreements to pay one to whom a public contract has been duly awarded additional compensation for extras or additional labor and materials not included in the original contract, at least where the additional compensation exceeds the amount for which public contracts may be made without competitive bidding."

"Persons dealing with the public agency are presumed to know the law with respect to the requirement of competitive bidding and act at their peril." *Miller v. McKinnon,* 124 P. 2d 34 (Cal.), and cases cited; 49 Am. Jur., States, Territories, and Dependencies § 86; 81 C.J.S., States § 113, pp. 1087-1088. This includes knowledge that the officials and agents of the public agency may not waive the sovereign right of immunity or act in violation of statutory requirements. 19 Am. Jur., Estoppel § 166.

This Court has held a purported public contract not made in conformity with the (similar) requirements of G.S. 143-129 is void, but

that performance and acceptance of construction work imposes an obligation to pay the reasonable and just value of the work done and materials furnished. Even so, such recovery excludes profits and such reasonable and just value cannot exceed actual cost. *Hawkins v. Dallas,* 229 N.C. 561, 50 S.E. 2d 561, and cases cited. Compare *Insulation Co. v. Davidson County,* 243 N.C. 252, 90 S.E. 2d 496, and see 35 N.C.L.R. 188, 239.

After compliance with requirements of G.S. 136-28, the contract of July 8, 1958, for Project No. 8.13438, was awarded to Teer. Teer's work was interrupted and delayed on account of another contractor's failure to perform properly the contract (Project No. 8.13437) covering rough grading, drainage and shoulder work. Teer performed extensive extra work to remedy these deficiencies, such work being prerequisite to the performance of Teer's contract. The fact now emphasized is that Teer, well within the prescribed number of working days, completed on October 14, 1960, the work called for in its written contract of July 8, 1958.

Whether such deficiencies were of such character and magnitude as to constitute sufficient ground for rescission by Teer of its contract with the Highway Commission need not be determined. Suffice to say, Teer made no attempt to rescind but performed the extra (remedial) work as directed by the Highway Commission's engineers in addition to that required to perform its contract of July 8, 1958.

Pertinent provisions of the Standard Specifications for Roads and Structures, published October 1, 1952 by the Highway Commission, include the following:

"4.4 EXTRA WORK. The contractor shall perform unforeseen work, for which there is no price included in the contract whenever it is deemed necessary or desirable in order to complete fully the work as contemplated, and such extra work shall be performed in accordance with the specifications and as directed; provided, however, that before any extra work is started a supplemental agreement shall be entered into, or a written extra work order issued by the Engineer to do the work.

"If it is possible to agree upon equitable prices, the contractor and Commission shall enter into a supplemental agreement to cover any and all the extra work necessary.

"When such prices cannot be agreed upon, then the work will be paid for on Force Account basis as described in Section 9.4. The contractor shall perform extra work whenever it is deemed necessary or desirable, and such work shall be done in accordance with the requirements of these specifications as directed by the Engineer."

Section 9.4 relates to the authorization of extra and force account work, provides in detail for the keeping of records in connection therewith and provides specifically for the compensation to be paid therefor. Generally, in respect of work done by force account, Section 9.4 provides for the payment of all specified costs plus 10% of the actual costs of labor and materials.

As indicated in our preliminary statement, with reference to the extensive undercutting and replacement in the subgrade of the roadway and of the shoulders, the Highway Commission contends it was agreed that this remedial work was to be done by Teer at the rates shown in the estimates while Teer contends payment on this basis was made and received subject to the definite agreement that final determination and adjustment for this required remedial work would be made upon completion of Teer's contract. In this connection, it is noted that this extensive remedial work, according to Teer's contention and as evidenced by payments to Teer based on estimates, greatly exceeded the $1,000.00 established by G.S. 136-28 as the amount determinative of the necessity for public advertisement for bids and competitive bidding.

The statute under which Teer initiated this proceeding (G.S. 136-29, G.S. Vol. 3B, 1958 Replacement) is quoted in full below.

"§ 136-29. Settlement of controversies between Commission and awardees of contracts. — Upon the completion of any contract awarded by the State Highway Commission to any contractor, *if the contractor fails to receive such settlement as he claims to be entitled to under his contract, he may, within sixty days from the time of receiving his final estimate, file with the State Highway Engineer a claim for such amount as he deems himself entitled to under the said contract;* and the State Highway Engineer shall, within thirty days from the receipt of the said claim, pass upon the same and notify the contractor in writing of his decision. If the contractor desires to do so, he may, within thirty days from the receipt of the said decision of the State Highway Engineer, appeal in writing to the State Highway Commission. Upon receipt of said appeal the chairman of the State Highway Commission shall promptly appoint some competent person, and the claimant shall likewise select a competent person, and these two shall elect a third such person, the three of whom shall constitute a board of review, and shall promptly set a time and place for the hearing. The committee or the claimant shall have power and authority to summon persons and papers and the committee shall make a complete investigation of all matters relating to the said appeal and the contract and the work out of which it grows, and determine all matters at issue in a fair and equitable manner according to their best judgment. The decision of

the said committee shall be final and any amount which they may award the said contractor will be a valid claim against the State Highway Commission; provided, however, an appeal may be had from the decision of the said committee to the Superior Court of Wake County under the same terms, conditions and procedure as appeals from the Industrial Commission, as provided in § 97-86. The provisions of this section shall be deemed to enter into and form a part of every contract entered into between the State Highway Commission and any contractor, and no provision in said contracts shall be valid that are in conflict herewith." (Our italics.)

A primary question for determination is whether the committee (board of review) authorized by the statute, referred to hereafter as the Board of Review, has the status of a board of arbitration or that of a judicial or *quasi*-judicial body.

It is noted that the statutory procedure is available when the contractor has completed his contract with the Highway Commission and fails to receive "such settlement as he claims to be entitled to *under his contract*." (Our italics.) The statute assumes a valid contract is subsisting. The procedure is to resolve any controversy as to what (additional) amount, if any, the contractor is entitled to recover under its terms.

The manner of selection of the persons to serve on the Board of Review is in accord with a traditional method for the selection of arbitrators. Each interested party is authorized to select a member. No qualifications or limitations with reference to the persons so selected are prescribed. Presumably, it was contemplated that each party would select a person it anticipated would be favorably inclined to it and its position; and that the third person, selected by joint vote of the two original appointees, would occupy a key role in deciding the controversy. Too, the statute provides that "the committee shall make a complete investigation of all matters relating to the said appeal and the contract and the work out of which it grows, and determine all matters at issue in a fair and equitable manner according to their best judgment."

Based largely on the provisions referred to in the preceding paragraph, Teer contends the status of the Board of Review is that of an arbitration board. Its brief states its position as follows: "As is true with arbitration boards, the hearings before the Board of Review are extra-judicial proceedings and the Board members are not bound by the rules of procedure and evidence which prevail in a court of law; COTTON MILLS v. TEXTILE WORKERS UNION, 238 N.C. 719, 79 S.E. 2d 181. The Board members are not required to determine the controversy according to law, POE & SONS, INC. v. UNIVERSITY, 248 N.C. 617, 104

S.E. 2d 189, but rather may decide according to their own opinions of equity and conscience, and are not restricted to precedents and positive rules of either law or equity. LUSK v. CLAYTON, 70 N.C. 184; ROBBINS v. KILLEBREW, *et al.*, 95 N.C. 19."

Notwithstanding provisions which, standing alone, are consistent with arbitration, the true status and function of the Board of Review, in our opinion, is clarified by the following provision: "The decision of the said committee shall be final and any amount which they may award the said contractor will be a valid claim against the State Highway Commission; provided, however, an appeal may be had from the decision of the said committee to the Superior Court of Wake County *under the same terms, conditions and procedure as appeals from the Industrial Commission, as provided in § 97-86.*" (Our italics.)

The Industrial Commission, with reference to contested claims for compensation, "is constituted a special or limited tribunal, and is invested with certain judicial functions, and possesses the powers and incidents of a court, within the provisions of the act, and necessary to determine the rights and liabilities of employees and employers." *Hanks v. Utilities Co.*, 210 N.C. 312, 319, 186 S.E. 252. The Industrial Commission is required to hear the parties (evidence), determine the dispute in a summary manner and file its award, "together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue." G.S. 97-84, G.S. 97-85.

Specific findings of fact by the Industrial Commission, covering the crucial questions of fact upon which the plaintiff's right to compensation depends, are required. *Guest v. Iron & Metal Co.*, 241 N.C. 448, 451, 85 S.E. 2d 596, and cases cited. Its findings of fact, except jurisdictional findings *(Askew v. Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280), are conclusive on appeal if supported by competent evidence. G.S. 97-86; *Penland v. Coal Co.*, 246 N.C. 26, 97 S.E. 2d 432, and cases cited. However, when it appears that the Industrial Commission has found the facts under a misapprehension of the applicable law, the cause will be remanded for findings of fact by the Industrial Commission upon consideration of the evidence in its true legal light. *McGill v. Lumberton*, 215 N.C. 752, 3 S.E. 2d 324, and cases cited therein, and numerous subsequent decisions. (See Shepard's North Carolina Citations, 215 N.C. 752, headnote 3.) The Industrial Commission is vested with the judicial function and the authority and duty to determine whether, under the established facts and applicable law, the plaintiff has a compensable claim.

In our view, an appeal from the Board of Review to the Superior Court of Wake County "under the same terms, conditions and procedure as appeals from the Industrial Commission, as provided in § 97-

86" presupposes that the Board of Review has performed judicial functions comparable to those vested in the Industrial Commission. Hence, we are of opinion, and so hold, that the statute contemplates that the Board of Review, in the exercise of judicial functions and authority, shall, based on findings of fact, determine what (additional) amount, if any, the contractor is entitled to recover *as a matter of legal right* "under the said contract." When considered in context, the provision that the Board of Review shall "determine all matters at issue in a fair and equitable manner according to their best judgment" is not inconsistent with the exercise of said judicial functions and authority. We cannot accept the view that the General Assembly intended a contractor's claim against the Highway Commission should be determined otherwise than in accordance with their respective legal rights.

The only prior case in which the quoted statute was considered by this Court is *Paving Co. v. Highway Commission,* 258 N.C. 691, 129 S.E. 2d 245. There a contractor initiated a proceeding under said statute to recover from the Highway Commission an (additional) amount allegedly due under a paving contract. Specifically, the controversy was whether the Highway Commission had wrongfully withheld $2,-900.00 as liquidated damages on account of the contractor's failure to complete the project within the prescribed number of working days. While the precise question was not raised, the decision and opinion clearly reflect the view, in full accord with that stated herein, that the controversy was determinable in accordance with the respective legal rights of the parties and not otherwise.

The quoted statute, which assumes a valid contract is subsisting, provides for recovery "under the said contract." In our view, recovery, if any, "under the said contract" must be based on the terms and provisions thereof.

The Board of Review, in accordance with Teer's contention, did not relate its decision to Teer's right, if any, to recover "under the said contract." It made no distinction between the work covered originally by the contract and the extra (remedial) work performed by Teer. It devised a formula covering Teer's entire operations (without regard to contract provisions) which, in its judgment, would give Teer an "appropriate financial return." In short, it did not exercise the judicial functions and authority vested in it by the statute. Clearly, it did not consider it was required to do so but that its function was comparable to that ordinarily performed by a board of arbitration.

It appearing upon the face of the record that the Board of Review acted under misapprehension of the applicable law, Judge Martin, based on the Highway Commission's exceptions, should have vacated

all findings of fact, conclusions and the decision and remanded the proceeding to the Board of Review for further hearing and consideration in a manner consistent with applicable legal principles as stated herein.

As noted in our preliminary statement, when the Board of Review convened March 27, 1963, the Highway Commission moved to dismiss Teer's claim. Its motion(s) was based on the contention that the statute (former G.S. 136-29) waived immunity only in respect of a claim to recover under a valid contract, and that the claim on which this proceeding is based (submitted by Teer on November 4, 1961) is not such a claim. The Board of Review overruled the Highway Commission's said motion(s) and Judge Martin overruled the Highway Commission's exceptions to said rulings.

If technical rules as to pleadings were applicable, there would be much force in the Highway Commission's said contention. However, Teer submitted its claim for additional compensation in apt time ("within sixty days from the time of receiving his final estimate"); and the Chairman of the Highway Commission, referring to the claim so filed, referred specifically to the procedure authorized by (former) G.S. 136-29 as the appropriate procedure for determination of Teer's claim. The statute contained no provision as to pleadings. It provided simply for the filing of a claim.

Under the circumstances, we are of opinion, and so hold, that Teer, in further hearings before the Board of Review, should be permitted to offer evidence tending to establish the amount, if any, to which it is entitled for work done and materials furnished in categories set forth in its claim of November 4, 1961. Even so, recovery, if any, must be within the terms and framework of the provisions of the contract of July 8, 1958 and not otherwise. Questions analogous to nonsuit will be for consideration (initially by the Board of Review) after Teer has had opportunity to offer such evidence.

It is noted that the decision of the Board of Review, as appears from the excerpt quoted in our preliminary statement, is not related to or in accord with the claim submitted by Teer on November 4, 1961.

It is noted further: The Highway Commission challenges the decision of the Board of Review on the ground that Mr. Dopler, the appointee of Teer, had certain conversations with and made certain inquiries of representatives of Teer when the Board of Review was not in session. We have reviewed the record fully bearing upon this matter. Originally, it appears, Mr. Dopler was under the impression it was appropriate for members of the Board to make any investigation or inquiry that might be of assistance in rendering a decision they deemed fair and equitable. After the matter was called to his attention, he

limited his consideration to evidence offered before the Board of Review. In short, the evidence in the record before us is not deemed sufficient to disqualify Mr. Dopler from further service as a member of the Board of Review.

The foregoing applies to matters involved in what the Board of Review referred to as "General Award to the Teer Company," that is, questions raised by the Highway Commission's appeal.

With reference to Teer's appeal, we confine consideration to Teer's exception to the portion of Judge Martin's judgment which provided "that the Nello L. Teer Company have and recover nothing of the State Highway Commission for the benefit of the Brown Paving Company on the matters arising in this proceeding."

The record discloses that Teer attached to its letter of July 27, 1959 to Brown Paving Company a purchase order for "157,700 Tons Bituminous Concrete Base Course (Modified)" and for "51,800 Tons Bituminous Concrete Surface Course"; and, when accepted by Brown Paving Company, unit prices of "$5.12 per ton" and "$5.87 per ton," respectively, were stipulated. It was also provided: "All asphaltic concrete stone requirements will be purchased from Nello L. Teer Company at the following rates: . . ." It is noted that this order, which refers specifically to "Project 8.13438; I-95-2(10)55," covers the two biggest items of Teer's contract of July 8, 1958 with the Highway Commission. The evidence is unclear as to Teer's settlement with Brown Paving Company. Nothing indicates Brown Paving Company on November 4, 1961 or thereafter had asserted a claim against Teer in connection with work on the subject project. For reasons stated below, further discussion of references in the record to Brown Paving Company is unnecessary.

The final estimate ($19,916.86) was paid by the Highway Commission to Teer on September 13, 1961. The statute fixes "sixty days from the time of receiving his final estimate" as the time within which the contractor may file a claim for additional compensation under the contract. Assuming, without deciding, Teer's right under said statute to assert a claim "for the benefit of the Brown Paving Company," we are of opinion, and so hold, that the statute required that such claim be asserted (filed) within sixty days from September 13, 1961. Consequently, apart from the merits, if any, of Brown Paving Company's claim, and apart from the question as to Teer's right, if any, to assert (file) such claim, any claim Brown Paving Company may have had is barred for failure to assert (file) it within the time prescribed by statute. While the judgment of Judge Martin is vacated, as stated below, his ruling that Teer was not entitled to recover "for the benefit of the Brown Paving Company" was correct.

In this Court, Teer moved to dismiss the Highway Commission's statement of case on appeal for failure to comply with Rule 19(4), Rules of Practice in the Supreme Court, 254 N.C. 783, 800. The Highway Commission set out the major portion of the evidence offered by Teer under direct examination in question and answer form. It asserts this was necessary to show its objections to this evidence as the basis for its contention there was no *competent* evidence to support designated findings of fact, citing *Maley v. Furniture Co.,* 214 N.C. 589, 200 S.E. 438. Since decision on this appeal is based on matters appearing on the face of the record, determination as to whether the Highway Commission's said statement of case on appeal violates Rule 19(4) is academic. However, its status has been considered in taxing the costs incident to this appeal.

The costs on this appeal are taxed as follows: Each party shall pay the entire costs of its briefs. Each party shall pay the entire costs of printing its statement of case on appeal. All other costs incident to the appeal shall be taxed one-half against Teer and one-half against the Highway Commission.

For the reasons stated, the judgment of Judge Martin is vacated and the cause is remanded to the superior court for the entry of a judgment (1) vacating the decision of the Board of Review, including all findings and conclusions stated therein, and (2) remanding the proceeding to the Board of Review for further proceedings not inconsistent with this opinion.

Error and remanded.

RUBIE L. SMITH, SURVIVING WIDOW OF ALMON F. SMITH, PETITIONER v. FREDERICK D. SMITH AND E. V. WILKINS, TRUSTEE, RESPONDENTS.

(Filed 23 July, 1965.)

1. Wills § 60—

Litigation which "affects the share of the surviving spouse" within the purview of G.S. 29-30(c)(4) extending the time for the surviving spouse to make an election to take a life estate in one-third of intestate's lands, is litigation which substantially and materially affects the choice, and is not limited to litigation which directly affects the title to that part of the estate belonging to the surviving spouse under the Intestate Succession Act.

2. Same—

Intestate died leaving a widow and one child by a former marriage. The widow's stepson deeded his one-half interest in the estate to her and, prior

to the expiration of the time for the widow to make an election under G.S. 29-30(c)(3), instituted suit to set aside his deed for fraud. *Held:* The suit to set aside the deed was litigation affecting the widow's share of the estate within the purview of G.S. 29-30(c)(4), since until the termination of such suit the widow could not judge whether it would be to her advantage to make the election.

3. Same—

Intestate died leaving a widow and one child by a former marriage who executed a deed of trust on his one-half interest in the lands of the estate and then conveyed to the widow the same realty in fee. *Held:* The widow's suit to enjoin foreclosure of the deed of trust on the grounds that she individually was the sole owner of the land and that the land was subject to sale to make assets to pay debts of the estate is litigation affecting the widow's share in the estate within the purview of G.S. 29-30(c)(4), and such suit remained pending until dismissed, notwithstanding that prior to dismissal final judgment was rendered in another action setting aside the deed to the widow for fraud.

4. Actions § 12—

An action properly instituted remains pending until there is a judgment making a final disposition of it.

5. Wills § 60—

If the surviving widow, while litigation affecting her share of the estate is pending, files a sufficient written request with the clerk for an order fixing a time under which she may make an election under G.S. 29-30(c)(4), such proceeding is instituted within the time limited, and delay of the clerk in entering the order fixing the time within which such election might be filed may not be imputed to the widow.

6. Estoppel § 4—

Equitable estoppel is to be applied as a means of preventing injustice and must be based on the conduct of the party to be estopped which the other party relies upon and is led thereby to change his position to his disadvantage.

7. Judgments § 30—

The sole child of intestate was successful in obtaining judgment setting aside his deed to the widow for his intestate share. *Held:* The right of the widow to elect to take a life estate in the homeplace instead of the fee in one-half of the lands of the estate was not in issue in the action to set aside the deed, and the judgment therein does not constitute an estoppel.

8. Registration § 5—

Deed of the son of intestate to his step-mother for his interest in the lands of the estate was set aside for fraud. On the day judgment was rendered setting aside his deed, he executed deed of trust to his attorneys. *Held:* The attorneys, having knowledge of the respective rights of the parties, may not claim as innocent purchasers for value so as to preclude the widow from thereafter electing to take a life estate in the homeplace under G.S. 29-30(c).

9. Estoppel § 1—

The widow entitled to one-half interest in the lands of the estate accepted deed to the other one-half interest from intestate's sole child. The deed was thereafter set aside for fraud. *Held:* The acceptance of the deed does not estop the widow from thereafter electing to take a life estate in the homeplace in lieu of her one-half interest, since her right to make the election is founded on statute and is *aliunde* the deed.

10. Estoppel § 3— Widow's claim of title under void deed from heir held not to estop her from electing to take a life estate in homeplace.

The widow of intestate procured deed from intestate's son for his one-half interest in the lands of the estate and asserted sole ownership of the lands in the son's action to set aside his deed for fraud and in her action to enjoin foreclosure of a deed of trust executed by him to a third person. Final judgment was rendered setting aside the deed for fraud. *Held:* The widow is not estopped from asserting her right to elect, under G.S. 29-30, to take a life estate in the homeplace, since she failed to maintain her position in the prior actions, since her prior assertion of sole ownership, while different, is not necessarily inconsistent with an election, since the questions involved are not the same, and since the son and the parties claiming under his deed of trust did not alter their positions and thus render it unjust for her to assert her right of election.

11. Dower § 1; Curtesy—

Dower and curtesy have been abolished, but G.S. 29-30 preserves to a surviving spouse the benefits of dower and curtesy.

12. Wills § 60—

The right of the surviving spouse to take a life estate under G.S. 29-30 may be precluded by equitable estoppel only if all of the elements of estoppel *in pais* are present.

13. Same—

The fact that a widow accepts from testator's sole child a deed to his one-half interest in the lands of the estate does not constitute an election to take under G.S. 29-14 and does not preclude her upon the later rendition of judgment setting aside the deed to her for fraud from electing under G.S. 29-30 to take a life estate in the homeplace.

14. Estoppel § 4—

The fact that the widow procures by fraud the execution of a deed from intestate's son for his one-half interest in the lands of the estate does not estop her, after the rendition of judgment setting aside the deed, from asserting her election under G.S. 29-30 to take a life estate in the homeplace, since the position of the parties with respect to the title to the lands was not altered by reason of the fraud, and since it would be unjust to deprive the widow of her right to contest the action for fraud unless she gave up her rights under G.S. 29-30 in the event that action was terminated against her.

SHARP, J., dissenting.

BOBBITT, J., joins in dissent.

APPEAL by respondents from *Hobgood, J.*, November 1964 Session of JOHNSTON.

Lyon & Lyon for Petitioner.
L. Austin Stevens and Wiley Narron for Respondents.

MOORE, J. This is a special proceeding, instituted pursuant to G.S. 29-30 whereby petitioner elects to take life interest, in lieu of her share in fee, in the homeplace of which her husband died seized.

Almon F. Smith died intestate on 11 December 1961, survived by his widow Rubie L. Smith, petitioner herein, and a son Frederick D. Smith, one of the respondents herein. Frederick is the child of deceased by a former wife and is stepson of Rubie. Rubie qualified as administratrix of Almon's estate on 22 December 1961.

On 19 January 1962 Frederick executed and delivered to Wiley Narron, Trustee, a deed of trust conveying his one-half undivided interest in the lands of which his father died seized, to secure the payment of a note of even date payable to L. Austin Stevens on 1 January 1963.

On 28 April 1962 Frederick executed and delivered to Rubie a warranty deed conveying the same realty to her in fee simple. Included in this conveyance was his one-half undivided interest in the homeplace where Rubie resided with Almon until the time of his death, and where she has resided at all times since. On 9 May 1962 Frederick instituted an action to set aside the deed for fraud in its procurement, alleging he signed the deed while intoxicated thinking it was a note for money advanced, the consideration was inadequate, and Rubie had taken advantage of her fiduciary relationship as administratrix. There was a verdict in favor of Frederick and judgment was entered on 4 April 1963 declaring the deed void. Rubie appealed to Supreme Court.

In the meantime, early in February 1963, Narron, Trustee, because of default of Frederick, undertook to foreclose the deed of trust and advertised the property for sale — sale date 4 March 1963. On the date of the sale, Rubie, individually and as administratrix, filed a suit to enjoin the foreclosure, alleging that she, individually, was the sole owner of the property and it was subject to sale to make assets to pay the debts of her late husband and Frederick had warranted against encumbrances. This sale was conducted, but on 8 March 1963 a temporary restraining order was issued enjoining consummation of the sale. On 19 March 1963 the restraining order was continued to the final hearing.

The Supreme Court affirmed the judgment of the superior court in the fraud case, and the opinion (*Smith v. Smith,* 261 N.C. 278, 134 S.E. 2d 331) was certified to the clerk of superior court on 7 February 1964.

On 4 May 1964 Rubie filed with the clerk of superior court an *ex parte* petition and notice of election to take life interest in the homeplace, in lieu of one-half interest in all of the lands of her late husband in fee. She requested the clerk to make an order permitting the election to be filed in accordance with G.S. 29-30. The clerk declined to enter any order until Frederick and other interested persons were made parties, served with summons and had opportunity to answer.

On 27 June 1964 a judgment was entered in the suit to enjoin the foreclosure of the deed of trust, dismissing same on the ground that the opinion in *Smith v. Smith, supra,* rendered the action moot.

On 6 August 1964, by consent of interested parties, the clerk entered an order in the election proceeding, permitting Rubie to file her notice of election as provided by G.S. 29-30 and have summons issued for interested parties, without prejudice to interested parties in their right to contest the election. Summons was issued 20 August 1964 and the same, together with petition and notice of election, was served on respondents herein, Frederick D. Smith and E. V. Wilkins, Trustee. Respondents filed separate answers contesting petitioner's right to make an election and alleging that petitioner was guilty of laches, had previously made an election to take under the provisions of G.S. 29-14 one-half of the real estate in fee, and was estopped by her fraud in the procurement of the deed from Frederick which had been set aside. Wilkins, named trustee in a second deed of trust from Frederick D. Smith dated 4 April 1963, also defended on the further ground that the holders of the note secured by the deed of trust "are innocent purchasers for value without any notice of defects." The proceeding was transferred to the civil issues docket for the judge to pass on the pleas in bar.

The matter was heard by Hobgood, J., and judgment was filed on 18 November 1964. The judgment finds as a fact that at the time the petition and notice of election were filed on 4 May 1964 there were actions pending in the superior court of Johnston County which "did involve the share and interest of the said Rubie L. Smith . . . in said lands," and that the "request and petition for the written order was made within apt and reasonable time within the meaning of the statute." The pleas in bar were overruled. It was decreed that petitioner "is hereby permitted and allowed to file her notice of election to take a life estate . . . as of May 4, 1964," and that the proceedings are remanded to the clerk for an order carrying out this judg-

ment "and for orders allotting the life estate of the surviving spouse as provided by G.S. 29-30." Respondents appeal from this judgment.

If an intestate is survived by only one child, the share of the surviving spouse shall be one-half of the net estate, including a one-half interest in the real property. G.S. 29-14. The surviving spouse may elect and is entitled to take, in lieu of the share provided in G.S. 29-14, a life estate in one-third in value of all of the real estate of which the deceased spouse died seized. The life estate shall, at the election of the surviving spouse, include a life estate in the usual dwelling house occupied by the surviving spouse at the time of the death of the deceased spouse, *together with the outbuildings, improvements and easements* thereunto belonging and appertaining, and lands upon which they are situated and reasonably necessary for the use and enjoyment thereof — this, regardless of the value and despite the fact that the life estate might exceed the said one-third value limitation. G.S. 29-30 (a), (b). Such election shall be made within one month after the expiration of the time limited for filing claims against the estate, if letters of administration are issued within twelve months after the date of the deceased spouse. G.S. 29-30 (c)(3). But, if litigation that affects the share of the surviving spouse in the estate is pending, then within such reasonable time as may be allowed by written order of the clerk of the superior court. G.S. 29-30(c)(4).

Rubie qualified as administratrix on 22 December 1961. Claims against the estate were required to be filed within six months after the publication of the first notice to creditors. G.S. 28-113. Rubie had one month after the expiration of said six-months period within which to elect to take a life estate in lieu of a share in fee, G.S. 29-30(c)(3), unless litigation affecting her share in the estate was pending, G.S. 29-30(c)(4). If no such litigation was pending, she was required to make her election on or before 22 July 1962 or a date shortly thereafter, depending on the date of the first publication of notice to creditors. She first filed her notice of election and request for an order permitting filing of same on 4 May 1964. At the expiration of the time limited in G.S. 29-30(c)(3) the action, instituted by Frederick to set aside the deed he had made to her, was pending; this action was instituted 9 May 1962 and was terminated 7 February 1964. Her first notice of election was filed 87 days after termination of that action. At the time of filing said first notice of election, Rubie's suit to restrain foreclosure of deed of trust by Narron, Trustee, was pending; it had been instituted 4 March 1963 and was terminated 29 June 1964.

The first question for decision is whether the action to set aside the deed for fraud and the suit to restrain the foreclosure of the deed of trust were litigation *affecting the share* of the surviving spouse. Re-

spondents say they were not. They point to G.S. 29-2(6) which defines "share" and states: " 'Share', when used to describe the share of a net estate or property which any person is entitled to take, includes . . . the undivided fractional interest in the real property, which the person is entitled to take." They insist, therefore, that Rubie's share was a one-half interest in the real estate in fee, and that the litigation did not affect her share as thus defined, but affected only the one-half interest of Frederick, his share. It is true that the *subject* of both actions was Frederick's one-half interest.

We do not agree that the expression, "litigation that affects the share of the surviving spouse in the estate" is to be so narrowly limited and applied. The definition contained in G.S. 29-2(6) is intended to apply when "share" is used "to describe the share *of a net estate or property,*" *i.e.,* a share under G.S. 29-14, which "includes . . . the undivided fractional interest in the real property." As used in G.S. 29-30(c)(4), "share" means such share in the estate (not necessarily the net estate or property) as the surviving spouse shall be entitled to take by any provision of the act. The very reason for granting the surviving spouse an election or choice is to prevent such spouse from being rendered penniless and turned out of doors by reason of a small net estate or an insolvent estate. The life estate, which the surviving spouse elects, is not subject to the payment of the ordinary debts due from the estate of the deceased spouse. G.S. 29-30(g). Certainly a surviving spouse would elect to take a life estate where it would require a sale of all of the property of deceased's estate to pay the debts. The reason different time limits are fixed for making the election, under the different circumstances, as set out in G.S. 29-30(c)(1), (2), (3) and (4), is to give the surviving spouse ample opportunity to make a decision as to which choice is most beneficial. And the subject of litigation would rarely be the deciding factor in making the choice. For example, if there is a disputed claim which, if allowed, would render the estate insolvent or nearly so, and which, if disallowed, would leave a large net estate, the outcome of the suit on the claim would *affect* the share of the surviving spouse and might well determine the matter of election, though the subject of the litigation is a mere debt and not the title to land. Any litigation which may substantially and materially *affect* the choice the surviving spouse is entitled to make "affects the share of the surviving spouse in the estate."

It is a fair inference that Rubie did not wish to accept one-half interest in a house and be subjected to possible annoyance, interference and unreasonable demands of a cotenant, and run the risk of a sale for partition — particularly in view of the fact that it had been and was her home. The alternative was to take a life estate in the whole

of the homeplace. Before the time limited for making an election had expired, she acquired by deed the outstanding one-half interest of her cotenant. It seemed that there was no longer any need for electing to take a life estate. Before the time limit for making an election, as provided in G.S. 29-30(c)(3), had expired, Frederick instituted litigation to set aside the deed to the interest he had conveyed, on the ground that she had defrauded him. Should Rubie prevail there would be no reason for an election; should Frederick prevail she would be relegated to the position she occupied before the deed was passed. The outcome of the litigation would *affect* her choice or election, *i.e.*, her share of the estate. The pendency of the litigation extended her time for making the election.

Before execution of the deed to Rubie, Frederick had executed and delivered to Narron, Trustee, a deed of trust conveying as security his interest in all of the lands of the estate, including his interest in the homeplace. While the fraud action was still pending, Narron, Trustee, undertook to foreclose the deed of trust under the power of sale therein. Rubie was confronted with these possibilities: A sale under foreclosure of a one-half interest in the homeplace, if she was not the successful bidder, would place her in the same position she occupied before she acquired the deed from Frederick; to permit the property to be sold without objection might amount to a waiver of her right of election in the event she did not prevail in the fraud suit (19 Am. Jur., Estoppel, § 91, pp. 747-749); and her deed from Frederick contained a warranty against encumbrances and a sale might cut off possibility of recovery on the warranty. She instituted a suit to enjoin the sale, asserted her ownership of the property, pointed out her right as administratrix of the estate to resort to the property as an asset of the estate for payment of debts, and tendered payment of the indebtedness secured by the deed of trust upon condition the debt and security be assigned to her to protect her rights under the warranty. Narron, Trustee, and his codefendant, answering, declined the tender and refused to assign the indebtedness and deed of trust. Whether the sale was consummated and, if so, whether she was the successful bidder at the sale, would affect her decision in the matter of making an election under G.S. 29-30, and therefore would affect her ultimate share in the estate. It is suggested that the decision in *Smith v. Smith,* 261 N.C. 278, was to all intents and purposes decisive of the issues in the foreclosure suit. Conceding the point, without decision thereon, the fact remains that there was no final judgment in the foreclosure suit until 27 June 1964. It was pending on 4 May 1964 when petitioner filed her notice of election and request for a written order by the clerk. "Pendency" is "the

state of an action . . . after it has been begun, and before the final disposition of it." Black's Law Dictionary (4th Ed.).

The second question presented by the appeal is: Was this proceeding commenced within apt and reasonable time within the meaning of G.S. 29-30(c)(4)?

The court below adjudged that the proceeding is deemed to have been commenced on 4 May 1964 when petitioner filed *ex parte* her notice of election and requested the clerk to make a proper written order. If this ruling is correct, the proceeding was commenced while litigation affecting the share of petitioner was pending, and no question of laches or of "apt and reasonable time" is involved.

G.S. 29-30(c)(4) provides that if litigation is pending, which affects the share of the surviving spouse, the surviving spouse shall make the election "within such reasonable time as may be allowed by written order of the clerk of the superior court." The statute contemplates that the outcome of such litigation may well determine whether the surviving spouse will elect to take a life estate. Therefore it authorizes the surviving spouse, if such litigation is pending, to request of the clerk a written order allowing a reasonable time within which the notice of election and the proceedings pursuant thereto may be filed and instituted. Upon such request, it becomes the duty of the clerk forthwith to make a written order fixing a time within which an election may be filed in accordance with the last paragraph (and subsections thereof) of G.S. 29-30(c). The time allowed should be such time after the termination of the pending litigation as to the clerk, in the exercise of his sound discretion, seems reasonable under the circumstances. The written order is only ministerial, it merely fixes the time limit, it is not an adjudication of any issues or questions of law which may be raised in the proceeding between the surviving spouse and other interested parties. The order fixing the time limit must be made forthwith upon the *ex parte* request of the surviving spouse. The rights of the parties are determined after notice of election has been filed pursuant to the order fixing the time limit, summons served and the pleadings are in. The proceedings determining the rights of the parties and allotting the life estate are in accordance with the rules of procedure relating to partition of lands as far as practicable. G.S. 29-30(f).

The first petition, filed on 4 May 1964, though inartfully drawn, was sufficient to require the clerk to make the written order fixing time limit. The clerk did not enter such order until 8 August 1964. The most likely explanation of the delay is that the procedure is new and the clerk did not fully understand the nature and extent of his duty. In any event the delay may not be imputed to petitioner. The written order was made in compliance with petitioner's written request which

was filed in apt time. The clerk's order provided that the petitioner "shall have twenty days from this date (8 August 1964) within which to issue summons in her Notice of Election with this Court in the form of a special proceeding, as set forth in G.S. 29-30." Petitioner complied with the order by filing notice of election and issuing summons on 20 August 1964. Summons was served 25 August 1964. All of the steps taken were essential and each was a component of one general proceeding — the proceeding was instituted on 4 May 1964, when the petition and request for a written order was filed, and it was filed in apt time. Certainly the twenty days allowed by the clerk for filing notice of election and issuing of summons was not unreasonable. The objection that the proceeding was not commenced in "apt and reasonable time" is overruled.

The final question presented is whether petitioner is estopped by her conduct and other circumstances to make an election. Appellants contend that petitioner is estopped by judgment, deed, prior inconsistent election, prior inconsistent position, and fraud.

". . . estoppel is a bar which precludes a person from denying or asserting anything to the contrary of that which has, in contemplation of law, been established as the truth, either by acts of judicial or legislative officers or by his own deed or representations, either express or implied." 19 Am. Jur., Estoppel, § 2, p. 601. ". . . equitable estoppel (which is estoppel *in pais)*, grows out of such conduct of a party as absolutely precludes him, both at law and in equity, from asserting rights which might have otherwise existed, either of property of contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of contract or of remedy." *Boddie v. Bond,* 154 N.C. 359, 70 S.E. 824. ". . . estoppels should be resorted to solely as a means of preventing injustice and should not be permitted to defeat the administration of the law or to extend beyond the requirements of the transactions in which they originate. . . . the doctrine of estoppel when misapplied may be a most effective weapon for the accomplishment of injustice." 19 Am. Jur., § 4, p. 602. The conduct of the party claiming an estoppel must be considered no less than the conduct of the party sought to be estopped. *Peek v. Trust Co.,* 242 N.C. 1, 86 S.E. 2d 745.

Appellants say, "We have litigated title to this property in the case of *Smith v. Smith,* 261 N.C. 278, and the matters therein adjudicated concerning title, we submit is *res judicata* between the parties." The case referred to is the action instituted by Frederick to set aside his deed to Rubie on the ground of fraud. Before the execution of the deed Frederick owned a one-half undivided interest in the homeplace in fee

subject to the right of Rubie to elect to take a life estate therein and relinquish to him the remainder in fee of her undivided one-half interest after the life estate. The action resulted in a judgment in his favor cancelling the deed. This relegated the parties to the position occupied by them prior to the execution of the deed. This was all he asked for in the case and was all the court could grant him. Rubie's right of election was not involved and could not have been — her right of election could only be determined under the proceeding outlined in G.S. 29-30. The applicable rule is succinctly stated in *Gillam v. Edmonson,* 154 N.C. 127, 69 S.E. 924, thus: "The doctrine is that an estoppel of record will bind parties and privies as to matters in issue between them, but it does not conclude as to matters not involved in the issue, nor when they are claimed in a different right." Wilkins, Trustee, is in no better position on this point than Frederick. He alleges that the owners of the note secured by the deed of trust are *bona fide* purchasers without notice. The facts are otherwise. It is admitted in appellants' brief that the holders of the note are the attorneys who have represented Frederick in all of the litigation between him and Rubie, including the instant case. The deed of trust was executed the very day the superior court rendered judgment in favor of Frederick in the fraud case, and while the case was pending in Supreme Court. Certainly there are no persons who were in a better position to know and understand the respective relations and rights of the parties and the effect of a judgment in favor of Frederick than these attorneys. See *High v. Pearce,* 220 N.C. 266, 17 S.E. 2d 108; *Boddie v. Bond, supra.*

Appellants further contend that "the petitioner claimed the full fee in the property under the fraudulent deed, and . . . that she is now estopped to deny that Frederick D. Smith owns the one-half interest he purportedly conveyed to her." They contend that Rubie's claim of title, in the fraud and foreclosure suits, under the deed from Frederick, though the deed was later judicially declared to be void, now estops her in this proceeding to elect to take a life estate. They cite in support of this proposition, *Fisher v. Toxoway Co.,* 165 N.C. 663, 81 S.E. 925; *Monds v. Lumber Co.,* 131 N.C. 20, 42 S.E. 334. These cases do not stand for the proposition asserted; they hold that the grantee in a deed or other instrument, who claims title *solely* by reason of the deed or instrument, is estopped to deny the title of the grantor in an action between grantee and grantor, or his assigns, involving the title, though the deed or instrument be void. "While no one can impugn the title under which he holds, as a general rule, an estoppel by deed runs against the grantor rather than the grantee, the exceptions to such rule being limited in scope. Thus, it is generally held that, by accepting a deed, a grantee is not estopped to deny the grantor's title or seizin, ex-

cept when the grantee relies on grantor's conveyance to establish his own claim." 31 C.J.S., Estoppel, § 15, pp. 302, 303. A person cannot claim under a title and deny it at the same time. Petitioner is not now claiming title under the deed from Frederick. She is claiming a life estate by virtue of a right given her by statute; her right came into existence the very moment of her husband's death, and the rights of Frederick and those claiming under him were and are subject to this right of petitioner. She is not estopped by deed.

In both the fraud case and foreclosure case, petitioner in her pleadings asserted sole ownership of the homeplace in fee. Appellants say that this now estops her from claiming a life estate therein. They say that she may not change her position and make a claim contrary to that asserted in the earlier actions. ". . . the following have been enumerated as essentials to the establishment of an estoppel under the rule that a position taken in an earlier action estops the one taking such position from assuming an inconsistent position in a later action: (1) The inconsistent position first asserted must have been successfully sustained; (2) a judgment must have been rendered; (3) the positions must be clearly inconsistent; (4) the parties and questions must be the same; (5) the party claiming estoppel must have been misled and have changed his position; (6) it must appear unjust to one party to permit the other to change." 19 Am. Jur., Estoppel, § 73, pp. 709, 710. Only one of these essentials is clearly present in the instant case — rendition of judgment. Petitioner did not sustain her position in the earlier cases; the positions taken by her are different but not necessarily inconsistent; the questions involved are not the same; respondents have not been misled and have not changed their positions; it is not unjust for petitioner to claim what the statute gives her, especially when she now claims only an estate for life and renounces all rights to any of the property in fee, ceding the remainder interest in fee to Frederick and his assigns in all of the property. In *High v. Pearce, supra,* a widow defended an ejectment suit, instituted by the purchaser at a foreclosure sale, on the ground that her dower had been allotted in the homeplace. It was held that she was not, after an unfavorable judgment in the ejectment suit, estopped to move to set aside the allotment of dower (which was in law void), and to have her dower properly allotted. In *Etheridge v. Davis,* 111 N.C. 293, 16 S.E. 232, defendant denied that he owned certain logs, but the verdict established his ownership. It was held that he was not estopped by his pleading, denying ownership, to claim his personal property exemption in the logs when plaintiff sought to take them under execution. See also *Boddie v. Bond, supra.* Petitioner is not estopped by her pleadings in

the fraud and foreclosure cases to elect to take a life estate in the instant proceeding.

Respondents further contend that, by accepting the deed from Frederick and asserting title in fee in the fraud and foreclosure cases, petitioner made an election to take in accordance with G.S. 29-14 and is estopped to revoke the election and take pursuant to G.S. 29-30. Dower, as such, has been abolished in North Carolina, but G.S. 29-30 preserves to a surviving spouse the benefits of the former rights of dower and curtesy. "There is no doubt that a widow may estop herself from asserting her right of dower by acts *in pais.* On the question whether such an estoppel exists, the rule is that if the claimant by her actions or statements led others to believe that she did not claim dower and to act on that belief, so that the subsequent allowance of dower would operate as a virtual fraud upon them, she will be barred. . . . The rule is equally well settled, however, that in order to bring about this result of equitable estoppel all of the elements of estoppel must be proved." 17A Am. Jur., Dower, § 109, p. 378; *Waggoner v. Waggoner*, 246 N.C. 210, 97 S.E. 2d 887. Upon the death of the intestate, title to his lands immediately vested in Rubie and Frederick under G.S. 29-14, each taking a one-half undivided interest in fee. There is never a gap or *hiatus* in title to land; title always vests in someone. Title to one-half vested in Rubie by operation of law, and not by any election on her part. By statute, G.S. 29-30, she was entitled to take a life estate in lieu of the one-half interest by taking positive action within the time limited by the statute. She has in apt time elected to take the life estate. Petitioner has not by instrument, word or deed waived or released her right to do so. Petitioner had not been called upon, prior to 4 May 1964, to make her election; nothing had occurred, and no one was in position, to require her to make the election prior to that date. She is claiming only what the statute gives her. She has done nothing to lead respondents to believe that she would not claim the life estate or to act on any such belief, and they have not changed their position with respect to the title at any time by reason of anything she has said or done concerning an election.

Finally, it is said that petitioner is estopped by her fraud in procuring the deed from Frederick. Her fraud in that transaction has been established. *Smith v. Smith, supra.* A person may be estopped by fraudulent conduct. Indeed, estoppel *in pais* arises only by reason of fraud, undue advantage, overreaching or unconscionable conduct. *In re Will of Covington*, 252 N.C. 546, 114 S.E. 2d 257; *Hawkins v. Finance Corp.*, 238 N.C. 174, 77 S.E. 2d 669; *Peek v. Trust Co., supra.* Petitioner is not now claiming any benefit or advantage springing from her fraud. That matter has been laid to rest, and she has paid the penalty. Re-

spondents have at no time relied on her fraud, except that Frederick made the deed by reason thereof. The deed has been set aside, and the positions of the respondents have not changed with respect to the title to land *by reason of the fraud,* except that they were improved by the judgments in favor of respondents. The fact that the litigation arose by reason of her fraud and the litigation extended her time to make the election, does not create an estoppel. A court of equity could not in fairness say to a widow: "An action, involving the property of the estate, has been instituted charging you with fraud. You may not stand on your right to contest this action and at the same time reserve your right to take under G.S. 29-30 in the event you lose. You must make a positive election as if no action were pending. You may elect to take a life estate, and surrender your right to vindicate your position in the fraud suit and your right to take whatever you may gain therein, or you may decline to so elect and take your chances in the fraud suit." Such rule might well be a vehicle of injustice. Petitioner's right under G.S. 29-30 is not derived from and has no relation to petitioner's deed transaction with Frederick. Dower was a favorite of the law. *Pridgen v. Pridgen,* 190 N.C. 102, 129 S.E. 419. Dower was an elongation of the husband's estate, and the widow held in *priority* with the heirs and those claiming under them. *Forbes v. Long,* 184 N.C. 38, 113 S.E. 575. The courts are no less concerned with the rights of a surviving spouse under G.S. 29-30.

The judgment below is
Affirmed.

SHARP, J., dissenting. G.S. 29-30(b) permits the widow of an intestate who is survived by only one child and no other lineal descendants to take, in lieu of her one-half share of his real estate in fee, G.S. 29-14(1), a life estate in one-third in value of the real estate, including a life estate in the dwelling, regardless of its value, which she occupied at the time of intestate's death. Such an election is, however, subject to the condition that she make it "within one month after the expiration of the time fixed for the filing of a dissent," G.S. 29-30 (c)(1), unless "litigation that affects the share of the surviving spouse in the estate is pending." G.S. 29-30(c)(4). If such litigation is pending, the election shall be made "within such reasonable time as may be allowed by written order of the clerk of the superior court." *Ibid.*

The majority concede that, unless litigation affecting her share in her husband's estate was pending, petitioner was required "to make her election (to take a life estate) on or before July 22, 1962 or a date shortly thereafter, depending on the date of the first publication of notice to creditors." She did not attempt to make the election in ques-

tion until May 4, 1964. Notwithstanding, the majority would permit her to elect, on the premise that litigation affecting her share in the estate was pending.

Intestate died December 11, 1961. Petitioner was appointed his administratrix December 22, 1961. On April 28, 1962, intestate's son, respondent Smith, conveyed to petitioner his one-half interest in the dwelling she was occupying at the time of her husband's death. *Prima facie,* she then owned the fee in the whole of this property. Ten days later, however, respondent instituted an action against petitioner to set this deed aside for her fraud in procuring it. On April 4, 1963, the deed was set aside. This, then, is the litigation which the majority say affected the widow's *share in the estate.* How can it be said that it affected her share *in the husband's estate* when, no matter how the fraud action terminated, she still retained the share she acquired from her intestate husband as his widow, a fee simple in one-half of the dwelling in controversy? If she should lose, the title to the realty remained as it had been transmitted to both beneficiaries by the death of the decedent. If she should win, in addition to the one-half she acquired through her husband, she had the son's share, *from the son.* The market value of the property was likewise unaffected; it remained the same, whether it was owned by two persons or by one. In no wise did this litigation affect the share which the widow derived from the husband's estate; it affected only the share of her stepson, the other beneficiary.

The majority opinion states that "any litigation which may substantially and materially affect the choice the surviving spouse is entitled to make affects the share of the surviving spouse in the estate." With this statement I would agree — provided the reference is confined to litigation growing out of transactions by the decedent in his lifetime or connected with the proper administration of his estate. Clearly a contested mortgage, a disputed account, or a pending tort action might affect the net value of the husband's estate and thereby affect the widow's election and her share in the estate within the meaning of G.S. 29-30, but not so a fraud action which arose after decedent's death as the result of the widow's efforts to acquire the share of another beneficiary of the estate. Suppose, instead of an action between the widow and the son involving the validity of his deed to her, the action had been between the son and his prior grantee in a mortgage deed and had involved the validity of the mortgage. Under the majority's rule, even that action would have extended the widow's time to make an election. Thus, the heirs might be left for years in a state of uncertainty as to when they would come into possession of their shares in the realty. Certainly the litigation with her stepson materially affected her finan-

cial interests and her *claim* to the whole property, but it did not affect the share she took, as his surviving spouse, in her deceased husband's realty, which share was a one-half interest in fee in the property now in dispute. To toll the statute while she attempted to secure the other half by fraud, with no penalty for failure, would put a premium on fraud. It is true that *favorabilia in lege sunt fiscus, dos, vita, libertas,* but surely the law will not permit even a widow to have her cake and eat it, too, under such circumstances. There is no reason to fear that the interpretation of G.S. 29-30(c)(4) for which I contend will become "a vehicle of injustice" to any widow who is not a tort-feasor.

It may be conceded, without in the least weakening the thesis of this dissent, that the evidence in respondent's action to set aside the deed made out a minimal case of fraud. Nevertheless, upon that evidence the jury found that petitioner had fraudulently secured the deed from her alcoholic stepson while acting as the administratrix of his father's (her husband's) estate. This Court, in an opinion to which there were no dissents, affirmed the judgment of the Superior Court setting the deed aside. *Smith v. Smith,* 261 N.C. 278, 134 S.E. 2d 331. The humanitarian urge to take care of widows is always strong, and the facts in this case graphically illustrate the possible disadvantages of a tenancy in common. Yet fraud is not an acceptable means of ridding oneself of the annoyance, interference, and unreasonable demands of a co-tenant nor of the risk of partition. Surely it is not for this Court, who did not see or hear the witnesses, to substitute our judgment for that of the jury in a case which we have heretofore affirmed on appeal. To do so would merely add another hard case to the quicksands of the law.

In this case petitioner simply failed to make her election to take a life estate within the time required by law. She was not, in my opinion, protected by G.S. 29-30(c)(4), which has no application to litigation resulting solely from the acts of one or more of the beneficiaries in dealing with their individual shares after the decedent's death. I therefore vote to reverse the order from which the appeal is taken.

BOBBITT, J., joins in dissent.

FREDERICK D. SMITH, PETITIONER v. RUBIE L. SMITH, RESPONDENT.

(Filed 23 July, 1965.)

APPEAL by petitioner from *Hobgood, J.*, November 1964 Session of JOHNSTON.

This proceeding was begun in May 1964. Plaintiff, alleging co-tenancy with defendant, prayed for a sale for partition of a lot in Selma, the property involved in *Smith v. Smith*, 261 N.C. 278, 134 S.E. 2d 331.

Defendant is the widow of Almon F. Smith, who owned the lot at his death. Petitioner is the son of Almon Smith. Prior to the institution of this proceeding, and subsequent to the decision in *Smith v. Smith, supra,* defendant filed with the Clerk of the Superior Court of Johnston County notice of her election to take an estate for her life in the land here in question, as permitted by G.S. 29-30. Based on her election, she denied co-tenancy as alleged by the petitioner.

In October 1964, petitioner filed a motion praying for the appointment of a receiver, *pendente lite.* As a basis for his motion, he alleged defendant had sole possession, having ousted him. He asserted defendant, because of the delay in making an election, had lost the right to take an estate for life under G.S. 29-30.

The motion for the appointment of a receiver was heard in November 1964, at the same time a hearing was had on the son's challenge to the widow's right to take an estate for her life. The court denied the motion for the appointment of a receiver, and sustained the widow's right to make an election and take an estate in the dwelling for her life.

L. Austin Stevens; Wiley Narron for petitioner appellant.
Lyon & Lyon for respondent appellee.

PER CURIAM. We have today sustained the ruling that the widow had not lost the right of election given by G.S. 29-30. *Smith v. Smith, ante,* 18. Defendant's election to take an estate for her life has terminated the co-tenancy which would otherwise exist. The parties are not co-tenants, but tenants for life and in remainder, respectively.

Whether a receiver should have been appointed, *pendente lite,* was a matter resting in the sound discretion of Judge Hobgood. No abuse of discretion is shown. The question is now moot.

Affirmed.

STATE HIGHWAY COMMISSION v. THE GREENSBORO CITY BOARD OF EDUCATION; GREENSBORO HIGH SCHOOL STADIUM CORPORATION.

(Filed 23 July, 1965.)

1. **Highways § 1—**

The State Highway Commission is an agency of the State created for the purpose of constructing, developing and maintaining a statewide system of highways, G.S. 136.1, and in exercising the power of eminent domain conferred by statute upon it, it is virtually the sovereign State itself and is not a municipality within the meaning of constitutional limitations.

2. **Schools § 4—**

A municipal board of education created by virtue of G.S. 115-27 is an administrative agency of the State with power to sue and be sued as authorized by statute and with power to condemn land for school purposes. G.S. 115-125.

3. **Eminent Domain § 1—**

The power of eminent domain is an inherent power of a sovereign state, and the power of the state to condemn property for a public purpose is limited only by the constitutional requirement that just compensation be paid for land appropriated.

4. **Same—**

The general rule that property already devoted to a public use by an agency having the right of eminent domain may not be condemned by another agency does not apply when the condemnor is the sovereign itself.

5. **Same—**

Where an unchallenged finding of fact is to the effect that the Highway Commission was seeking to condemn property of a school administrative unit for controlled-access facilities for a limited-access highway, *held,* the State Highway Commission is given specific authority to condemn both private and public property for controlled-access facilities, G.S. 136-89.49(2), and in condemning such facility acts virtually for the State itself, and therefore is not subject to the general rule and may condemn such property notwithstanding the property is devoted to a public use by an agency itself having the power of eminent domain.

6. **Pleadings § 29—**

The issues in an action arise upon the pleadings in the case.

7. **Administrative Law § 3—**

The courts will not ordinarily interfere with the exercise of a discretionary power by an administrative agency unless the decision of the agency is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion.

8. **Eminent Domain § 1; Highways § 1—**

The State Highway Commission is vested with broad discretionary authority in the performance of its statutory duties, and where in the exercise of such discretion it has determined the route of a limited-access high-

way so as to require it to condemn access facilities over land owned by a municipal board of education, its selection of such route cannot be enjoined on the ground that the Commission acted unreasonably and without justification when there is neither allegation nor evidence that the Commission acted arbitrarily or capriciously, or in a manner constituting an abuse of discretion.

APPEAL by plaintiff from *Gambill, J.*, 1 February 1965 Civil Session of GUILFORD, Greensboro Division.

The State Highway Commission commenced this civil action on 8 September 1964, under G.S. Chapter 136, Article 9, by the filing of a complaint, a declaration of taking, and notice of deposit, along with a deposit of $17,850 as just compensation for said taking, to condemn 3.83 acres in fee simple for a right of way of State Highway Project 8.15395, 0.35 of an acre for construction and drainage easements for said project, and 0.02 of an acre for a temporary detour easement for said project from a 129.19-acre tract of land owned by the Greensboro City Board of Education. A small part of this 129.19-acre tract, none of which part is sought to be condemned by plaintiff, was leased by the City Board of Education to the Greensboro High School Stadium Corporation, which has filed no answer.

City Board of Education filed an answer in which it denied that the General Assembly had vested plaintiff with the power of eminent domain to condemn any of the 129.19-acre tract of land owned by it. As a first affirmative defense, it alleges that it is a body corporate existing by virtue of G.S. Chapter 115, and is the governing body of the Greensboro City Administrative Unit, and as such operates the public schools within the Greensboro City Administrative Unit, and plaintiff "has no specific legislative authorization, nor any legislative authorization of unmistakable intent to condemn land owned" by it. As a second affirmative defense, it alleges that the part of its lands plaintiff seeks to condemn "is in actual public use for school purposes, or is now, or may hereafter become, necessary and vital for the operation" of Brooks Elementary School, Kiser Junior High School, and Grimsley Senior High School, which three schools have at present about 3,500 pupils, and plaintiff cannot condemn this land. As a counterclaim it alleges that plaintiff's threatened condemnation will, unless enjoined, cause it immediate and irreparable damage for which it has no adequate remedy at law. It prays that plaintiff's action be dismissed, and that plaintiff be permanently enjoined from condemning or attempting to condemn any part of its land.

Plaintiff filed a reply and a further reply alleging its action is to establish a "controlled-access facility," G.S. 136-89.52, and it had, by virtue of the provisions of G.S. 136-89.52, legislative authority to con-

demn the City Board of Education's land for such purpose, and further alleging that its project is so designed and established as not to interfere with the City Board of Education's access, private or public, to and from the remaining school property, and its project is so designed and established as to facilitate travel and traffic to and from the remaining school property.

On 21 December 1964 Gwyn, J., issued a temporary injunction restraining plaintiff from entering on the land to construct its highway project, pending a final hearing.

On 1 February 1965, pursuant to the provisions of G.S. 136-108, a hearing was had by Gambill, J., to determine all issues raised by the pleadings other than the issue of damages. Judge Gambill heard evidence offered by the State Highway Commission and by the City Board of Education. This is a summary of his findings of fact, except when quoted:

The City Board of Education owns a 129-acre tract of land situate in the city of Greensboro. This tract of land is bounded on the east by Westover Terrace, on the southwest by Benjamin Boulevard, on the west by a golf course, and on the north by land owned by Starmount Company and the city of Greensboro. On this tract of land are three schools, which comprise a part of the school system of the city of Greensboro operated by the City Board of Education. Brooks Elementary School is situate on its northeast corner and faces Westover Terrace. Grimsley Senior High School is situate south of Brooks Elementary School and faces Westover Terrace. Kiser Junior High School is situate on its southwest corner and faces Benjamin Boulevard. The present enrollment in these three schools is about 3,500 students. Parking areas and athletic fields are located on this tract of land. The State Highway Commission claims it has condemned an area of this 129-acre tract of land along its northern line 2,239.09 feet in length and 60 to 316 feet in width. The purpose of the condemnation is "for the purpose of constructing thereon a part of West Wendover Avenue in connection with the State Highway Commission Project No. 8.15395. West Wendover Avenue at the place where the State Highway Commission plans to have it cross over the property of The Greensboro City Board of Education will be a limited access highway consisting of four traffic lanes, two for traffic traveling east and two for traffic traveling west with ramps at Westover Terrace and Benjamin Boulevard."

Between Brooks Elementary School and the northern property line of the 129-acre tract of land there is a playground area for this school and a private access road which runs west from Westover Terrace a distance of more than 450 feet. This private access road is used for the

purposes of loading and unloading students at Brooks Elementary School, ranging in age from 6 to 12 years, by bus and private car, and of delivering supplies to the school. In the event the condemnation here is consummated, it will be necessary to change the loading and unloading of students at Brooks Elementary School to a parking lot south of this school which serves Grimsley Senior High School. The playground area near Brooks Elementary School is used daily by the students at this school for outdoor physical education classes.

Students at Brooks Elementary School and at Kiser Junior High School use other portions of the property sought to be condemned here for collection of specimens for science exhibits in connection with science and biology classes, and it could be used for a cross-country course. It is reasonably probable that the property sought to be condemned here will be needed for additional parking areas and playgrounds in connection with the anticipated future growth of the enrollment in the three schools situate on the 129-acre tract of land.

The State Highway Commission's project can be accomplished by moving it northwardly and off the property owned by the City Board of Education onto vacant property owned by Starmount Company and the city of Greensboro, without materially affecting the project. The State Highway Commission in seeking to condemn property of the City Board of Education has acted without specific authority, or without authority by implication, and its action is "unreasonable and without justification."

Based upon his findings of fact, Judge Gambill made the following conclusions of law:

> "1. The State Highway Commission, plaintiff herein, and The Greensboro City Board of Education, one of the defendants herein, are each agencies of the State of North Carolina.
>
> "2. The State Highway Commission has the right, generally, under eminent domain to condemn property owned by The Greensboro City Board of Education.
>
> "3. Under the facts of this case, however, the State Highway Commission does not have authority, either specifically or by implication, to condemn and take for highway purposes the property of The Greensboro City Board of Education which it attempted to condemn and take in this action for that such action is unreasonable and without justification."

Based upon his findings of fact and his conclusions of law, Judge Gambill entered a judgment adjudging and decreeing that the State Highway Commission by this action has acquired no land owned by

the City Board of Education, that its action is dismissed, that its deposit be returned to it, and that it is enjoined permanently from entering upon the property of the City Board of Education in connection with its project No. 8.15395.

From the judgment, the State Highway Commission appeals to the Supreme Court.

Attorney General Thomas Wade Bruton, Assistant Attorney General Harrison Lewis, and Trial Attorney Andrew McDaniel, and Associate Attorneys Stern, Rendleman & Clark for plaintiff appellant.

Moseley & Edwards by Robert F. Moseley and Cooke & Cooke by William Owen Cooke for defendant Greensboro City Board of Education.

PARKER, J. At the outset it should be understood that we are not here passing upon the right of *a municipal corporation* to exercise the power of eminent domain to condemn property already devoted to a public use, as was the case in *R. R. v. Greensboro,* 247 N.C. 321, 101 S.E. 2d 347; *Goldsboro v. R. R.,* 246 N.C. 101, 97 S.E. 2d 486; *Yadkin County v. High Point,* 217 N.C. 462, 8 S.E. 2d 470, cases relied on by the City Board of Education. "The State is not a municipality within the meaning of the Constitution." *Bridges v. Charlotte,* 221 N.C. 472, 20 S.E. 2d 825.

The State Highway Commission is a State agency or instrumentality, and as such exercises various administrative and governmental functions. G.S. 136-1; *Smith v. Highway Commission,* 257 N.C. 410, 126 S.E. 2d 87; *Equipment Co. v. Hertz Corp.,* 256 N.C. 277, 123 S.E. 2d 802; *Carpenter v. R. R.,* 184 N.C. 400, 114 S.E. 693. Its powers and duties are set forth in G.S. Chapter 136, Article 2. It is the State agency created for the purpose of constructing, developing, and maintaining "a state-wide system of roads and highways commensurate with the needs of the State as a whole * * *." G.S. 136-1.

The Greensboro City Board of Education was created and exists by virtue of G.S. Chapter 115, Article 5. By virtue of G.S. 115-27, it is a body corporate, and has the authority to purchase and hold real and personal property for school purposes, and to prosecute and defend suits against it. It has the authority, by virtue of G.S. 115-125, to acquire by condemnation sites for school houses or other school facilities.

The statutory machinery for the operation of the public school system of this State is codified in Chapter 115 of the General Statutes. G.S. 115-8 sets up two coordinate classes of local administrative units: (1) county units, and (2) city administrative units. This statute provides "The governing board of a city administrative unit is 'the . . .

city board of education,'" with its executive officer designated a "superintendent," and its executive head a "principal." This Court said in *Smith v. Hefner,* 235 N.C. 1, 68 S.E. 2d 783 (1951): "By application of this principle, a subordinate division of the state, or agency exercising statutory governmental functions like a city administrative school unit, may be sued only when and as authorized by statute." In the *Burlington City Board of Education v. Allen,* 243 N.C. 520, 91 S.E. 2d 180 (1956), the Court said: "The petitioner is an administrative agency of the government."

This is a description of the 129.19 acres of land owned by the City Board of Education as set forth in plaintiff's declaration of taking:

> "Those certain lands lying and being in Morehead Township, Guilford County, North Carolina, and being that parcel of land conveyed to Greater Greensboro School District by deed dated November 5, 1927, recorded in Book 571, page 359; deed to Board of Education of Greater Greensboro School District dated July 11, 1928, recorded in Book 606, page 557; and deed to The Greensboro City Board of Education dated November 16, 1960, recorded in Book 1923, page 406, Guilford County Public Registry; said referenced descriptions being specifically incorporated herein."

We are concerned in the instant case with the power of the sovereign State of North Carolina, acting by the State Highway Commission, its State agency and in essence the sovereign State of North Carolina itself, and in behalf of the State and for its immediate sovereign purposes, to condemn, under the provisions of G.S. 136-89.52, for a "controlled-access facility" to a controlled-access State highway project property owned by the Greensboro City Board of Education and devoted to a public use, which City Board of Education is "a subordinate division of the state, or agency exercising statutory governmental functions," and vested with the power of eminent domain. This is not an action, if there ever should be such, in which the State Highway Commission seeks to acquire by condemnation property owned by, and with title in, the State of North Carolina, and already devoted to a public use.

The power of eminent domain is one of the essential attributes of a sovereign state, and an inherent power necessary to the very existence of government. It comes into being *eo instante* with the establishment of government, and continues as long as the government endures. It does not require recognition by constitutional provision, but exists in absolute and unlimited form, and under this doctrine, therefore, positive assertion of limitations upon the power is required. Such assertion of limitations is a limitation upon a sovereign state's such inherent

power. *Redevelopment Commission v. Hagins,* 258 N.C. 220, 128 S.E. 2d 391, and authorities there cited; *Burlington City Board of Education v. Allen, supra;* 1 Nichols on Eminent Domain, rev. 3d Ed., 1.14[2], p. 18. In *Burlington City Board of Education v. Allen,* it is said: "It is the exclusive prerogative of the Legislature — limited only by our organic law which requires that just compensation shall be paid for the land so appropriated — to prescribe the method of taking land for the public use."

The following finding of fact made by Judge Gambill is not challenged by the parties: "West Wendover Avenue at the place where the State Highway Commission plans to have it cross over the property of The Greensboro City Board of Education will be a limited access highway consisting of four traffic lanes, two for traffic traveling east and two for traffic traveling west with ramps at Westover Terrace and Benjamin Boulevard." This unchallenged finding of fact shows that the State Highway Commission is seeking to condemn land of the City Board of Education for "controlled-access facilities" within the intent and meaning of G.S. 136-89.49(2), which reads: "'Controlled-access facility' means a State Highway, or section of State highway, especially designed for through traffic, and over, from or to which highway owners or occupants of abutting property, or others, shall have only a controlled right or easement of access." *Barnes v. Highway Commission,* 257 N.C. 507, 126 S.E. 2d 732.

G.S. 136-89.49 is codified under G.S. Chapter 136, Article 6D.

G.S. 136-89.52, which is codified under G.S. Chapter 136, Article 6D, reads in relevant part: "For the purposes of this article, the Commission may acquire private *or public property and property rights for controlled-access facilities* and service or frontage roads, including rights of access, air, view and light, by gift, devise, purchase, or condemnation in the same manner as now or hereafter authorized by law to acquire such property or property rights in connection with highways. The property rights acquired under the provisions of this article may be in fee simple or an appropriate easement of right of way in perpetuity." (Emphasis supplied.)

In 1 Nichols on Eminent Domain, rev. 3d Ed., § 2.2, p. 203, it is stated: "In the determination of the question whether or not property already devoted to a public use can be subjected to the process of eminent domain the primary factor to be considered is the character of the condemnor. If the sovereign, such as the state or the United States, on its own behalf and for its own sovereign purposes, seeks to acquire such property by eminent domain, the character of the *'res'* as public property, generally, has no inhibiting influence upon the exercise of the power."

Likewise it is stated in 29A C.J.S., Eminent Domain, § 74, pp. 326-28: "As a general rule, property already devoted to a public use cannot be taken for another public use which will totally destroy or materially impair or interfere with the former use, unless the intention of the legislature that it should be so taken has been manifested in express terms or by necessary implication, mere general authority to exercise the power of eminent domain being in such case insufficient; and this is so whether the property was acquired by condemnation or by purchase. The rule also applies to property about to be lawfully appropriated, although the appropriation is not complete. However, the general rule does not ordinarily apply where the power of eminent domain is being exercised by the sovereign itself, such as the state or federal government, for its immediate purposes, rather than by a public service corporation or a municipality." To the same effect, Jahr, Eminent Domain, § 20.

The factual situation in the case of *State of Louisiana through the Department of Highways v. Ouachita Parish School Board,* 242 La. 682, 138 So. 2d 109, *reh. den.* 2 February 1962, *cert. den.* 370 U.S. 916, 8 L. Ed. 2d 497, is quite similar to the factual situation in the instant case. In that case the proceeding was instituted by the Department of Highways for the expropriation for a controlled-access highway facility of a tract of land owned by the Ouachita Parish School Board, consisting of an entire square in the city of Monroe with buildings and improvements. The tract sought to be expropriated at the time of the suit was being used by the school board in connection with a junior high school with 1200 pupils, and lies in the center of the school facility between the classroom building and the gymnasium. The Supreme Court, after first holding that Parish School Boards in Louisiana are not immune from suit, said:

> "The next question for determination is whether public property devoted to a public use (as here, to a school) and owned by a public corporation (as in this case, the Ouachita Parish School Board), itself vested with the power of expropriation, is subject to expropriation by The Department of Highways, an agency of the state created by the Legislature by Act 4 of 1942, R.S. 48:11 *et seq.,* which also possesses the power of expropriation.
>
> * * *
>
> "In determining whether property already devoted to a public use can be subjected to expropriation, the factor to be considered is the character of the condemnor. If the sovereign on its own behalf seeks to acquire such property by eminent domain, the fact that the land sought to be taken is public property generally

is immaterial. *Ibid* [1 Nichols on Eminent Domain]., Sec. 2.2, pp. 131-132; Jahr, Law of Eminent Domain, sec. 20, p. 37 (1953); *Elberton Southern Ry. Co. v. State Highway Dept.,* 211 Ga. 838, 89 S.E. 2d 645; see *Township of Weehawken v. Erie Railroad Company,* 20 N.J. 572, 120 A. 2d 593.

* * *

"The petition filed by the highway department discloses that it desires to construct in the Parish of Ouachita certain projects, one of which is designated State Project No. 451-06-07, Federal Aid Project No. I-20-3(12)115; that this project is a part of the state highway system as well as a part of the national system of interstate and defense highways; that this project will be 'a *controlled-access facility,* and no person has any right of access to, from or across such facility to or from abutting lands except at the designated points at which access is permitted upon the terms and conditions specified from time to time and upon the service, frontage or access roads provided' (italics ours); that there is included within the right of way for this project the property of the Ouachita Parish School Board which the department seeks to expropriate. Moreover, the resolution of the Board of Highways attached to the department's petition specifically states that the project above designated provides for the construction of what is called a controlled-access facility, and the *ex parte* order of expropriation signed by the trial judge clearly shows that the property being expropriated is acquired for a controlled-access facility.

"In Title 48 of the Louisiana Revised Statutes of 1950, Chapter I styled 'State Department of Highways', Part XIV designated 'Control of Access', Section 301 provides that the highway authorities of the state may establish, maintain, and provide controlled-access facilities for public use, etc. Section 303 [which contains substantially the identical language used in N.C.G.S. 136-89.52] reads in part:

" 'For the purposes of this Part, the highway authorities may acquire private or public property and property rights for controlled-access facilities and service roads, including rights of access, air, view, and light, by donation, purchase, exchange, lease, or expropriation in the same manner as they are now or hereafter may be authorized by law to acquire property or property rights in connection with highways and streets within their respective jurisdictions. They may acquire any use of the property or the full ownership of it. * * *'

> "Thus the Legislature has expressly given the highway department authority to expropriate public property for the purpose for which it here seeks to expropriate the school board's property. Whether the department has been given authority, either expressly or by necessary implication, to expropriate public property for other purposes need not be decided in this suit."

The Court held that the State Highway Department had authority to expropriate a school board's property for the purpose of acquiring land for a controlled-access highway facility, even though the property sought to be condemned was devoted to a public use and even though the school board itself was vested with power of expropriation.

This matter was recently considered in *Riley v. South Carolina State Highway Department,* 238 S.C. 19, 118 S.E. 2d 809 (1961), in which a unanimous Court held that the Highway Department as an agency of the State had the power to condemn for highway purposes a strip of land through certain property in the city of Sumter, which is used as an orphanage for white children, even if it was considered as being devoted to a public use. The respondents did not question the power of the Legislature to authorize the taking of land already applied to one public use and devote it to another, but contended that where such a taking will destroy or materially interfere with the former use, the mere general authority to exercise the power of eminent domain is insufficient, and that such authority must be given by the Legislature in express terms or by necessary implication. The Supreme Court of South Carolina observed that this general rule is well settled, and went on to state: "We do not think the rule relied on by respondents applies to the facts of this case. The condemnation here is by the Highway Department as an agency of the State, in behalf of the State and for its own immediate purpose. The condemnor is, in essence, the sovereign."

In *State of Missouri ex rel. State Highway Commission of Missouri v. Hoester,* Missouri Supreme Court, En Banc, 362 S.W. 2d 519 (1962), *reh. den.* 11 December 1962, the Supreme Court of Missouri held that the State Highway Commission in condemning a right of way for a highway acts for the State and as its *alter ego* so that the taking is by the sovereign, and it has authority to condemn the property of a fire protection district already devoted to a public use. The fire protection district was established by statute, and given authority to exercise the power of eminent domain. The Court said: "Our conclusion is that, since the highways the Commission is authorized to acquire, locate and construct belong to the state and are provided for the use and benefit of all of its citizens, the Commission in condemning right

of way for them acts for the state and as the *alter ego* of the state, so that the taking is by the sovereign."

It was held in *Elberton Southern Ry. Co. v. State Highway Department,* 211 Ga. 838, 89 S.E. 2d 645, 648, *reh. den.* 13 October 1955, that under a general power of condemnation, the Highway Department of Georgia could acquire for public road purposes a part of a railroad right of way and in such condemnation proceedings "where, as here, the State, the sovereign itself, is acting by and through its duly constituted agency, the State Highway Department, it has paramount authority in the matter of taking any property within its boundaries for those public uses to which it may reasonably devote such property, including that which has already been devoted to a different public use."

See also to the same effect: *State v. Superior Court,* 44 Wash. 2d 607, 269 P. 2d 560; *State Highway Commission v. City of Elizabeth,* 102 N.J. Eq. 221, 140 A. 335; *Welch v. City and County of Denver,* 141 Colo. 587, 349 P. 2d 352; *In re Elimination of Highway-Railroad Crossing in Village of Altamont,* 234 App. Div. 129, 254 N.Y.S. 578, 580, and cases cited, appeal dismissed 259 N.Y. 564, 182 N.E. 182; *City of Davenport v. Three-fifths of an Acre of Land,* 252 F. 2d 354; *United States v. Certain Parcels of Land,* D.C. 175 F. Supp. 418.

In *Department of Public Works and Buildings v. Ells,* 23 Ill. 2d 619, 179 N.E. 2d 679 (1962) the Supreme Court of Illinois held that the State Department of Public Works and Buildings had no authority, under its general power of eminent domain, to condemn school district property for highway purposes. The Court stated: "The Department's petition was based on section 4-501 of the Highway Code, which authorizes it to acquire, by purchase or by eminent domain, 'any land, rights, or other property necessary for the construction, maintenance or operation of State highways.' (Ill. Rev. Stat. 1961, chap. 121, par. 4-501)." This case is distinguishable from the instant case, in that the State Highway Commission in the instant case is proceeding under the provisions of G.S. 136-89.52 which gives it express and explicit legislative power and authority to "acquire private or public property and property rights for controlled-access facilities * * * by gift, devise, purchase, or condemnation in the same manner as now or hereafter authorized by law to acquire such property or property rights in connection with highways," and "the property rights acquired under the provisions of this article may be in fee simple or an appropriate easement of right of way in perpetuity."

The case of *Commonwealth v. Massachusetts Turnpike Authority,* 346 Mass. 250, 191 N.E. 2d 481, relied on by City Board of Education, is distinguishable, in that the condemnor is the Massachusetts Turnpike Authority, and not the State of Massachusetts, and it was seeking to

take for highway purposes land belonging to the Commonwealth. The case of *New Jersey Turnpike Authority v. Parsons, Attorney General,* 3 N.J. 235, 69 A. 2d 875, relied on by City Board of Education, is distinguishable, in that the condemnor is the New Jersey Turnpike Authority, and in that case the Court said:

> "Reading the provisions of these two sections together, we do not construe Section 5 (j) as granting any power of general condemnation of property owned or held by the State. In the light of the detailed directions for the acquisition of state property by lease, loan, grant or conveyance contained in Section 14 and the absence of a clear and unambiguous grant of authority to the Turnpike Authority to take state property by condemnation, we cannot properly infer the existence of the power of eminent domain as to state property in the Turnpike Authority."

There is nothing in our Constitution inhibiting the Legislature from granting express and explicit power and authority to the State Highway Commission to condemn for "controlled-access facilities" property owned by City Board of Education and devoted to public use, except that our organic law provides that just compensation shall be paid for property so appropriated. *Burlington City Board of Education v. Allen, supra.* There is an unchallenged finding of fact by Judge Gambill that "West Wendover Avenue at the place where the State Highway Commission plans to have it cross over the property of the Greensboro City Board of Education will be a limited access highway." This finding of fact is supported by evidence offered by the State Highway Commission of its maps and plans and profile of its Project No. 8.15395 showing that it "is a controlled-access project from beginning of the project to Battleground Rd. and from Southern R. R. R/W (Sta. 136+43±) to Summit Ave. with access limited to the Ramps and side streets shown on the plans," and by the resolution of the State Highway Commission directing the acquisition of property by condemnation for the construction of Project No. 8.15395 "in accordance with the preliminary right-of-way plans, together with such control of access as has been hereinabove authorized." Our conclusion is that the General Assembly by virtue of the provisions of G.S. 136-89.52 has granted to the State Highway Commission, acting in behalf of the State of North Carolina and for its sovereign purposes in constructing, developing and maintaining "a state-wide system of roads and highways commensurate with the needs of the State as a whole," express and explicit power and authority in plain and unmistakable words to acquire by condemnation the property owned by the Greensboro City Board of Education for

"controlled-access facilities" which it here seeks to acquire by condemnation to complete its Project No. 8.15395.

Neither party has excepted to or assigned as error Judge Gambill's second conclusion of law reading: "The State Highway Commission has the right, generally, under eminent domain to condemn property owned by the Greensboro City Board of Education." The State Highway Commission here is proceeding under the provisions of G.S. 136-89.52. Judge Gambill's second conclusion of law as to the authority of plaintiff under its general power of eminent domain to condemn property owned by the City Board of Education is irrelevant here, and need not be decided in this case.

The State Highway Commission assigns as error the following, which Judge Gambill designates findings of fact, but which in reality are mixed findings of fact and conclusions of law:

> "XIV. * * * The proposed project of the State Highway Commission can be accomplished even if the proposed right of way is moved northwardly so that all of it is removed from the property of The Greensboro City Board of Education and will not materially affect this project.
>
> * * *
>
> "XVI. In disregarding the necessity of this property for use and the use for which it is now being put by The Greensboro City Board of Education for school purposes when said right of way can be located on other property without materially affecting the proposed project, the State Highway Commission in attempting to take the property of The Greensboro City Board of Education in this action has acted without specific authority or without authority by implication, in that such action is unreasonable and without justification."

These assignments of error are good. In the first place, the City Board of Education's answer does not raise any issue of bad faith or of arbitrary, capricious or fraudulent action on the part of the State Highway Commission, or that the action of the State Highway Commission is unreasonable and without justification. *State v. Superior Court, supra.* "A trial is the examination of the issues joined between the parties, and these issues arise upon the pleadings in the case." 1 McIntosh, N. C. Practice and Procedure, 2d Ed., § 1351. The City Board of Education's defense as alleged in its answer is that the State Highway Commission "has no specific legislative authorization, nor any legislative authorization of unmistakable intent to condemn land owned" by it which "is in actual public use for school purposes, or is

now, or may hereafter become, necessary and vital for the operation" of its schools. Second, there is no evidence in the record to support the challenged part of finding of fact XIV, and there is no evidence in the record to support this part of finding of fact XVI challenged by plaintiff, to wit, "In disregarding the necessity of this property for use and the use for which it is now being put by The Greensboro City Board of Education for school purposes when said right of way can be located on other property without materially affecting the proposed project * * *." It is true, Judge Gambill made the following observations:

> "Now, is it reasonable or necessary that they take part of the school property there in order to build the road when they can build the road on property which is apparently used for nothing but a golf course, and at this point, that is the evidence, and the map would indicate that. Why can't the Highway Commission move that road down about 50 feet and get off this property and this question wouldn't arise as far as the school is concerned? You would run into the question of the Town owning the other property, and it is true it is public property, but it is not being used except for a golf course. Well, we can move our tees very easily on those. We don't necessarily have to have a golf course. That will be the thing I am concerned with."

Judge Gambill's observations are not evidence, and further he did not observe that if the proposed right of way for Project No. 8.15359 is moved off the school property, it would not materially affect the project. Third, it is well-settled law in this State that the State Highway Commission is vested by statute with broad discretionary authority in the performance of its statutory duties, and the court cannot substitute its judgment for that of the State Highway Commission, and control the discretion vested in the State Highway Commission to acquire by condemnation the property here sought to be acquired for "controlled-access facilities," and the exercise by it of such discretionary authority and powers is not subject to judicial review, unless its action here is so clearly unreasonable as to amount to oppressive and manifest abuse, and as to this the City Board of Education's answer raises no issue of oppressive and manifest abuse of its discretion by the State Highway Commission here, and if it did, there is no evidence before us that the action of the State Highway Commission here in respect to City Board of Education's property amounts to an oppressive and manifest abuse of the State Highway Commission's discretion. *Cameron v. Highway Commission,* 188 N.C. 84, 123 S.E. 465; *Road Commission v. Highway Commission,* 185 N.C. 56, 115 S.E. 886. See

Hedrick v. Graham, 245 N.C. 249, 96 S.E. 2d 129, for a brief statement as to the greater safety and convenience for motorists using limited-access highways and limited-access urban highways over using ordinary highways. Fourth, G.S. 136-89.52 grants the State Highway Commission specific authority, as above stated, to acquire by condemnation the school property it seeks here to acquire for "controlled-access facilities."

Plaintiff assigns as error Judge Gambill's finding of fact, which is a conclusion, that "if such construction is started, immediate and irreparable damage and injury will result to the property of the Greensboro City Board of Education for which damage and injury said defendant has no adequate remedy at law." This assignment of error is good.

Plaintiff assigns as error Judge Gambill's conclusion of law No. 3:

> "Under the facts of this case, however, the State Highway Commission does not have authority, either specifically or by implication, to condemn and take for highway purposes the property of The Greensboro City Board of Education which it attempted to condemn and take in this action for that such action is unreasonable and without justification."

For reasons stated above, this assignment of error is good.

Plaintiff assigns as error the judgment adjudging and decreeing that the State Highway Commission by this action has acquired no land owned by the City Board of Education, that its action is dismissed, that its deposit be returned to it, and that it is enjoined permanently from going upon the property of the City Board of Education in connection with its Project No. 8.15395. For reasons above stated, this assignment of error is good.

This action is remanded to the superior court for the entry of a judgment in accordance with this opinion, and in this judgment shall be a provision for the determination of an issue of the damages to be recovered by the City Board of Education for its property taken in this action by the State Highway Commission.

Error and remanded.

FRANK D. BYHAM v. THE NATIONAL CIBO HOUSE CORPORATION.

(Filed 23 July, 1965.)

1. Process § 13— Evidence held sufficient to support finding that the contract between the parties was to be performed in this State.

Evidence to the effect that under the franchise agreement between the resident plaintiff and defendant, a foreign corporation, the resident purchased the right to operate a restaurant bearing the chain trade name in the specified territory in this State, the corporation to select the location, set up the business, establish procedure during the opening week, control policies, maintain general supervision, furnish supplies and equipment, control advertising, inspect the books, etc., *held* sufficient to support a finding of the court that the contract was to be performed in North Carolina within the purview of G.S. 55-145(a)(1), notwithstanding that the goods and supplies were to be shipped to the resident by common carrier from points outside this State.

2. Same—

In determining whether service of process on a foreign corporation by service on the Secretary of State meets the requirements of due process, the ultimate test is not whether the foreign corporation is "doing business" in this State but whether the foreign corporation has minimum contacts in this State so that under the facts and circumstances of the particular case such service does not violate traditional notions of fair play and substantial justice. Factors to be considered in determining the question are listed in the opinion.

3. Same— Evidence held to support conclusion that foreign corporation had contacts in this State in the performance of its business.

The evidence tended to show that a nonresident corporation advertised in a newspaper published in this State for franchise owners for its restaurant chain, that the resident plaintiff answered one of the advertisements, that sequent thereto a nonresident who sold franchises for the corporation on a commission basis, but who had no specific territory and over whom the corporation exercised no control except that of accepting or rejecting franchise contracts at its home office, wrote him on corporation stationery and arranged a meeting at which the resident signed a contract with the nonresident to operate a restaurant in this State under the franchise, which contract was accepted by the corporation at its home office. *Held:* By accepting the franchise agreement, the corporation ratified all acts of the commission agent, and therefore the evidence supports the conclusion that the corporation had contacts within this State sufficient to warrant service of summons under the provisions of G.S. 55-146(a), (b).

4. Same—

In this action by a resident plaintiff against a nonresident corporation to rescind for fraud a contract negotiated and to be performed in this State, the evidence *is held* sufficient to support the conclusion that the corporation had sufficient contacts within this State to support service of summons on it by service on the Secretary of State under G.S. 55-146(a), (b) and that upon the particular facts, service under the statute meets the requirements of fair play and justice within the purview of due process of

law, so that our court acquired *in personam* jurisdiction over the corporation, it being admitted that notice had been given in accordance with the statute.

5. Actions § 8—

When plaintiff alleges all the essential elements of fraud inducing plaintiff to execute the contract in suit, and seeks to rescind the contract for such fraud and to recover the consideration paid by plaintiff, the action arises out of the contract and is not in tort.

APPEAL by defendant from *Braswell, J.*, November 16, 1964, Civil Session of DURHAM.

Jerry L. Jarvis and R. Roy Mitchell, Jr., for Plaintiff.
Hofler, Mount and White, by L. H. Mount and W. O. King for Defendant.

MOORE, J. Appellant questions the validity of the service of summons on defendant, a foreign corporation, by service on the Secretary of State in accordance with the provisions of G.S. 55-146(a), (b), and challenges the constitutionality of G.S. 55-145(a)(1) as applied in this case.

This action was commenced 13 August 1964. The verified complaint alleges in substance these facts: Plaintiff is a resident of North Carolina. Defendant is a Tennessee corporation and is engaged in the selling and maintaining franchises for a chain of food and eating establishments known as "Cibo Houses," and servicing and supervising in part the establishments franchised and put in operation. Defendant solicited by mail and newspaper advertisements franchise owners in North Carolina. In consequence plaintiff contacted defendant relative to a franchise for the Durham, North Carolina, area. On 17 February 1964 plaintiff and defendant entered into a contract in writing whereby plaintiff became owner of such franchise, and plaintiff paid defendant the franchise fee of $2950. Prior to the execution of the contract, defendant, through its agents and through brochures, publications and advertisements, represented to plaintiff that he "could secure a franchise, lease, equip, open and begin operating a 'Cibo House' in the Durham, North Carolina, area for approximately" $5000. After the execution of the contract, plaintiff discovered it would require a minimum of $10,000. The representation was false to the knowledge of defendant and its agents and was made with the intent to deceive plaintiff and induce him to sign the contract. The said representation did in fact deceive plaintiff, and in reliance thereon plaintiff did sign the contract and pay the franchise fee to his hurt and damage. He is entitled

to rescind the contract and recover the sum of $2950 paid defendant. At all of the times referred to in the complaint and at the time of the institution of this action, defendant was transacting business in North Carolina and had not secured a certificate of authority therefor from the Secretary of State. The contract was executed by plaintiff in North Carolina and was to be "partly performed" within the State.

As indicated above, service of summons was had by service on the Secretary of State of North Carolina in accordance with the provisions of G.S. 55-146(a), (b).

Defendant entered a special appearance and moved to quash the service of process and for dismissal of the action on the ground that the court had not acquired jurisdiction of the person of defendant, asserting that the Secretary of State was not a process agent of defendant in North Carolina, defendant not having transacted business in the State, and the purported service of process contravenes the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

The court heard evidence and the arguments of counsel and made the following findings of fact and conclusions:

> "2. The said contract between plaintiff and defendant became binding on both parties as of February 28, 1964, and was to be performed within the State of North Carolina.
>
> "3. The defendant . . . does not hold a Certificate of Authority from the Secretary of State of North Carolina to transact business in this State.
>
> . . . . .
>
> "5. The Superior Court of Durham County acquired jurisdiction over the defendant under the authority of North Carolina General Statutes 55-145(1).
>
> "6. Under the facts before the Court, North Carolina General Statutes 55-145(1) is not offensive to the due process clause of the Constitution of the United States.

The court denied the motion, ruling that jurisdiction of defendant had been acquired. Defendant filed exceptions and appealed.

The appeal raises two questions.

—I—

Did the court err in finding as a fact that the contract was to be performed in North Carolina?

The "Protected Territory Franchise Agreement" was introduced in evidence. It had been signed by the plaintiff and an agent of defend-

ant on 17 February 1964 and "accepted" by defendant at its home office in Memphis, Tennessee, on 28 February 1964. It has a provision that it is effective only when so accepted. It contains, among others, these provisions: The territory covered is Durham, North Carolina, and the life of the franchise is 10 years with the right of renewal for an additional 10-year period upon conditions. Plaintiff is to operate one or more "Cibo Houses" in the territory for sale, at retail, pizza, Italian style foods and related items, and specialize in "carry out" service. The name, style and design of the "houses" outdoor signs, uniforms of waitresses, etc., are to conform to those of other "Cibo Houses" of the Chain, as specified by defendant. Menus and specifications for preparation and service of food, as furnished and changed by defendant from time to time, must be followed exclusively. Only such food ingredients, goods, supplies, chinaware, equipment and fixtures as are approved by defendant are to be used, and these are to be purchased from defendant or sources approved by defendant. Plaintiff is to be given instructions, and may spend a week or more in a training school and in an operating "Cibo House" in preparation for opening and operating such business. After opening, plaintiff is "to provide free on-the-job training to other franchise owners or their employees as requested by" defendant. When plaintiff's "house" is opened defendant is to provide a "staff member" for a week to assist in establishing procedures, and training personnel. Plaintiff is to keep complete and accurate records according to a system devised by defendant, make monthly reports to defendant of gross receipts and financial status, and pay defendant, in addition to the franchise fee and indebtedness for items purchased, 3% of the gross receipts of the business. Defendant is to have the right at any time to examine plaintiff's books and records and to inspect the premises and operations. There are strict provisions in case of any default on the part of plaintiff in the performance of the contract on his part. Plaintiff is to adhere to defendant's advertising policy. Defendant will pay one-half the cost "of any approved co-operative advertising or sales promotion that is deemed advisable and profitable" by the defendant.

Mr. Kimpel, Vice President of defendant, testified "that the food and supplies which were purchased by the franchise operators from defendant . . . were delivered by common carrier; that it was the practice of the defendant . . . to send an employee to assist the purchasers of franchises in establishing a location and to assist them in the operation of the franchise business for the week of the opening; that other aspects of the franchise were performed by the defendant in Memphis, Tennessee.

It is clear that the business to be operated under the franchise agreement was to be operated entirely in Durham, North Carolina. All of the acts and duties of plaintiff were to be performed in Durham. Defendant reserved and retained the right to select the location, set up the business, establish procedures during the opening week, control policy, maintain general supervision throughout the life of the franchise, inspect the books, premises and operations, control all of the forms and details of the business, furnish supplies and equipment, and control advertising. Defendant was to take 3% of the gross receipts, and have exclusive control of the sales to plaintiff of needed goods and supplies. There is ample evidence to support the court's finding that the contract was to be performed in North Carolina. The fact that defendant was to cause goods and supplies to be shipped by common carrier from points outside the State to Durham for use in the business does not fix the place of defendant's performance of the contract at points outside the State. ". . . with respect to contracts for delivery of specific articles, the usual . . . place of business of the obligor is the place of performance, where no place is expressed." 17A C.J.S., Contracts, § 357, p. 358. Furthermore, the contract not only designated the place of performance but limits its performance to the Durham area.

— II —

Upon the facts and circumstances disclosed by the record, does the assumption of *in personam* jurisdiction of corporate defendant by the North Carolina court pursuant to G.S. 55-145(a)(1) offend the Due Process Clause of the Constitution of the United States?

G.S. 55-145(a)(1) — enacted in 1955 — provides: "Every foreign corporation shall be subject to suit in this State, by a resident of this State . . ., whether or not such foreign corporation is transacting or has transacted business in this State and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows: (1) Out of any contract made in this State or to be performed in this State. . . ." It is conceded that plaintiff is a resident of North Carolina and defendant is a foreign corporation.

This is the first case which has reached this Court directly involving G.S. 55-145(a)(1). Former cases involving substituted service of process on foreign corporations have dealt with the question whether there was a showing of *transactions of business* sufficient to subject them to such process and to confer *in personam* jurisdiction on the North Carolina courts. *Equipment Co. v. Equipment Co.*, 263 N.C. 549, 140 S.E. 2d 3; *Farmer v. Ferris*, 260 N.C. 619, 133 S.E. 2d 492; *Reverie Lingerie, Inc. v. McCain*, 258 N.C. 353, 128 S.E. 2d 835; *Bab-*

son v. Clairol, Inc., 256 N.C. 227, 123 S.E. 2d 508, and many others. Defendant urges "that the test must be the same one which has been used all along — Has the corporation had the necessary 'minimum contact' with this State? If it has, it is doing business here. If it has not, it is not doing business here."

Insofar as it is defendant's position that "doing business" is the ultimate test for determining due process in such cases, it is untenable. The controlling authority in this field is found in the decisions of the Supreme Court of the United States. The correct criteria are set out in the landmark case, *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). As stated in *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

> "Since *Pennoyer v. Neff*, 95 U.S. 714, this Court has held that the Due Process Clause of the Fourteenth Amendment places some limit on the power of state courts to enter binding judgments against persons not served with process within their boundaries. But just where this line of limitation falls has been the subject of prolific controversy, particularly with respect to foreign corporations. In a continuing process of evolution this Court accepted and then abandoned 'consent,' 'doing business,' and 'presence' as the standard for measuring the extent of state judicial power over such corporations. See Henderson, the Position of Foreign Corporations in American Constitutional Law, c. V. More recently in *International Shoe Co. v. Washington*, 326 U.S. 310, the Court decided that 'due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "the traditional notions of fair play and substantial justice"' *Id.*, at 316."

"In *McGee* the Court noted the trend of expanding personal jurisdiction over nonresidents. As technological progress has increased the flow of commerce between states, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff*, 95 U.S. 714, to the flexible standard of *International Shoe Co. v. Washington*, 326 U.S. 310. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts." *Hanson v. Denckla*, 357 U.S. 235, 250.

When the activities of the foreign corporation in the forum state have not only been continuous and systematic, but also give rise to the liabilities sued on, the forum state does not violate due process by taking jurisdiction of the suit instituted by a resident of such state, even though no consent to be sued or authorization to an agent to accept service of process has been given. On the other hand, the casual presence of the corporate agent or even his conduct of single or isolated activity in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there. *International Shoe Co. v. Washington, supra.* Between these extremes, "The amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined in each case" by testing the facts and circumstances by the aforementioned rule of "minimum contacts" and "fair play." *Perkins v. Benguet Mining Co.,* 342 U.S. 437 (1952).

"It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. . . . Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to fair and orderly administration of the laws which it was the purpose of the due process clause to insure." *International Shoe Co. v. Washington, supra.*

We list, in the numbered paragraphs following, several factors, some essential and others having weight, to be considered in determining whether the test of "minimum contacts" and "fair play" has been met.

(1). The form of substituted service adopted by the forum state must give reasonable assurance that the notice to defendant will be actual. *International Shoe Co. v. Washington, supra; McGee v. International Life Ins. Co., supra.*

(2). ". . . it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws." *Hanson v. Denckla, supra.* ". . . to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of and are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." *International Shoe Co. v. Washington, supra.*

(3). Consideration should be given to any legitimate interest the state of the forum has in protecting its residents with respect to the activities and contacts of the foreign corporation. *Travelers Health Assn. v. Virginia*, 339 U.S. 432 (1950); *McGee v. International Life Ins. Co., supra.*

(4). Consideration should also be given to the question whether the courts of the forum state are open to the foreign corporation to enforce obligations of residents of such state created by the activities and contacts of the corporation. *Travelers Health Assn. v. Virginia, supra.*

(5). "An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant. . . ." *International Shoe Co. v. Washington, supra.*

(6). Consideration should be given to the question whether the crucial witnesses and material evidence are to be found in the forum state. *McGee v. International Life Ins. Co., supra; Travelers Health Assn. v. Virginia, supra.*

(7). When claims are small or moderate, individual claimants frequently cannot afford the cost of bringing an action in a foreign forum, thus placing the foreign corporation beyond the reach of the claimant. Whether this is the situation in a given case is pertinent. *McGee v. International Life Ins. Co., supra.*

(8). It is sufficient for the purposes of due process if the suit is based on a contract which has substantial connection with the forum state. *Id.*

(9). It is essential to determine the extent to which the legislature of the forum state has given authority to its courts to entertain litigation against foreign corporations. Provisions for making foreign corporations subject to service in the forum state is a matter of legislative discretion, and a failure to provide for such service is not a denial of due process. *Perkins v. Benguet Mining Co., supra.* Courts are recognizing, for the most part, that the statutes reflect on the part of their legislatures a conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due process requirement. *Nixon v. Cohn*, 385 P. 2d 305; *Gavenda Brothers, Inc. v. Elkins Limestone Company*, 116 S.E. 2d 910.

McGee v. International Ins. Co., supra, is a "single transaction" case. A resident of California bought a life insurance policy from an Arizona corporation. Later, defendant, a Texas corporation, assumed the obligations of the Arizona corporation and mailed a reinsurance certificate to insured in California. Insured accepted the policy and paid premiums by mail to defendant's office in Texas. Neither corpora-

tion had ever had any officer or agent in California or done any other business in that state. Plaintiff, beneficiary named in the policy, sent proof of death to defendant, but it refused payment on the ground that insured had committed suicide. Plaintiff instituted action on the policy in California and, pursuant to California statute, served notice by registered mail, and obtained judgment. Plaintiff then sued upon the judgment in Texas. The Texas courts refused to enforce the judgment holding that it was void because the service of process violated the Due Process Clause and the California court acquired no jurisdiction. The Supreme Court of the United States reversed the Texas court, holding that the contract had a substantial connection with California and the substituted service did not violate the due process clause.

A number of states have statutes similar to N.C.G.S. 55-145(a)(1). [In the judgment below the court inadvertently referred to this statute as G.S. 55-145(1)]. These statutes generally provide that where the cause of action arises out of a contract with a foreign corporation, made in the forum state or to be performed in whole or in part in such state, an action *in personam* may be maintained in the forum state, upon substituted service of process. In no instance has such statute been declared unconstitutional. See: *Smyth v. Twin State Improvement Corp.*, 80 A. 2d 664, 25 A.L.R. 2d 1193 (Vt.); *Gavenda Brothers, Inc. v. Elkins Limestone Co., supra* (W. Va.); *State v. Knapp*, 131 S.E. 2d 81 (W. Va.); *Beck v. Spindler*, 99 N.W. 2d 670 (Minn.); *Dahlberg Co. v. Western Hearing Aid Center*, 107 N.W. 2d 381 (Minn.), *cert den.* 366 U.S. 961; *McKanna v. Edgar*, 380 S.W. 2d 889 (Texas). See also *Deveny v. Rheem Manufacturing Company*, 319 F. 2d 124 (C.C., 2C); *Ewing v. Lockheed Aircraft Corp.*, 202 F. Supp. 216 (D.C., Minn. 4D).

In the instant case the parties stipulate that "the mechanics of service and return set forth in subsections (a) and (b) of section 55-146 of the General Statutes of North Carolina were in all respects complied with." Hence, it is conceded that the statute gives reasonable assurance that the notice to defendant will be actual, and in this case was actual.

Defendant is not by nature and intent localized in Tennessee in any sense other than to meet the requirement of the corporation laws that it have a "home" or principal office at some locality. The contract states, "It is understood and agreed by the parties hereto that it is of substantial value and importance to both the National Cibo House and Franchise Owner that a chain of Cibo Houses be established all using the name 'Cibo House'" etc. It is clear that it was the purpose of defendant to extend its business operations to many states. It had contacts with North Carolina. It proposed to extend its chain of franchises

to North Carolina and placed "advertisements in local (North Carolina) newspapers" soliciting franchise owners. Plaintiff answered one of the advertisements. "He met a man in Greensboro (North Carolina) by the name of C. E. Miller, as a result of the advertisement." C. E. Miller had a "flip sheet" which had pictures of "Cibo Houses" and showed how the franchise businesses were operated. C. E. Miller had written plaintiff on stationary which purported to be the National Cibo House Corporation stationary. As a result of the meeting with Miller, plaintiff signed the contract and sent it to the home office at Memphis, Tennessee, for acceptance. After acceptance of the contract by defendant, "a representative of the National Cibo House Corporation came to North Carolina in an endeavor to help him (plaintiff) in establishing a location; . . . the representative took him to High Point, North Carolina, where there was an establishment which purported to be a Cibo House."

Mr. Kimpel, Vice President of defendant, testified that "he was not aware that there were other Cibo House franchises in the State of North Carolina; that he would not testify positively that there was not such franchises." Further: ". . . Mr. Miller who had secured a contract from the plaintiff . . . sold Cibo House franchises strictly on a commission basis and . . . was at liberty to perform these services for as many companies as he chooses. . . . C. E. Miller was not a resident of North Carolina . . . was not assigned a specific territory; nor did the defendant corporation exercise any control over his activities other than accepting or rejecting franchise contracts in Memphis, Tennessee. . . . Mr. Miller had no follow-up duties after the contract had been completed."

Accepting Mr. Kimpel's testimony as true, the fact remains, as far as the present inquiry is concerned, Miller was acting in behalf of defendant in North Carolina in negotiating a contract with plaintiff. It is reasonable to infer that plaintiff's letter to defendant, in response to the advertisement in the local paper, was referred to Miller by defendant. Miller wrote plaintiff on defendant's stationary and arranged the Greensboro meeting. When plaintiff's signature to the contract was obtained, defendant accepted it and thereby accepted the benefits of Miller's activities and ratified them. Miller signed the contract, in the first instance, as agent for defendant. Defendant, as its initial step in performing the contract, sent a representative to North Carolina to assist in procuring a location for plaintiff's "Cibo House." It does not lie in the mouth of defendant to say that it had no contacts with North Carolina. Furthermore, the contract made was to be performed in North Carolina by the establishment of a "House" in Durham to do business exclusively in North Carolina — a business in which the de-

fendant not only had a substantial financial interest, but which would be subject to its general control and policy.

It is true that according to the technical rules of construction, the franchise agreement was a Tennessee contract. The final act necessary to make it a binding obligation was done in Tennessee — the acceptance by defendant at its home office. *Compania de Astral v. Boston Metals Company*, 205 M.D. 237, 107 A. 2d 357, 108 A. 2d 372, 49 A.L.R. 2d 646. However, as we have seen, the negotiations took place in North Carolina, it was to be performed in North Carolina, and defendant undertook to perform in North Carolina.

Defendant purposely availed itself of the privileges of conducting activities in North Carolina, and thus invoked the benefits and protection of its laws. This gave rise to obligations connected with the activities, *i.e.*, that the negotiations be free of fraud or oppression, and that the contract, if valid, be performed in this state according to its terms. North Carolina has a legitimate interest in the establishment and operation of enterprises and trade within its borders and the protection of its residents in the making of contracts with persons and agents who enter the state for that purpose. The courts of the state have been and now are open to defendant for protection of its activities and to enforce the valid obligations which a resident or residents of this state have assumed by reason of defendant's contacts and activities. There is no showing of unusual or harmful inconvenience which would be suffered by defendant in litigating this action in North Carolina. It would appear that it would be a greater inconvenience and hardship for plaintiff to prosecute his action in Tennessee inasmuch as the amount of money involved is relatively small and most of the witnesses and evidence is of necessity in North Carolina. There is almost always some hardship to the party required to litigate away from home. But there is no constitutional requirement that this hardship must invariably be borne by the plaintiff whenever the defendant is a nonresident. *Henry R. Jahn & Son, Inc. v. Superior Court*, 323 P. 2 2d 437.

This action arose out of the contract. The contract is the subject of the action — "the thing in respect to which the plaintiff's right of action is asserted." *Mills v. Cemetery Park Corp.*, 242 N.C. 20, 32, 86 S.E. 2d 893. Fraud is ordinarily a tort. But plaintiff elected not to sue in tort for damages; he elected to sue in equity for rescission of the contract and to recover the amount paid. *Surratt v. Insurance Agency*, 244 N.C. 121, 131, 93 S.E. 2d 72. The validity of the contract is the matter which the complaint seeks to put at issue.

The case of *York Mfg. Co. v. Colley*, 247 U.S. 21, upon which defendant relies is not apposite. Plaintiff, a Pennsylvania corporation, sold to defendants, residents of Texas, machinery for making ice,

shipped the machinery to Texas and sent an engineer to Texas to install the machinery and test its operation. Defendants accepted the machinery but failed to pay the purchase price. Plaintiff filed suit *in Texas,* where defendants resided. The Texas courts dismissed the action on the ground that plaintiff had no standing in the Texas court because it had done business in Texas without having obtained a permit therefor. The Supreme Court of the United States reversed the Texas court, holding that the ruling of that court was repugnant to the *Commerce Clause,* the installation of the machinery was germane to the transaction of interstate business and did not involve the doing of local business. There the foreign corporation was seeking to submit its cause to the jurisdiction of the Texas court; in the instant case the foreign corporation is attempting to avoid the jurisdiction of the North Carolina court.

The contract in question was to be performed in North Carolina and has a substantial connection with the State; defendant had sufficient contacts with the State to satisfy due process requirements; and the court's assumption of *in personam* jurisdiction over defendant in action does not "offend traditional notions of fair play and substantial justice" within the contemplation of the Due Process Clause.

The judgment below is

Affirmed.

ABNEY MILLS, A CORPORATION v. TRI-STATE MOTOR TRANSIT COMPANY, A CORPORATION, AND NORTH CAROLINA NATIONAL BANK, A CORPORATION.

(Filed 23 July, 1965.)

1. Process § 13—

For valid service of process on a foreign corporation by service on the Secretary of State, G.S. 55-146, it is necessary that the foreign corporation must have transacted business in North Carolina and that the cause of action must have arisen out of the transaction of such business here. G.S. 55-144.

2. Same—

The requirement of G.S. 55-144 that a foreign corporation must have transacted business in this State in order to be subject to service by service on the Secretary of State is a liberalization of the requirement of the former statute that it must have been "doing business" here, and the decisions under the former statute are apposite, and transacting business in this State within the meaning of the statute is the transacting here of some

substantial part of the corporate business, and not merely a casual or occasional transaction, each case to be determined upon its particular facts.

3. Same—

Mere ownership of the controlling stock of a domestic corporation by a foreign corporation does not alone constitute transacting business here by the foreign corporation, but when the foreign corporation acquires controlling interest of a domestic corporation and through an officer or officers sent here manages and controls the affairs of the domestic corporation in the pursuit of its business here, the foreign corporation is transacting business here and is subject to the jurisdiction of the courts of this State.

4. Same—

A finding that the evidence failed to show that a foreign corporation was transacting business in the State during a relevant period so as to subject it to the jurisdiction of the courts of this State, *held* not a finding of fact but a conclusion of law. In order to support a conclusion in this regard the court must make specific findings supported by evidence as to the particular activities of the foreign corporation in this State in order that it can be judicially determined whether its activities were substantially continuous and systematic so as to support service on it by service on the Secretary of State. G.S. 55-144.

5. Same—

In an action against a foreign carrier by a nonresident plaintiff for breach of the carrier's contract to purchase the stock of a domestic corporation at a stipulated price, the foreign carrier having sent an officer into this State who temporarily managed the domestic corporation under the provisions of the contract, a finding that the cause alleged in the complaint did not arise out of any business transacted by the carrier in this State is not a finding of fact but a conclusion of law. In order to support a conclusion in this respect the court must find the specific facts in respect to the breach of the contract.

6. Appeal and Error § 55—

Where an order of the court is not supported by determinative findings of fact on the crucial questions presented for decision, the order must be vacated and the cause remanded for findings of fact and the entry of an order based upon such findings and the conclusions made therefrom.

APPEAL by plaintiff from *Walker, S.J.*, 23 November 1964 Civil Session, Schedule "D", of MECKLENBURG.

Civil action by plaintiff, a South Carolina corporation with its principal place of business in that State, to recover damages from defendant Tri-State Motor Transit Company, a Delaware corporation with its principal place of business in Joplin, Missouri, for an alleged breach of its contract to purchase and pay for 35 shares owned by plaintiff of the capital stock of Kilgo Motor Freight, Inc., a North Carolina corporation with its principal place of business in Mecklenburg County, North Carolina, at a price of $1,100 a share, heard upon a motion of Tri-State Motor Transit Company to dismiss the action upon the fol-

lowing grounds: (1) lack of jurisdiction; (2) the action does not arise out of business transacted or activities performed in North Carolina; and (3) the action not arising in North Carolina, and all parties being nonresidents of North Carolina, the maintenance of the action would be contrary to the interests of justice and to the convenience of parties and witnesses.

The parties stipulated that "Tri-State Motor Transit Company received from the Secretary of State, State of North Carolina, by registered mail, copies of the summons, extension of time to file complaint, order for service of complaint, and the complaint." This was pursuant to the provisions of G.S. 55-144 and 55-146. The motion was heard upon oral testimony, depositions, affidavits, and exhibits offered by plaintiff and Tri-State.

Judge Walker entered an order, the relevant parts of which are:

> "And the Court having heard and considered all of the evidence presented, and the arguments and contentions advanced by counsel for the parties, and the Court having found and concluded:
>
> "1. That the defendant, Tri-State Motor Transit Company, is a non-resident of the State of North Carolina, it being a Delaware corporation with its principal office and place of business in the State of Missouri, and has never procured a certificate of authority to transact business in the State of North Carolina;
>
> "2. That the plaintiff is a non-resident of the State of North Carolina, being a corporation organized and existing under the laws of a State other than the State of North Carolina, and having its principal place of business in the State of South Carolina;
>
> "3. That the evidence presented to the Court fails to show that the defendant, Tri-State Motor Transit Company, during any relevant period, engaged in transacting business in the State of North Carolina so as to make it subject to the jurisdiction of the Courts of this State;
>
> "4. That no cause of action stated in the Complaint filed in this case arises out of any business transacted by the defendant, Tri-State Motor Transit Company, in the State of North Carolina;
>
> "5. That the service of process attempted in this case pursuant to the provisions of North Carolina General Statutes, Sections 55-144 and 55-146 was not authorized by the law of this State under the facts shown by the evidence before the Court and accordingly such attempted service is ineffectual, null and void;
>
> "NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Motion to Dismiss filed herein by the defendant, Tri-State

Motor Transit Company, be and the same is hereby granted, and the action is hereby dismissed with the costs to be taxed to the plaintiff."

From the order of dismissal of plaintiff's action, it appeals.

Ervin, Horack, Snepp & McCartha by Frank W. Snepp for plaintiff appellant.

Blakeney, Alexander & Machen by Ernest W. Machen, Jr., for defendant appellee, Tri-State Motor Transit Company.

Of Counsel: Linde, Thomson, Van Dyke, Fairchild & Langworthy for defendant appellee, Tri-State Motor Transit Company.

PARKER, J. Plaintiff requested Judge Walker in writing to make certain findings of fact and conclusions of law. It assigns as error the judge's refusal to make the fifth finding of fact requested by it, which reads:

> "5. On or about September 28, 1960, the defendant, Tri-State Motor Transit Company, through its duly authorized agent, to-wit: its President, assumed complete management and control of Kilgo Motor Freight, Inc., and through its said agent, entered into and remained within the State of North Carolina for this purpose until on or about May 1, 1961, pursuant to the contract referred to, and under authority of the Interstate Commerce Commission. The said defendant continued to exercise complete management and control of Kilgo Motor Freight, Inc. until on or about May 1, 1961, when said defendant withdrew from such management and control, and refused to consummate the stock purchase from the plaintiff and other stockholders of Kilgo pursuant to the said contract."

It also assigns as error the judge's refusal to make the following conclusions of law as requested by it:

> "1. The defendant, Tri-State Motor Transit Company, was transacting business in the State of North Carolina, during the period of September 28, 1960, until on or about May 1, 1961, without first procuring a certificate of authority so to do from the Secretary of State.
>
> "2. The breach of contract alleged by the plaintiff in this action arose out of such business.
>
> "3. The Court has jurisdiction over the person of the defendant, Tri-State Motor Transit Company."

Plaintiff also assigns as errors Judge Walker's third, fourth, and fifth findings and conclusions, and his order dismissing its action, and taxing it with the costs.

Defendant's evidence shows these uncontradicted facts:

Tri-State, a Delaware corporation with its principal place of business in Joplin, Missouri, is a common carrier of freight by motor vehicles with operating rights from the Interstate Commerce Commission through approximately ten central and southwestern states. Its major business is a common carrier of explosives and dangerous items in interstate commerce. It has never been domesticated in North Carolina, and has never obtained authority to do business in this State. It had no direct connection with motor lines in North Carolina, operated no road equipment in this State, and had no employees in this State prior to 1960.

Feeling a need, or at least a desire, for increase of its business, in order to diversify the products it was permitted to haul, and to expand its operations and build up its revenue, it in the spring of 1960 became interested in acquiring control of Kilgo Motor Freight, Inc., a North Carolina corporation with offices in Charlotte, North Carolina, and in Greenville and Greer, South Carolina, which was a common carrier of general commodities by motor vehicles with operating rights from the Interstate Commerce Commission over routes extending from South Carolina to New York, and westward to Pittsburgh, Pennsylvania, and Dayton, Ohio. Kilgo did not operate in any area covered by Tri-State. Their lines did not connect, and there was no traffic flow between them.

Prior to 1960 plaintiff and other persons or corporations in South Carolina acquired controlling interest in Kilgo, their total purchases of Kilgo capital stock having reached 210 shares out of its 368 shares outstanding, or 57% of all its shares outstanding. Mr. Paul L. Andrews of Nashville, Tennessee and of Greenville, South Carolina, president of Kilgo, owned the remaining 43% of all its shares outstanding.

In the spring or early summer of 1960 George F. Boyd, president and general manager of Tri-State, had a conference in Greenville, South Carolina, with Paul L. Andrews, president of Kilgo, in respect to Tri-State's acquisition of a controlling interest in the capital stock of Kilgo. Andrews arranged a series of meetings between Boyd and others representing Tri-State and plaintiff and the other persons or corporations owning 57% of all the Kilgo stock outstanding for the purchase of their controlling stock ownership. On 17 August 1960 Tri-State entered into a contract with Benjamin O. Johnson of Spartanburg, South Carolina, who was acting as attorney for plaintiff and the other persons or corporations owning 57% of all the Kilgo stock outstanding, by the terms

of which the owners of the 57% of all the Kilgo stock outstanding agreed to sell to Tri-State, and Tri-State agreed to purchase from them, their 57% ownership of all stock outstanding of Kilgo at a price of $231,000. This contract provides, *inter alia,* that "all parties of this agreement understand that the purchase herein contemplated is in all respects subject to prior approval by the ICC." It also provides in part: "It is agreed that as soon as the same can reasonably be accomplished the parties will file an appropriate application (or applications) with the ICC (and other governmental agencies having jurisdiction) for authority to consummate the transaction herein proposed and for temporary control pursuant to the management contract made a part hereof." This contract also provides as follows:

> "11. TEMPORARY MANAGEMENT CONTROL: In connection with the application to ICC under Section 210a(b) of the ICC Act as provided under Paragraph 7 above, it is further agreed as follows:
>
> "(a) That for a period of 180 days commencing with approval hereof by the ICC and continuing for such additional periods as said ICC may authorize, Sellers grant to Buyer, and Buyer accepts the management of the operation of Kilgo.
>
> "(b) The authority to so manage Kilgo shall include but not be confined to the payment and collection of accounts, the hiring and firing of employees, the purchase, lease and sale of motor carrier equipment, and the general supervision of Kilgo's business, it being intended that for all practical intent and purposes Buyer shall be substituted for Kilgo's Board of Directors in the management and control of Kilgo's business affairs including the specific right to execute checks, notes and commercial instruments in the name of Kilgo.
>
> "(c) Buyer will arrange for sufficient funds to enable Kilgo to effectively prosecute its business activities in an efficient and profitable manner. Buyer is specifically granted the sole and exclusive right to determine the extent to which it shall trade, sell, purchase and lease equipment as in its opinion is for Kilgo's best interests.
>
> "(d) Buyer agrees that during the period this temporary management control remains effective it will not permit the net deficit of Kilgo to increase by more than $100,000 in excess of the net deficit existing as of the close of business or the date Buyer so assumes management control. In computing any such net deficit of Kilgo, usual and applicable accounting principles and proce-

dures shall be followed. If said net deficit should increase by more than $100,000 and if this agreement shall not be consummated, then said additional deficit over and above said $100,000 as adjusted shall be paid by Buyer to Kilgo.

"(e) It is further agreed that in consideration of the stock purchase hereinbefore set forth, Buyer shall receive no compensation for its services hereunder, except that it may charge to Kilgo the actual out of pocket travel expenses its management may incur in performing their duties in connection with Kilgo."

This contract was signed as follows:

"BY: (s) BENJAMIN O. JOHNSON
Attorney for Sellers.

TRI-STATE MOTOR TRANSIT COMPANY
(Formerly Westport Properties Corporation).

BY: (s) GEORGE F. BOYD
President and Treasurer."

Beneath the signature of George F. Boyd on this contract appears the following:

"I, the undersigned Paul L. Andrews, being the owner of the remaining 158 shares of the outstanding stock of Kilgo Motor Freight, Inc., covered by the foregoing agreement, do hereby consent to and concur in the foregoing agreement.

(s) PAUL L. ANDREWS"

This contract was negotiated, drafted, and executed in Johnson's office in Spartanburg, South Carolina.

In this contract the parties agreed in order to facilitate the transfer of the 210 shares of Kilgo stock owned by plaintiff and the other persons or corporations, designated as the sellers, to Tri-State that an escrow arrangement will be established with the American Commercial Bank of Charlotte, North Carolina, subsequently merged into the North Carolina National Bank, as escrow agent for the parties to the contract. This escrow arrangement provided as follows:

"The Sellers will deposit with the Escrow Agent their certificates for the 210 shares duly endorsed for transfer with necessary stock powers attached. The escrow arrangement shall make provision for delivery of said shares to Buyer on full and final payment of

> the purchase price to the Escrow Agent. The Buyer will forthwith deposit with the Escrow Agent the amount of $25,000 in cash or U. S. Government securities of equal amount having a maturity of not greater than one year from date of this agreement. The Buyer's deposit shall be applied to the payment of the first installment of the purchase price due on the closing date. In event of final denial of approval of this agreement by ICC, then the escrowed deposits shall be returned to the respective parties."

An escrow arrangement as specified in the contract was executed by the parties on the same day the contract was executed by them.

On 25 August 1960 Tri-State filed with the Interstate Commerce Commission, Washington, D. C., an application, under section 5 of the Interstate Commerce Act, for authority to acquire control of Kilgo Motor Freight, Inc., through ownership of capital stock. On the same date Tri-State and Kilgo filed with the Interstate Commerce Commission an application for approval, under section 210 a(b) of the Interstate Commerce Act, of the temporary operation of motor carrier properties sought to be acquired under separately filed application under section 5 of the Interstate Commerce Act.

On 12 September 1960 the Interstate Commerce Commission entered an order granting Tri-State authority "to assume temporary control of Kilgo, through management, for a period not exceeding 180 days, beginning with the date hereof, unless otherwise ordered, at a nominal management fee of $1 * * *."

On 1 February 1961 the Interstate Commerce Commission entered an order granting Tri-State authority to acquire control of Kilgo through purchase of its capital stock upon the terms and conditions agreed upon, and further decreeing that unless the authority herein granted is exercised within 90 days from the date hereof, this order shall be of no further force and effect.

On 28 September 1960 Tri-State sent George F. Boyd, its president and General manager, to North Carolina to take over active management control of Kilgo. From 28 September 1960 until 1 May 1961, Boyd spent the majority of his time either in Charlotte, North Carolina, or in South Carolina, or over the Kilgo operations in trying to assist it in operations. Kilgo had an office in Charlotte. Boyd solicited freight transportation business for Kilgo. He hired J. H. Santeen as general sales manager for Kilgo. He hired Mr. Griggs as assistant manager for Kilgo, fixed his salary, and Griggs worked under his direction. After he took over management control of Kilgo, he negotiated a loan from Farmer and Ochs for Kilgo, and requested a resolution from Kilgo's board of directors approving it, and received it. He bought

several trailers for Kilgo while he was exercising temporary management control, and requested approval by Kilgo's board of directors for such purchase, and received it. He negotiated the renewal of a note upon which Kilgo was liable. While he was in temporary management control of Kilgo, Tri-State loaned Kilgo over $273,000, which Kilgo has never repaid. Boyd made recommendations to Kilgo's board of directors to improve Kilgo's operations, and Kilgo's board acted favorably upon his recommendations. He and Mr. Martin, safety man and personnel man for Kilgo, who worked under his supervision and control, had negotiations with a union representing Kilgo's employees in respect to a modification of the union contract. None of his recommendations to Kilgo's board of directors were turned down by the board when he asked for action, as he recalls. He gave Mr. Willis, an employee of Kilgo, written instructions that a separate account be maintained by Kilgo for taxes, and that moneys deposited in this account should not be used for any other purposes. He hired and set the salaries for a number of Kilgo's employees. Boyd received no compensation from Kilgo. Except for Boyd's activities in respect to Kilgo's operations and management, Tri-State has not had any officer or employee in North Carolina, prior to a day or two before 1 May 1961 as hereinafter set forth.

On Sunday prior to 1 May 1961, Boyd, Mr. Thompson, Tri-State's corporate counsel from Kansas City, Missouri, Mr. Morgan, Tri-State's Commerce Counselor from Oklahoma City, Oklahoma, and a director of Tri-State, whose name does not appear in the record, had a meeting with Benjamin O. Johnson, attorney for the sellers of 57% of all the Kilgo capital stock outstanding, in Charlotte, North Carolina. In this meeting the representatives of Tri-State stated that Tri-State had serious financial difficulties that might prevent consummation of the purchase by it of the control through stock ownership of Kilgo. Johnson said he would confer with his people in South Carolina. The next day in Spartanburg, South Carolina, there was a meeting between Tri-State's representatives, who had met with Johnson in Charlotte, and Johnson and the selling stockholders of Kilgo he represented. In this meeting Tri-State's representatives explored the possibilities of some means whereby assurances would be given by the sellers that they would support Tri-State and Kilgo with freight and help Tri-State overcome its financial troubles in closing the purchase. The selling stockholders of Kilgo gave Tri-State nothing specific in the way of help. Whereupon, by letter dated 2 May 1961 from Oklahoma City, Oklahoma, Tri-State notified Johnson that its available funds were exhausted, and it could not consummate the purchase of the controlling stock of Kilgo, and that it had notified the Interstate Commerce Com-

mission that the purchase will not be consummated, and the temporary management control is terminated.

Subsequent to 1 May 1961 Kilgo was placed or went into receivership.

G.S. 55-144 reads: "Whenever a foreign corporation shall transact business in this State without first procuring a certificate of authority so to do from the Secretary of State * * *, then the Secretary of State shall be an agent of such corporation upon whom any process, notice, or demand in any suit upon a cause of action arising out of such business may be served."

The uncontradicted evidence is that Tri-State is a Delaware corporation, and that it has never procured a certificate of authority from the Secretary of State of North Carolina to transact business in North Carolina. The parties stipulated that service of process was had upon the Secretary of State of North Carolina, as provided by G.S. 55-146. For the service of process in the instant case upon the Secretary of State to be valid and binding upon Tri-State, two things must exist, by reason of the express provisions of G.S. 55-144: (1) Tri-State must have transacted business in North Carolina, and (2) the cause of action here must have arisen out of such business. The provisions of G.S. 55-144 are not available for transitory foreign causes of action. *R. R. v. Hunt & Sons, Inc.*, 260 N.C. 717, 133 S.E. 2d 644.

G.S. 55-144 went into effect 1 July 1957. G.S. 55-38, a comparable statute in effect prior to 1 July 1957, required that a foreign corporation be "doing business in this State," and many of our decisions are under G.S. 55-38. In respect to G.S. 55-38 and G.S. 55-144, the Court said in *Worley's Beverages, Inc. v. Bubble Up Corporation,* 167 F. Supp. 498: "However, it is generally considered that changing the statute from 'doing business' to 'transacting business' only had the effect of liberalizing the statute."

In *Lambert v. Schell,* 235 N.C. 21, 69 S.E. 2d 11 (1952), the Court said: "Doing business in this State means doing some of the things or exercising some of the functions in this State for which the corporation was created. *Ruark v. Trust Co.,* 206 N.C. 564, 174 S.E. 441; *Radio Station v. Eitel-McCullough, supra* [232 N.C. 287, 59 S.E. 2d 779]; *Harrison v. Corley,* 226 N.C. 184 [37 S.E. 2d 489]; and cases cited. And the business done by it here must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction and is, by its duly authorized officers and agents, present within the State. [Citing authority.]"

In *Ruark v. Trust Co.*, 206 N.C. 564, 174 S.E. 441, the Court said: "The expression 'doing business in this state,' as used in C.S. 1137 [later G.S. 55-38], means engaging in, carrying on, or exercising, in this

State, some of the things, or some of the functions, for which the corporation was created."

Ballentine, Law Dictionary, 2d Ed., defines the words "transacting business within the state" as "The transaction within the state of some substantial part of a party's ordinary business, which must be continuous in the sense that it is distinguished from merely casual or occasional transactions, and must be of such a character as will give rise to some form of legal obligations."

What we have quoted above from the *Lambert* and *Ruark* cases as to the meaning of the expression "doing business in this State," as used in G.S. 55-38, is also accurate as to the meaning of "shall transact business in this State," as used in G.S. 55-144. However, it is to be distinctly understood that no all-embracing rule as to what is the meaning of "shall transact business in this State" is here formulated. This question must be determined largely according to the facts of each individual case rather than by the application of fixed, definite, and precise rules. *Harrison v. Corley,* 226 N.C. 184, 37 S.E. 2d 489 (1946).

"'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given." *International Shoe Co. v. Washington,* 326 U.S. 310, 90 L. Ed. 95.

In *Harrison v. Corley, supra,* the Court held that when a foreign corporation accepts the provisions of G.S. 55-38, by engaging in business here without domesticating or appointing a process agent, "it cannot, by the simple expedient of closing shop and departing this jurisdiction, withdraw that assent so as to defeat a suit instituted on a cause of action which arose while it was engaged in business here."

Generally, it has been held or recognized that the mere ownership or control by a foreign corporation through a majority stock ownership of the stock of another corporation which is doing business within a state, either resident or domesticated, does not, in and of itself, constitute doing business within the state by the foreign corporation for the service of process so as to subject it to the state's jurisdiction, where the foreign corporation is not created for the very purpose of holding such stock and the two corporations remain distinct entities. *Steinway v. Majestic Amusement Co.,* 179 F. 2d 681, 18 A.L.R. 2d 179, *cert. den.* 339 U.S. 947, 94 L. Ed. 1362; Annot. 18 A.L.R. 2d 189, II § 3, where many cases are cited; 18 Fletcher, Cyclopedia Corporations, §§ 8721, 8773 and 8774 (perm. Ed. Rev. 1955); 20 C.J.S., Corporations, § 1841; 23 Am. Jur., Foreign Corporations, §§ 374 and 375.

However, where a foreign corporation acquires and holds controlling stock interest in a domestic corporation, and comes into the state where the domestic corporation is created and doing business, and there itself by its officer or officers transacts business of the domestic corporation and manages and controls its internal affairs, then such foreign corporation is doing business within the domestic state and is subject to the jurisdiction of its courts. *Bergold v. Commercial Nat. Underwriters, Inc.*, 61 F. Supp. 639; *Bankers Holding Corp. v. Mayberry*, 161 Wash. 681, 297 P. 740, 75 A.L.R. 1237; 18 Fletcher, Cyclopedia Corporations, § 8721, pp. 493-94, § 8773, p. 821 (Perm. Ed. Rev. 1955); 23 Am. Jur., Foreign Corporations, § 374, p. 362; 30 Mich. Law Review 1114. See *Clover Leaf Freight Lines v. Pacific Coast Wholesalers Ass'n*, 166 F. 2d 626 (7 Cir. 1948); *Groel v. United Electric Co.*, 69 N.J. Eq. 397, 60 A. 822; Annot. 18 A.L.R. 2d § 6, p. 198; 60 Yale Law Journal 908.

In *Bankers Holding Corp. v. Maybury, supra*, the Court said:

> "We do not hold that isolated transactions, whether commercial or otherwise, performed in this state by a foreign corporation constitute doing business within this state. But we do hold that, where a foreign corporation is formed for a particular purpose, to wit, acquiring, owning, and voting a majority of the corporate stock of other banking institutions, and comes into this state and carries out the very purposes and objects for which it was created, it is 'doing business' within this state."

Plaintiff assigns as error Judge Walker's 3rd finding and conclusion "that the evidence presented to the Court fails to show that the defendant, Tri-State Motor Transit Company, during any relevant period, engaged in transacting business in the State of North Carolina so as to make it subject to the jurisdiction of the Courts of this State." This is not a finding of fact, but a pure conclusion of law. Judge Walker should have found as facts from the evidence the authority vested in Tri-State by the contract between the sellers and itself, which was consented to and concurred in by Paul L. Andrews, as to temporary management control of Kilgo by Tri-State, and the authority vested in Tri-State by order of the Interstate Commerce Commission as to temporary control of Kilgo by Tri-State, and what acts Tri-State did when it came into the State by its president and general manager Boyd, pursuant to such authority, and assumed active control and management of Kilgo in North Carolina, so that it can be determined upon the facts found by him whether or not such activities by Tri-State in North Carolina were "substantial," "continuous and systematic," and "regular," as distinguished from "casual," "single" or "isolated acts," and that Tri-

State by such activities was transacting business in this State under the relevant rules of law above stated, and within the intent and meaning of G.S. 55-144.

Plaintiff assigns as error Judge Walker's 4th finding and conclusion "that no cause of action stated in the Complaint filed in this case arises out of any business transacted by the defendant, Tri-State Motor Transit Company, in the State of North Carolina." This is not a finding of fact, but a pure conclusion of law. The written contract is not the cause of action stated in the complaint, but breach in the performance thereof. The judge should have found specifically the facts in respect to the alleged breach of the contract, in order that it can be determined upon the facts found whether or not plaintiff's cause of action arises out of business transacted by Tri-State in North Carolina.

Plaintiff assigns as error his order dismissing its action and taxing it with the costs. Judge Walker's order dismissing plaintiff's action is not supported by determinative findings of fact on the crucial questions presented for decision and it must be vacated, and the cause is remanded for further specific findings of fact, and then for the entry of an order based upon the findings of fact and the conclusions of law made from such findings of fact in accordance with law. *Sizemore v. Maroney*, 263 N.C. 14, 138 S.E. 2d 803, and cases cited.

Error and remanded.

HALLIE N. HATLEY, EXECUTRIX OF CARL ALEXANDRA HATLEY, DECEASED; AND HALLIE N. HATLEY, INDIVIDUALLY v. FRANK SHELTON JOHNSTON.

(Filed 23 July, 1965.)

1. Insurance § 9.1—

The creditor has an insurable interest in the life of the debtor, and as between the creditor and an insured debtor, credit life insurance is collateral security. G.S. 58-195.2.

2. Chattel Mortgages and Conditional Sales § 11.1; Principal and Surety § 10—

Where the chattel mortgagor sells the mortgaged chattel to a purchaser who assumes the mortgage debt and pays installments thereon with the assent of the mortgagee, the purchaser becomes liable on the debt as principal and the original mortgagor becomes a surety, and if the original mortgagor pays the debt he is subrogated to the rights of the mortgagee, even without an assignment.

3. Same; Subrogation—

Plaintiff's evidence tended to show that her testator owned a vehicle subject to a chattel mortgage protected by a policy of credit insurance on his life for which he paid the premiums, that testator sold the vehicle to a purchaser who assumed the debt, and that upon testator's death insured paid to the mortgagee the balance of the mortgage debt. *Held:* Plaintiff's evidence makes out a cause of action against defendant in subrogation to the rights of the mortgagee, since testator was a surety on the debt and payment by insurer amounted to involuntary payment through testator's insurance.

4. Appeal and Error § 59—

A decision of the Supreme Court must be construed in the light of the facts of the case in which it is rendered.

APPEAL by plaintiff from a judgment of compulsory nonsuit entered at the close of her evidence by *McLaughlin, J.,* September 1964 of ROCKINGHAM.

Gwyn & Gwyn by Julius J. Gwyn for plaintiff appellant.
Jordan, Wright, Henson & Nichols by Perry C. Henson for defendant appellee.

PARKER, J. Plaintiff's evidence and the allegations in her complaint admitted to be true in the answer show these facts: She is the widow of Carl Alexandra Hatley who died testate on 18 February 1963. She is sole devisee and legatee of her husband's estate under his will. She instituted this action as executrix of his estate and individually.

For some 30 years she and her husband owned and operated in Rockingham County a business under the name of Hatley Laundry and Dry Cleaning Company. Prior to 25 January 1963 they owned a number of trucks, and employed a number of route drivers to pick up articles to be laundered or dry cleaned, and then returned. Each driver was paid a 21% commission on his route for pickup and delivery.

On 7 February 1962 Carl Alexandra Hatley, hereafter referred to as C. A. Hatley, purchased from Johnson Chevrolet, Inc., a new 1962 model Chevrolet truck for a total time price of $2,887.60. The conditional sale contract, which he executed and delivered to Johnson Chevrolet, Inc., to secure the time payments for the purchase of this truck shows the following:

"Total Time Price (Sum of items 2 and 8)	$2,887.60
1. Cash Sale Delivered Price	2,500.00
2. Total Down Payment Under Installment Sale	550.00
3. Difference Between Items 1 and 2	1,950.00

4a.	Cost of Required Car Insurance	102.00
4b.	Charge for Creditor Insurance on Life of Purchaser	16.88
5.	Other Charges	$...........
6.	Principal Balance (Items 3, 4a, 4b, 4c and 5)	2,068.88
7.	Finance Charge	268.72
8.	Time (Deferred) Balance	2,337.60
	Payable * * * in 24 installments of each commencing March 24, 1962, and on the same day of each successive month thereafter."	97.40

This conditional sale contract was assigned by Johnson Chevrolet, Inc., to General Motors Acceptance Corporation, hereafter called GMAC, and thereafter the installment payments, which were paid, were paid to that corporation.

The conditional sales contract on the back of the page contains Provision 9, reading in relevant part:

> "If a charge for Creditor Insurance on the life of the purchaser is included in Item 4b on the face of this contract, the purchaser hereby specifically requests and authorizes the seller or assignee, in its or their own name, to procure from the Prudential Insurance Company of America insurance against the contingency of the purchaser's death occurring prior to the 15th day after the date herein provided for payment of the final instalment hereunder * * *. Such insurance shall be payable to the seller or assignee, or both, in an amount equal to the balance remaining to be paid hereunder on the happening of such contingency prior to termination of the insurance * * *. The time price payable under this contract includes a charge for said insurance."

Pursuant to the above-mentioned Provision 9 in the conditional sale contract, GMAC procured from the Prudential Insurance Company of America a certificate of insurance, which certifies that the life of C. A. Hatley, "debtor under a certain instalment obligation as dated above [2-7-62], has become insured under the provisions of Group Creditors Insurance Policy No. GL-360 issued by" itself. This certificate of insurance states that the life insurance charge was $16.88. It obligates Prudential immediately upon receipt of due proof in writing of C. A. Hatley's death prior to the termination of this insurance on his life to pay to GMAC the amount equal to the balance remaining to be paid under the installment obligation and unpaid.

A certificate of title to this Chevrolet truck was issued to Hatley Laundry and Dry Cleaning Company by the Commissioner of Motor Vehicles, which showed GMAC as a lienholder.

Prior to 1 February 1963 C. A. Hatley decided to sell all the trucks owned by his wife and himself and used in the operation of their laundry and dry cleaning business to their route drivers, and in consideration of their operating their own trucks to pay them a 40% commission for pickup and delivery, instead of the 21% they were paying when they furnished the trucks.

Defendant Johnston had been working for them for 16 or 17 years, and was operating as a route driver the 1962 Chevrolet truck which C. A. Hatley had purchased from Johnson Chevrolet, Inc., as above set forth. The Hatleys had made installment payments to GMAC on this truck, but had not paid the installment payments due in December 1962 and in January 1963, and on 1 February 1963 the installment payments unpaid on this truck under the conditional sale contract amounted to $1,363.60. The value of this truck at that time was $1700 or $1800. About 1 February 1963 C. A. Hatley and defendant Johnston entered into a contract providing that Hatley sell to him this Chevrolet truck, and that Johnston should pay him for it $400 and assume and pay the monthly installments on it as set forth in the conditional sale contract. Defendant Johnston paid C. A. Hatley $400 on the purchase price of this truck. On 1 February 1963 C. A. Hatley gave defendant Johnston a written power of attorney to apply for a certificate of title to this Chevrolet truck.

Before defendant Johnston paid GMAC any installment payment, C. A. Hatley died on 18 February 1963. On 4 March 1963 Prudential Insurance Company, as it was obligated to do by the provisions of its certificate of insurance issued to GMAC on the life of C. A. Hatley, paid to GMAC the sum of $1,363.60, which represented the amount of unpaid installments at the time of C. A. Hatley's death on the time price of the Chevrolet truck under the conditional sale contract. Van York, an employee of GMAC in Greensboro, testified: "There was a rebate due as a consequence of the prepayment of the deferred installments when the $1,363.60 was paid from the insurance. A rebate of $62.84 was rebated to the estate of Carl Alexandra Hatley. * * * When we received that money, we pulled this certificate of title and marked the lien paid in full."

On 5 March 1963 defendant Johnston applied to the Department of Motor Vehicles for a new certificate of title to himself as purchaser of this Chevrolet truck, in which he stated that he had acquired this Chevrolet truck from Hatley Laundry and Dry Cleaning Company, and that he placed this vehicle in operation in North Carolina on 1

February 1963, and there was no lien on it. This was sworn to and subscribed by him before a notary public on 5 March 1963. As a part of his application for a new certificate of title to himself, defendant attached to it an assignment of title by registered owner sworn to and subscribed by him on 5 March 1963 before a notary public reading as follows:

"ASSIGNMENT OF TITLE BY REGISTERED OWNER

"For value received, the undersigned hereby sells, assigns or transfers the vehicle described on the reverse side of this certificate unto the purchaser whose name appears in this block and hereby warrants the title to said vehicle and certifies that at the time of delivery the same is subject to the lines [*sic*] or encumbrances named in Section D, the purchaser's application for new certificate of title and none other.

"Purchaser's name and address:
Frank Shelton Johnston
429 High Street
Draper, North Carolina
"Date of sale: Feb. 1, 1963
"Seller's name and address:
Hatley Laundry and Dry Cleaning Co.
By Carl Alexandra Hatley
By Power of Attorney by:
s/ Frank Shelton Johnston
(PA attached)"

The certificate of title to this Chevrolet truck issued to Hatley Laundry and Dry Cleaning Company submitted by defendant as part of his application for a transfer of title to this Chevrolet truck to himself shows the following:

"FIRST LIEN:
Amount, $2338.56; Kind, Conditional Sale Contract, Date 2-6-62; Lienholder, GMAC, Greensboro, N. C.
RELEASE OF FIRST LEASE [*sic*]
Date of Release: 3-4-63
Lienholder: GMAC
By: s/ C. G. Heath, Authorized Representative"

Over defendant's objection plaintiff offered in evidence a written agreement entered into on 28 February 1963 by and between Hallie N. Hatley and defendant by the terms of which Hallie N. Hatley sold this Chevrolet truck to defendant for the sum of $400, and defendant agreed to operate it as a route driver to pick up and deliver articles for Hatley Laundry and Dry Cleaning Company, which she continued to operate after her husband's death, and if he decided to stop such work that he would sell this truck back to her at the wholesale price shown for it by the Blue Book. This agreement contains this language: "This sale is subject to lien in favor of GMAC on this truck." This agreement was signed Hatley Laundry and Dry Cleaning Company by Hallie N. Hatley, owner, and by defendant, and witnessed by D. Floyd Osborne. Plaintiff testified: "In other words, the contract which I signed with the routemen, including Mr. Johnston, on or about February 28, 1963, was the contract that my husband had worked out with all of these drivers prior to his death." The trucks sold by C. A. Hatley to the other drivers were old, and had no liens on them.

At the time of the trial defendant was operating this Chevrolet truck as a route driver picking up and delivering articles for Hatley Laundry and Dry Cleaning Company. After her husband's death, plaintiff asked defendant to pay her the balance of the installments that were due on this Chevrolet truck at the time her husband died. All defendant would say was, "it was his truck." All defendant has paid for this Chevrolet truck is $400.

From our considerable investigation of the authorities over the United States, the nearest case we have found presenting a factual situation similar to the factual situation in the instant case is *Kincaid v. Alderson*, 209 Tenn. 597, 354 S.W. 2d 775 (1962). The facts in the *Kincaid* case, as set forth in the opinion, are: In 1958 Clayton L. Alderson and his wife, Barbara M. Alderson, purchased a mobile home in Wichita Falls, Texas. At the time of this purchase they executed a chattel mortgage on this mobile home to Commercial Credit Corporation to secure a note, payable to said corporation, in the sum of $6,-439.20, which was payable in monthly installments of $107.32 over a period of five years. The amount of these payments included premiums on a life insurance policy issued to Commercial Credit Corporation on the life of Clayton L. Alderson, the maker of the note. This life insurance was payable to the credit corporation in the event Clayton L. Alderson died prior to the payment date of his note. In January 1960 the Kincaids purchased this mobile home from Alderson for $600 in cash and assumed the payment of the balance due to the Commercial Credit Corporation on the note executed by Alderson to secure the purchase money chattel mortgage on this mobile home. At the time of

the purchase by the Kincaids the balance due on said note was $4,-892.80. In September 1960 Clayton L. Alderson was killed in Germany. In due course the insurance company paid the balance due on said note to Commercial Credit Corporation. The Kincaids instituted an action against Barbara M. Alderson, the surviving mortagor, and Commercial Credit Corporation to quiet title to this mobile home and to compel execution of clear title of it to them. The Kincaids' bill was demurred to by defendants on various grounds. The Chancellor sustained the second ground of the demurrer which was that the Kincaids had not paid the $4,892.80, which was the balance due to the credit corporation on the note executed by Alderson to secure the purchase money chattel mortgage on this mobile home, as they had contracted to do. The Supreme Court affirmed the order of the Chancellor, holding that a chattel mortgagor, on whose husband's life policy of insurance was taken and paid for by him in mortgagee's favor and who sold chattel to plaintiffs under title bond obliging plaintiffs to assume payments, was not required to execute clear title to plaintiffs upon husband's death and consequent payment of insurance to mortgagee, but had a right of action against plaintiff as a surety who had discharged his principal's debt. The rationale of the *Kincaid* decision is as follows: The contract between the Aldersons and the Kincaids is nothing more than an old-fashioned title bond. Such a bond gives the Kincaids an equitable title converted into a legal title, upon the payment of the consideration. Commercial Credit Corporation had an insurable interest in the life of its debtor, Clayton L. Alderson, so as to entitle it to the proceeds of such insurance to the amount of its debt, including interest, citing in support of such principle Appleman on Insurance Law and Practice, Vol. 2, § 762, p. 88, and Couch on Insurance, Vol. 3, § 24:154, p. 266. The Court in its opinion said:

> "When the Kincaids assumed the mortgage indebtedness of the Aldersons on this mobile home they, that is the Kincaids, became primarily liable to the mortgagee, owner of the debt, and the Aldersons then occupied the legal status of a surety. *Fulmer v. Goldfarb,* 171 Tenn. 218, 101 S.W. 2d 1108; *Title Guaranty & Trust Co. v. Bushnell,* 143 Tenn. 681, 228 S.W. 699, 12 A.L.R. 1512; *Merrimon v. Parkey,* 136 Tenn. 645, 191 S.W. 327, and many others. This proposition is annotated in 21 A.L.R. 439, wherein it is shown that most of the jurisdictions in the United States, including Tennessee [also North Carolina], have adopted this proposition. In other words the Kincaids now become personally liable for the debt.

"When the Kincaids assumed payment of this debt they became the principal debtor and the Aldersons became the surety for the debt. *Stone's River National Bank v. Walter,* 104 Tenn. 11, 55 S.W. 301; *Sully v. Childress,* 106 Tenn. 109, 60 S.W. 499, and many others. By these undertakings the successive grantees form a chain of liabilities for the payment of the mortgage debt, the last grantee being the principal debtor and the others surety. See likewise *Wright v. Bank of Chattanooga,* 166 Tenn. 4, 57 S.W. 2d 800. An annotation on this subject is in 21 A.L.R., page 504, wherein cases from many jurisdictions are cited to support the proposition. Thus it is that the Aldersons after this obligation had been assumed by the Kincaids are merely sureties and Kincaid is the principal debtor. In other words the Commercial Credit Corporation would have had an insurable interest in the Kincaids as well as the Aldersons because they both, the Kincaids primarily and the Aldersons now secondarily, were liable for this obligation.

"When thus a surety by his death through a valid life insurance policy on his life has discharged the obligation, this does not discharge the obligation of the Kincaids who are primarily liable. It would be exactly the same situation as if a surety on an obligation for any reason decided to pay off the obligation. This would not release the principal debtor from his obligation, but it would then be transferred to the surety who had discharged the obligation to release himself as surety. Thus by the death of Alderson and his life insurance paying this debt it would merely transfer the debt of the principal obligator to the surety rather than to the creditor. When the debt is thus paid the surety subrogated to the rights of the creditor. *Willis v. Davis,* 3 Minn. 1. This payment constitutes 'an unjust enrichment of the principal' who must 'reimburse the surety to the extent of the enrichment.' Restatement of the Law, Security, § 104. Comment on Subsection (2), page 279. The contract herein, quoted from extensively, makes no provision to the contrary but by the plain wording of this contract the Aldersons or their heirs agree when this obligation is discharged, or put in a position where it can be refinanced, then they will convey good title. There is nothing in this contract which would indicate that if Alderson dies and the debt is paid through this insurance that it would relieve the principal obligator.

* * *

"Argument is likewise made herein in behalf of the Kincaids that by this contract, assuming and agreeing to pay for this, that

> it amounted to an assignment of the Aldersons to the Kincaids of this life insurance on Alderson's life. This is an incorrect assumption because the Aldersons had nothing to assign. The life insurance was written for the benefit of the Commercial Credit Corporation. They were the beneficiaries of the insurance on Alderson, and Alderson had nothing to assign and by any contract that he made he couldn't make such an assignment."

The writer of the opinion stated in effect that due to his interest in the questions presented he spent several days in an independent investigation before arriving at a conclusion, and that "from our investigation of the authorities over the United States the nearest case, and the only one anywhere near the factual situation herein that can be found, is that of *Moneymaker v. Calloway, supra* [9 Tenn. App. 348]." In our opinion, the result reached in the Kincaid case is sound law.

Another case we have found in our investigation with a quite similar factual situation to the factual situation in the instant case is *Betts v. Brown,* 219 Ga. 782, 136 S.E. 2d 365, *reh. den.* 2 April 1964. This is a summary statement of the facts in the *Betts* case, as set forth in the opinion: Decedent L. Porter Betts conveyed land mortgaged to a bank to Brown, who assumed payment of the mortgage debt. Brown went into possession of the land, and so remains. Brown defaulted in the mortgage payments. Decedent Betts and Brown then executed a note to the bank in renewal of decedent's original note to the bank. At the same time, the bank procured two credit life insurance policies on decedent Betts' life for the amount of the debt. Brown then defaulted on the renewal note, and decedent Betts died while payments on the mortgage were still in default. After collecting on the insurance and after applying the proceeds from the insurance policies to the payment of its debt, which was sufficient to satisfy it, the bank filed an interpleader in the action of *Betts v. Brown* in the trial court to determine how it should dispose of the mortgage note and deed. It was not alleged who paid or agreed to pay the premiums on these policies. Brown claimed his obligation on the debt was cancelled by the payment of the insurance by the insurer. Decedent's widow, to whom the entire estate of her deceased husband had been set aside to her as her year's support, claimed payment by the insurer was payment by the insured decedent, and thus his estate was entitled to subrogation against the primary debtor, Brown. The trial court entered judgment holding payment under the credit life insurance policy cancelled Brown's obligation on the note. The Supreme Court of Georgia reversed the trial court's judgment sustaining Brown's demurrer and dismissing plaintiff's claim, and held that claim of the widow of deceased grantor whose death resulted

in the involuntary payment of a debt to the bank by the insured with the proceeds of a credit life insurance policy resulted in subrogation by the insured's estate against the assuming grantee, and stated a cause of action to have money judgment against grantee who had agreed to assume the indebtedness. The Court in its opinion said: "Insofar as we have found, the instant case is one of first impression." In the *Betts* case the Court reasoned that the primary debtor, as a stranger to the credit life insurance contract, could claim none of its benefits. To determine what constitutes payment of the debt by the insured surety in credit life insurance situations, the Court relied upon the Georgia Insurance Code, in concluding that payment by the insurer is payment by the insured surety. In our opinion, the result reached in the *Betts* case is sound. The Court in conclusion said:

> "This brings about an equitable result, in keeping with the purpose and principles of subrogation. What Betts and Brown originally agreed upon takes place. Brown has his portion of the land in return for paying the balance of the agreed consideration, the indebtedness which he assumed. Betts (as succeeded by Mrs. Betts) receives what he bargained for, in that the debt on the entire tract of land, the portion he retained and the portion he conveyed to Brown, is paid by Brown. There is no unjust enrichment of Mrs. Betts because she receives money in addition to the debt being paid. If Brown had paid the indebtedness as he promised to do, the bank could not have declared the entire amount due and applied the insurance proceeds to pay it."

The opinion in the *Betts* case neither refers to nor cites the Tennessee case of *Kincaid v. Alderson, supra.*

G.S. 58-195.2 states: "Credit life insurance is declared to be insurance upon the life of a debtor who may be indebted to any person, firm, or corporation extending credit to said debtor." This statute was enacted in 1953. As a creditor of C. A. Hatley, GMAC had an insurable interest in his life. *Miller v. Potter*, 210 N.C. 268, 186 S.E. 350. When, according to plaintiff's evidence, her husband sold the Chevrolet truck to defendant, and defendant assumed the payment of the unpaid installment payments on it to GMAC, defendant became liable as principal on this indebtedness to GMAC, and her husband became liable as surety. GMAC could have sued defendant on his contract as assumption. *Miller v. Potter, supra; Rector v. Lyda,* 180 N.C. 577, 105 S.E. 170, 21 A.L.R. 411; 83 C.J.S., Subrogation, § 37.

In 2 Jones on Mortgages, 8th Ed., § 1125, it is said: "An indorser of a note or surety of a debt, upon being compelled to pay it, is entitled to the benefit of any security, as, for instance, a mortgage given by

the principal debtor to the holder of the note, or debt to secure it. Without any assignment of it, he is by force of law subrogated to the benefit of it." Citing in support many cases from many jurisdictions, including our case of *Knight v. Rountree*, 99 N.C. 389, 6 S.E. 762. See *Boney, Insurance Comr. v. Insurance Co.*, 213 N.C. 563, 197 S.E. 122, for a discussion of the doctrine of subrogation.

In 50 Am. Jur., Subrogation, § 101, it is stated: "A mortgagor who, after a transfer of the property or security, pays the debt secured by the mortgage is entitled to be subrogated to the rights of the mortgagee under the mortgage, where the amount due under the mortgage is taken into consideration and deducted from the purchase price, or where the purchase is simply of the equity of redemption."

In 83 C.J.S., Subrogation, § 37, it is said:

> "Where a grantor, mortgagor, or chattel mortgagor conveys the mortgaged property, and his grantee assumes payment of the mortgage, as between such parties the former becomes a surety and the latter the principal debtor, and, in accordance with the general rule, discussed infra § 47, that a surety who pays the debt of the principal is subrogated to the rights and remedies of the creditor, where the grantor or mortgagor or a chattel mortgagor pays the debts secured, he is entitled to subrogation thereto, and to all of the rights of the mortgagee, and may foreclose the mortgage for his own benefit, sue to recover the land, or sue the vendee in an action at law for money paid."

In *ibid*, § 47, it is said:

> "A surety, by payment of the debt of his principal at a time when he is obliged to make payment, acquires an immediate right to be subrogated, to the extent necessary to obtain reimbursement or contribution, to all rights, remedies, and securities which were available to the creditor to obtain payment from the person or property of any person who, as to the surety is primarily liable for the debt, or of a cosurety who is bound to contribute."

Credit life insurance, as between the creditor and insured debtor, is collateral security. Consequently, payment of the debt with credit life insurance, when the insured authorizes the creditor to procure the policy and pays the premium himself, is payment by the insured debtor, just as payment with any collateral security is payment by the owner thereof. The presence of an assuming grantee, who has no right to change the beneficiary under the policy, and therefore no claim of ownership, should not alter that result. 45 Texas Law Review (March 1965), p. 580, "Credit Life Insurance — Payment of Mortgage In-

debtedness with Proceeds of Credit Life Insurance Inured to Insured Mortgagor's Widow in Her Claim for Subrogation Against Assuming Grantee. *Betts v. Brown,* 219 Ga. 782, 136 S.E. 2d 365 (1964)."

Considering plaintiff's evidence in the light most favorable to her, it seems clear that the payment by the insurer of $1,363.60 under credit life insurance on the life of C. A. Hatley, the premium on which had been paid by him, and which represented the amount of unpaid installments on the Chevrolet truck at the time of C. A. Hatley's death on the time price of the Chevrolet truck under the conditional sale contract, was an involuntary payment, and should entitle insured's estate to subrogation against the assuming grantee. If such payment by the insurer were allowed to cancel the primary defendant debtor's obligation, under the assumption agreement entered into by him, the defendant, the primary debtor, would in effect be made a beneficiary although he has no insurable interest in the life of the insured. On the other hand, if the creditor, GMAC, were given an absolute right to the proceeds of the policy, independent of the debt involved, the public policy limiting it to indemnification would be contravened, 45 Texas Law Review, p. 580. In our opinion, and we so hold, plaintiff's evidence makes out a case against defendant entitling her husband's estate to subrogation against him, the assuming grantee, and primarily liable for the payment of the unpaid installments on the Chevrolet Truck at the time of C. A. Hatley's death, to obtain payment from him of the amount paid by Prudential to GMAC in full payment of such unpaid installment payments on the Chevrolet truck under the obligatory terms of a credit life insurance policy on C. A. Hatley's life, the premium on which was paid by C. A. Hatley, sufficient to survive the challenge of a motion for a judgment of compulsory nonsuit.

Defendant relies upon *Miller v. Potter, supra,* which was decided by a divided Court, three to two. This case is factually distinguishable from the instant case. In that case the facts as stated in the opinion, so far as relevant here, are as follows: On 15 October 1928 Home Mortgage Company loaned $3,000 to Nash and wife, secured by a deed of trust on a house and lot. On 17 May 1929 Nash and wife conveyed the house and lot to Miller, who, as part of the purchase price, "assumed and agreed to pay" the deed of trust. On 11 June 1929, to better secure the loan Home Mortgage Company, under the provisions of the deed of trust, took out a 12-year term reducing policy of insurance on Miller's life in the sum of $3,000, had itself made the beneficiary in the policy, and paid the premiums thereon. On 8 September 1930 Miller and wife conveyed the house and lot to Hatcher, who also assumed the payment of the debt as Miller had done. On 19 September 1930 Hatcher conveyed the house and lot to Potter and wife, who also assumed the

payment of the debt just as Miller and Hatcher had done. On 11 March 1933 Miller died. In December 1933 Home Mortgage Company collected insurance in the amount of $2,475.39, marked the deed of trust paid, and mailed it to Potter, who had it cancelled of record. Miller's widow, as administratrix of her deceased husband's estate, and his only child brought this action, *inter alia,* for subrogation to the rights of the creditor Home Mortgage Company to that part of the insurance proceeds used in paying the indebtedness and to have the cancellation of the deed of trust stricken out, to the end that Miller's estate should hold the deed of trust as a valid lien against the house and lot. The majority opinion states in part:

> "However, while the debt of Miller's estate was paid, neither Miller nor his estate paid it, and since neither paid the debt, the estate is not entitled to subrogation. * * * True, if Miller or his estate had been compelled to pay the debt he or his representative would have been subrogated to the rights of the creditor, the Home Mortgage Company."

The majority opinion held that Miller's estate was not entitled to be subrogated to the rights of Home Mortgage Company as against the later transferees of the equity, since neither Miller nor his estate paid the mortgage debt.

Defendant in a memorandum of additional authority relies upon the following statement in *Insurance Co. v. Assurance Co.,* 259 N.C. 485, 131 S.E. 2d 36:

> "Where, however, the insurance is procured by the mortgagee pursuant to the authorization and at the expense of the mortgagor, no right of subrogation exists and the amount paid by the insurer must be applied to discharge or reduce mortgagor's obligation to mortgagee."

"The law discussed in any opinion is set within the framework of the facts of that particular case * * *. 'It is platitude to say that language wrenched from its context is apt to be misconstrued. Courts repeatedly have held that the language of their opinions must be read in connection with the facts of the case in which the language was used.' * * * Walter, Brief-Writing and Advocacy, pp. 78-9." *Light Co. v. Moss,* 220 N.C. 200, 17 S.E. 2d 10.

In *Insurance Co. v. Assurance Co., supra,* the question presented on appeal for decision was: Should each of two insurance companies contribute to the payment of the loss in the proportion which the sum insured bears to the total insurance, or must plaintiff insurance company pay all the loss? The factual situation in that case was utterly

different from the factual situation here. The statement in that case relied on by defendant states correctly the law as applied to the facts of that case, but it is not authority supporting defendant's contention that on the particular facts of the instant case Hatley's estate here is not entitled to subrogation against defendant.

The judgment of compulsory nonsuit below is

Reversed.

SECURITY NATIONAL BANK OF GREENSBORO AS ADMINISTRATOR C.T.A. OF THE ESTATE OF LOOMIS McA. GOODWIN, AND AS ADMINISTRATOR C.T.A. OF THE ESTATE OF HANNAH B. GOODWIN; ADELAIDE GOODWIN LIPSCOMB, AND ANDREW W. GOODWIN v. THE EDUCATORS MUTUAL LIFE INSURANCE COMPANY.

(Filed 23 July, 1965.)

1. Insurance § 2—

While the statutes prescribe qualifications and require the licensing of insurance agents, G.S. 58-40, G.S. 58-41, an agent's right to commissions is not prescribed by statute but depends upon the contract between the agent and the insurer, which contract must be interpreted in accordance with the intent of the parties under the rules of construction applicable to contracts generally.

2. Same— Under the terms of agreement, insurer was liable for commissions on renewal premiums after death of the agent.

The agency contract in this case provided for cancellation by either party upon thirty days' notice and cancellation without notice for specified causes, with a following provision that upon termination of the contract under the prior provisions, insurer should have the option to purchase the agent's right to renewal commissions in accordance with a stipulated formula, and then provided in an independent paragraph that if the insurer did not exercise the purchase option the agent should be entitled to receive commissions on renewal premiums so long as the renewal premiums were paid by insureds. *Held:* The contract does not provide an option to insurer to purchase the agent's right to commissions upon termination of the contract by the death of the agent, and the agent's personal representative is entitled to recover commissions on all renewal premiums thereafter paid on policies that had been sold by the agent, and another provision of the contract that the company should pay the agent compensation during the continuance of the agreement does not alter this result, such provision being read in context with the specific provisions for payment of commissions on renewal premiums after the termination of the contract.

3. Contracts § 12—

A contract must be construed as a whole, and a paragraph or excerpt must be interpreted in context with the rest of the agreement.

4. Insurance § 2; Fiduciaries—

The relationship of debtor and creditor exists between an insurance agent and insurer in regard to commissions due the agent, and ordinarily the contract between them creates no trust relationship expressly or by necessary implication.

5. Trusts § 14—

A constructive trust does not arise where there is no fiduciary relationship and there is an adequate remedy at law, and mere silence of the debtor and failure to disclose the facts to the person entitled to collect the obligation, or even the debtor's request of secrecy to a third person, does not constitute fraud as the basis of a constructive trust when the facts are equally available to the person entitled to collect the obligation.

6. Same; Insurance § 2—

An insurance agent's personal representative had possession of the contract between the agent and the insurer providing for the payment of commissions on renewal premiums. *Held:* The purposeful and deliberate failure of insurer to disclose the facts in regard to the receipt of renewal premiums does not create a constructive trust in regard to the personal representative's right to collect the commissions on renewal premiums.

7. Seals—

Two or more persons may adopt the same seal, and where only one seal appears on the contract between two parties, even when one of the parties is a corporation, whether both intended to adopt the seal is a question of fact, while whether the instrument is a sealed instrument is for the court.

8. Corporations § 21—

As a general rule a corporation may use or adopt any seal, and if it adopts a seal different from the corporate seal for special occasions or if it has no corporate seal, the seal adopted is the corporate seal for the time and the occasion. G.S. 55-17(3).

9. Limitation of Actions § 17—

The burden is upon plaintiff upon defendant's plea of the applicable statute of limitations to prove that the action was commenced within the time limited, including the burden of proving that defendant adopted the seal affixed to the instrument, or other facts and circumstances, when relied on by plaintiff to repel the three-year statute pleaded, and when neither the referee nor the court finds the crucial facts in regard thereto, the cause must be remanded.

10. Appeal and Error § 55—

Where the conclusions of law are not supported by findings of the crucial facts, the cause must be remanded.

11. Reference § 9—

Where the Supreme Court remands a cause for necessary findings of fact, the Superior Court may make its own findings or may recommit the cause to the referee for further hearing and findings.

APPEAL by plaintiffs and defendant from *McKinnon, J.,* December 1964 "A" Civil Session of WAKE.

Adams, Kleemeier, Hagan & Hannah and Allen Langston for plaintiffs.

Lassiter, Leager, Walker & Banks for defendant.

MOORE, J. This is a civil action for recovery of insurance agent's commissions on renewal premiums paid on insurance policies — the commissions are allegedly due and owing by defendant to the estate of Loomis McA. Goodwin, deceased.

Educators Mutual Life Insurance Company (Company), a foreign corporation with its principal office at Lancaster, Pennsylvania, was at all times mentioned herein licensed to do business in North Carolina and maintained an office in Raleigh. Loomis McA. Goodwin (Agent) was a licensed general insurance agent, G.S. 58-39.4(c). Said Company and Agent on 16 May 1950 entered into a contract under which Agent engaged to procure on behalf of Company policies of health, accident and hospitalization insurance in North Carolina. A substantial volume of business was written, particularly group insurance covering members of the North Carolina Bar Association and insurance covering employees of the Olivia Raney Library. With the consent and approval of Company several sub-agents were appointed to assist Agent with the business, and they shared in Agent's commissions. Agent was allowed a commission on the initial premium and a smaller commission on each renewal premium. Policy-holders paid premiums directly to Company's North Carolina office. Commissions were sent monthly to Agent and sub-agents, as per their agreements for division of the commissions. Agent died 2 March 1953. Thereafter, sub-agents' shares of the commissions were sent to them, but no further commissions were sent to Agent or his personal representative.

On 3 December 1958 this action was instituted by the administrator, c. t. a., of Agent's estate and the persons entitled to the assets of the estate to recover the commissions which had accrued after Agent's death and which were retained by Company. The complaint alleges that plaintiffs are entitled to recover commissions on renewal premiums in the sum of $22,381.25 with interest from 5 June 1956, and, for a second cause of action, that Company holds the commissions in trust for

plaintiffs. Defendant, answering, denies that it is obligated to pay such commissions in any amount, denies any trust relationship, and pleads the 3-year statute of limitations, G.S. 1-52.

A compulsory reference was ordered. The referee heard and considered evidence and stipulations of the parties, and filed his report on 4 May 1964. He decided that plaintiffs are entitled to judgment for $18,106.25 with interest from 5 December 1956. Defendant filed exceptions.

In superior court trial by jury was waived. The judge considered the exceptions, affirmed referee's findings of fact, made conclusions of law, and entered judgment in favor of plaintiffs in the sum of $5,-359.54 with interest at the legal rate from 5 December 1956. All parties filed exceptions and appeal.

We do not deem it necessary or desirable to encumber the Reports with a complete summary of the pleadings, full recital of the evidence and stipulations, tedious review of the proceedings had, recital of referee's findings of fact, listings of the many exceptions to the referee's report and to the judgment, and statement of all of the judge's conclusions of law. Such of these matters as are essential to an understanding and solution of the ultimate questions raised by the appeals will be set out in the discussions of these questions.

We now consider the legal questions in dispute.

(1). Did Agent's right to commissions on renewal premiums survive his death so as to entitle his personal representative to an accounting for such commissions on renewal premiums collected by the Company after Agent's death?

The contract between Company and Agent was not terminated in any manner prior to the latter's death. Before an insurance agent may engage in the business of "writing" insurance, he must meet certain qualifications, G.S. 58-41, obtain a license from the Insurance Commissioner, G.S. 58-40, and assume certain obligations and responsibilities imposed for the protection of the public. His license to do business is a valuable property right, but the duties and obligations which exist between such agent and the company he represents are not specifically fixed by statute. It is a well established general rule that the right of an insurance agent to commissions on renewal premium depends upon the terms of the contract between the agent and the insurance company, having in view the intent of the parties, the rules of construction applicable in arriving at that intent, and the evidential circumstances under which the right to such compensation is claimed or denied, as such contract constitutes the guide for ascertaining, determining and measuring the rights, duties and obligations of the parties. *Wood v.*

Insurance Co., 206 N.C. 70, 72, 173 S.E. 34; 163 A.L.R. 1470; 136 A.L.R. 160; 79 A.L.R. 475.

The pertinent parts of the subject contract are:

> "1. DUTIES: . . . Company hereby appoints said Agent its agent for the purpose of soliciting, procuring, and transmitting to Company applications for its Commercial Division Health, Accident and Hospitalization Insurance policies, delivering policies, collecting and paying to Company the premiums on insurance so effected, and performing such other duties as may be required by the Company."
>
> "4. COMPENSATION: Company will allow Agent, during the continuance of this agreement, and agent will accept as full compensation for all services performed and expenses incurred in work hereunder, the following commissions (subject to the provisions of . . . 9 hereof) upon premiums received by Agent on business written by him . . .:"
>
>> (A schedule of commissions on initial premiums and on renewal premiums is set out.)
>
> "9. COMPANY — RESERVED RIGHTS: Company reserves the right to withdraw authority from Agent to write any classifications of risks or policy forms at any time without previous notice and to amend the commission rates specified in . . . 4 hereof, with respect to new policies issued, and renewals . . . received (whether before or after termination of this contract) after such amendment/s"
>
> "12. TERMINATION: PURCHASE: CONTINUING COMMISSIONS: RECORDS:
>
>> "A. This contract may be cancelled by either party, without assignment of cause, upon thirty days' prior written notice to the other; and in case of Agent's incapacity, insolvency, fraud, breach of contract provisions, or inability to retain necessary license from governmental authorities, or in case the Company should deem it advisable, because of unfavorable legislation or other reasons, to withdraw its business from the territory . . ., this contract may be cancelled by Company at any time thereafter, without previous notice. . . ."
>>
>> "B. Upon termination of this contract under any of the provisions of the foregoing . . . paragraph, Company should have the option, exercisable by notice given to Agent at any time within 60 days after termination to purchase all of Agent's

rights in and to Company business (including expiration and other records, goodwill, rights to renewal commissions, and any other items in which Agent may be considered to have any property or interest) and Agent shall sell and transfer the same to Company for a price equal to the commissions specified in . . . 4 hereof on the entire renewal premium income received by the Company from Agent's business so purchased, during each month for a period of eighteen consecutive months immediately following the month of termination, payable at the end of each month. . . ."

"If Company shall not exercise the foregoing purchase option, Agent shall be entitled to receive from Company the same amount of renewal commissions as specified in . . . 4 hereof (subject to any reduction under the provisions of . . . 9 hereof which may be made applicable to all of the Company's other Agents of the same type and class as Agent under this contract) less a service charge equal to 10% of renewals received by Company after termination on policies previously written by Agent, so long as said policies continue to be renewed and so long as renewal premiums paid by Insured therefor aggregate Five Hundred ($500.00) Dollars per calendar year . . ."

"C. Upon termination of this contract under any of the provisions of this (contract) . . . Agent shall immediately return to Company all policy forms and other blanks, supplies and property which have been furnished by Company for transaction of business hereunder."

It is our opinion, and we so hold, that under the terms of the contract Agent's estate was entitled to commissions on renewal premiums collected by the Company after the death of Agent. The third paragraph of section 12 of the contract — the paragraph not designated by a letter — determines the right to these commissions. It is clear that said paragraph is independent of paragraphs A, B and C of section 12 and fixes the rights of Agent to commissions, after termination of the contract, in all situations to which paragraph B is not applied. The form in which section 12 is cast in the original contract and in the original record on appeal is significant. The third paragraph of section 12 is not indented as are paragraphs A. B and C, *i.e.*. its left margin is well to the left of the left margins of paragraphs A, B and C — thus it is set apart and is not dependent upon paragraphs A, B and C. The heading of section 12 contains four titles, one for each paragraph, and the title for the third paragraph is, significantly, "CONTINUING COMMISSIONS." Under paragraph B, if Agent voluntarily cancels the con-

tract or if the Company cancels without assignment of cause or for any of the causes set out in paragraph A, the Company has the option to require Agent to sell and transfer his commissions on renewal premiums to the Company upon the terms stated in paragraph B. This option does not, of course, exist in a situation where the contract terminates by death of the agent. There is good reason for the existence of such option in cases of voluntary cancellations by Agent or the Company. Upon termination of the contract of a living agent, such agent will most likely continue in the insurance business and represent a competing company. It is therefore important that there be a definite and enforceable plan for a speedy settlement between Agent and Company. No such reason exists when a contract is terminated by death. Therefore, the contract does not provide an option for purchase in case of termination by death. Such option does not apply in the present case. Therefore we may disregard the clause at the beginning of the first sentence in the third paragraph of section 12, to wit: "If Company shall not exercise the foregoing option." After eliminating this clause as inapplicable to Loomis McA. Goodwin, the said third paragraph reads (eliminating matters not essential to the decision of the question involved) as follows: "Agent (Loomis McA. Goodwin) shall be entitled to receive from Company the same amount of renewal commissions as specified in (section) . . . 4 hereof . . . less a service charge . . . after termination on policies previously written by Agent, so long as said policies continue to be renewed. . . ." (According to a specific declaration in the naming clause the word "Agent" when used in the contract refers to Loomis McA. Goodwin.) Thus, the estate of Goodwin was entitled to receive the commissions after termination of his contract by death. The "service charge" is, of course, to compensate the Company for loss of the services of Agent after termination. It will be noted that the declaration of the right of Agent to receive commissions after termination is not limited to any particular mode of termination. And there is no provision that an agent whose contract is terminated by death shall not have that right.

Our interpretation of the contract, based on the third paragraph of section 12, is consistent with all other provisions of the contract. In paragraph B of section 12 the Company's option is "to purchase all of Agent's rights . . . (including . . . rights to renewal commissions. . . .)" No such expressions as "if any" or "which he may have" are used in connection with renewal commissions — the existence of such "rights" is acknowledged and recognized. Furthermore, the "price" for all of Agent's rights purchased, including "goodwill" and other properties, is payment of *commissions* to Agent for 18 months, if the option is exercised. We also call attention to section 9 of the contract in

which the Company is given the right to change the rate of commissions from time to time. The Company is given the right "to amend commission rates . . . with respect to new policies issued, and renewals . . . received (whether before or after termination of this contract)." Here again the right to renewal commissions "after termination of the contract" is recognized.

In contending that Goodwin had no right to renewal premiums after his death terminated the contract, defendant Company relies on the provisions of section 4, entitled "COMPENSATION," and particularly the italicized words in the following sentence: "Company will allow Agent, *during the continuance of this agreement,* and Agent will accept as full compensation for all services performed . . . the following commissions. . . ." If section 4 is considered alone and without regard to other provisions of the contract, it is susceptible of the construction urged by defendant, and it would seem that commissions are payable only during "the continuance" of the contract. But when considered together with the other provisions of the contract discussed above, the fallacy of defendant's interpretation and the meaning of the provision become clear. "During the continuance of the agreement" compensation for all services shall be as specified in section 4, but after termination of the agreement compensation shall be as specified in the third paragraph of section 12 or, if the right of option to purchase exists and is exercised, compensation shall be as specified in paragraph B of section 12. "The contract must be construed as a whole, and a paragraph or excerpt must be interpreted in context with the rest of the agreement." 1 Strong: N. C. Index, Contracts, § 12, p. 585; *Stanley v. Cox,* 253 N.C. 620, 117 S.E. 2d 826; *Robbins v. Trading Post,* 253 N.C. 474, 117 S.E. 2d 438.

Section 3 of the contract, not copied above, provides that the relationship between Company and Agent shall be construed as that of principal and independent contractor. The construction which defendant Company places on the contract, with respect to Agent's compensation, is more consistent with employer-employee relationship; the principal-independent contractor relationship is in keeping with our interpretation. We note that Company, after the death of Agent, continued to pay renewal commissions to the sub-agents.

The construction we place on the contract in this case and the rules applied in construing same do not conflict with the principles stated in *Adickes v. Drewry,* 171 N.C. 667, 89 S.E. 23; *Ballard v. Insurance Company,* 119 N.C. 187, 25 S.E. 956; *Insurance Co. v. Williams,* 91 N.C. 69.

(2). Does the Company hold the commissions on renewal premiums collected since the death of Agent in trust for Agent's estate?

Plaintiffs urge that we adopt the holding of the Oklahoma Court in *General American Life Insurance Co. v. Roach,* 65 P. 2d 548, in a somewhat similar situation that the Company "stood in a trust capacity" toward the agent, or, failing this, that we declare that a constructive trust arose by reason of the Company's fraudulent intent to withhold the fund and its failure to disclose facts which it was its duty to reveal.

Company's obligation to plaintiffs arose by virtue of its contract with Agent. A contract to pay renewal commissions creates a debtor-creditor relationship. *Wood v. Insurance Co., supra.* The contract contains no provisions which create a trust relationship, expressly or by necessary implication, running in favor of Agent as *cestui que trust.*

Mr. O. E. Stubblefield, State manager for the Company during the life of the contract and for a period of time after Agent's death, testified that he reported Agent's death to the Company and requested authority to make settlement for renewal commissions with Agent's estate, there were several discussions and after some delay the president of the Company finally gave him verbal instructions with respect to the matter. Stubblefield's testimony on this point is: ". . . president . . . called me and told me that the matter had been discussed further among the people at the home office and suggested that I not contact any of the Goodwin heirs. In fact, just don't be around them or let them see me . . . to stay away from the Goodwins. . . . He told me (it had been) decided not to pay . . . his estate anything unless they made a noise, and if they did we would pay them a little something to satisfy them."

Plaintiffs' evidence tends to show that the contract was in possession of Agent's personal representative during the administration of Agent's estate. Defendant offered evidence tending to contradict Mr. Stubblefield's testimony in part. The referee found as a fact that the Company concealed information from plaintiffs and such information was not within the knowledge of plaintiffs. Referee concluded that the Company held the commissions in trust for plaintiffs. The judge, however, concluded that no trust arose.

". . . a constructive trust ordinarily arises out of the existence of fraud, actual or presumptive — usually involving the violation of a confidential or fiduciary relation — in view of which equity transfers the beneficial title to some person other than the holder of the legal title." *Bowen v. Darden,* 241 N.C. 11, 84 S.E. 2d 289. "The mere failure to perform an agreement or to carry out a promise, or the failure to pay a debt, cannot in itself give rise to a constructive trust, since such a breach does not in itself constitute fraud or abuse of confidence, or duty requisite to the existence of a constructive trust; but a breach of

agreement or promise may in connection with other circumstances give rise to such a trust." 54 Am. Jur., Trusts, § 221, p. 171. A constructive trust does not arise where there is no fiduciary relationship and there is an adequate remedy at law. *Atkinson v. Atkinson,* 225 N.C. 120, 33 S.E. 2d 666. "It is generally held that mere silence does not constitute fraud where it relates to particular facts and matters of such nature as to be equally open to common observation or visible to the eye, or such facts are discernible by the exercise of ordinary diligence, or where the means of information are as accessible to one party as to another. . . . a debtor (is not) bound to disclose to the creditor or his personal representative the fact of the indebtedness. . . . A request of secrecy to a third person, who sustains to the transaction the mere relation of a witness, does not constitute actionable fraud, at least where no application appears to have been made to the witness to disclose the facts of the transaction, and no misrepresentation appears to have been made to the party in relation to them." 23 Am. Jur., Fraud and Deceit, § 84, p. 863.

No constructive trust arises upon the facts and circumstances here presented. There was no fiduciary relationship; the relation was that of debtor and creditor. The contract, which created the debt, was in the hands of deceased Agent's personal representative. Plaintiffs knew at all times the nature of Agent's business. There was no misrepresentation. The evidence shows nothing more than mere silence on the part of the Company, albeit the Company purposely and deliberately remained silent. As debtor, it was under no obligation to disclose the fact of the indebtedness to Agent's personal representative. Plaintiffs had an adequate remedy at law.

(3). Is plaintiffs' cause of action barred by the 3-year statute of limitations, G.S. 1-52, except for commissions on renewal premiums paid the Company during the three years next preceding the institution of this action?

Agent died 2 March 1953; this action was instituted 3 December 1958. From the last sentence (not copied hereinabove) of the third paragraph of section 12 of the contract, it appears that Company was to make payment of commissions monthly. Defendant contends a cause of action accrued as to each monthly payment upon failure of the Company to make payment at the end of the month. *Peal v. Martin,* 207 N.C. 106, 176 S.E. 2d 282. Defendant further contends that a cause of action accrued to plaintiffs at the end of each month after the death of Agent, each monthly payment was barred three years after it was due and payable, and only such amount due plaintiffs as has accrued within the three years immediately preceding the institu-

tion of the action is recoverable. G.S. 1-52; *Jennings v. Morehead City,* 226 N.C. 606, 39 S.E. 2d 610; *Robertson v. Pickerell,* 77 N.C. 302.

However, both the referee and the judge concluded as a matter of law that "The contract between Goodwin and defendant was under seal." The 10-year statute of limitations applies in an action "upon a sealed instrument against the principal thereto." G.S. 1-47(2). Both the Company and the Agent are principals with respect to the subject contract.

For reasons which hereafter become apparent, we refrain from setting out herein the evidence bearing upon the question whether the contract was under seal as to the Company and the Agent, other than the execution clause of the contract, which is:

> "In witness whereof, the parties hereto have executed the agreement on the aforesaid date.
>
> EDUCATORS MUTUAL INSURANCE COMPANY
> By J. Laurence Strickler,
> President.
> and A. A. Slater
> Director of Agencies
> Loomis McA. Goodwin (SEAL)
> Agent
>
> Witness
> O. E. Stubblefield."

So far as the record before us discloses the only seal appearing on the contract is that opposite the name of Loomis McA. Goodwin. ". . . our Court has held that a seal appearing upon an instrument, opposite the name of the maker, in the place where the seal belongs, will in the absence of proof that the maker intended otherwise, be valid as a seal." *McGowan v. Beach,* 242 N.C. 73, 86 S.E. 2d 763; *Allsbrook v. Walston,* 212 N.C. 225, 193 S.E. 151; *Bank v. Jonas,* 212 N.C. 394, 193 S.E. 265. The law permits two or more obligors to adopt one seal, and it will be the specialty (sealed instrument) of all of them. *Yarborough v. Monday,* 14 N.C. 420; *Pickens v. Rymer,* 90 N.C. 282. The burden is on the plaintiff to prove that the action accrued within the time limited by the statute, and that defendant adopted the seal. *Sprinkle v. Sprinkle,* 159 N.C. 81, 74 S.E. 739; *Pickens v. Rymer, supra.* Whether the defendant adopted the seal is a question for the jury. *Yarborough v. Monday, supra.*

In *Rusling v. Union Pipe & Const. Co.,* 39 N.Y.S. 216, affd. 53 N.E. 1131, corporate defendant and individual plaintiff executed a contract

in the same manner as in the instant case, except there it was recited that parties "have hereunto set their hands and seals." The court said: ". . . where several parties execute a paper, reciting that it is executed under their seals, it is sufficiently sealed if one seal is affixed, because all parties may adopt the same seal as their own. *Van Alstyne v. Van Slyck,* 10 Barb. 383. This rule applies although one of the parties to the deed be a corporation. A corporation, like an individual, may adopt any seal that is convenient for the particular occasion. The only limitation of the rule is that the seal adopted must be affixed as the seal of the corporation."

Purdon's Pennsylvanian Statutes Annotated, Title 15, section 2852-302, provides: "Subject to the limitations and restrictions contained in this act or in its articles, every business corporation shall have power: . . . (3) to have a corporate seal, which may be altered at pleasure, and to use the same by causing it or a facsimile thereof to be impressed or affixed, or in any manner reproduced." North Carolina has a statute to the same effect. G.S. 55-17(3). As a general rule, a corporation may use or adopt any seal. If a corporation adopts a seal different from its corporate seal for a special occasion, or if it has no corporate seal, the seal adopted is the corporate seal for the time and the occasion. It has been said that a corporate seal may consist of anything found upon a paper and which appears to have been put there by due authority or to have been adopted and used by such authority as and for the seal of the corporation. Whether an instrument is sealed is for the court; but whether the seal affixed is the defendant's seal is for the jury. 18 Am. Jur., 2d, Corporations, 689-691.

The burden is upon plaintiffs to prove that the action accrued within the time limited by the applicable statute, by showing that the Company adopted the seal appearing on the contract for the special occasion or for all similar occasions, or that such seal became the seal of the corporation by reason of some other rule of law, or that the regular corporate seal was impressed or attached to the original of the contract, or that there are facts and circumstances which exclude the operation of the 3-year statute, G.S. 1-52, other than the matter of a seal. With respect to these matters, neither the referee nor the judge found facts which support the conclusions that the contract was a sealed instrument and that the 3-year statute of limitations does not apply. It is therefore necessary that the cause be remanded for findings of fact on this particular phase of the case. *Jamison v. Charlotte,* 239 N.C.423, 79 S.E. 2d 797; *McMillan v. Robeson,* 225 N.C. 754, 36 S.E. 2d 235.

The superior court upon remand may make its own findings of fact and conclusions of law, as to the appropriate statute of limitations, or may recommit the cause to the referee for further hearing, findings,

conclusions and decision, on this phase of the case.

When the appropriate statute of limitations has been determined, recovery shall be in accordance with the terms and provisions of the third paragraph of section 12 of the contract and subject to the statute of limitations if it bars any part of the recovery.

Plaintiffs shall pay one-half the costs of this appeal, and defendant shall pay one-half.

Error and remanded.

WILLIAM M. WELLS, JR.; ALICE ELIZABETH WELLS ROMANEK; AND JOSIE M. WELLS, GUARDIAN OF REDMOND S. WELLS, PLAINTIFFS v. THE PLANTERS NATIONAL BANK AND TRUST COMPANY, AS ANCILLARY ADMINISTRATOR OF THE ESTATES OF WILLIAM M. WELLS, SR., AND PEARL KENT WELLS, AND AS TRUSTEE UNDER CERTAIN INTER VIVOS TRUSTS CREATED BY WILLIAM M. WELLS, SR., UNDER DATES OF FEBRUARY 4, 1956, AND FEBRUARY 6, 1956; LILLIAN KENT DICKENS; WALTER GLASS KENT; AND S. GARLAND KENT, DEFENDANTS.

(Filed 23 July, 1965.)

1. Trusts § 6—

A trust providing that the net income therefrom should be paid to a designated person for life and at the death of such person to his heirs does not come within the Rule in *Shelley's* Case, since the interest of the life beneficiary is an equitable and that of the heirs a legal estate.

2. Wills § 33—

A devise of land to designated beneficiaries "to share and share alike" is a devise in fee. G.S. 31-38.

3. Trusts § 6; Wills § 39— Power of disposition may be exercised by changing the quality of the estate in remainder without changing identity of remaindermen.

By trust instruments and by will the owner of lands provided that the income therefrom should go to a life beneficiary and at the death of the life beneficiary should go in fee to two of his children and in trust for the life of the third child, remainder in this third to such child's heirs, but the instruments also provided that his wife, the life beneficiary in the main instrument, should have the power to dispose of the entire *corpus* of the trust by will with the same effect as if she were the owner of the *corpus* in fee. By will the wife provided that the fee should go to testator's children, without making any provision for a trust estate for the third child. *Held:* The third child took the fee in his share free from the trust as appointee under the wife's will.

4. Estates § 4—

The common law rule of non-apportionment of rents between the life tenant and the remaindermen has been amended in several respects by statute, G.S. 42-6, G.S. 42-7, G.S. 34-4, so that when there is successive ownership under a trust or will or other instrument, the rents are to be apportioned between the life tenant and the remaindermen. *In re Estate of Galloway*, 229 N.C. 547, and *Trust Co. v. Frazelle*, 226 N.C. 724, distinguished in that in those cases the successive ownerships were not under a trust, will or other instrument.

5. Same—

The land in question was held in trust for the payment of income to trustor's wife for life with remainder in fee to his children. At the time of the death of the life beneficiary the lands were leased at a rental of one-third of the sale price of the tobacco crops grown on the lands, to be paid on the dates the tenants sold tobacco. *Held:* The dates of the sale of tobacco determine "periodic payments", G.S. 37-4, for "fixed periods", G.S. 46-6, and therefore rents received for the year during which the life beneficiary died are to be apportioned between the personal representative of the life beneficiary and the remaindermen. The same rule of apportionment applies to Federal Grain Program payments under 57 Stat. 301, § 131, which are in effect payments of annual rent.

6. Same—

Upon the death of the life beneficiary of a trust, the ordinary expenses incurred in the administration and management of the trust, including charges for labor and supplies, building repairs, property insurance and taxes, and trustee's commissions, must be apportioned in the same percentages as the apportionment of rents. G.S. 37-12(1).

APPEAL by plaintiffs from *Mintz, J.*, December 14, 1964 Civil Session of NASH.

Action for a declaratory judgment: (1) to determine the distribution of income from farm leases made, during the life of the beneficiary, by the trustee of an *inter vivos* trust known as the Pearl K. Wells Trust; and (2) to construe the exercise of the power of appointment, by the beneficiary, over the remainder of the trust corpus.

The facts are not in dispute. Plaintiffs and defendants each moved for judgment on the pleadings, which establish these facts: Plaintiffs, William M. Wells, Jr., Alice Wells Romanek, and Redmond S. Wells (R. S. Wells) are children of the marriage of William M. Wells, Sr. (Wells), now deceased, to Josie M. Wells. As a result of congenital injuries, R. S. Wells is incompetent and brings his action by his guardian, Josie M. Wells. In 1941 Wells obtained a divorce from Josie M. Wells, and subsequently married Pearl K. Wells. To them no children were born. By an instrument dated February 3, 1956, Wells created an *inter vivos* trust for the benefit of Pearl K. Wells (Pearl K. Wells

Trust). Defendant Bank was made trustee, with plenary powers to preserve, manage, sell, rent (for a term which might run beyond the duration of the trust), and exchange the trust property, which consisted principally of farm lands, during the lifetime of Pearl K. Wells, who was "entitled to all the income from the corpus of the trust." The trustee was empowered, if necessary, to invade the principal for her support. At the death of Pearl K. Wells, Wells directed, by paragraph 7 of the instrument, that the trust "shall be terminated and the corpus remaining shall be equally divided among my three children," William M. Wells, Jr., Alice W. Romanek, and R. S. Wells, "share and share alike absolutely and in fee simple, this being a vested remainder." Notwithstanding this limitation over, Wells gave to his wife "the power to dispose of the entire corpus of this trust, free of the trust, by her will, but only by making specific reference to this power, as she may see fit, with the same effect as if she were the owner of said corpus free of the trust." Wells reserved the right, by written instrument delivered to the trustee, to revoke or amend the trust at any time during his life.

On February 6, 1956, Wells amended paragraph 7 of the Pearl K. Wells Trust by a provision that the undivided interest of R. S. Wells "in the trust assets remaining at the termination of the trust shall vest in Planters National Bank & Trust Company of Rocky Mount, North Carolina, as trustee for a trust known as the 'R. S. Wells Trust' created by me on February 4, 1956, instead of the said R. S. Wells himself, and subject to all the terms and conditions of the instrument creating the said R. S. Wells Trust." The instrument creating the R. S. Wells Trust recited the handicap of the beneficiary and his need for assistance in the management of his affairs. To insure his support, Wells transferred to defendant Bank certain property, including farm lands, and empowered it to operate, manage, sell, invest and reinvest, and otherwise deal with the trust assets in its discretion during the lifetime of R. S. Wells. The trustee was directed to pay him, in periodic installments, such sums as it deemed necessary for the proper support of him, his wife, and his children, if any, by her. Upon the beneficiary's death the trustee was directed to pay his funeral expenses and to terminate the trust by conveying and distributing the trust assets to "the heirs and distributees of the said R. S. Wells (excluding any adopted child or children) as if the said R. S. Wells died intestate under the intestacy laws of North Carolina."

On February 2, 1956, Wells, by the "Mercer Farm Trust Indenture," created a trust similar to the Pearl K. Wells Trust and the R. S. Wells Trust for the benefit of his first wife, Josie M. Wells, and R. S. Wells during the lifetime of Josie M. Wells and one year thereafter. At the

end of the calendar year after the death of Josie M. Wells, defendant Bank as trustee was directed to terminate the trust by conveying the corpus to Wells' three children, plaintiffs, in fee. On February 6, 1956, Wells amended this trust, as he had the others, to direct a conveyance of the share of R. S. Wells to defendant Bank as trustee of the R. S. Wells Trust.

On February 4, 1956, the same day he created the R. S. Wells Trust, Wells executed his last will and testament. In Item Four thereof he "devised and bequeathed to the defendant, the Planters Bank and Trust Company, as trustee under the Pearl K. Wells Trust, one-half of the adjusted gross estate as finally determined for federal estate tax purposes, less the aggregate value of other property which qualified for the marital deduction. . . ." In the same item he referred to the power of appointment he had given his wife in the instrument creating the Pearl K. Wells Trust and stated, "These provisions are reimposed by this will."

In Item Five of the will, the residuary clause, he devised all the rest and residue of his net estate to his three children, plaintiffs, share and share alike in fee simple. By a codicil, dated February 6, 1956, Wells amended Item Five to give the share of R. S. Wells in the residue of his estate to defendant Bank as trustee to be managed and disposed of under the terms of the R. S. Wells Trust.

On September 7, 1961, William M. Wells, Sr., died testate while residing in Reno, Washoe County, Nevada. The primary administration of his estate is being had there, with an ancillary administration in North Carolina by defendant Bank. Subsequent to January 17, 1963, First National Bank of Nevada, as the executor of Wells' estate, by agreement with defendant Bank, as trustee, allocated to the Pearl K. Wells Trust, in satisfaction of the marital-deduction devise and bequest, certain farm lands located in North Carolina, including the farms identified as the "Barron farm," the "Kansas-Weaver-Langley farm," and the "Moore farm." Although these farms were not officially allocated until after the death of Pearl K. Wells, it is conceded that defendant Bank, prior to the allocation and prior to her death, had, as trustee of the Pearl K. Wells Trust, leased them.

On June 28, 1962, Pearl K. Wells died testate while a resident of Reno, Nevada. Defendant Bank is the ancillary administrator of her estate in North Carolina. By her will dated May 3, 1961, with specific reference to the power of appointment given her by her husband, Pearl K. Wells devised certain farm lands in North Carolina, including the Barron, the Kansas-Weaver-Langley, and the Moore farms, allocated to the Pearl K. Wells Trust, "to the three children of (her) husband William Mercer Wells, share and share alike."

Defendant Bank, as trustee under the Pearl K. Wells Trust, leased the Barron farm for the calendar year 1962 to John R. Highsmith, and also leased the Kansas-Weaver-Langley farm for the calendar year 1962 to S. R. Cockrell. Under these leases it was provided that defendant Bank, as trustee-lessor, would receive as rent one-third of the tobacco crops harvested on such farms, which rents would be payable on an "as sold" basis at the warehouse in Rocky Mount. These leases also provided that defendant Bank, as trustee-lessor, would be responsible for certain expenses incurred in connection with the leased farms, namely, maintenance expense, insurance on buildings, real-estate taxes, and one-third of the expense incurred for lime and insurance on the tobacco crops. For the year 1962 these expenses amounted to $5,638.71.

After the death of Pearl K. Wells, the tobacco grown on the Barron farm and on the Kansas-Weaver-Langley farm was harvested and sold, and defendant Bank received the total sum of $19,262.88, one-third of the sale proceeds. In addition to the foregoing sum, defendant Bank received the sum of $293.84 under the Federal Grain Program maintained on the Moore farm, of which it received $140.26 on March 24, 1962, and the balance of $153.58 on August 4, 1962.

A controversy immediately arose between plaintiffs and defendant Bank, as ancillary administrator of the estate of Pearl K. Wells and as trustee of the R. S. Wells Trust and the Pearl K. Wells Trust; and between plaintiffs and the three individual defendants, beneficiaries under the will of Pearl K. Wells.

Plaintiffs contend: (1) They are entitled to the Federal Grain Program payment of $153.58 which was made to the trustee after the termination of the life estate. (2) The expenses of $5,638.71 "are not the proper subject of apportionment" and "should be first paid out of income realized by said trust," including the income of $140.26 the trust received from the Federal Grain Program on March 24, 1962. (3) They are entitled to the whole of the tobacco rents in the amount of $19,262.88, to the exclusion of the estate of Pearl K. Wells.

Defendants contend: (1) The sum of $293.84 received under the Federal Grain Program belongs to the estate of Pearl K. Wells. (2) Both the tobacco rent and the expenses should be apportioned equally between plaintiffs and the estate of Pearl K. Wells.

A further dispute exists between plaintiff R. S. Wells and defendant Bank, as trustee of the R. S. Wells Trust. He contends that his share in the remainder of the Pearl K. Wells Trust passed direct to him in fee under her will. Defendant Bank contends that his interest passed to it as trustee of the R. S. Wells Trust.

Judge Mintz allowed defendants' motion for judgment on the pleadings and decreed, *inter alia:*

"1. That the 1962 rents and profits from the Barron Farm, the Kansas-Weaver-Langley Farm, and the Moore Farm, received by The Planters National Bank and Trust Company, be apportioned Seven Thousand One Hundred Five and 93/100 Dollars ($7,105.93) to the Estate of Pearl K. Wells, Deceased, and the sum of Six Thousand Eight Hundred Twelve and 08/100 Dollars ($6,812.08) be apportioned to the plaintiffs, share and share alike." (Plaintiffs' recovery is one-half of the tobacco rents after deducting the expenses; the estate's recovery is that figure, plus the Federal Grain Program payment.)

"2. That The Planters National Bank and Trust Company, Trustee under the R. S. Wells Trust Indenture, is entitled to receive as an asset of the trust the undivided interest of R. S. Wells in the Barron Farm, the Kansas-Weaver-Langley Farm, and the Moore Farm, and any other property appointed to him by the will of Pearl K. Wells."

Plaintiffs excepted to the signing of the judgment and appealed.

Poyner, Geraghty, Hartsfield & Townsend by Arch. E. Lynch, Jr., for plaintiffs, appellants.

Battle, Winslow, Merrell, Scott & Wiley by F. E. Winslow for defendants, appellees.

SHARP, J. In entering his declaratory judgment Judge Mintz noted that the action involved two controversies: the first, between the plaintiff remaindermen and defendant Bank as ancillary administrator of the life tenant, Pearl K. Wells, over certain rents and expenses for 1962; the second, between one of the plaintiffs, R. S. Wells, and defendant Bank as trustee as to what estate he takes in the remainder of the corpus of the Pearl K. Wells Trust. Judge Mintz recognized that there is a misjoinder of parties and causes. His judgment recites that to this misjoinder "no objection has been raised in the interest of convenience and economy." We shall first consider the question raised by defendant Bank as trustee of the Pearl K. Wells Trust.

Did the interest of R. S. Wells in the corpus of the Pearl K. Wells Trust pass to him in fee, freed of the trust, as appointee under the will of Pearl K. Wells? Or did it pass, under the terms of the *inter vivos* trust, to defendant Bank as trustee for R. S. Wells for life and at his death to his heirs (excluding any adopted child) in fee? The answer is that R. S. Wells owns his share in fee, freed of the trust, as appointee. By the terms of the instrument creating the Pearl K. Wells Trust, the income beneficiary was given a general power of appointment to dis-

pose of the corpus of the trust by her will just as if she herself owned the corpus free of the trust. She could have appointed to her own estate. *Hicks v. Ward,* 107 N.C. 392, 12 S.E. 318; 41 Am. Jur., Powers §§ 4, 55 (1942); Simes & Smith, Future Interests § 875 (2d Ed. 1956). Had Pearl K. Wells failed to exercise the power, the share of R. S. Wells in the remainder of the corpus would have become, under the terms of the trust instrument as amended February 6, 1956, a part of the R. S. Wells Trust. R. S. Wells' interest in this trust was an equitable life estate. He was entitled to receive from the income or principal such sums as the trustee should determine to be "necessary and proper" for his support and that of his dependents. At his death the corpus of the trust was given to his heirs generally. Since the interest of R. S. Wells in the trust was an equitable one and that of his heirs a legal one, the Rule in *Shelley's* Case would have no application. *Benton v. Baucom,* 192 N.C. 630, 633, 135 S.E. 629, 631. By the exercise of her power of appointment, Pearl K. Wells devised the remainder in all North Carolina farm lands which constituted a part of the trust, with the exception of one designated farm, "to the three children of (her) husband, William Mercer Wells, share and share alike." This was a devise of a fee to each child. G.S. 31-38. By the exercise of her power of appointment she did not disturb the vested remainder which William M. Wells, Jr. and Alice Wells Romanek took under the Pearl K. Wells Trust, but she converted R. S. Wells' interest in the remainder of the trust corpus from an equitable life estate (via the R. S. Wells Trust) to a fee. Thus, as to him she did not merely parrot the language of the trust. A different estate passed to him through her exercising her power, to do which did not require her, as defendant Bank contends, to divert entirely the interest of R. S. Wells to another person. It is obvious that by her devise of that property to R. S. Wells in fee, Pearl K. Wells changed, to that extent, her husband's plan that during the life of R. S. Wells defendant Bank should manage the property the settlor had provided for his son's support. In 1956 he had expressed this intent in the instrument creating the Pearl K. Wells Trust, the Mercer Farm Trust, the R. S. Wells Trust, as well as in his last will. At the same time he gave her, notwithstanding, specific power to change his plan with respect to the corpus of the Pearl K. Wells Trust, even to the extent of substituting other beneficiaries for his three children. She changed the plan for R. S. Wells by language in her will which "is clear and has a recognized legal meaning" leaving "no room for construction." *Rhoads v. Hughes,* 239 N.C. 534, 535, 80 S.E. 2d 259, 259. Since she did so, the settlor's over-all intent, which defendant Bank stresses so forcibly, is quite irrelevant. We hold that R. S. Wells takes his interest in the corpus of

the Pearl K. Wells Trust in fee simple as a result of the exercise of her power of appointment.

Are the rents, in amount of $19,262.88, from the 1962 tobacco crops raised on those farms which plaintiffs acquired as successors to Pearl K. Wells subject to apportionment between them and the ancillary administrator of Pearl K. Wells, the life beneficiary of the trust? Contending that they are not, plaintiffs rely on *In re Estate of Galloway,* 229 N.C. 547, 50 S.E. 2d 563; *Trust Co. v. Frazelle,* 226 N.C. 724, 40 S.E. 2d 367, and other cases which apply the well-established rule that "rent which is due at the time of the death of the lessor passes to his personal representative for administration as an asset of the decedent's estate, while rent which becomes due after that becomes the property of the heirs or devisees who are entitled to the reversion, as an incident thereof." *Trust Co. v. Frazelle, supra* at 728, 40 S.E. 2d at 371; *accord,* 32 Am. Jur., Landlord and Tenant § 457 (1941).

At common law where the landlord dies intestate between rent days, there is no apportionment of rents which are unsevered and not then due, and the right to all rent accruing after the decedent's death devolves upon the heirs of the decedent lessor. 32 Am. Jur., Landlord and Tenant § 448 (1941); 2 Mordecai's Law Lectures 1367 (2d Ed. 1916). "Thus, ordinarily, *in the absence of statute,* there is, upon the death of a lessor, no right to an apportionment of rents to accrue as between the administrator, executor, or trustee and the heir, devisee, or trust beneficiary." 32 Am. Jur., Landlord and Tenant § 457 (1941). (Italics ours.) The rents were said to follow the reversion. Hence, where *A* devised his personalty to *B* and Blackacre, rented to *T* and in *T*'s possession as lessee, to *C*, and the rent on Blackacre fell due after *A*'s death, *C*, not *B*, was entitled to all the rent, none of it being apportioned to *B* as personalty owned by *A* at the time of his death. And where *A* died intestate, his heirs, not his personal representative, were entitled to the whole of the rent. Interest, on the other hand, was apportionable between persons successively entitled. 33 Am. Jur., Life Estates, Remainders, and Reversions § 295 (1941).

The North Carolina legislature has in several respects amended the common-law rule of non-apportionment. G.S. 42-6 provides that in all cases where rents, or any other payments of any description, are made payable at fixed periods to successive owners *under any instrument,* and where the right of any owner to receive payment is terminated by a death or other uncertain event *during a period in which a payment is growing due,* "the payment becoming due next after such terminating event shall be apportioned among the successive owners according to the parts of such periods elapsing before and after the terminating event." G.S. 37-4 makes the same rule applicable to the income from

trusts. It provides, *inter alia,* that whenever an income beneficiary shall have the right to income from periodic payments, which include rent, and such right was determined by death or otherwise at a time other than the date when such periodic payments should be paid, "he or his personal representative shall be entitled to that portion of any such income next payable which amounts to the same percentage thereof as the time elapsed from the last due date of such periodic payments to and including the day of the determination of his right is of the total period during which such income would normally accrue. The remaining income shall be paid to the person next entitled to income by the terms of the transaction by which the principal (trust) was established." G.S. 42-7 apportions rents on farm leases which it extends in lieu of emblements, when the life tenant dies during the lease year. G.S. 37-4 brought the administration of trusts in harmony with the apportionment principles of both G.S. 42-6 and G.S. 42-7.

The rule applied in *In re Estate of Galloway, supra,* and *Trust Co. v. Frazelle, supra,* has not been changed by statute. These are of a genus of cases which do not fall within any of the amendments to the common-law rule and in which, for that reason, the rent was held to follow the reversion. In these cases the successive ownership is not under a trust, G.S. 37-4, and not "under any instrument, or by any will." G.S. 42-6. Where the predecessor owner had the fee prior to the execution of the instrument under which the successive owners take, the former cannot be said to own by the instrument, *i.e.,* the deed, will or trust indenture, by which the latter owners take. G.S. 42-6 by its terms makes provision for successive owners under the same instrument. For that reason it applies to the rents involved here, and *In re Estate of Galloway, supra,* and *Trust Co. v. Frazelle, supra,* are inapposite.

In addition to the two preceding cases and others of the same import, plaintiffs say they rely strongly on the case of *Phillips v. Gilbert,* 248 N.C. 183, 102 S.E. 2d 771, a case which came up from Jones County. The facts in that case are these: Testator devised his lands to the plaintiff as trustee for the benefit of testator's son during his life and at the son's death, to the plaintiff in fee. Plaintiff never assumed the duties of the trust. The son died December 28, 1956. Prior to his death his guardian, the defendant, had leased the land for the crop year 1957 for one-third of the crop. The defendant collected these rents, and the plaintiff sued for the landlord's share of the rents and the immediate possession of the farm. The defendant alleged that the plaintiff had forfeited his remainder by failing to execute his duties as trustee, and he counterclaimed for reimbursement of expenses incurred during his ward's last illness. The trial judge held that the trust had imposed no active duties upon the plaintiff and rendered judgment for the plaintiff on the

pleadings. In affirming the judgment this Court, speaking through Denny, J. (now C. J.), said that the ward "never had anything more than a life estate in the premises involved in this action, and upon his death the life estate was extinguished and the title to the premises passed to the plaintiff in fee simple, free from the obligations of the life tenant, except as to the rental agreement for the 1957 crop. It follows, therefore, that since the rent for the crop year 1957 did not accrue under the terms of the agreement until after the death of the life tenant, such rent became the property of the owner of the reversion, to wit, the plaintiff." *Id.* at 188, 102 S.E. 2d at 774.

Neither the pleadings nor the briefs in *Phillips v. Gilbert* raised the question of apportioning the rents, and apportionment was not an issue between the parties to the action. The life tenant died December 28, 1956. G.S. 42-23, applicable to Jones County, provides that agricultural leases for one year or from year to year shall be "from December first to December first." At the death of the life tenant, therefore, the lease had run for 28 days, approximately a month. The ward's personal representative, the only person who could have raised the question of apportionment or who could have collected the estate's share of the rents for those 28 days, was not a party to the action. Counsel either overlooked this aspect of the case or deemed the amount involved ($133.00) not worth the cost of an administration. As the case was constituted, the decision was clearly correct. See the comment on *Phillips v. Gilbert,* in 37 N.C.L. Rev. 423.

Phillips v. Gilbert does not upset the principles of apportionment established by the legislature in G.S. 42-6, G.S. 37-4, and G.S. 42-7. To bring about such a *volte-face* by a case which was actually concerned with whether a trust was passive or active and in which there was no issue as to apportionment, would be an unusual procedure indeed.

G.S. 42-7 applies only to farm leases which are determined, *inter alia,* by the death of a life tenant. Since the settlor authorized the trustee to make leases beyond the term of the duration of the trust, the leases so made did not terminate with Pearl K. Wells' death. G.S. 42-7 does not, therefore, apply, and *Hayes v. Wrenn,* 167 N.C. 229, 83 S.E. 356, and *King v. Foscue,* 91 N.C. 116 (the latter cited by defendants), allowing apportionment under G.S. 42-7, are inapplicable.

The two leases *sub judice* were for the calendar year 1962. The rents under them accrued from day to day throughout the term of the leases. Pearl K. Wells died on June 28, 1962, while they were "growing due." Her right to receive the income from these rents was determined on that day by her death. She and plaintiffs were successive owners under the trust instrument. The rents reserved were ⅓ of the sale price of the tobacco crops and were to be paid "at the warehouse" on the days the

tenants sold tobacco. These sale days could not, of course, be designated in the lease, but they were no less "fixed periods" within the meaning of G.S. 42-6, and "periodic payments" within the meaning of G.S. 37-4. We hold that under both G.S. 42-6 and G.S. 37-4, the 1962 rents from the Barron and the Kansas-Weaver-Langley farms are apportionable, 48.77% to the ancillary administrator of Pearl K. Wells and 51.23% to plaintiffs, 178 days of the period covered by the leases having elapsed before Pearl K. Wells' death, and 186 days after her death. Under the statutes "rent is considered as accruing from day to day, and the right to rent follows the ownership of the estate during the period when it is earned by the property, and accordingly is apportionable in respect of time." 52 C.J.S., Landlord and Tenant § 531(b) (1947).

The next question is what disposition is to be made of Federal Grain Program payments in the amount of $293.84, paid to defendant trustee under 75 Stat. 301, § 131, for the withdrawal of acreage from the production of certain grains during the crop year 1962. In effect, these payments were the *annual* rent which the federal government paid the trustee for 8.8 acres which it caused to be diverted from the growing of corn on the Moore farm to a use or non-use designated by the government. This rent was paid in two installments, pursuant to the law's requirement that payments in excess of 50% of any payments to producers may not be made in advance of performance. The first installment of $140.26 was paid prior to the death of Pearl K. Wells. The total rent accrued from day to day under a contract which, the parties stipulate, was for the calendar year 1962. Ordinarily, in the absence of statute, as between persons successively entitled to rent there is no apportionment of rent paid in advance. Annot., Apportionment of income where right to income commences or ends during the accrual period, 126 A.L.R. 12, 51; 32 Am. Jur., Landlord and Tenant § 455 (1941). G.S. 37-4 provides that "when the right of the first tenant accrues at a time other than the payment dates of such periodic payments, he shall only receive that portion of such income which amounts to the same percentage thereof as the time during which he has been so entitled is of the total period during which such income would normally accrue. . . ." This provision requires the apportionment of the total Federal Grain Program payments in the same percentages as the apportionment of the tobacco rents.

Finally, the expenses in the amount of $5,638.71 will be apportioned in the same percentages as the apportionment of the rents. G.S. 37-12(1), (3). This sum represents ordinary expenses incurred in the administration and management of the trust, including charges for miscellaneous labor and supplies, building repairs, property insurance and taxes, and trustee's commissions. Rent of realty is income, G.S. 37-3(1),

which is to be distributed to the person entitled "after payment of expenses properly chargeable to it." G.S. 37-12(1). Clearly, the trustee's expenses in raising the crop (labor and supplies) are properly chargeable against the income derived from the sale of the crop and are properly apportioned. In addition, G.S. 37-12(1) requires regularly recurring taxes, premiums on insurance, ordinary repairs, and trustee's compensation (except commissions computed on principal — not involved here) to be paid out of income. These expenses are "considered" by the statute, G.S. 37-12(3), to have accrued from day to day and are required to be apportioned on that basis "whenever the right of the tenant begins or ends at some date other than the payment date of the expenses."

The judgment of Mintz, J., is vacated and the cause remanded for the entry of judgment in accordance with this opinion.

Error and remanded.

NORTH CAROLINA TURNPIKE AUTHORITY, AN AGENCY OF THE STATE OF NORTH CAROLINA v. PINE ISLAND, INC., A CORPORATION; W. N. SPRUILL; STATE HIGHWAY COMMISSION, AN AGENCY OF THE STATE OF NORTH CAROLINA; AND THOMAS WADE BRUTON, INDIVIDUALLY, AND AS ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA.

(Filed 23 July, 1965.)

1. Constitutional Law § 7—

The General Assembly may not delegate its supreme legislative power to any other branch of the State Government or agency, but as to specific subject matter it may delegate a limited portion of its legislative power to an administrative agency if it prescribes the standards under which the agency is to exercise the delegated power. Constitution of North Carolina, Art. I, § 8.

2. Same—

The power delegated to the North Carolina Turnpike Authority to select routes is no broader than like power delegated to the State Highway Commission, and the statutes requiring that the Authority select routes with a view to tolls for the payment of its bonds and the integration of toll roads with the State highways, and insuring such integration by requiring approval of the Highway Commission, prescribe sufficient standards for the exercise of the delegated power. G.S. 136-89.59.

3. Same—

The power delegated to the North Carolina Turnpike Authority to fix tolls is required by statute to be exercised with a view to providing revenue sufficient to pay the cost of maintaining and operating its projects and

pay the principal and interest on its bonds, G.S. 136-89.69, and therefore the act prescribes sufficient standards for the exercise of the delegated authority.

4. Same—

The power delegated to the North Carolina Turnpike Authority to issue bonds and spend the proceeds thereof is limited by statute to the purpose of constructing and maintaining toll roads as authorized by the statute, G.S. 136-89.62(3), and therefore the statute prescribes sufficient standards for the exercise of the delegated power.

5. Same—

The power delegated to the North Carolina Turnpike Authority to determine points of ingress and egress on toll roads must be exercised by the Authority to effectuate the purposes of the act, G.S. 136-89.63(10), and therefore the statute prescribes sufficient standards for the exercise of the delegated authority.

6. Taxation § 2—

Since bonds issued by the North Carolina Turnpike Authority are payable by statutory restriction solely from tolls which may be collected from those who elect to use the toll roads, G.S. 136-89.59, such bonds do not constitute a debt of the State within the purview of Art. II, § 14 with regard to the passage of revenue acts, or the purview of Art. V, § 4 in regard to the increase of the public debt.

7. Statutes § 9—

If a statute within the power of the General Assembly to enact is objectionable as a local act relating to subjects enumerated in Art. II, § 29, of the Constitution because its scope is limited by a particular section of the act, the repeal of the limiting section validates the act in regard to its future operation.

8. Statutes § 2—

Even though a statute creating a turnpike authority limits the authority to the construction, for the time being, of one toll highway, such act is not a local act proscribed by Art. II, § 29, of the State Constitution, since even one toll highway may be of statewide significance in developing and rendering a section of the State accessible to motor traffic.

9. Highways § 6—

The North Carolina Turnpike Authority is empowered to construct a toll highway in phases by constructing first a road with only one lane of travel in each direction, with the other lanes and the center division to be constructed later, since the provision of the statute that the authority construct modern, express highways with safety devices including center divisions, etc., G.S. 136-89.59, is not a limitation of its power in this respect, it being contemplated by the statute that the toll roads be constructed in phases since it is provided that bonds for toll roads be authorized and issued from time to time. G.S. 136-89.66.

10. Statutes § 5—

The use of the word "including" in a statutory delegation of authority does not necessarily restrict it to the matters enumerated in the inclusion, and the doctrine of *expressio unius est exclusio alterius* does not ordinarily apply.

APPEAL by defendants Pine Island, Inc. and W. N. Spruill from *Fountain, J.*, in Chambers, 29 December 1964. From CURRITUCK.

This action was instituted by the North Carolina Turnpike Authority (Authority) under the Declaratory Judgment Act, Gen. Stats., ch. 1, art. 26, to determine: (1) the constitutionality of Sess. Laws of 1963, ch. 757, codified as Gen. Stats., ch. 136, art. 6E (the Act); and (2) whether, if the Act is constitutional, Authority can legally construct a turnpike in two phases, the first phase being a two-lane highway with only one lane for traffic in each direction, the second phase, multiple lanes in each direction. Authority is a body politic and corporate created by the Act, which expressly constitutes it a public agency.

The legislative purpose in creating Authority is declared by G.S. 136-89.59 to be "to provide for the construction of modern highways and express highways or superhighways embodying safety devices, including center division, ample shoulder widths, long-sight distances, multiple lanes in each direction and grade separation at intersections with other highways and railroads, and thereby facilitate vehicular traffic, provide better connection between the highway system of North Carolina and the highway systems of the adjoining states, remove many of the present handicaps and hazards on the congested highways in the State and promote the agricultural and industrial development of the State. . . ." To effectuate this purpose, G.S. 136-89.63 empowers Authority, *inter alia:*

> "5. To construct, maintain, repair and operate turnpike projects at such locations within the State as may be determined by the Authority and approved by the State Highway Commission. . . . (N)o turnpike or toll road shall be constructed or operated in this State unless and until a certificate of approval be first obtained from the State Highway Commission certifying that the operation of such toll road or turnpike will not be harmful or injurious to the secondary or primary roads embraced in the system of State highways;
>
> "6. To issue turnpike revenue bonds of the Authority for any of its corporate purposes, payable solely from the tolls and revenues pledged for their payment, and to refund its bonds, all as provided in this article * * *."

The Act provides that the revenue bonds issued under its grant of power to Authority "shall not be deemed to constitute a debt of the State or of any political subdivision thereof or a pledge of the faith and credit of the State or of any political subdivision." It requires a statement to this effect on the face of every bond issued. G.S. 136-89.60. From funds acquired under the Act, Authority is empowered to acquire by purchase or condemnation such property of every kind as may be necessary for the construction and operation of any approved project. G.S. 136-89.64. It is also authorized to accept federal grants and, from any source, gifts of land, money, or labor, G.S. 136-89.63(13), as well as "to do all acts and things necessary or convenient to carry out the powers expressly granted in this article," G.S. 136-89.63(14). This latter includes the power "to employ consulting engineer, attorneys, accountants, construction experts, superintendents, managers, and such other employees and agents as may be necessary in its judgment, and to fix their compensation, and to employ financial experts and fiscal agents with the advice and approval of the Local Government Commission; provided, however, that the provisions of G.S. 159-20 shall be complied with to the extent that the same shall be applicable," G.S. 136-89.63(12).

As originally enacted, the Act expressly provided, G.S. 136-89.77, that Authority "shall not construct more than one turnpike project, which project shall not exceed one hundred (100) miles in length, until the General Assembly shall have reviewed the activities of the Authority" and specifically authorized additional projects. On June 16, 1965, by S.B. 532, the General Assembly repealed G.S. 136-89.77 in its entirety.

The facts out of which the controversy arises are undisputed. Admissions in the answer establish them to be as stated in the complaint, which is here summarized:

Authority has determined to construct a turnpike project along the Outer Banks of North Carolina, commencing at or near Duck, Dare County, and extending north through Currituck County, a distance of about 29.30 miles, to a point near the North Carolina-Virginia boundary. The location of the Outer Banks Turnpike has been established, and on October 1, 1964, defendant State Highway Commission duly approved its location and determined that the turnpike would not be injurious to the secondary or primary roads of the State. In compliance with G.S. 136-89.63(5), it issued its certificate to that effect. Authority determined that it would not be economically feasible, in the beginning, to develop and construct the turnpike as a highway with multiple traffic lanes in each direction, but that it would be economically feasible to do so in successive phases. It has therefore provided for the development of the project in two phases, the first to be a two-lane highway providing one traffic lane in each direction, the second, on later deter-

mination of economic feasibility, a four-lane highway providing two traffic lanes in each direction, with a center division.

On or about July 1, 1964, Authority entered into a contract with defendant W. N. Spruill, whereby the latter was employed to serve as Engineering Consultant with respect to the planning and development of the turnpike. This employment is authorized by the Act. His compensation is dependent upon Authority's power to issue and sell its revenue bonds.

Defendant Pine Island, Inc. is the owner of a tract of land, portions of which are embraced within the projected right of way of the proposed turnpike. Pine Island has heretofore conveyed to Authority by deed of gift, dated November 16, 1964, a portion of its lands located within the projected right of way of the turnpike for use only as part of the turnpike. The deed contains a clause whereunder title to such lands will revert in the event the turnpike shall fail to qualify as a "turnpike project" under the Act.

A bona fide controversy exists between plaintiff and defendants Pine Island and Spruill in regard to legal questions, which involve the constitutionality of the Act and the interpretation of certain provisions of it. They contend: (1) that the Act violates N. C. Const., Art. I, § 8; Art. II, § 14; Art. V, § 4; Art. II, § 29; and (2) that the Act does not authorize plaintiff to construct, maintain and operate the proposed turnpike in phases.

The State Highway Commission and the Attorney General were made parties defendant under G.S. 1-260. They, however, contend, with Authority, that the Act is constitutional and authorizes the construction of the turnpike in two phases, as Authority contemplates doing.

After hearing the matter Judge Fountain adjudged that the Act violates no provision of the Constitution of North Carolina and empowers Authority to proceed with the project in two phases, as planned. From his judgment defendants Pine Island and Spruill appeal.

Poyner, Geraghty, Hartsfield & Townsend for North Carolina Turnpike Authority, plaintiff, appellee.

Thomas Wade Bruton, Attorney General, and Harrison Lewis, Assistant Attorney General, for North Carolina State Highway Commission and the Attorney General of North Carolina, defendants, appellees.

McLendon, Brim, Holderness & Brooks for Pine Island, Inc. and W. N. Spruill, defendants, appellants.

SHARP, J. Appellants' challenges to the constitutionality of the Act will be considered *seriatim*.

Appellants' first contention is that, in empowering Authority to determine the need, location, extent, and nature of a turnpike project, and to establish tolls and regulations for its use, the General Assembly delegated its legislative authority without providing sufficient standards for a guide and that the Act therefore violates N. C. Const., Art. I, § 8. This article declares: "The legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other." Legislative powers are vested, by N. C. Const., Art. II, § 1, in a Senate and a House of Representatives. It is settled and fundamental in our law that the legislature may not abdicate its power to make laws nor delegate its *supreme* legislative power to any other coördinate branch or to any agency which it may create. *Coastal Highway v. Turnpike Authority,* 237 N.C. 52, 74 S.E. 2d 310. It is equally well settled that, as to some *specific* subject matter, it may delegate a *limited* portion of its legislative power to an administrative agency *if* it prescribes the standards under which the agency is to exercise the delegated powers. *In re Annexation Ordinances,* 253 N.C. 637, 117 S.E. 2d 795; *Cox v. Kinston,* 217 N.C. 391, 8 S.E. 2d 252; *Provision Co. v. Daves,* 190 N.C. 7, 128 S.E. 593.

When, in 1951, the Indiana legislature created the Indiana Toll Road Commission and authorized it to construct, maintain, and operate toll projects "at such locations as shall be approved by the Governor, and in accordance with such alignment and design standards as shall be approved by the Highway Commission," the enactment was attacked on the same principles upon which appellants attack the act under consideration here, namely: The Act delegates discretionary duties to administrative officers and bodies without providing reasonable standards for (1) the selection of routes, (2) the fixing of tolls, (3) determining the limit on the borrowing and expenditure of money, and (4) providing points of ingress and egress on the toll-road projects. Under a constitutional provision substantially similar to N. C. Const., Art. I, § 8, and Art. II, § 1, the Indiana court, in *Ennis v. State Highway Commission,* 231 Ind. 311, 108 N.E. 2d 687, held these contentions to be without merit. As to the selection of routes, the court pointed out that the powers delegated to the Toll Road Commission "are no broader than the powers granted to the State Highway Commission in selecting and constructing highways in the State," *Id.* at 326, 108 N.E. 2d at 694; and that, since the turnpike must finance its construction by marketable bonds to be paid by tolls, the locations must be selected with this standard in mind. These observations are as applicable to North Carolina's Turnpike Authority as they were to Indiana's Toll Road Commission. G.S. 136-18(2) authorizes the State Highway Commission "to locate and acquire rights of way for any new roads that

may be necessary for a State highway system. . . ." G.S. 136-45 declares the general purpose of the system to be "highways running to all county seats, and to all principal towns, State parks, and principal State institutions, and linking up with State highways of adjoining states and with national highways into national forest reserves by the most practical routes with special view of development of agriculture, commercial and national resources of the State. . . ." By the Act the legislature authorized turnpike projects to augment the state highway system, G.S. 136-89.59, and insured an integrated system by making such projects subject to the approval of the State Highway Commission. "Exercising its general police powers of the State, the legislature can choose from many different methods to provide for highways." *Dearborn v. Michigan Turnpike Authority,* 344 Mich. 37, 58, 73 N.W. 2d 544, 555. As to the selection of routes, we are of opinion that the General Assembly has set, for the selection of routes, reasonable standards which are as specific as the circumstances permit.

As to toll charges, the legislature authorized Authority to fix and collect tolls for transit over any turnpike project constructed by it. G.S. 136-89.63(7). These tolls are required to be "so fixed and adjusted in respect to the aggregate of tolls from the turnpike project or projects in connection with which the bonds of any issue shall have been issued as to provide a fund sufficient with other revenues, if any, to pay (i) the cost of maintaining, repairing and operating such turnpike project or projects and (ii) the principal of and the interest on such bonds as the same shall become due and payable, and to create reserves for such purposes." G.S. 136-89.68. As the Court said in *Ennis v. State Highway Commission, supra,* with reference to the Indiana act's similar provision regarding tolls charged, "It seems to us that section 14 of the act (tolls) so obviously sets reasonable standards for the fixing of toll charges that a discussion thereof would be idle." *Id.* at 327, 108 N.E. 2d at 695. As a practical matter tolls require little legislative regulation. If they are unreasonably high, motorists will boycott the turnpike; if they are unreasonably low, the bondholders will register their objections in some appropriate manner.

Revenue bonds are authorized only for the purpose of paying the cost of a project. The items embraced in the word *costs,* as applied to a turnpike project, are specifically enumerated in G.S. 136-89.62(3), and the amount of revenue bonds to be issued is limited by the costs as thus defined. Under G.S. 136-89.66, these bonds shall bear interest at a rate not exceeding 6% and shall mature at such time, not exceeding 40 years, as Authority may determine. They must be approved and sold by the Local Government Commission. All funds received pursuant to the Act are, by G.S. 136-89.69, required to be applied "solely as pro-

vided" in the Act. The authority to spend is circumscribed by the authority to do, *i.e.*, to construct and maintain toll roads, to collect the revenues therefrom, and out of them to retire the bonds. Any unrelated expenditures would be illegal. These requirements constitute sufficiently definite standards for both the borrowing and the spending of money.

With reference to points of ingress and egress on the projects, the Act authorizes Authority to establish and control them "as may be necessary or desirable . . . to insure the proper operation and maintenance of such project. . . ." G.S. 136-89.63(10). This could only mean that such points shall be so established as to effectuate the purposes of the Act. G.S. 136-89.59. The legislature could provide no more definite criteria for points of ingress and egress on a road the location of which it has authorized Authority to select. When the City of Dearborn attacked the Michigan Turnpike Act on the ground that it was an unconstitutional delegation of legislative authority, the Michigan court said: "The complexities of modern life are such that courts of last resort have recognized the necessity of legislative grants of authority to carry forward programs such as provided in this Turnpike Act." *Dearborn v. Michigan Turnpike Commission, supra* at 71, 73 N.W. 2d at 561. We also find applicable to the act *sub judice* the reasoning of Francis, J.C.C., in dismissing a similar attack on the constitutionality of powers given the New Jersey Turnpike Authority:

> "In my judgment, it would not be feasible to require more certain standards than those now prescribed. If it were necessary for the Authority to formulate specific plans as to the course of the turnpike through the various municipalities, and as to the manner and method of construction and then seek legislative approval thereof, there would be no purpose in creating the Authority; the Legislature might just as well act itself in the entire matter. The prohibition against abdication of legislative power in favor of an agency was never intended to extend to such administrative details." *City of Newark v. N. J. Turnpike Authority,* 12 N.J. Sup. 523, 536, 79 A. 2d 897, 903.

Accord, Opinion of the Justices, 330 Mass. 713, 113 N.E. 2d 452 (act delegating power to Mass. Turnpike Authority held constitutional.)

The second constitutional question presented by this appeal is whether the Act contravenes N. C. Const., Art. II, § 14, which specifies a certain procedure in the General Assembly for the passing of any law raising money on the credit of the State, pledging the faith of the State for the payment of any debt, or imposing any tax on the people of the State. The answer to the second question is, No. Tolls are not taxes. A

person uses a toll road at his option; if he does not use it, he pays no toll.

> "Taxes are levied for the support of government, and their amount is regulated by its necessities. Tolls are the compensation for the use of another's property or improvements made, and their amount is determined by the cost of the property or improvements." *Ennis v. State Highway Commission, supra* at 323, 108 N.E. 2d at 693.

Nor will the credit of the State or any of its municipalities be pledged for the payment of principal or interest on Authority's revenue bonds. These bonds are "payable solely from revenues from the turnpike." G.S. 136-89.59. The General Assembly has taken great care to make it crystal clear that the credit of neither the State nor any of its political subdivisions can be pledged to pay the bonds. G.S. 136-89.60. This method of financing creates no debt within the meaning of the Constitution. *Keeter v. Lake Lure*, 264 N.C. 252, 141 S.E. 2d 634; *Ports Authority v. Trust Co.*, 242 N.C. 416, 88 S.E. 2d 109; *Williamson v. High Point*, 213 N.C. 96, 195 S.E. 90; *Webb v. Port Commission*, 205 N.C. 663, 172 S.E. 377; *Brockenbrough v. Commissioners*, 134 N.C. 1, 46 S.E. 28; *accord, Peo. ex rel Gutknecht v. Port Dist.*, 4 Ill. 2d 363, 123 N.E. 2d 92; *Ennis v. State Highway Commission, supra; Dearborn v. Michigan Turnpike Authority, supra.*

Since the revenue bonds do not create a debt within the meaning of the Constitution, the limitations of N. C. Const., Art. V, § 4, are inapplicable, and appellants' third constitutional contention is likewise without merit. *Ports Authority v. Trust Co., supra.*

For all practical purposes, the repeal of G.S. 136-89.77, which limited Authority to one road not over 100 miles in length "until the General Assembly shall have reviewed the activities of the Authority and shall have authorized additional projects," eliminates appellants' fourth constitutional challenge to the Act. This one is made on the ground that G.S. 136-89.77 gave the Act the character of local legislation so as to violate N. C. Const., Art. II, § 29, which prohibits local legislation authorizing, *inter alia*, the laying out of highways. As heretofore pointed out, the legislature had power, in the first instance, to pass the Act as it now stands with G.S. 136-89.77 deleted. Even had that section rendered the Act local legislation when passed in 1963, the repeal of the section undoubtedly validated the Act in this regard, as to its future operation. *Insurance Co. v. High, Com'r. of Revenue*, 264 N.C. 752, 142 S.E. 2d 681; 16 Am. Jur. 2d, Constitutional Law § 179 (1964). Although plans have been made and approved, no bonds have been issued and no work begun on the Outer Banks project. The Act as passed in

1963 was not, however, local legislation merely because it limited Authority, *for the time being,* to one project. *McIntyre v. Clarkson,* 254 N.C. 510, 119 S.E. 2d 888. One project can well be of State-wide significance. When statutes authorizing a State bridge commission to build a bridge at Port Huron were assailed as local legislation contravening the Michigan constitution, the Michigan court said: "The scope of the act is not limited to an international bridge and ferries at or near Port Huron although it does embrace such objects." *Attorney General v. State Bridge Comm.,* 277 Mich. 373, 378, 269 N.W. 388, 390. The court pointed out that the geography of Michigan requires all its citizens to be particularly interested in transportation across, over, and under the waters of the State, lest they remain without vehicular transportation to the south and to the west. When the Michigan legislature, in its Turnpike Act, asked the Turnpike Authority to study the feasibility of and need for two specifically designated turnpike projects, the Act was held not to violate the Michigan constitution as being local legislation. *Dearborn v. Michigan Turnpike Authority, supra.* Patently North Carolina's act was drafted with the idea of supplementing the Statewide public-highway system. The State Highway Commission is the State agency created for the purpose of constructing and maintaining State-wide highways *at the expense of the entire State.* G.S. 136-45; *Equipment Co. v. Hertz Corp.,* 256 N.C. 277, 123 S.E. 2d 802. The Authority is the State agency created to provide additional roads *at the expense of those who choose to use them.* It is anticipated, however, that these toll roads, when all indebtedness incurred in connection with their construction shall have been paid, will become a part of the State highway system and thereafter be free of toll. G.S. 136-89.74. But, since toll roads are a departure from a legislative policy of many years' standing, in 1963 the General Assembly was proceeding cautiously and experimentally in authorizing them. Even so, it did not direct the location of the pilot project with which it authorized Authority to begin. This was left to the discretion of Authority and State Highway Commission, uncontrolled except by the same general policies which direct location of roads by the State Highway Commission — plus the policy that it must be located in a section where a toll road might reasonably be expected to pay for itself. Although Authority and State Highway Commission could have located it anywhere in the State where it was economically feasible, they located it from the Virginia border southward for 100 miles on North Carolina's Outer Banks, an isolated and a unique geographical asset of the State, a rare tourist attraction. To develop, preserve, and make this section of the State accessible is not simply a local project. In holding constitutional the act creating a port commission to develop port facilities at Morehead City, the Court con-

sidered N. C. Const., Art. II, § 29, although it was primarily concerned with a possible violation of Art. VIII, § 1. *Webb v. Port Commission, supra.* Like the construction of the international bridge at Port Huron, the development of the port at Morehead City was not a local project.

Appellants rely on *Coastal Highway v. Turnpike Authority, supra.* That case is not controlling here. As Denny, J. (now C. J.), pointed out in *In re Annexation Ordinances, supra* at 645, 117 S.E. 2d at 801, the statute under attack in *Coastal Highway* "was held unconstitutional because the General Assembly had not determined the policy of the State with respect to the creation of a municipal corporation to be created by the Municipal Board of Controls for the purpose of constructing and operating a toll road and a toll bridge, and the legislature had further failed to lay down adequate standards for the guidance of such agency when created."

We hold that the Act under consideration here survives the several attacks made upon its constitutionality.

Appellants' final contention is that, even if the Act is constitutional, the legislature has not authorized Authority to proceed with any project in two phases; that a road with only one lane for travel in each direction is not a turnpike within the meaning of the Act, which contemplates the construction of a highway of multiple lanes in each direction, with a center division. This same contention was advanced and rejected in an attack made upon the validity of revenue bonds sold by the West Virginia Turnpike Commission. *Guaranty Trust Co. v. West Virginia Turnpike Commission,* 109 F. Supp. 286 (S.D.W. Va., 1952). There is no substantial difference between the language of the West Virginia act, passed in 1947, and that of ours. The West Virginia legislature created the West Virginia Turnpike Commission "to provide for the construction of modern express highways embodying every known safety device including center division, ample shoulder widths, long-sight distances, the by-passing of cities, multiple lanes in each direction and grade separations at all intersections with other highway and railroads. . . ." W. Va. Sess. Laws of 1947, ch. 139, § 1. The Commission decided to construct a turnpike between a point at the Virginia border south of Princeton, West Virginia, and a point near Charleston, West Virginia, on U. S. Route 60. Because of the high cost of construction through mountains a four-lane highway could not be financed by revenue bonds *in the foreseeable future.* The Commission determined, by resolution, therefore, that it would build the proposed turnpike in phases. The Attorney General of West Virginia argued that the applicable statute limited the Commission's power to the construction of a four-lane highway. Moore, Chief Judge, said:

"The plain language does not admit of this construction. Clearly, by use of the word 'including' the lawmakers intended merely to list examples of known safety devices, but not to exclude others equally well known. Had the latter been their intention, the proper expression to have been used would have been 'comprising,' 'consisting of,' or some synonymous term. This is not a situation which calls for the application of the maxim, '*expressio unius est exclusio alterius.*' * * * If the Commission should find that immediate construction of a four-lane trunpike could be financed by revenue bonds, then the financing and building of an inferior type of roadway might well be deemed an abuse of that discretion. * * * The Act itself contemplates the construction of turnpikes in stages. It provides that bonds may be authorized and issued at one time or from time to time for the payment of any part of the cost of any project." *Id.* at 296, 297.

This statutory construction is equally applicable to our act, which prefaces a listing of turnpike safety devices with the word *including.* "The term 'includes' is ordinarily a word of enlargement and not of limitation. (Citations.) The statutory definition of a thing as 'including' certain things does not necessarily place thereon a meaning limited to the inclusions. (Citations.)" *People v. Western Air Lines, Inc.*, 42 Calif. 2d 621, 639, 268 P. 2d 723, 733; *accord, Phelps Dodge Corp. v. N. L. R. B.*, 313 U.S. 177, 189, 85 L. Ed. 1271, 1280, 61 S. Ct. 845, 850. Our act, in G.S. 136-89.66, like the West Virginia act, in W. Va. Sess. Laws of 1947, ch. 139, § 9, provides: "The Authority is hereby authorized to provide by resolution, at one time or from time to time, for the issuance of turnpike revenue bonds of the Authority for the purpose of paying all or any part of the cost of any one or more turnpike projects."

The logic employed by Moore, Chief Judge, is applicable to our act. We hold that Authority is authorized to proceed with the construction of the turnpike project as approved by the resolution of the State Highway Commission dated October 1, 1964.

The judgment of Fountain, J., is in all respects

Affirmed.

THE DIXIE FIRE & CASUALTY COMPANY, PLAINTIFF *v.* ESSO STANDARD OIL COMPANY, STANDARD OIL COMPANY OF NEW JERSEY, HUMBLE OIL AND REFINING COMPANY, AND ESSO DIVISION OF HUMBLE OIL & REFINING COMPANY, ORIGINAL DEFENDANTS, AND JULIAN F. HEAD, ADDITIONAL DEFENDANT.

(Filed 23 July 1965.)

1. Negligence § 20—

It is sufficient for plaintiff to allege facts establishing negligence and establishing such negligence as the proximate cause of his damage, and the failure of the complaint to allege the conclusions of negligence and proximate cause is not a defect.

2. Same—

Allegations that a filling station attendant failed to place the prong of the lift in proper position to hold an automobile he was raising, that the automobile slipped on the lift in such manner that the prong on the lift punctured the gasoline tank, causing gasoline to run from the tank, and that the gasoline vapors were ignited by the open flame of a heater nearby, *held* sufficient to allege actionable negligence, notwithstanding failure of plaintiff to use the term "proximate cause."

3. Landlord and Tenant § 17—

Lessee, in the absence of specific agreement to the contrary, is under implied obligation to treat the demised premises in such manner that no injury be done the property, and while lessor may not hold lessee liable for accidental damage by fire, he may hold lessee liable for damage by fire resulting from negligence. Lessor's covenant to make all repairs to the demised premises at his own expense is not a covenant excluding such implied obligation.

4. Contracts § 10—

Contracts exempting a party from liability for negligence are not favored by the law and are to be strictly construed.

5. Landlord and Tenant § 8—

In the absence of an agreement to the contrary, the sublease of the premises does not release lessee from his obligations under the lease, including the implied obligation not to damage the premises as a result of negligence.

6. Landlord and Tenant § 17—

The allegations were to the effect that lessees of a filling station subleased same and that sublessee was guilty of negligence resulting in damage to the premises by fire. *Held:* Liability of lessee to lessor for the negligent act of the sublessee is not based on the principle of *respondeat superior* but is based upon breach of implied covenant by lessor that waste would not be committed by negligence in the use of the property, and under express covenant of lessee to indemnify and save lessor harmless from any claims through the negligence of lessee, his sublessee and assigns.

7. Same—

An action for waste may be brought before the expiration of the term, and although the existence of the lease contract establishes the relationship upon which the duty to exercise due care arises, the action for waste resulting from negligent conduct sounds in tort.

8. Negligence § 1—

While breach of contract does not ordinarily give rise to an action in tort, where the contract imposes a duty to exercise due care in the performance of the contract and that duty is violated, an action may be maintained to recover the resulting damages on the theory of negligence.

9. Landlord and Tenant § 5—

An agreement in the lease that lessor should not exercise any of his remedies against lessee by reason of any default until after 30 days notice by registered mail applies to possessory remedies of lessor and does not require lessor to give notice of his claim for damages from waste.

10. Insurance § 86—

Insurer paying the landlord damages resulting from a fire caused by negligence is subrogated to the landlord's rights against the third person tort-feasor causing or responsible for the loss. G.S. 58-176.

11. Courts § 9—

The denial of a motion for leave to amend does not preclude movant from again making the motion upon later trial before another Superior Court judge.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Walker, S. J.*, February 15, 1965, Civil Session of GUILFORD (Greensboro Division).

Action by plaintiff insurance company to recover of defendants a sum paid to an insured on account of a fire loss. Summons was issued 12 October 1960.

We set out herein only such matters appearing in the pleadings and proceedings as are essential to an understanding of the legal question presented by this appeal. The three corporate defendants are hereinafter referred to merely as "Esso," and this designation may in a particular instance refer to only one or to all of these defendants.

The complaint, summarized in part and verbatim in part, states these facts:

On 24 November 1954 James M. Bullard and others leased in writing to Esso a lot, containing a service station building, located in Gilmer Township, Guilford County, at the northeast corner of the intersection of Bessemer Avenue and Elwell Avenue, for a term of 15 years. An annual rental, payable in equal monthly installments, is specified.

The lease, which is attached to the complaint and made a part thereof, provides among other things that:

> "(5) Lessee may move, remove or alter any building, structure, tank, curbing, pavement or driveway now or hereafter placed on said premises and may construct, build and place upon said premises such buildings, structures, tanks, curbings, pavement, driveways, machinery and other equipment as shall in its opinion be necessary or desirable to use and operate said premises, and may perform any and all acts necessary to the conduct of its business.
>
> "Lessor agrees that all buildings, structures, tanks, machinery, equipment and all other property owned by Lessee heretofore or hereafter placed upon the premises, whether annexed to the freehold or not, shall remain the personal property of Lessee, and Lessee shall have the right and privilege (but shall be under no obligation) to remove such property at any time during the period of this lease or any renewal thereof. . . ."
>
> "(7) Lessee may sublet all or any part of the premises but no such subletting shall release the Lessee from its obligations hereunder.
>
> "(8) Anything herein contained to the contrary notwithstanding, Lessor agrees not to exercise any landlord's remedies against Lessee by reason of any default unless and until Lessor shall have given to Lessee written notice by registered mail of the default and unless Lessee shall have failed to remedy such default within a period of thirty (30) days from the giving of such notice."
>
> "(10) Lessor agrees at Lessor's own cost and expense to . . . make promptly any and all repairs to the demised property including (but not limited to) repairs and improvements required by public authority. . . ."
>
> "(15) Lessee covenants and agrees to indemnify and save Lessor harmless from any and all claims, (and) demands . . . for or on account of damage or injury . . . to property . . . of Lessee, its agents, servants or other party or parties caused by or due to the fault or negligence of Lessee, its sublessee and assigns in the operation of the service station."

On 13 September 1957 James M. Bullard and his co-owners conveyed the property to F.C. Caveness, subject to Esso's lease; Caveness succeeded to the rights of the lessors under the lease. Esso sublet the property to Julian F. Head (Head) and Head was sublessee of the property and was operating the service station on 13 November 1957. On that date Head "was in the process of raising an automobile on a lift pre-

paratory to greasing the said automobile; . . . the said Julian F. Head negligently failed to place the prong on the lift in its proper position around the axle of the automobile to hold it in place; . . . as the lift was being raised, the automobile slipped on the lift in such a manner that the prong on the lift punctured the gasoline tank of the automobile, causing gasoline to run from the tank down to the floor beneath the lift; . . . at the same time there was in the very near vicinity of the lift a certain open flame heater known as a salamander-type heater with a flame burning in said heater; . . . as the gasoline vapors and the gasoline ran to the floor from the punctured gasoline tank the gasoline and gasoline vapors were ignited by the flames of the said salamander-type heater, which fire spread throughout the entire building and burned and badly damaged said building." Caveness had the building repaired at the cost of $8,346.57. Plaintiff insurance company had issued to Caveness a fire insurance policy covering the risk; it made investigation and paid Caveness the cost of the repairs. At the time of the payment Caveness "executed a settlement and subrogation agreement which by its terms and provisions provided that the insured assigned, transferred and set over to the insurer any and all claims and causes of action of whatever kind and nature which the insurer had . . . to recover against any person or persons as the result of said occurrence and loss. . . ."

Esso demurred, asserting that the facts alleged do not constitute a cause of action for that (1) "there is no allegation that the alleged negligent acts of Julian F. Head proximately caused the fire in question," and (2) the facts alleged do not show that Esso was negligent or was responsible for the negligence of Head. The demurrer was overruled by order of Olive, J., on 6 March 1961.

Esso answered and stated, among other things, that if it was liable Head was obligated to indemnify Esso under an indemnity agreement he had executed. On motion of Esso, Head was made an additional party defendant by order of Gambill, J., dated 3 April 1961. Head answered.

The case was calendared for trial at the January 18, 1965, Session of Guilford superior court. At that session Esso moved that plaintiff be required to elect whether it would proceed in tort or in contract. Thereupon, plaintiff moved for leave to amend its complaint in order to allege negligence and proximate cause with more particularity, and to allege the breach of certain sections of the Fire Prevention Code. By order dated 20 January 1965, McLaughlin, J., denied plaintiff's motion to amend and allowed Esso's motion to require plaintiff to make an election of remedies. On 21 January 1965 plaintiff elected in writing

"to proceed in negligence." Plaintiff excepted to the denial of its motion to amend.

The case was calendared for trial at the February 15, 1965, session. After hearing arguments of counsel and considering briefs filed by the parties, Walker, S. J., sustained demurrer *ore tenus* interposed by Esso on the ground "that the complaint fails to allege a cause of action in negligence."

Jordan, Wright, Henson & Nichols, and Karl N. Hill, Jr., for plaintiff.
Smith, Moore, Smith, Schell & Hunter, and Richmond G. Bernhardt, Jr., for Original Defendant Appellees.

MOORE, J. Plaintiff assigns as error the ruling that the facts alleged in the complaint do not constitute as against the original defendants, Esso, a cause of action sounding in tort.

The ultimate facts stated are sufficient, if established, to support a finding that Head, the sublessee, was negligent and his negligence was a proximate cause of the damage to the building. Only the *facts* which constitute the negligence and the *facts* which establish such negligence as a proximate cause of the damage need be stated. There is no requirement that the pleader state its conclusions. On demurrer only facts properly pleaded are to be considered; legal inferences and conclusions of the pleader, if stated in the complaint, are to be disregarded. G.S. 1-122; *Gillispie v. Service Stores,* 258 N.C. 487, 128 S.E. 2d 762; *Shives v. Sample,* 238 N.C. 724, 79 S.E. 2d 193.

It is apparent that the judge below was of the opinion, in consideration of all of the facts alleged, that the lessee, Esso, is not legally responsible to the lessor, Caveness, or his subrogee, plaintiff insurance company, for the damage to the demised property caused by the negligence of the sublessee, Head. Hence, the matter of responsibility on the part of the lessee is the ultimate question for decision.

Formerly a lessee was liable in an action for waste for damage to or destruction of buildings on land covered by the lease, even if the damage or destruction was the result of an accident or of the act of a stranger. See concurring opinion of Barnhill, J., (later C.J.) in *Rountree v. Thompson,* 226 N.C. 553, 555, 39 S.E. 2d 523. Now by statute, G.S. 42-10, in North Carolina a tenant "shall not be liable for damage occurring on the demised premises accidentally, and notwithstanding reasonable diligence on his part, unless he so contract."

The law as it now stands in this jurisdiction is stated in *Winkler v. Amusement Co.,* 238 N.C. 589, 79 S.E. 2d 185, thus: "In every lease there is, unless excluded by the operation of some express covenant or agreement, an implied obligation on the part of the lessee to use rea-

sonable diligence to treat the premises demised in such manner that no injury be done to the property, but that the estate may revert to the lessor undeteriorated by the wilful or negligent act of the lessee. The lessee's obligation is based upon the maxim *sic utere tuo ut alienum non laedas.* The lessee is not liable for accidental damage by fire; but he is liable if the buildings are damaged by his negligence. *Moore v. Parker,* 91 N.C. 275; *Hollar v. Telephone Co.,* 155 N.C. 229, 71 S.E. 316; *U. S. v. Bostwick,* 94 U.S. 53, 24 L. Ed. 65; 32 Am. Jur., Landlord and Tenant, 669; 51 C.J.S., Landlord and Tenant, 904."

In the lease in the instant case "Lessor agrees at Lessor's own cost and expense to . . . make promptly any and all repairs to the demised property." If Esso is otherwise responsible to Lessor for the fire damage, this provision of the lease imposing upon Lessor the duty to make repairs at his own expense does not relieve Esso of its responsibility for the damage. As stated in *Winkler v. Amusement Co., supra:* "Contracts for exemption from liability for negligence are not favored by the law, and are strictly construed against the party asserting it. The contract will never be so interpreted in the absence of clear and explicit words that such was the intent of the parties. *Hill v. Freight Carriers Corp.,* 235 N.C. 705, 71 S.E. 2d 133, where the authorities are cited." It is not reasonable to construe the covenant of the lessor to make repairs as meaning that the parties intended that lessor should repair damages caused by negligence for which lessee is responsible. We find no express covenant or agreement in the lease which excludes therefrom the implied obligation on the part of lessee to treat the demised premises in such manner that no injury be done to the property, and this obligation must be considered an effective provision of the lease.

The demised property was sublet by Esso to Head. ". . . the sublessees *(sic)* liability runs only to the lessee who in turn is responsible to the lessor. . . . There is no privity of contract between the lessor and sublessee." 3A Thompson on Real Property, § 1210, pp. 52, 53; *Dunn v. Barton and Hazelton,* 16 Fla. 765; *Garbutt & Donovan v. Barksdale-Pruitt Junk Co.,* 139 S.E. 357 (Ga.). "A subletting, although assented to by the lessor, does not in any way affect the liability of the original lessee on the covenants of the lease unless there is a surrender and substitution of tenants. . . . The original lessee is responsible for any violation of the covenants of the lease by the sublessee, whether or not he knew of such violation. . . ." 51 C.J.S., Landlord and Tenant, § 47, p. 578; *Burke v. Bryant,* 128 A. 821 (Pa.); *Rourke v. Bozarth,* 229 P. 495 (Okla.).

In *McGaff v. Schrimshire,* 155 S.W. 976 (Tex.), lessee sublet property. There was no agreement by lessor that lessee should be released.

The property was damaged by the sublessee. It was held that lessee was liable to lessor for the damages.

In *Barkbaus v. Producers' Fruit Co.*, 219 P. 435 (Cal.), plaintiff leased to defendant an orchard; defendant-lessee covenanted to keep the trees in healthy condition and plaintiff-lessor reserved the right to supervise the care of the orchard. The property was subleased, and defendant retained the right of control and supervision. The trees were damaged by neglect and improper methods and procedures. Held: "The defendant (lessee) . . . continued to be obligated to the plaintiff (lessor) upon the covenants of the original lease."

Bishop v. Associated Transport, Inc., 332 S.W. 2d 696 (Tenn.), is in most material respects legally and factually analagous to the case at bar. The sublessee deliberately set fire to and destroyed the buildings on the demised premises. Lessor sued lessee to recover damages for the burning. The original lease provided that lessee might sublet the property "provided the lessee shall nevertheless remain liable to lessor for the performance of all of the terms and conditions on lessee's part to be performed" under the lease. Lessee "had no knowledge of the unlawful act of Jess Wilson (sublessee) and such act was not permitted by defendant (lessee)." The court declared that "the question of responsibility on the part of lessee is the ultimate question for decision here," and addressing itself to certain aspects of the case said:

> "When the lessee subleased to Jess Wilson, the second covenant of the lease (dealing with subletting — quoted above) . . . operated to render the lessee liable to the lessor for the performance of all the terms and conditions of the contract in the hands of the sub-lessee, and we think that the fact that Wilson, the sublessee, may have acted without the permission of the lessee in destroying the property, is not determinative of the questions here involved." Parentheses added.
>
> "We think that where the leased premises were destroyed by fire which was deliberately set by the lessee or by one for whose violation of the covenants of the lease the lessee is liable, there was a breach of the covenant to return the premises in good repair. . . ."
>
> "As stated in 32 Am. Jur. 339 and in many cases, a subletting does not in any manner affect the liability of the lessee to his lessor for the performance of the covenants of the lease, and especially is this true where the lease, as in the case at bar, provides that the lessee shall remain responsible, and where the lessor has no control whatsoever over the selection of the sublessee."

It seems there is as strong, if not stronger, grounds for liability of the lessee to the lessor in the case at bar than in the *Bishop* case. The

lease provides that "Lessee may sublet all or any part of the premises but no such subletting shall release the Lessee from its obligation" under the lease. One of lessee's obligations was "to treat the premises demised in such manner that no injury be done to the property." Esso did not *assign* its lease to Head: it merely sublet the property. Lessor did not agree to accept Head as tenant as a substitute for Esso, and did not agree to release Esso from its obligation. Lessor did not agree that Esso might delegate its duty to Head and thereby be relieved of responsibility. Lessor did not reserve the right to select the sublessee or to pass upon his qualifications or financial responsibility. These matters were left entirely to Esso. Lessor looked to Esso for the reasonable care and protection of the property in the manner of its use, and Esso agreed to assume the responsibility. The acts of negligence alleged arose in the course of the use of the premises for the purpose for which it was leased. It was within the power and privilege of Esso to bind the sublessee to protect it with respect to its obligation to lessor. It is true that the sublessee was not the agent of Esso in the ordinary sense, and Esso's liability to lessor is not based on the principle of *respondeat superior*. But it is also true that Esso put sublessee in possession and control of the property and assumed the risk that sublessee might breach the covenants, express and implied, by which Esso had bound itself in its solemn contract with lessor. Liability of Esso to lessor was imposed by breach of the implied covenant that waste would not be committed by negligence in the use of the property — the observance of the covenant being a duty which, by terms of the lease, Esso could not delegate to a sublessee so as to relieve it of responsibility.

There is further evidence of Esso's assumption of liability to lessor for damage in the nature of waste arising from negligence in the use of the property. The lease provides as follows: "Lessee covenants and agrees to indemnify and save Lessor harmless from any and all claims, (and) demands . . . on account of damage or injury . . . to property of Lessee, its agents, servants or other party or parties caused by or due to the fault or negligence of lessee, its sublessee and assigns in the operation of the service station." Taking the allegations of the complaint to be true, as we must in testing the complaint by demurrer, the building was injured by the negligence of Esso's sublessee "in the operation of the service station," lessor has borne the loss and is entitled to be indemnified by Esso. The building is "property of . . . other party or parties," and Esso had a property right therein. Esso's liability does not depend upon this indemnity agreement, but it is sufficient within itself to support liability.

An action for waste may be brought before the expiration of the term. 51 C.J.S., Landlord and Tenant, § 262(b), p. 906. "The nature of

the wrongful act or omission for which a remainderman is entitled to recover for waste is a tort. Though the acts of a tenant are tortious in their nature, they may also be breaches of his contract with his landlord for which the tenant will be responsible in an action *ex contractu*. . . . An action may be one of tort purely, although the existence of a contract may have been the occasion or furnished the opportunity for committing the tort. It would be sufficient to allege the making of a lease, the entry of the lessee, the good condition of the premises, and the injury caused by the bad management of the lessee. Such a cause of action is one sounding in tort and not in contract." 3A Thompson on Real Property, § 1279, pp. 397-398.

"Ordinarily, a breach of contract is not a tort, but a contract may create the state of things which furnishes the occasion of a tort. The relation which is essential to the existence of the duty to exercise care may arise through an express or implied contract. . . . The sound rule appears to be that where there is a general duty, even though it arises from the relation created by, or from the terms of, a contract, and that duty is violated, either by negligent performance or negligent nonperformance, the breach of the duty may constitute actionable negligence." 38 Am. Jur., Negligence, § 20, pp. 661, 662. The lease and subletting created relationships and duties, the negligence resulting in damage gave rise to the cause of action. The action alleged sounds in tort and may be maintained on the theory of negligence.

It is suggested that the action is barred by failure of lessor and plaintiff to give notice as provided by the following clause of the lease: "Anything herein contained to the contrary notwithstanding, Lessor agrees not to exercise any landlord's remedies against Lessee by reason of any default unless and until Lessor shall have given to Lessee written notice by registered mail of the default and unless Lessee shall have failed to remedy such default within a period of thirty (30) days from the giving of such notice." We do not agree that the present action is barred by failure to give notice. The use of the words "landlord's remedies" and "default" and the allowance of only 30 days to remedy default, indicate that the parties had in mind the landlord's possessory remedy. For a list of landlord's possessory remedies at common law, see 32 Am. Jur., Landlord and Tenant, § 1008, pp. 845, 846. In this jurisdiction the remedy is by proceeding in summary ejectment. G.S. 42-26 to 37. See also G.S. 42-8. The parties did not contemplate the construction or extensive repair of a burned building within a 30-day period. See *Bishop v. Associated Transport, Inc., supra.*

An insurance company paying a loss is subrogated to the rights of the insured against the third person tort-feasor causing or responsible for the loss, to the extent of the amount paid, both by the provision of

G.S. 58-176 and under equitable principles. *Winkler v. Amusement Co., supra.*

There are questions which may cause concern to one interested in the procedures following the institution of this action and the filing of the complaint: (1) Whether the holding of Olive, J., overruling demurrer precluded the later ruling of Walker, S.J., sustaining demurrer; (2) whether it was proper to bring in the sublessee as an additional defendant on the theory that he had expressly contracted to indemnify Esso; and (3) whether plaintiff should have been required to make an election of remedies before its evidence was in. These questions are not presented by exceptions and assignments of error and are not discussed in the briefs. We express no opinion with respect thereto, and this case does not constitute authority or precedent on any of these points.

The ruling of the court on plaintiff's motion to amend the complaint is not *res judicata.* If so advised, any of the parties may hereafter move in superior court for leave to amend the pleadings. *Overton v. Overton,* 260 N.C. 139, 132 S.E. 2d 349. "The doctrine of *res judicata* does not apply to ordinary motions incident to the progress of the trial." 1 Strong: N. C. Index, Courts, § 9, p. 656.

The judgment below sustaining the demurrer *ore tenus* is

Reversed.

PARKER, J., took no part in the consideration or decision of this case.

HENRY F. BONGARDT, JR. v. LEON FRINK.

(Filed 23 July 1965.)

1. Pleadings § 27.1—

Motion to be allowed to withdraw a pleading is addressed to the discretion of the trial court.

2. Same—

In this case plaintiff filed a reply alleging that defendant's counterclaim was barred by a release signed by defendant. Plaintiff moved to be allowed to withdraw the reply so as to obviate a ratification of the act of his insurer in procuring the release. The evidence disclosed that the motion to withdraw the reply was made at the next term after it was filed and there was a permissible inference from the record that the attorneys who filed the reply were also attorneys for insurer, and there was other evidence tending to establish justification for withdrawal of the reply. *Held:* Order

of the court permitting withdrawal of the reply is upheld, there being no evidence of abuse of discretion.

3. Trial § 21—

On motion to nonsuit, the evidence must be considered in the light most favorable to plaintiff and plaintiff is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom.

4. Automobiles § 41a—

Allegations and evidence tending to show that defendant operated his vehicle on a public highway in a reckless and careless fashion in violation of G.S. 20-140(b), operated his vehicle without lights and without keeping a proper lookout, and that such negligence was the proximate cause of plaintiff's personal injuries and damage, and that plaintiff was not guilty of contributory negligence, *held* sufficient to take plaintiff's case to the jury.

5. Compromise and Settlement—

A prior settlement is an affirmative defense and such plea in bar must be pleaded, and therefore when the pleading setting up such defense is withdrawn by discretionary order of the court, the plea in bar must fail.

6. Pleadings § 29—

The issues arise upon the pleadings in the case.

7. Compromise and Settlement—

A settlement and release obtained by plaintiff's insurer will not bar insurer's right of action against defendant when insurer has neither consented nor ratified such settlement, and in the instant case evidence solicited on cross-examination of plaintiff in regard to the allegations of his reply, withdrawn prior to trial, setting up the release signed by defendant, *held* not to compel the conclusion that plaintiff either consented to or subsequently ratified the act of his insurer in obtaining the release.

APPEAL by defendant from *Johnson, J.*, December 1964 Session of BRUNSWICK.

Action *ex delicto* to recover damages for personal injuries and damage to an automobile allegedly caused by the actionable negligence of defendant, when an automobile owned and operated by plaintiff collided on 14 April 1962 with an automobile owned and operated by defendant. This action was instituted on 21 January 1963.

Defendant filed an answer in which he denied that the collision was the result of his negligence, and in which as a further answer and defense and as a bar to any recovery by plaintiff, he alleged that if he were negligent, plaintiff was guilty of negligence in the operation of his automobile, which proximately contributed to his injuries and property damage. His answer was filed on 2 March 1963.

On 12 February 1964 defendant filed with the court a written motion and petition for permission to file a counterclaim for personal in-

juries and damage to his automobile resulting from the collision between his automobile and plaintiff's automobile on 14 April 1962. This is a summary of his written motion and petition: A few days after the collision on 14 April 1962 a person unknown to him came to him to discuss the facts with reference to the automobile collision. This person led him to believe that he was a representative of his (defendant's) automobile insurance company and offered to pay him $150 as partial compensation for his personal injuries and damage to his automobile sustained in the collision, and gave him (defendant) the impression that the acceptance of the $150 did not deprive him of a right to seek affirmative relief from Dr. Henry F. Bongardt, Jr. He was badly in need of money because of his personal injuries and damage to his automobile, and accepted the offer of $150, relying upon the representations made to him by this person unknown to him that he would still retain a right to seek further relief from Dr. Bongardt. After receiving the $150 he signed his name to some paper writing which he supposed to be a receipt, but which he was unable to read or understand because he is uneducated, with ability to read and write only to a limited extent. When he filed his answer in this action, he neither understood nor informed his lawyers as to the transaction between himself and this person unknown to him. Thereafter, he was reliably informed and believes, and alleges that this person unknown to him, who paid him $150, was a representative of plaintiff or of plaintiff's automobile liability insurance carrier, and that the paper writing he signed was a release purporting to discharge plaintiff from any further liability to him in connection with the collision. He is the victim of a misrepresentation made to him by this person unknown to him for the purpose of depriving him of his right to seek affirmative relief for his personal injuries and damage to his automobile sustained in the collision, for which personal injuries and damage to his automobile the payment of $150 was grossly inadequate to compensate him. Defendant gave notice to plaintiff and his counsel of record that he would appear before the presiding judge of Brunswick County superior court on the first day of the 24 February 1964 Session, and pray the court to grant his motion and petition to file a counterclaim in the action.

Defendant's motion and petition to file a counterclaim came on to be heard before Braswell, J., presiding at the 24 February 1964 Session of Brunswick. Judge Braswell requested that defendant appear in person for examination, and he was examined by his counsel, and cross-examined by plaintiff's counsel. Defendant testified in part on direct examination: "He [this person unknown to him] told me he was my insurance agent and he came down to pay me for the car. * * * Dr.

Bongardt's insurance paid me off then and I thought it was mine the way he was telling me. The first time I talked with you [Mr. James] and told you who I understood paid me off was the morning we were going to have the trial back yonder just before Christmas." He testified in part on cross-examination: "He told me that it was my insurance that was paying me off. I asked him about Bongardt's insurance, and he said, 'You don't have to worry about him, we are paying you for your car.' " Judge Braswell handed him his answer and asked him to read the best he could the paragraph above his signature. Defendant replied: "No, sir, I can't read it. I can't read enough to put it together. I can read my name on it and a few more words. I rather not mess with it, Judge." After the conclusion of defendant's testimony, Judge Braswell entered an order in the exercise of his discretion allowing defendant to file a counterclaim in the action. To this order plaintiff did not except. Whereupon, defendant filed a counterclaim on 3 March 1964.

On 16 March 1964 plaintiff filed a reply to defendant's counterclaim in which he denied that he was negligent, conditionally pleaded defendant's contributory negligence as a bar to any recovery by him, and as a third further reply and defense and as a plea in bar alleged as follows:

> "That the defendant, for a valuable consideration, executed in favor of plaintiff and all other persons, a full and general release of all claims of any kind and nature arising out of the collision which occurred on April 14, 1962, on U. S. Highway #17, about nine miles south of Shallotte in Brunswick County, which is the same collision set out in the counterclaim herein. Said Release is expressly pleaded in bar of defendant's counterclaim."

This reply was signed by a prominent law firm of Wilmington, N. C., and by present counsel of record. This prominent law firm of Wilmington signed no other pleading in the case, so far as the record before us shows.

At the June 1964 Session of Brunswick, Judge Braswell presiding, plaintiff made a motion to be permitted to withdraw his reply in its entirety. Judge Braswell allowed the motion on 1 June 1964, and entered an order decreeing that plaintiff's reply be withdrawn as a pleading in the case. To this order defendant excepted.

At the same time defendant made a motion for judgment on the pleadings dismissing plaintiff's action. On 1 June 1964 Judge Braswell entered an order on defendant's motion in which he recited that he "finds as a fact that the Court allowed the plaintiff to withdraw his Reply, in the discretion of the Court, prior to the ruling on this present

motion, and that with the Reply being withdrawn and no longer a part of the pleadings in this case, that in the discretion of the Court, the present motion for judgment on the pleadings is disallowed." Whereupon, he adjudged and decreed that defendant's motion for judgment on the pleadings dismissing plaintiff's action is disallowed. To this order defendant excepted.

The instant action came on to be heard on plaintiff's complaint, amended by agreement between the parties, and on defendant's answer, amended by agreement between the parties, and on defendant's counterclaim at the December 1964 Session of Brunswick before Judge Johnson presiding, and a jury.

This is a brief summary of plaintiff's evidence: About 8 p.m. on 14 April 1962, he was driving his 1960 Chevrolet automobile, in which his wife and two children were riding as passengers, south on U. S. Highway #17 about nine miles south of the town of Shallotte, at a speed of 50 to 55 miles an hour, in his right lane of traffic. At and near the scene of the collision the highway is straight and level. Its paved portion is 24 feet wide, and its shoulders are 10 feet wide. The weather was clear. Suddenly, a Mercury automobile, without any lights on it, crossed in front of him from the left lane of the highway into his right lane of the highway, and was completing a turn at the time of the impact. He applied his brakes, and the front part of his automobile collided with the Mercury automobile. "The Mercury was damaged in the right rear, the right side of the rear, the fender, the back end, and extending up the right side of the car on the fender." Plaintiff sustained personal injuries as a result of the collision.

Plaintiff testified as follows on cross-examination by Mr. James, counsel for defendant: "I did not ever pay any sum of money to Leon Frink for damages arising out of this accident. I do not definitely know whether that was accomplished by anyone else representing me. I did not at any time say that I knew that it had been done. I do not remember previously making any sworn written statement to the effect that it had been done." At this point in plaintiff's cross-examination, Mr. James handed to him the original of his reply to defendant's counterclaim and directed his attention to the signature of the verification and asked him if that was his signature. Plaintiff replied, "Yes, sir, it is." Mr. James asked him to read the verification, which he did. Plaintiff then testified: "That was sworn to and subscribed to [*sic*] before a notary public whose acknowledgment appears there. That is my signature." Mr. James then directed the attention of plaintiff to that portion of the reply designated as a third further reply and defense and as a plea in bar, which is copied verbatim above, and requested him to read it, which plaintiff did. Plaintiff then testified further on

cross-examination by Mr. James to the effect that he recalls signing the reply and the statement he read from it speaks the truth.

This is a brief summary of defendant's evidence: About 8 p.m. on 14 April 1962 he was driving his 1953 Mercury automobile south on U. S. Highway #17 south of the town of Shallotte. He was driving about 55 miles an hour, which was the speed limit there. His wife and Mazz Lee Frink were passengers in his automobile. The rear lights on his automobile were burning. He saw in the range of his headlights some children running down the shoulder of the highway close to its pavement. He slowed up, but did not apply his brakes, and drove close to the white line in the highway, but did not get over it. After he slowed up, he looked in his rear view mirror and saw a car approaching him from behind traveling pretty fast and with one light. Before he could do anything this approaching automobile hit his automobile behind, and knocked him off the road. Defendant sustained personal injuries in the collision.

Plaintiff alleged in his complaint he was driving his 1960 Chevrolet automobile at the time of the collision. Defendant in his answer alleged he was driving his 1953 Mercury automobile at the time of the collision.

There is no exception to the issues submitted to the jury. The jury found by its verdict that plaintiff was injured and his property damaged by defendant's negligence as alleged in the complaint, that plaintiff did not by his own negligence contribute to his injuries and damage, and awarded him $650 for damages to his automobile, and $4,000 for personal injuries. The jury did not answer the issue, "Was the defendant injured and his property damaged as a result of the negligence of the plaintiff in the counterclaim?", and the sixth and seventh issues as to what amount, if any, is the defendant entitled to recover for property damage and for personal injuries. The judge entered a judgment in accord with the verdict, and ordered and decreed that plaintiff recover from defendant the sum of $4,650, and taxed him with the costs.

From this judgment, defendant appeals to the Supreme Court.

James, James & Crossley by Joshua S. James for defendant appellant.
Herring, Walton, Parker & Powell for plaintiff appellee.

PARKER, J. Defendant has four assignments of error. (1) He assigns as error the order entered by Judge Braswell allowing in his discretion plaintiff's motion to withdraw his reply in its entirety, and ordering it withdrawn as a pleading in the case. (2) He assigns as error Judge Braswell's order denying him a judgment upon the pleadings and refusing to dismiss plaintiff's action. (3) He assigns as error the denial of his motion for judgment of compulsory nonsuit made at the

close of all the evidence. (4) He assigns as error the denial by the court of his motion to dismiss the action *non obstante veredicto,* and the denial of his motion to set aside the verdict as contrary to the greater weight of the evidence, and the signing of the judgment.

This Court said in *McFetters v. McFetters,* 219 N.C. 731, 14 S.E. 2d 833: "A pleading, when filed, passes beyond the control of the pleader and becomes a part of the record in the case. Thereafter the subject of its withdrawal, as a general rule, is a question addressed to the reasonable discretion of the court. 31 R.C.L., 593."

In 41 Am. Jur., Pleading, § 318, it is said: "Withdrawal of pleadings is a subject closely akin in many respects to that of amendments, for it is concerned with alterations in the record and their effect on the rights of the adverse party, and, as a general rule, is a question addressed to the reasonable discretion of the court. In the exercise of such discretion, courts may allow * * * the withdrawal of particular pleas or of entire pleadings as the exigencies of the case warrant."

In 71 C.J.S., Pleading, § 419, p. 852, it is said: "While leave to withdraw a pleading will usually be given, where the other party will not be prejudiced, the matter is largely within the discretion of the court, and the application should be made with due diligence, in good faith, and should present good reasons for granting it." In *ibid,* p. 855, it is said: "The status of the pleadings on withdrawal of a particular pleading is the same as though it had never been filed * * *. While leave to withdraw a pleading does not authorize the party actually to take it off the files, such withdrawal removes it from consideration. A defense is abandoned by withdrawal of a plea setting it up * * *."

Defendant states in his brief: "The reply did not allege nor is it contended by anyone that the money consideration paid for the release executed by the defendant was paid personally by the plaintiff. On the contrary, as everyone knows, the money was paid by the plaintiff's liability insurance carrier on his behalf." There is no evidence in the record that plaintiff consented to the settlement. When defendant on 12 February 1964, over twelve months after the institution of this action, filed with the court a written motion and petition to file a counterclaim for personal injuries and damage to his automobile resulting from the collision between his automobile and plaintiff's automobile on 14 April 1962, he, and his counsel of record, then and now, knew that defendant, according to his statement, had signed the release and settlement by reason of a gross fraud perpetrated on him by a representative of plaintiff's automobile liability insurance carrier. Defendant and his counsel well-knowing these facts decided, for reasons best known to themselves, not to plead the previous settlement as a bar to plaintiff's action, but to repudiate the previous settlement on

the ground of fraud, and to allege a counterclaim against plaintiff for his (defendant's) damage. When defendant's motion was allowed by the court, he filed a counterclaim on 3 March 1964.

On 16 March 1964 plaintiff filed a verified reply to defendant's counterclaim, in which he alleged the previous settlement as a plea in bar to defendant's counterclaim. This reply was signed by a prominent law firm in Wilmington, N. C., and plaintiff's present counsel of record. This prominent law firm in Wilmington signed no other pleading in the case, so far as the record before us shows, and it is a fair inference that it represented plaintiff's automobile liability insurance carrier. It seems a fair inference that under the particular facts here plaintiff by signing the verified reply did not intend to ratify the settlement. It is also a fair inference that plaintiff's counsel of record later realized that plaintiff by pleading the general release and previous settlement, ratified his insurance carrier's settlement with defendant and barred his right of action against defendant. *Bradford v. Kelly,* 260 N.C. 382, 132 S.E. 2d 886; *Keith v. Glenn,* 262 N.C. 284, 136 S.E. 2d 665. At the June 1964 Session of Brunswick, plaintiff made a motion before the presiding judge for permission to withdraw his reply in its entirety. The presiding judge allowed the motion. Under the particular facts here, the granting of the motion did not prejudice defendant for these reasons: (1) He knew of the release at least on 12 February 1964, and declined to allege it as a plea in bar, but decided to repudiate it on the ground of fraud and to set up a counterclaim for his own damage. (2) After the motion was allowed, he could have, but did not, request the court for permission to amend his pleadings by alleging the previous settlement and general release as a bar to plaintiff's action, but decided to ignore it and to go to trial on his counterclaim. Under the particular facts here, plaintiff's motion to withdraw his reply in its entirety was made with due diligence, in good faith, and presented good reasons for granting it. Defendant states in his brief that plaintiff's motion to withdraw his reply was made at the "next ensuing civil term convening in Brunswick County following the time when plaintiff filed his reply." Plaintiff's motion for permission to withdraw his reply in its entirety was addressed to Judge Braswell's sound discretion, and under the particular facts here, no abuse of his discretion appears in granting the motion. His ruling will not be disturbed. Defendant's first assignment of error is overruled.

Keith v. Glenn, supra, presents a different factual situation. In that case plaintiff replied to the counterclaim. In his reply he denied any negligence on his part, and alleged as a further defense to the counterclaim his insurance carrier, against his wishes, paid defendant $1,250 in full settlement of defendant's claim against plaintiff. Notwithstanding

his allegations that settlement was made contrary to his wishes, he specifically alleges it bars defendant's right to claim damages from plaintiff. Later plaintiff sought permission to withdraw the reply he had filed. Judge Hall in his discretion declined to permit plaintiff to withdraw his reply.

After Judge Braswell entered an order in his discretion allowing plaintiff to withdraw his reply in its entirety, he correctly denied defendant's motion for a judgment on the pleadings. Defendant's second assignment of error is overruled.

In respect to defendant's third assignment of error, the denial of his motion for judgment of compulsory nonsuit made at the close of all the evidence, it is hornbook law that in considering a motion for judgment of compulsory nonsuit, plaintiff is entitled to have his evidence considered in the light most favorable to him, and he is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. *Bridges v. Graham,* 246 N.C. 371, 98 S.E. 2d 492. Considering plaintiff's evidence in such a light, he has allegation and proof that would permit a jury to find that defendant was guilty of operating his automobile on a public highway in a reckless and careless fashion, in violation of G.S. 20-140(b), in operating his automobile on a public highway without lights, and in operating it on a public highway without keeping a proper lookout, and that such negligence was the proximate cause of plaintiff's personal injuries and damage to his automobile, and that plaintiff was not guilty of any negligence proximately contributing to his injuries and property damage.

Defendant contends that if plaintiff's evidence is sufficient to carry the case to the jury, plaintiff in his testimony at the trial on cross-examination admitted he signed his reply, read the release in the plea in bar therein contained, and said what he read was true, and this was a second ratification of the release, and this entitles him to a judgment of nonsuit dismissing plaintiff's action. That a ratification once made may not be revoked.

Judge Braswell entered an order in his discretion permitting plaintiff to withdraw his reply at the June 1964 Session. The case was tried on its merits at the December 1964 Session on the complaint, answer, and defendant's counterclaim. There was no plea in bar of the prior settlement to defeat plaintiff's or defendant's claim, when the case was tried on the merits. Such a plea in bar is an affirmative defense which must be pleaded. *Bradford v. Kelly, supra.* "A trial is the examination of the issues joined between the parties, and these issues arise upon the pleadings in the case." McIntosh, N. C. Practice and Procedure, 2d Ed,. Vol. 1, § 1351. Even if the question of a previous settlement arose

upon the pleadings in the instant case, which it did not, when the instant case was tried on the merits, plaintiff's testimony on cross-examination in respect to his reply, which had been withdrawn by order of Judge Braswell entered in his discretion, when considered in the light most favorable to him, does not compel the inescapable conclusion under the particular facts here that he either consented to or ever subsequently ratified his automobile liability insurance carrier's settlement with defendant. It is well-settled law in this State that a compromise and settlement of a claim against its insured will not bar the right of its insured from suing the releasor for his damages where he has neither consented to nor subsequently ratified such settlement. *Keith v. Glenn, supra; Bradford v. Kelly, supra; Phillips v. Alston,* 257 N.C. 255, 125 S.E. 2d 580; *Lampley v. Bell,* 250 N.C. 713, 110 S.E. 2d 316.

The court correctly denied defendant's motion for a judgment of compulsory nonsuit made at the close of all the evidence. Defendant's third assignment of error is overruled.

Defendant's last and fourth assignment of error is formal, and is overruled.

The judgment below is

Affirmed.

EARL K. DAVIS, ADMINISTRATOR OF THE ESTATE OF EVA D. DAVIS, DECEASED v. THOMAS B. WILSON, M.D.; ALBERT L. CHASSON, M.D.; AND ARTHUR E. DAVIS, M.D.

(Filed 23 July 1965.)

1. Physicians and Surgeons § 12—

As a general rule, a physician who exercises due care is not liable for the negligence of nurses, attendants or internes who are not his employees.

2. Master and Servant § 3—

Ordinarily, a general manager, even though he aids in the selection of subordinate employees and has direction and control over such subordinates in the performance of their duties, is not an independent contractor and is not liable for the negligence of such subordinate employees when such subordinate employees are on the payroll of the principal employer and subject to his ultimate control, and perform their duties in the furtherance of the principal employer's business.

3. Physicians and Surgeons § 12— Evidence held to show that physicians in charge of hospital laboratory were employees and not independent contractors.

The evidence tended to show that the physicians in charge of the laboratory department of a hospital were paid by the hospital, had supervisory responsibility for the conduct and work of the personnel of the department, but that their conduct and management in respect to the department was under the policy of the hospital, and that the technologists under their supervision were paid by the hospital. This action was brought against the physicians in charge of the laboratory department of the hospital for damages and wrongful death of a patient resulting from error of a medical technologist in the laboratory department in sending incompatible blood to the operating room for a transfusion for the patient. *Held:* Motions of the physicians for nonsuit were properly allowed, since under the evidence they were not independent contractors but fellow employees of the medical technologist, and are not liable for any negligence of their fellow employee.

APPEAL by plaintiff from *McKinnon, J.*, September 1964 Civil Session of WAKE.

Civil action to recover damages for pain and suffering prior to death of his intestate and for wrongful death of his intestate allegedly caused by a severe blood transfusion reaction of incompatible blood, two containers of which blood had been mistakenly and negligently labeled as compatible blood by Mrs. Frances W. Smith, a medical technologist at Rex Hospital who was an agent of the three defendant doctors, the relationship of which doctors with Rex Hospital was that of independent contractors.

Defendants in their joint answer deny that their relationship with Rex Hospital was that of independent contractors, and also deny any responsibility for Frances W. Smith's negligence on the ground she was not their agent.

From a judgment of compulsory nonsuit entered at the close of plaintiff's case, he appeals.

Bailey and Ragsdale by George R. Ragsdale for plaintiff appellant.
Young, Moore & Henderson by J. C. Moore for defendant appellees.

PARKER, J. This is a summary of plaintiff's evidence:

Plaintiff's intestate, Eva D. Davis, who was his wife, was admitted in Rex Hospital, Raleigh, North Carolina, as a patient to have a surgical operation for removal of an ulcer. On 24 September 1963 in Rex Hospital, Dr. L. Gordon Sinclair, a surgeon, performed an operation on Mrs. Davis for a sub-total gastrectomy vagotomy for ulcer. The day before her operation a requisition to cross-match blood for Mrs. Davis

was sent to Frances W. Smith in the laboratory of Rex Hospital where the hospital's blood bank was. Dr. John C. Doerr, a physician and a specialist in anesthesiology practicing in Rex Hospital, attended Mrs. Davis in the operating room, and transfused into her arteries and veins blood from donor 1738. There were no undue complications, and Mrs. Davis went through the surgery quite well, and went to the recovery room in excellent condition.

About 4:30 p.m. that afternoon, or some two or four hours after the operation, Dr. Sinclair went to the recovery room to see Mrs. Davis, and observed that urine coming through the catheter was thick and black, which indicated to him that she had experienced a severe blood transfusion reaction. The appearance of dark fluid coming through the catheter means the blood of the patient and the blood of the donor have been fighting, and that the blood cells are broken down and excreted by the kidneys. In an endeavor to stop the oozing of blood, about 6 p.m. he opened her abdomen again. Being unable to control the oozing of blood by any surgical maneuver, he packed the area hoping to control the bleeding. During the second operation she was given more blood and drugs, and her blood pressure came up to about normal. During the end of the second operation, Mrs. Davis had a cardiac arrest and her heart stopped. He started it again by external massage. Mrs. Davis was carried from the operating room again to the recovery room. At that time she looked fairly well. This lasted a short time. She grew worse, and died at 9:18 p.m.

Dr. Sinclair testified in effect that a blood transfusion reaction is caused when a patient receives blood incompatible with his own. That Mrs. Davis was given two pints of blood during the first operation, and that she had at least two or three additional pints of blood during the second operation. That the typing and cross-matching of blood is done in the blood bank at Rex Hospital. The blood is sent with a marked slip, and there is a corresponding slip on the patient's chart which may be compared with the slip on the container of blood to see if they are identical. That he relies on the slips that the blood had been typed in the pathology laboratory at Rex Hospital.

Dr. Sinclair also testified to the effect that, in his opinion, the three doctor defendants are well-qualified pathologists, and that as to the technical side of Frances W. Smith's work "he would be delighted for her to cross-match his blood."

Frances W. Smith works in the blood bank at Rex Hospital as a medical technologist. She has had special training in this field, and has worked in the laboratory at Rex Hospital for five years. Her duties are processing blood, cross-matching blood from donors, and making it available for patients. In September 1963 she typed blood for Mrs.

Eva Davis, determined what her blood type was, cross-matched some other person's blood with hers, and found that it was compatible with her blood. That the type blood was "O." She does not know whether she typed the blood in container number 1738, but she did place the name of Mrs. Eva Davis on that container. Frances W. Smith was asked on direct examination, "how it happened that she placed Mrs. Davis's name on that container?" She testified as follows:

> "When I received the request to cross-match blood for Mrs. Eva Davis, who was supposed to go to surgery the next day, the patient was sampled, that is blood was taken from the patient, and she was grouped, an Rh, and a cross-match was set up on her which was compatible. At that particular time we were quite busy, but the cross-match was gotten ready and was compatible. The whole blood bank was quite busy at that time, and since this was not something that was rushing I didn't think that I should rush to write up the requisition, that that should be something that I could do at a later time when we were not quite so busy, so the cross-match was made and put aside with the requisition and in transposing the numbers is where I made the mistake. I wrote the wrong group for the patient as well as the wrong pint of blood that was compatible for the patient. I wrote up a requisition and I wrote the patient's group as being an "A" positive whereas she was not, as she was an "O" positive. And also in the transposing of the number that was compatible with her. The cross-match that I had set up for the patient was "O" positive and the pint of blood was "O" positive which was cross-matched with the patient and was compatible, and it was in the transposing of the numbers that there was a mistake."

This is a summary of the testimony of Joseph E. Barnes, director of Rex Hospital:

Rex Hospital is a corporation, whose operations are controlled by a board of trustees. He is next in order of control as director of Rex Hospital. The hospital is divided into various departments, one of which is the laboratory department, which is generally in charge of the typing and cross-matching of blood. Dr. Thomas B. Wilson is chief of the laboratory department or chief pathologist. Dr. Wilson was employed by the board of trustees of Rex Hospital to provide adequate organization, both professional and nonprofessional, for the laboratory of the hospital. Defendant Doctors Albert L. Chasson and Arthur E. Davis are associated in the laboratory department with Dr. Wilson. Rex Hospital does not have a relationship with all three of these doc-

tors, but has a relationship only with Dr. Wilson. He and Dr. Wilson have a dual responsibility for the employment of personnel in the pathology department. He is not competent to pass upon the professional qualifications of applicants for work in the laboratory department. He and Dr. Wilson participate in the recruitment together, but the selection is made by Dr. Wilson. Dr. Wilson delegates the work and the details to the employees under him. Dr. Wilson receives by arrangement with Rex Hospital a percentage of the gross proceeds of the laboratory, which includes a percentage of the gross proceeds for the typing and cross-matching of blood. The charges for services rendered to patients in the pathology department are sent to the business office of Rex Hospital, where they are posted to the accounts of the patients. Based upon these records, Dr. Wilson's percentage is computed. Dr. Wilson divides this gross percentage among his associates.

This is a summary of the testimony of Dr. Wilson, who was called and testified as a witness for plaintiff, except when quoted: He is a physician and practices at Rex Hospital as a pathologist. He is at the top of the pathology department by reason of seniority. Next to him is Dr. Chasson, a pathologist in this department, who has specific responsibility over the blood bank in the department. This responsibility is also shared by himself and Dr. Davis, another pathologist in the department. He is "responsible for the over-all laboratory with the thorough understanding that those responsibilities must, however, be shared equally by the two other pathologists." As a member of the laboratory department, he has supervisory responsibility for the conduct and work of Frances W. Smith. He has liberty to conduct his practice. "As far as the relationship of the laboratory is concerned, which is a part of the hospital of course, my conducting, my management within that sphere must come under the policies of the hospital which are indicated through the director of the hospital and the board of trustees." An agreed percentage of the gross proceeds from the laboratory department available to the pathologists is divided by mutual agreement between Doctors Chasson, Davis, and himself, and Rex Hospital sends each one of them separate cheques in payment. Rex Hospital has an agreement with Doctors Chasson and Davis through him as senior pathologist. He has supervisory administrative responsibility for the conduct of the personnel of the pathology department. The pathology department is composed of several sub-departments. In each of these sub-departments there is a technologist who has had from five to ten years of experience in technology. There are a senior technologist and three pathologists.

All technologists and clerical personnel connected with the laboratory are interviewed by the laboratory personnel to determine their

qualifications, and if their qualifications are satisfactory, they are sent down to the personnel office of Rex Hospital for the completion of their employment. "He passes on the medical or technical qualifications of personnel in the laboratory, but that the final approval as to the need or the opening or the salary is Mr. Barnes'; that if he felt that if the department needed a technician tomorrow he could recommend that a technician be added, but that the ultimate approval would be Mr. Barnes'." Frances W. Smith and the other technicians in the pathology department were paid for their services by Rex Hospital. He never paid Frances W. Smith anything.

He recalls interviewing Frances W. Smith when she applied to Rex Hospital for a job. She had been interviewed before he saw her by Dorothy McGhee, chief medical technologist in the pathology department of Rex Hospital, who went over Frances W. Smith's credentials, her background and her training, and then referred her to him for an additional interview. He testified: "I interviewed Mrs. Smith then and I recommended that she be employed, and she was sent then to the employment office for the completion of her records * * *." The pathology department at Rex Hospital does between eight and ten thousand cross-matchings of blood per year, and Frances W. Smith does about half of these. He had no connection with Mrs. Davis while she was in the hospital.

After Mrs. Davis's death Dorothy McGhee, chief medical technologist in the pathology department of Rex Hospital, and Dr. Chasson made an investigation as to Mrs. Davis's death. Their investigation disclosed that Mrs. Davis's blood group was group "O", Rh positive, and the donor's blood group was group "A", Rh positive, and that the cross-match of blood was incompatible. The blood containers sent to the operating room for Mrs. Davis were numbered 1738 and 1742. The container numbered 1738 was labeled "O", Rh positive, and that after Mrs. Davis's death she checked this container and found out it contained "A", Rh positive blood, and Mrs. Davis's name was on it.

Frances W. Smith was supervised in doing her work in typing and cross-matching blood by Dorothy McGhee. She usually goes to Dr. Wilson with her problems. Rex Hospital pays her by cheque every two weeks for her work in the pathology department, and makes deductions for social security, taxes, etc. At the end of each year, Rex Hospital gives her a W-2 form indicating the amount it has paid her during the year for her services, and the amount of tax it has withheld. Dorothy McGhee set the vacation schedule for people who worked in the pathology department of Rex Hospital.

The decision in *National Homeopathic Hospital v. Phillips,* 181 F. 2d 293, which is a case with a factual situation quite similar to the fac-

tual situation in the instant case, is most helpful, and is in point. In that case the decision of a unanimous Court written by Circuit Judge Proctor is as follows:

> "This appeal is from a judgment against appellant hospital for the death by negligence of a patient resulting from a transfusion of incompatible blood erroneously tested and reported as compatible by a technician in the hospital laboratory.
>
> "The main question is whether such a relationship prevailed between the hospital and technician as to render the hospital liable upon the principle of *respondeat superior.* The trial court held a master and servant relationship did exist, and submitted the question of negligence to the jury, which returned a verdict for the plaintiff.
>
> "We think the court was right. The undisputed evidence showed that the laboratory was an established part of the hospital. By arrangement with an outside physician it was operated under his overall direction. The technician was hired and paid by the hospital. In the instant case the hospital, in usual course, ordered a laboratory test. The technician, without the presence or supervision of the physician, made the test and submitted her report directly to the hospital. Relying thereon the hospital made the transfusion. In our opinion the facts clearly established the responsibility of the hospital for the acts of its technician. That responsibility is unaffected even though, agreeably to the requirements of 2 D. C. Code (1940) §§ 101, 102, and 134(b), the technical work in the laboratory was put under the 'direction' of a physician."

Where it appeared that the plaintiff, a patient at the defendant hospital, was given a serological test to determine her Rh blood factor, which test was given by a laboratory technician employed by the defendant hospital, and that the technician concededly made an error in designating the plaintiff's blood type, with the result that she was infused with blood of the wrong type and suffered serious injuries for which she brought suit, the court in *Berg v. New York Soc. for Relief of the Ruptured & Crippled* (1956), 1 N.Y. 2d 499, 154 N.Y.S. 2d 455, 136 N.E. 2d 523, in reversing the judgment of the Appellate Division, 286 App. Div. 783, 146 N.Y.S. 2d 548, which held in favor of the defendant hospital on the ground that the negligence of the technician was a medical rather than administrative act because it was integrally related to medical care, reinstated the judgment of the trial court which directed a verdict for the plaintiff, 136 N.Y.S. 2d 528, and held that although it was a medical act in the sense that it was preparatory to a transfusion, the test was performed, not by a physician or nurse, but

by a technician who was employed and paid by the hospital and was so far short of professional status or attainments that only 4 to 6 weeks training was necessary for her job, so that she could not be classed as an independent contractor, but rather as a salaried employee of the hospital, for whose negligence the hospital was liable. In its opinion the Court said:

> "Modern hospitals hire on salary not only clerical, administrative and housekeeping employees but also physicians, nurses and laboratory technicians of many kinds. Not only do they furnish room and board to patients but they sell them services which are 'medical' in nature and, though furnished on physician's orders, are performed wholly by and under the control of the hospitals' salaried staffs."

See Annot. 59 A.L.R. 2d 768, entitled "Liability of injury or death from blood transfusion."

As a general rule, a physician who exercises due care is not liable for the negligence of nurses, attendants or internes who are not his employees. *Covington v. Wyatt,* 196 N.C. 367, 145 S.E. 673; 70 C.J.S., Physicians and Surgeons, § 54(f), p. 979.

Jackson v. Joyner, 236 N.C. 259, 72 S.E. 2d 589, relied on by plaintiff is factually distinguishable from the instant case. In this case the evidence tended to show that the surgeon performing the operation selected and arranged for the help of an anaesthetist employed by the hospital and had full power and control over him in the performance of his duties in administering the anaesthetic during the operation. The Court held the anaesthetist was, during the period of the operation, the agent of the surgeon, and the surgeon is liable for the negligence of the anaesthetist in the administration of the anaesthetic.

In 1 Labatt's Master and Servant (2d Ed.), § 32, it is stated:

> "It is well settled that, where an employee, acting under the express or implied authority of his principal, engages servants to perform work for the benefit of his employer, the principal, and not the employee, is in law the master of the servants so engaged. This doctrine is an obvious and necessary consequence of the fact that, in the case supposed, the power of controlling the servants, even though it may normally be exercised by the agent after they are hired, really resides in the principal, and may at any time be called into active exercise."

In 2 Restatement of the Law of Agency 2d, § 358, p. 132, it is said:

"Comment on Subsection (1):

"a. The doctrine of *respondeat superior* does not apply to create liability against an agent for the conduct of servants and other agents of the principal appointed by him, even though other agents are subject to his orders in the execution of the principal's affairs. He is, however, subject to liability under the rules stated in Sections 344, 351, 356, if he directs or permits tortious conduct by them or fails properly to exercise control over them.

"Illustration:

"1. A is employed by P as general manager. B, a servant under the immediate direction of A, is negligent in the management of a machine, thereby injuring T, a business visitor. A is not liable to T."

To the same effect, see Story on Agency, 9th Ed., § 313, p. 385; 57 C.J.S., Master and Servant, § 564; 35 Am. Jur., Master and Servant, § 540.

All the evidence clearly shows the following: The board of trustees of Rex Hospital employed Dr. Thomas B. Wilson, a physician specializing in pathology, as chief of the laboratory department of the hospital or chief pathologist to provide adequate organization, both professional and nonprofessional, for the laboratory department. Doctors Chasson and Davis, both pathologists, are associated in the laboratory department with him, and are all paid by cheque by Rex Hospital for such services as regular employees of Rex Hospital. Dr. Wilson and the two other defendant doctors associated with him have supervisory responsibility for the conduct and work of the personnel of the laboratory department, including the conduct and work of Frances W. Smith in typing and cross-matching blood in the laboratory, but his and their conduct and management in respect to the laboratory department of Rex Hospital "must come under the policies of the hospital which are indicated through the director of the hospital and the board of trustees" of Rex Hospital. Frances W. Smith was paid for her services in the laboratory department of Rex Hospital every two weeks by cheque by Rex Hospital. A laboratory of a modern hospital is essential to its operation. There is nothing in the record to show that the three defendant doctors supplied to the employees in the laboratory department of Rex Hospital any supplies or equipment to do this work. It is a fair inference that all this was furnished by Rex Hospital. Generally, physicians engaged in the practice of their profession are regarded as independent contractors. 27 Am. Jur., Independent Contractors, § 17. However, it is manifest from all the evidence in this case that the work and management in respect to the laboratory department of Rex Hospital

by the three defendant doctors, regularly employed and salaried members of the staff of Rex Hospital, and their supervisory control of the personnel and work of this department, was under the control of the director of Rex Hospital and its board of trustees, and consequently the three defendant doctors in respect to their work and duties in the laboratory department of Rex Hospital were employees and servants of Rex Hospital and not independent contractors. *Pressley v. Turner,* 249 N.C. 102, 105 S.E. 2d 289; *Hayes v. Elon College,* 224 N.C. 11, 29 S.E. 2d 137; 27 Am. Jur., Independent Contractors, §§ 5 and 6; 56 C.J.S., Master and Servant, § 3; Annot. 20 A.L.R. 684.

All the evidence in this case clearly and plainly shows that Frances W. Smith at all times relevant in the instant case was an employee of Rex Hospital, regularly employed and paid by it as an employer, and that she was not an agent or employee or servant of the three defendant doctors, or any one of them. There is nothing in the record before us to show that the three defendants, or any one of them, knew that Mrs. Davis was in Rex Hospital for surgery or that blood for transfusion had been requested for her and furnished by the laboratory department of the hospital. There is no evidence in the record before us, considering it in the light most favorable to plaintiff, that would permit a jury to find that Frances W. Smith was an agent or employee or servant of the three defendant doctors, or any one of them, so as to hold them, or any one of them, responsible for the tragic negligence of Frances W. Smith, which she admits, on the principle of *respondeat superior.*

The judgment of compulsory nonsuit is

Affirmed.

EVA R. BENNETT, SURVIVING WIDOW, AND CLIFTON C. BENNETT, SURVIVING SON OF C. C. BENNETT, DECEASED, AND EVA R. BENNETT, ADMINISTRATRIX OF C. C. BENNETT, DECEASED, PLAINTIFFS v. THE ANSON BANK & TRUST COMPANY, EXECUTOR OF THE ESTATE OF ROSALIE POLK BENNETT, AND THE ANSON BANK & TRUST COMPANY, ADMINISTRATOR, *c. t. a., d. b. n.* OF THE ESTATE OF PURDIE RICHARDSON BENNETT, DEFENDANT.

(Filed 23 July 1965.)

1. Limitation of Actions § 17—

Upon defendant's plea of the applicable statute of limitations, the burden devolves upon plaintiffs to show that their action was instituted within the time allowed.

2. Partnership § 3—

The fiduciary relationship existing between partners entitles one partner to demand an accounting of the other upon request, and the statute of limitations does not begin to run against the right to such accounting until one partner has notice of the other's termination of the partnership and his refusal to account.

3. Partnership § 9—

The death of one partner ordinarily terminates the partnership and entitles his personal representatives to sue the surviving partner for an accounting immediately upon the failure of the surviving partner to file an accounting with the clerk within twelve months from the deceased partner's death. G.S. 59-82.

4. Limitation of Actions § 7—

A cause of action for fraud is not barred until three years after the fraud constituting the basis of the action is discovered or should have been discovered, and where a confidential relationship exists the failure to discover the facts constituting the fraud may be excused.

5. Same; Partnership § 9— Evidence held for jury as to whether action for fraud was instituted within 3 years from date fraud was or should have been discovered.

The evidence tended to show that brothers were partners, that upon the death of one of them the surviving partner failed to file an accounting with the clerk as required by statute, that upon confrontation by the son of the deceased partner he stated that there were no assets requiring settlement and that proceeds from sale of partnership lands had been lost in stock investments, it appeared that the deceased partner's interest in the partnership was inventoried at a very small sum, that upon the death of the other partner his interest in the partnership was also inventoried at a very small sum, that upon the death of his widow, some 27 years thereafter, her estate was inventoried at a very large sum, that neither of the partners nor the widow had any material income other than from the partnership, and that after the death of the first partner, the surviving partner sold the partnership assets and borrowed money on the partnership credit and put the proceeds in his wife's name, and that after the death of the second partner his widow continued to use and invest the partnership assets as her individual property. *Held:* Whether plaintiffs used due diligence to ascertain the facts constituting their cause of action for fraud is a question for the jury upon the evidence, and the entry of judgment of nonsuit in their action for an accounting instituted less than three years after the death of the widow is reversed.

APPEAL by plaintiffs from *Brock, S. J.*, September 1964 Civil Session of ANSON.

Action by the administratrix and heirs of Clifton C. Bennett (C. C. Bennett) for an accounting of partnership assets and the imposition of a constructive trust.

Defendant Anson Bank and Trust Company is sued (1) as executor of Rosalie Polk Bennett, widow of Purdie Richardson Bennett (P.

R. Bennett), surviving partner of C. C. Bennett, and (2) as administrator *c. t. a., d. b. n.* of the estate of P. R. Bennett. The widow and the son of C. C. Bennett, as his sole surviving heirs, instituted this action on September 9, 1963. The widow, as the "reappointed administratrix" of her husband's estate, made herself a party and adopted the complaint on September 29, 1964.

Plaintiffs allege: C. C. Bennett died intestate in 1936. His administratrix inventoried his estate at $3,000.00. C. C. Bennett had been a general, unlimited partner with his brother, P. R. Bennett, in the business of Bennett Brothers. P. R. Bennett died testate in 1944 without ever having filed any accounting of the partnership assets. His wife, Rosalie P. Bennett, was his sole beneficiary and the executrix of his estate, which she inventoried at $2,187.35. She likewise never filed any accounting for P. R. Bennett. She died testate in 1963, leaving an estate which defendant inventoried at $80,904.13. During his lifetime P. R. Bennett had no known income from any trade or profession other than the partnership, and during her lifetime Rosalie Bennett had no known income other than that provided by her husband. At her death the size of her estate was so disproportionate to that of the inventoried estate of her husband that "these plaintiffs allege fraud, corruption, or mistake on the part of Purdie Richardson Bennett and Rosalie Polk Bennett," *viz.*, P. R. Bennett during his lifetime diverted partnership assets to his wife, who, on numerous occasions, said: C. C. Bennett had no business knowledge and, like a child, signed where P. R. Bennett told him to sign. Before C. C. Bennett's death, P. R. Bennett placed money borrowed by the partnership in her private account, and she used it to buy stocks and bonds, without the knowledge of C. C. Bennett, who was told that the money had been lost in bad investments P. R. Bennett had made for the partnership.

Plaintiffs pray that they be given an accounting of partnership assets and "that a trust be impressed on the estate of Rosalie Polk Bennett until such time as an accounting of partnership assets can be made and distributed according to law."

Answering as executor of Rosalie P. Bennett, individually, defendant denies all material allegations of the complaint. Answering as administrator *c. t. a., d. b. n.* of P. R. Bennett, it denies all material allegations of the complaint and pleads, by way of further answer and defense, that plaintiffs' cause of action, if any, accrued more than 10 years before the commencement of this suit and is barred by the 10-, 7-, 6-, and 3-year statutes of limitation, specifically G.S. 1-47, G.S. 1-49, G.S. 1-50, and G.S. 1-52. It pleads, also, the laches of plaintiffs in that the administratrix of C. C. Bennett, his widow, appointed in 1936, closed his estate without ever requiring any accounting; that plain-

tiffs never filed any claim against the executrix of P. R. Bennett, appointed in 1944; that 28 years have elapsed since the death of C. C. Bennett, and 20 years since the death of P. R. Bennett.

Plaintiffs' evidence tends to show: C. C. Bennett died March 16, 1936. His gross estate as shown by the inheritance- and estate-tax inventory filed by his administratrix was $4,582.50. In this figure was included his interest in Bennett Brothers, estimated at $2,902.50. P. R. Bennett died January 19, 1944. The inventory and final account (one document) filed by his executrix showed real estate valued at $5,545.00, personalty at $3,709.27, and disbursements of $1,039.65. Before the signature the account contained this statement:

> "In filing this account said Rosalie Bennett, as individual and sole devisee, hereby receipts herself as Executrix for the above balance of $767.72, in addition to remaining ½ share and interest in the properties of Bennett Bros., and all personal properties and real estate herein shown or otherwise, in closing said estate."

Rosalie Bennett died January 10, 1963. Her executor inventoried her estate at $80,904.13. The inventory of Rosalie P. Bennett's estate shows real estate valued at $49,600.00; stocks, $30,920.00; cash, $184.13.

Plaintiffs' evidence further tends to show: When they were young men, C. C. Bennett and P. R. Bennett went into business as equal partners in a mercantile and farming operation. The partnership lasted until the death of C. C. Bennett, 46 years later. During all that time C. C. Bennett had no individual bank account. The two brothers and their wives together owned 7,000-10,000 acres of land "in different counties and states." Between 1932 and 1936 the brothers, with the joinder of their wives, conveyed, according to the testimony of the Register of Deeds, 7,782.87 acres. According to the summary of conveyances introduced in evidence as plaintiffs' Exhibit 13, the conveyances totaled 8,284.27 acres, plus 5 lots, 2 "tracts" and "Bk 51-380," less an "exception" from a conveyance of 12.279 acres. Of this total, 2,782.7 acres, according to the Register of Deeds, were conveyed to the Bank of Wadesboro; according to Exhibit 13 — 3,284.09 acres, plus 2 lots and a "tract." Neither C. C. Bennett nor his wife ever received any funds from these sales. Mrs. C. C. Bennett testified: "These transfers of deeds to others were made back before my husband's death when they were liquidating the estates and paying their debts." Between 1939 and his death P. R. Bennett deposited a total of $37,109.87 in his own account in the Bank of Wadesboro. During that same period a total of $172,957.25 was deposited to the credit of his wife, Rosalie P. Bennett. After the death of C. C. Bennett his widow and two sons signed deeds at the request of P. R. Bennett, but they never received any proceeds from such transfers.

In 1951, Rosalie P. Bennett became disabled and employed Thelma Leak "as a night servant." Mrs. Leak stayed with her until January 1963. About 1956 she took Mrs. Leak "into her confidence about her personal financial affairs." The latter testified that Mrs. C. C. Bennett had remarked to her "how pitiful" Mrs. Rosalie Bennett was; that when she repeated this comment to her, Rosalie Bennett said that was all Mrs. C. C. Bennett knew about it, that she had money, that "they thought she had to sell her diamond ring." Mrs. Leak further testified that Mrs. Rosalie Bennett told her they had spent $60,000.00 since she had been with her and "she had enough if she lived 100 years. . . .," that she had "$100,000 in stocks and bonds," that "Bennett Brothers borrowed $100,000 from the Bank and that's what they were living on now," "that Bennett Brothers was land poor . . . they got this money and paid the Bank back with land," that "they didn't need the money when they borrowed it to put the stock in . . . they were getting rid of the land . . . and Mr. P. R. Bennett bought stock and bonds with it in her name," and that is what they were living on now. Mrs. Bennett had a farm, which she operated through a tenant. She did not spend any money on entertaining and spent only what she had to for living expenses.

At the time of the death of C. C. Bennett, his son, plaintiff Clifton C. Bennett, was in law school. He testified:

> "I consulted Professor McIntosh, who wrote the book on the Law of Partnerships, as I recall, and I confronted my uncle with the fact that he had not settled, and I am prepared to give you his reply. The reply was that there was nothing to settle, and since that time my assumption has been, until last year following the death of my aunt, his widow, that in fact there was no money to account for."

At the close of plaintiffs' evidence defendant's motion for judgment of nonsuit was allowed. Plaintiffs appeal from this ruling.

Long, Ridge, Harris & Walker by George A. Long and Theron L. Caudle for plaintiffs appellants.

Taylor and McLendon by H. P. Taylor, Jr., for defendant appellee.

SHARP, J. By this action instituted September 9, 1963, plaintiffs seek an accounting for a partnership which was dissolved March 16, 1936, by the death of a partner under whom they now claim. They further seek to trace partnership assets into the estate of the widow of the surviving partner and impress a trust upon such assets. Defendant, as administrator *c. t. a., d. b. n.* of the partner who survived in 1936, and

as executor of his widow, pleads the lapse of time — over 27 years — in bar of plaintiffs' right to an accounting. Specifically, defendant pleads G.S. 1-47, 10 years; G.S. 1-49, 7 years; G.S. 1-50, 6 years; and G.S. 1-52, 3 years. Upon defendant's plea of the statute of limitations the burden devolved upon plaintiffs to show that their action was not barred but was instituted within the time permitted by statute. *Jewell v. Price,* 264 N.C. 459, 142 S.E. 2d 1; *Fulp v. Fulp,* 264 N.C. 20, 140 S.E. 2d 708.

Before plaintiffs can obtain a money judgment against defendant upon a demand arising out of the partnership transactions of Bennett Brothers, there must be an accounting of partnership affairs and a balance struck. *Pugh v. Newbern,* 193 N.C. 258, 136 S.E. 707; *Baird v. Baird,* 21 N.C. 524, 539. Their first task, therefore, is to show that their right to an accounting has not been lost by lapse of time.

The partnership existing between the Bennett brothers created a fiduciary relationship imposing upon P. R. Bennett — the managing partner, according to plaintiffs' evidence — the duty to render to C. C. Bennett at any time upon his request "a full and actual account of partnership affairs." *Prentzas v. Prentzas,* 260 N.C. 101, 103, 131 S.E. 2d 678, 680; *accord, Pentecost v. Ray,* 249 N.C. 406, 106 S.E. 2d 467; *Casey v. Grantham,* 239 N.C. 121, 79 S.E. 2d 735. As between the partners themselves the statute would not begin to run on the cause of action for an accounting until one partner had notice of the other's termination of the partnership and his refusal to account. This is but an application of the rule that the statute of limitations does not commence to run against a trustee until he repudiates his trust. *Fulp v. Fulp, supra; Prentzas v. Prentzas, supra;* 40 Am. Jur., Partnership § 335 (1942).

In the absence of an express agreement to the contrary, every partnership is dissolved by the death of one of the partners. *In re Estate of Johnson,* 232 N.C. 59, 59 S.E. 2d 223; *Bank v. Hollingsworth,* 135 N.C. 556, 47 S.E. 618; 40 Am. Jur., Partnership § 286 (1942). This common-law rule is now codified as G.S. 59-61.4. Upon the death of C.C. Bennett, P. R. Bennett immediately stood "in the relation of trustee charged with the duty of faithful management and accounting to those entitled to the surplus of the deceased partner's interest after settling the debts of the partnership and winding up its affairs." *In re Estate of Johnson, supra* at 60, 59 S.E. 2d at 225; *accord, Walker v. Miller,* 139 N.C. 448, 52 S.E. 125. It was the duty of P. R. Bennett, as his surviving partner, to have filed with the Clerk of the Superior Court, within 12 months of the death of C. C. Bennett, a verified account stating his action as surviving partner, and, unless the Clerk had extended his time for good cause shown, to have come to a settlement with Mrs. C. C. Bennett, as administratrix of his deceased partner. N.

C. Code of 1935, § 3285 (now G.S. 59-82). The Clerk of the Superior Court did not extend the time for P. R. Bennett to account, and he died without ever having accounted. Clearly, therefore, on March 16, 1937, plaintiff administratrix had the right to sue P. R. Bennett for an accounting. *In re Johnson, supra;* see *Ewing v. Caldwell,* 243 N.C. 18, 89 S.E. 2d 774; *Sherrod v. Mayo,* 156 N.C. 144, 72 S.E. 216. Within 3 years thereafter, *nothing else appearing,* plaintiffs' action for an accounting would have been barred by G.S. 1-52(1). *Prentzas v. Prentzas, supra; Weisman v. Smith,* 59 N.C. 124; 40 Am. Jur., Partnership § 345 (1942). Plaintiffs contend, however, that here something else appears from their evidence: that in the lifetime of C. C. Bennett, his surviving partner, P. R. Bennett, the brother-in-law and uncle of plaintiffs, had fraudulently misappropriated partnership funds; that after C. C. Bennett's death he fraudulently concealed from plaintiffs the existence of their cause of action against him for his prior defalcations, which he had actively continued while making positive misrepresentations to plaintiffs that no such assets existed and that an accounting would be a futile thing.

In order to exercise their right to an accounting 26 years after i't accrued, plaintiffs must establish that they exercised it within 3 years of the time they discovered or ought by reasonable diligence *under the circumstances* to have discovered the fraud of P. R. and Rosalie P. Bennett. In 1937, plaintiffs knew of their *right* to require P. R. Bennett to account. If we take their evidence as true, as we must in passing upon a motion for nonsuit, *Spinning Co. v. Trucking Co.,* 263 N.C. 807, 140 S.E. 2d 534, their failure to exercise this right was the result of P. R. Bennett's statement that the partnership had no assets — "that there was nothing to settle." If this statement was true — and plaintiffs say they believed it —, the institution of an action to require an accounting would have been a vain and an expensive gesture.

Under the circumstances here, plaintiffs' evidence must, in order to repel the bar of the statute, tend to establish (1) the falsity if P. R. Bennett's statement that there were no partnership assets; (2) that they reasonably relied upon the statement; and (3) that P. R. Bennett had misappropriated the assets and was actively concealing his breaches of trust. In other words, the facts which plaintiffs say caused them not to require the accounting are also the facts upon which they base their action to recover partnership assets. If P. R. Bennett misled plaintiffs so as to repel the bar of the statute, he had converted partnership assets. To prove the first is to prove the second.

Defendant contends that plaintiffs should have insisted on their legal right to an accounting in 1937; that, had they done so and had P. R. Bennett been guilty of the misappropriations with which plaintiffs now

charge him, such an accounting would have disclosed the misappropriations; that in failing to require the accounting plaintiffs failed to exercise reasonable diligence to discover the fraud they allege, and they are therefore barred by G.S. 1-52(9) from any relief whatever.

Plaintiffs' evidence, should the jury accept it, would support but not compel a finding that C. C. Bennett and P. R. Bennett were general partners; that P. R. Bennett was the business manager of the partnership, which was "land poor"; that, in order to dispose of land, the partnership borrowed $100,000 from the Bank of Wadesboro; that this money was fraudulently misappropriated by P. R. Bennett and his wife, both of whom led C. C. Bennett and his heirs to believe that it had been lost by unfortunate investments; that 3,284.09 acres, plus two lots and a "tract," were conveyed to the Bank of Wadesboro in 1935 for a consideration, determined from the revenue stamps on the deeds, of about $35,500; that from 1932 through 1936 the partnership also conveyed to other grantees 5,000.18 acres, plus 3 lots, a "tract," and "Bk 51-380," less an "exception" from a conveyance of 12.279 acres, for a consideration, similarly determined, of about $44,000; that P. R. Bennett bought stocks and bonds in his wife's name with the proceeds of the loan from the Bank of Wadesboro; that, by 1956, Rosalie P. Bennett had spent $60,000 in funds originating from the loan and that she still had $100,000 in stocks and bonds derived from it.

The credibility of this evidence is not for the Court. Our task is to determine (1) whether, taken as true, it constitutes more than a scintilla of evidence of fraudulent misappropriation of partnership funds by P. R. and Rosalie P. Bennett and of their active, fraudulent concealment of these misappropriations from the heirs of C. C. Bennett; and (2) whether the failure of P. R. Bennett to account in 1937, considered in connection with his relation to plaintiffs and his statement to his nephew that there was nothing to account for, was sufficient to alert plaintiffs and set the statute running.

> "It is generally held that where there is concealment of fraud or continuing fraud, the statute of limitations does not bar a suit for relief on account of it, and thereby permit the statute which was designed to prevent fraud to become an instrument to perpetrate and perpetuate it. * * * The law applicable is well stated in 34 Amer. Jur., Limitation of Actions, par. 168, p. 135, as follows: 'Where a confidential relationship exists between the parties, failure to discover the facts constituting fraud may be excused. In such a case, so long as the relationship continues unrepudiated, there is nothing to put the injured party on inquiry, and he cannot be said to have failed to use due diligence in detecting the fraud. . . . Similarly, an agent sued for fraud, cannot set up that the principal

should have suspected him.'" *Small v. Dorsett,* 223 N.C. 754, 761, 28 S.E. 2d 514, 518.

A failure to use such diligence as is ordinarily required of two persons transacting business with each other may be excused when there exists such a relation of trust and confidence between the parties that it is the duty, on the part of the one who committed the fraud and thereby induced the other to refrain from inquiry, to disclose to the other the truth. *Vail v. Vail,* 233 N.C. 109, 63 S.E. 2d 202; *accord, Gillett v. Wiley,* 126 Ill. 310, 9 Am. St. Rep. 587; 34 Am. Jur., Limitation of Actions § 168 (1941); Annot., 25 Am. St. Rep. 227. In *Lataillade v. Orena,* 91 Calif. 565, 27 Pac. 924, a case on all fours with ours, the plaintiff, on February 21, 1887, brought a suit to compel an accounting by his stepfather and guardian, who had handled his affairs since 1849. The California Code, like G.S. 1-52(9), provided that an action for relief on the grounds of fraud or mistake was not deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake. Counsel for the defendant contended that the action was not one for relief on the ground of fraud. The court said:

> "It is true, the action was for an accounting, but the grievance complained of was that defendant knowingly received and held moneys in trust for plaintiff, and appropriated the same to his own use, and at all times fraudulently concealed from plaintiff the fact he had ever received or held any such moneys or any money in which plaintiff had any interest. It seems to us, therefore, that the averments make a case of the class provided for in the section of the Code above cited." *Id.* at 577, 29 Pac. at 926.

Although plaintiffs' evidence is susceptible of inferences to the contrary, yet the jury could find from it that, in view of the confidential relationship existing between plaintiffs and P. R. Bennett, the former were not indiligent by reason of failing to require the latter to account within 3 years from March 16, 1937. We conclude, therefore, that plaintiffs were entitled to go to the jury on all the issues raised by the pleadings. These include, *inter alia,* the issue whether plaintiffs' right to an accounting is barred by the statute of limitations. Needless to say, defendant's evidence, not yet heard, might disclose a version entirely different from that of plaintiffs. The question of tracing trust funds will arise only if the jury, after hearing the evidence of both sides, establishes plaintiffs' right to recover a sum of money from defendant. See *Trust Co. v. Barrett,* 238 N.C. 579, 78 S.E. 2d 730; *McGurk v. Moore,* 234 N.C. 248, 67 S.E. 2d 53.

The judgment dismissing the action as of nonsuit is

Reversed.

GEORGE R. HORN v. PROTECTIVE LIFE INSURANCE COMPANY.

(Filed 23 July, 1965.)

1. Insurance § 45—

Where insurer tenders the amount of the death claim and resists plaintiff's action on the supplementary contract for accidental death solely on the ground that insured's death was not accidental as defined by the policy, insurer waives its right to deny liability on the ground that notice and proof of loss were not given as required by the policy.

2. Insurance § 46—

In an action under supplementary provisions of a policy for additional payments if death of insured results from an accident, plaintiff has the burden of proving death by accident within the definition of that term in the policy.

3. Insurance § 34— If existing disease is contributing factor in causing death, death does not result exclusively from accidental means.

This action was instituted on a supplementary contract providing additional benefits if insured's death was caused directly and exclusively by external, violent and accidental means. The evidence was to the effect that insured had theretofore suffered heart attacks, and plaintiff's expert witness testified from his autopsy that the wounds received by insured in the accident were superficial and could not alone have caused death, that the condition of the heart and blood vessels disclosed insured had arteriosclerosis, and that upon the facts of the particular case the shock of the accident could have caused the heart failure and death. *Held:* Nonsuit should have been entered.

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

On August 20, 1963, defendant insured the life of R. R. Horn for the principal sum of $10,000. The usual provisions in life insurance policies, obligating insurer to pay a specific sum upon proof of death, were in this case supplemented by an endorsement on the policy entitled: "ACCIDENTAL DEATH AND DISMEMBERMENT SUPPLEMENT," which provided:

> If insured "(a) sustains bodily injuries caused directly and exclusively by external, violent and accidental means * * * and (b) sustains one of the losses enumerated in the Schedule of Losses * * * as the result, directly and independently of all other causes, of such injuries, the Company will, upon receipt of due proof of such loss within 60 days after the date of such loss, * * * pay * * * the amount determined in accordance with the Schedule of Losses * * *."

"LIMITATIONS:

"The Accidental Death and Dismemberment Benefits will not be payable for any loss resulting from, or caused, directly or indirectly, or wholly or partly, by

"1. [* * *]

"2. bacterial infection, whether introduced or contracted accidentally or otherwise (except pyogenic infections which shall occur simultaneously with and through a visible cut or wound which was caused directly and independently of all other causes by external, violent and accidental means), or

"3. medical or surgical treatment (except as may result directly from surgical operations or procedures made necessary solely by bodily injuries caused directly and independently of all other causes by external, violent and accidental means and furnished within 90 days after the date of such bodily injuries), or

"4. [* * *]

"5. [* * *]

"6. disease or bodily or mental infirmity * * *."

The Schedule of Losses required payment of the principal sum for:

"Loss of Life........Principal Sum
"Loss of Both Hands or Both Feet........Principal Sum
"Loss of Both Eyes........Principal Sum
"Loss of One Hand and One Foot........Principal Sum
"Loss of One Eye and One Hand........Principal Sum
"Loss of One Eye and One Foot........Principal Sum
"Loss of One Hand, or One Foot,
or One Eye........One-half Principal Sum."

Plaintiff, son of the insured, and beneficiary named in the policy, brought this action to recover $10,000 provided for in the supplemental contract of insurance. He alleged insured's death, on January 13, 1964, was a direct result of bodily injuries sustained by insured, caused directly and exclusively by violent and accidental means.

The court, to settle the rights of the parties, submitted this issue to a jury: "Was the death of R. R. Horn caused by bodily injuries sustained by the said R. R. Horn directly, exclusively and independently of all other causes by external, violent and accidental means, as set

forth in the complaint?" The jury answered "yes." Thereupon, judgment was entered in favor of plaintiff for $10,000. Defendant excepted and appealed.

Van Winkle, Walton, Buck & Wall; Herbert L. Hyde for Defendant Appellant.

Hamrick & Jones for Plaintiff Appellee.

RODMAN, J. The first and principal question debated in the briefs and on oral argument is directed to the motion to nonsuit. Defendant asserts the court's ruling was erroneous for two reasons:

First, plaintiff alleged, and defendant denied, that proof of loss required by the policy had been given. Plaintiff must establish compliance with policy provisions to recover, and proof of loss is a condition precedent. If this case had been tried on the theory that plaintiff had not filed proof of loss, as required by the policy, we would feel compelled to reverse for that reason; but it is manifest from the record, and tacit admission in appellant's brief, that the court and counsel understood that defendant's liability depended on proof at the trial that insured's death was the result of injuries, as defined in the policy. Defendant did not tender an issue relating to proof of death. It requested no instructions relating to proof. It is stated in appellee's brief that defendant paid the $10,000 called for by the policy proper, by check, stating it was in full settlement of all claims against defendant. Plaintiff declined to accept the check as a full settlement. It was cashed with the understanding that it would not in any manner affect plaintiff's right to maintain this action.

Defendant's position was a waiver of its formal denial in its answer that plaintiff had not filed proof of loss. To hold otherwise would not only be unjust to the litigants but unjust to the court and the counsel that participated in the trial.

The second reason assigned to support the motion to nonsuit is not so easily disposed of. An interpretation of the insuring provisions of the Accidental Death Supplement is necessary to ascertain the extent of defendant's obligation under its contract, and the application of the evidence to the contractual obligations.

Plaintiff has the burden of proof. His evidence must be sufficient to permit a jury to find death resulted directly and independently of all other causes from bodily injuries caused directly and exclusively by violent and accidental means. *Langley v. Insurance Co.*, 261 N.C. 459, 135 S.E. 2d 38; *Slaughter v. Insurance Co.*, 250 N.C. 265, 108 S.E. 2d 438; *Penn v. Insurance Co.*, 158 N.C. 29, 73 S.E. 99; *Tix v. Employers Casualty Company*, 368 S.W. 2d 105; *Hume v. Standard Life & Acci-*

dent Insurance Co., 365 P. 2d 387; *New York Life Insurance Co. v. Rees,* 341 S.W. 2d 246; *Newton v. Colonial Life & Accident Insurance Co.*, 149 F. Supp. 113; *Dauphin Deposit Trust Co. v. Lumbermens Mut. Cas. Co.*, 90 A. 2d 349; *Lucas v. Metropolitan Life Ins. Co.,* 14 A. 2d 85, 131 A.L.R. 235; *Calkins v. National Travelers' Ben. Ass'n of Des Moines,* 204 N.W. 406, 41 A.L.R. 363.

The evidence is sufficient to permit a jury to find these facts:

Insured died between 1:00 and 2:30 a.m. on Sunday, January 13, 1964. He was 72 years of age. He and his son were partners. Their business was extensive. They had the franchise for the Buick automobile at Forest City. They operated a used car lot. They had extensive real estate holdings, including rental properties and a small farm near Bostic. Insured looked after the real estate business and the farm, supervising the maintenance and repair of the buildings. He was active in buying and selling livestock, which he took to the farm for resale. His principal work in connection with the automobile business was in driving cars to and from dealers in other towns to Forest City.

During the week preceding his death, he had driven a car from Greensboro to Forest City; and about three weeks prior thereto, he had driven a car from Atlanta to Forest City. On Friday, prior to his death, he purchased four calves. He loaded and hauled these to his farm. He worked all day on Saturday prior to his death. He worked until the usual closing time, 6 to 7 p.m. He seemed to those who saw him at work on Saturday to be in good health.

About 8:30 p.m. he and a companion, pursuant to a prior agreement, left for insured's camp near Marion. There they prepared and ate an oyster stew. After supper they looked at television. During that period he appeared to his companion to be in good health. He looked for his medicine but could not find it. They left for home about 1:00 a.m. It was cold, raining and sleeting. Ice on the windshield was brushed off with a sack. The companion testified: "The windshield wipers were working but it was very poor on account of the ice, rain and weather." Because the road was slick, insured was driving 15-25 miles per hour. The companion felt the rear end of the car slide. It ran off the paved portion of the highway, across two ditches, through woods, down a 90 foot embankment, coming to rest only when it violently collided with a large tree.

As soon as the vehicle came to rest, the companion turned off the ignition switch and jumped out. He proceeded immediately to the highway to seek assistance. Perhaps an hour elapsed before help arrived.

The first person to see the insured after the car left the highway expressed the opinion insured was then dead. "He had his arms upon

the steering wheel, his head down like this. I walked around to the other side of the car and Mr. Horn went over to the right and his arms dropped down to the passenger side. * * * Mr. Horn's body was not lying down in the front seat. It was kind of slumped over that way. He was still half sitting up and half laying over in the seat. As to his hands, as I remember, one hand was down on his leg and in his lap." A few minutes thereafter, insured was placed on a stretcher and taken to a hospital. The coroner saw the body at the hospital about 2:30 a.m. He testified: "I observed Mr. R. R. Horn after I got to the hospital. He was then dead. I observed that he was bruised on the right side of his forehead, with cuts and bruises and blood running down his eyes."

A highway patrolman responded to the call for assistance. He reached the wreck between 1:30 and 2:00 a.m., about 15 minutes ahead of the ambulance. He expressed the opinion that insured was dead when he first saw him. He described insured's position in the automobile. He testified as to the location of the automobile, the fact that it had hit a large tree, rendering it impossible for one to get out of the driver's side. He made no reference to any signs of external injuries, merely saying, "I noticed there was saliva or mucous coming out of his mouth dripping on the seat."

Plaintiff arrived at the hospital shortly after the ambulance. His father was then dead. Describing the body, he said: "With reference to my father's head and face, I saw the whole righthand side of his face, he was blue up through here above his eye and all in here and he had a cut across his eye here, right along here and there was blood in his right eye and some running down his face."

An autopsy was made by Dr. Reese, pathologist, on Sunday morning, the 13th. He testified:

> "[T]he external auditory canals were free from blood and fluid and there were superficial laceration or cut over the right eyebrow, these associated with a few mild excorations [*sic*] of the skin. A superficial laceration is a very small cut. Mild excorations [*sic*] are scratches on the skin in that particular area. There was also some bleeding into the soft tissues of the skin and subcutaneous tissue, that is right under the skin, over the right forehead. The neck was normal in contour and there was a superficial scratch on the left side of the chin. * * * There was a superficial laceration over the posterior aspect of the right hand and bruises and superficial excoriations, involving the skin and soft tissues of each knee."

He testified there was no evidence of blood or injury to the brain or other organs of the body, other than the heart.

> "The heart weighed 550 grams, enlarged about 10 to 15%. There was superficial scars on the surface of the heart. On opening the heart, there was extensive scarring, some softening and also old adhesions involving heart muscles itself. The chambers of the heart were normal in proportion, guarded by competent valves. The blood supply showed extensive hardening of the arteries, placques of calcium deposit. These greatly reduces the size of the vessels and there was one vessel, the left anterior had a very small blood clot. The aorta, and the great vessels of the body were essentially normal, but did show extensive hardening of the arteries, arteriosclerosis. * * * There were gall stones in the gall bladder and some scarred areas near the fundus.
>
> "In regard to those supervicial [*sic*] lacerations or scratches on the skin on the outside of the body, I have an opinion satisfactory to myself as to whether or not they were of major importance sufficient to produce death, and in my opinion they were minor and did not represent major injuries to the body or the organs contained therein. * * * I have an opinion satisfactory to myself as to the cause of the death of Mr. R. R. Horn. It is my opinion that death resulted from severe heart disease that was demonstrated in the finding of hardening of the arteries and the occlusion of the arteries."

On cross examination by plaintiff, Dr. Reese was asked if he had not in a supplemental report said: "I think it would be most proper and probable to assume that the anxiety, apprehension and concern experienced by Mr. Horn following the accident actually precipitated the heart attack." He answered that he did, and stated that was his medical opinion. He then said:

> "A person who has had a heart attack might have a susceptibility to another heart attack. This might be activated by a person going over a 90 foot fill in an automobile on a dark night. * * *
>
> "On the information I got from the autopsy itself and examination of this patient, and medical history, I looked at, I would not be able to form an opinion as to whether or not anxiety or apprehension may have caused a heart attack of Mr. Horn."

He was then asked the question:

> "Now, Doctor, if the Jury should find from the evidence in this case that the deceased, Mr. R. R. Horn, 72 years of age, on the night of his death was riding along U. S. Highway 221 and went over an embankment in an automobile 90 feet below the highway

and the car struck a tree and came to a violent stop, would it be your opinion that could cause death, by shock alone?"

He responded that he had an opinion, and in his opinion it could produce death.

The evidence shows without contradiction that insured had suffered from heart attacks. Plaintiff testified he had been so informed by his father's doctor "about 10 years ago." Insured had a gall bladder ailment and "had a real bad right hip, had calcium deposit on it."

The death certificate filed with the Register of Deeds said:

> "Cause of death, Part I: Myocardial infarction, old and acute due to coronary artery disease, arteriosclerotic and acute thrombotic. Part II: Victim involved in a single car auto accident approximately one hour before death, no evidence of major injury sufficient to produce death * * *."

Rutherford Hospital records show that insured was a patient there from October 20, 1956 to November 26, 1956; from May 21, 1959 to May 25, 1959; from June 3, 1959 to June 8, 1959; from August 9, 1960 to August 15, 1960; from September 11, 1962 to September 18, 1962 and from August 18, 1963 to August 22, 1963. The final diagnosis made on his discharge on August 22, 1963 listed, among other diseases from which insured was suffering, "Arteriosclerotic cardiovascular disease." Each of the other hospital records refer to his heart condition.

The crucial question is: Does the evidence, fairly interpreted in the light most favorable to plaintiff, suffice to establish death for which compensation must be paid under the policy provisions? For an answer, we look to prior decisions of this Court and the conclusions reached by the appellate courts of sister states.

Penn v. Insurance Co., 160 N.C. 399, 76 S.E. 262, is the leading case in this State. Walker, J., there said:

> "[I]t appears that under policy contracts such as the one under consideration, three rules may be stated:
>
> "1. When an accident caused a diseased condition, which together with the accident resulted in the injury or death complained of, the accident alone is to be considered the cause of the injury or death.
>
> "2. When at the time of the accident the insured was suffering from some disease, but the disease had no causal connection with the injury or death resulting from the accident, the accident is to be considered as the sole cause.
>
> "3. When at the time of the accident there was an existing disease, which, cooperating with the accident, resulted in the in-

> jury or death, the accident cannot be considered as the sole cause or as the cause independent of all other causes."

The rules there stated have been repeated and applied as the proper yardstick to determine liability in subsequent cases. *Skillman v. Insurance Co.,* 258 N.C. 1, 127 S.E. 2d 789; *Harris v. Insurance Co.,* 193 N.C. 485, 137 S.E. 430.

Courts of sister states have, either expressly or by application, approved the rules as stated by Justice Walker. See *Crowder v. General Accident, Fire & Life Assur. Corp.,* 21 S.E. 2d 772; *The MacCabees v. Terry,* 67 So. 2d 193; *Fries v. John Hancock Mutual Life Ins. Co. of Boston,* 360 P. 2d 774; *Tomaiuoli v. U. S. Fidelity and Guaranty Co.,* 182 A. 2d 582; *Brown v. United States Fidelity & Guaranty Co.,* 147 N.E. 2d 160; *Bouchard v. Prudential Ins. Co. of America,* 194 A. 405; *Provident Life & Accident Ins. Co. v. Campbell,* 79 S.W. 2d 292. In that case the court summarized the rule to determine liability in this language:

> "The rule we deduce from the cases involving accident insurance contracts similar to those here under consideration, is that, if the insured, at the time of the alleged accidental injury, was also suffering from a disease, and the accident aggravated the disease, or the disease aggravated the effects of the accident and actively contributed to the disability or death, there can be no recovery upon the policy."

The court further said:

> "[T]hat a purely 'mental shock,' due to excitement or 'mental disturbance' such as that disclosed by the proof in the record before us, is not a bodily injury within the contemplation of the insurance contracts involved in these cases."

Plaintiff, in § 14 of his complaint, alleged insured suffered shock, blows and injuries which "caused his heart to stop beating and caused his death." The evidence supports the allegation that the immediate cause of death was the failure of the heart to perform its normal function. The evidence is sufficient to support a finding that the shock or excitement created by running off the road and striking the tree caused a strain on the heart and blood vessels, which they, because of the diseased condition, could not stand. This is as far as the evidence will warrant a factual finding. We conclude it is not sufficient under the restricted insuring provisions of the accidental death portion of the policy to impose liability. In reaching this conclusion, we are advertent to the irreconcilable conflict in the conclusions reached by courts in constru-

ing and applying provisions of policies providing for accidental death. Multitudinous cases indicating variant interpretations and results are assembled in the ANNOTATION: "Preexisting physical condition as affecting liability under accident policy or accident feature of life policy." 84 A.L.R. 2d 176, *et seq.* See particularly pp. 255-281; 29A Am. Jur., Insurance § 1212; 45 C.J.S. pp. 1088, 1089; 10 Couch on Insurance 2, § 41.75.

Reversed.

ABERFOYLE MANUFACTURING COMPANY v. IVEY L. CLAYTON, ACTING COMMISSIONER OF REVENUE.

(Filed 23 July, 1965.)

1. Appeal and Error § 21—

An assignment of error to the signing and entry of 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. Taxation § 28c—

Provision for loss carry-over in computing income tax for a particular year is not required by the organic law but is solely a matter of grace, and such allowance must be determined in accordance with public policy as set forth in the statute permitting such loss carry-over. G.S. 105-147(9)(d).

3. Same—

Where a corporation realizes a gain from the liquidation of wholly-owned subsidiaries, such gain, even though not constituting taxable income, G.S. 105-144(c), does constitute income "from all sources including income not taxable" within the purview of G.S. 105-147(9)(d)(2), and consequently must be deducted from any asserted loss carry-over from a previous year.

APPEAL by plaintiff from *Riddle, S.J.,* 2 March 1964 non-jury Session of GASTON.

The complaint alleges two causes of action: (1) to recover an alleged overpayment of income tax in the amount of $2,423.44, with interest; and (2) to recover the sum of $12,596.04, with interest, for an alleged additional income tax assessed against it by the then Commissioner of Revenue, and paid under protest.

When the action came on to be heard before Judge Riddle, the parties presented to him an agreed written statement of facts, signed by counsel of record of both parties on 26 November 1963, which is as follows:

"The parties, by their respective counsel, do hereby stipulate and agree that the following statement of facts, in narrative form, is true and correct and that said statement includes all facts necessary to a determination of the issues raised by the pleadings.

"It is further stipulated and agreed that the cause may be heard by the Court sitting without a jury upon the facts contained in this statement.

PRELIMINARY STATEMENT

"This case arises under Section 105-147 of the income tax article of the North Carolina Revenue Act. That section provides, in Subsection (9)(d), for a net economic loss deduction. 'Net economic loss' is defined as the amount by which allowable deductions (with certain exceptions) 'exceed income from all sources in the year including any income not taxable under this article.' Net economic losses for any or all of the five preceding years may be carried forward and deducted in a current year but 'only to the extent that such carry-over loss . . . shall exceed any income not taxable under this article received in the same year in which the deduction is claimed, . . .' Any such loss carry-over is also required to be offset by 'any income taxable or non-taxable' of any intervening year.

FACTS

"Plaintiff taxpayer is a Pennsylvania corporation which was domesticated in North Carolina in 1927 and which has its registered office in Ranlo, Gaston County. Plaintiff's business, at all times relevant to this action, was conducted and transacted partly within and partly without North Carolina.

"For plaintiff's tax years ended June 30, 1958-1961, the percentages of its net apportionable income which was allocable to North Carolina under G.S. 105-134 were as indicated below:

1958	29.4459%
1959	35.0895%
1960	41.3288%
1961	65.0033%

"During the three years ended June 30, 1958-1960, plaintiff's income tax deductions (other than those excepted by G.S. 105-147 (9)(d)(2)) exceeded its taxable income and thus produced operating losses apportionable to North Carolina of $11,725.38, $123,-245.39 and $96,575.86, respectively, a total of $231,546.63.

"Prior to the close of business June 30, 1960, plaintiff owned 100 percent of the stock of Rex Mills, Incorporated, a North Carolina corporation, and 100 percent of the stock of Aberfoyle Manufacturing Company of Canada, Limited. The business activities of plaintiff and its two named subsidiaries constituted a unitary textile manufacturing business.

"During plaintiff's tax year ended June 30, 1960, it received from Rex Mills dividends in the amount of $97,730. Subsequently, during the same tax year plaintiff liquidated Rex Mills and the above-named Canadian subsidiary. Gain to plaintiff from the liquidation of these subsidiaries amounted to $4,120,418.65. This gain, under the provisions of G.S. 105-144(c), was not recognized.

"Plaintiff, for the year ended June 30, 1961, had a net income apportionable to North Carolina in the amount of $341,123.00.

"In computing its net economic loss carry-over deduction on its June 30, 1961, return, plaintiff reduced its loss carry-over by $40,-390.00. This was the amount by which plaintiff's net taxable income apportionable to North Carolina would have been increased for the year ended June 30, 1960, but for the dividends received deduction allowed by G.S. 105-147(7) with respect to the $97,-730.00 in dividends from Rex Mills. Plaintiff was entitled to deduct 100% of the dividends it received from Rex Mills in the year ended June 30, 1960, because for that year all of Rex Mills income was apportionable to and taxed by North Carolina. The $40,390.64 reduction brought the plaintiff's claimed net economic loss apportionable to this State down from $231,546.63 to $191,155.99. On its June 30, 1961, return, plaintiff claimed a loss carry-over deduction of $191,155.00. The Commissioner required that the economic losses incurred in the years ended June 30, 1958-1960 be further reduced by the gain on the liquidation of Rex Mills and the Canadian subsidiary and disallowed the deduction in its entirety.

"Plaintiff made timely application to the Commissioner for a refund of the tax attributable to the $40,390.64 dividend deduction item. Plaintiff averred that it had erred in reducing its carry-over loss deduction by said amount and in paying $2,423.44 in tax (6% x $40,390.64) on account of the reduction. The refund application was denied.

"Plaintiff also made timely protest to the proposed assessment of additional tax on account of the disallowance of the $191,155.00 net carry-over loss deduction as aforesaid. The assessment, in the amount of $11,469.30 plus $1,126.74 in interest, was sustained by the Commissioner and paid under protest by plaintiff.

"The Commissioner contends that the $97,730 in 1960 dividends and $4,120,418.65 in 1960 gain both constituted non-taxable income which under G.S. 105-147(9)(d)(2) — (4) was required to be offset against plaintiff's 1958-1960 losses in computing the net economic loss which could be carried over and deducted in 1961. Plaintiff contends that the dividends did not constitute non-taxable income and that the Commissioner's denial of the claimed refund has deprived plaintiff of a deduction for these dividends in contravention of Section 105-147(7) and 105-147(9) of the General Statutes. Further, plaintiff contends that the gain from the liquidation of the two subsidiaries constituted 'gain' rather than 'income' which did not economically benefit plaintiff and which was not 'non-taxable' but was merely not 'recognized' during 1960 under G.S. 105-144(c).

"This suit was instituted for refund of (1) the $2,423.44 alleged to have been erroneously paid and (2) the $12,596.04 assessment plus interest which was paid under protest. If the Commissioner's contention with respect to the $4,120,418.65 unrecognized gain is sustained, plaintiff would not be entitled to recover any amount because this gain alone would more than offset the $231,546.63 in operating losses without regard to the treatment given the $97,-730.00 in dividends. If plaintiff's contentions regarding the unrecognized gain are sustained, however, plaintiff would be entitled to recover the $12,596.04 with interest from June 10, 1963, the date of payment of assessment under protest. If, in addition, plaintiff's contentions regarding the $97,300.00 in dividends are sustained, plaintiff would be entitled to recover the $2,423.44 with interest from June 10, 1963, the date of denial of its claim for refund.

"Plaintiff has complied with all prerequisite statutory requirements and has exhausted its administrative remedies and is entitled to maintain and prosecute this action."

Based upon the agreed statement of facts, Judge Riddle entered a judgment ordering and adjudging that plaintiff take nothing by this action, dismissing its action, and taxing it with the costs.

The Attorney General moved in this Court to substitute Ivey L. Clayton, acting Commissioner of Revenue, as party defendant in the place and stead of W. A. Johnson, former Commissioner of Revenue. The Court allowed this motion on 2 March 1965.

From the judgment entered, plaintiff appeals to the Supreme Court.

Moore and Van Allen by Robert W. King, Jr., for plaintiff appellant.

Attorney General T. W. Bruton and Assistant Attorney General Charles D. Barham, Jr., for defendant appellee.

PARKER, J. Plaintiff has one assignment of error reading as follows: "For that the court erred in the signing and entry of judgment dismissing plaintiff's suit for refund, the facts, as appear on the face of the record, being insufficient to support the judgment." This assignment of error 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 North Carolina Index, Vol. 1, Appeal and Error, § 21.

This statement appears in the agreed statement of facts: "If the Commissioner's contention with respect to the $4,120,418.65 unrecognized gain is sustained, plaintiff would not be entitled to recover any amount because this gain alone would more than offset the $231,546.63 in operating losses without regard to the treatment given the $97,730 in dividends." This quoted statement in the agreed statement of facts presents this basic question for decision, as stated in plaintiff's brief: "When on the liquidation of a wholly-owned subsidiary a parent corporation has a gain which under G.S. Sec. 105-144(c) is not recognized, is such gain nontaxable income which the parent must offset against its operating losses in computing the G.S. Sec. 105-147(9)(d) net operating loss deduction?" This quoted statement presents this basic question for decision, as stated in defendant's brief: "Does a capital gain which qualifies for nonrecognition as taxable income under the provisions of G.S. 105-144(c) constitute 'income from all sources in the year including income not taxable under this (Income Tax) Article of the Revenue Act' in determining net economic loss under G.S. 105-147 (6)(d) (now G.S. 105-147(9)(d))?" G.S. 105-147(6)(d) is the same section of our Income Tax Statute as G.S. 105-147(9)(d), and is expressed in substantially the same words, except that G.S. 105-147(9) (d)(2) was rewritten by Ch. 1169, p. 1610, 1963 Session Laws. This 1963 rewriting of G.S. 105-147(9)(d)(2) by the General Assembly is not relevant here on the basic question specifically stated above. This section is codified as G.S. 105-147(6)(d) in G.S. Vol. 2C, 1957 Cumulative Supplement to Recompiled Vol. 2C, 1950, and is codified as G.S. 105-147 (9)(d) in G.S. Vol. 2C—Replacement 1958, and as G.S. 105-147(9)(d) in G.S. Vol. 2D — Replacement 1965. It will hereafter be referred to as G.S. 105-147(9)(d).

Plaintiff makes these contentions: "Gain realized by plaintiff in the liquidation of a wholly-owned subsidiary should not reduce the carry-over loss deduction authorized under G.S. 105-147(9)(d)." Upon the liquidation of its subsidiaries, it merely transferred its subsidiaries' as-

sets to its own books. G.S. 105-144(c) provides that any "gain" attendant upon such transfer will not be recognized for tax purposes. The nonrecognition of gain on the liquidation of a subsidiary might well be a temporary condition, *i.e.*, subsequent sale of the property by the parent corporation can result in the taxation of this gain.

G.S. 105-144(c) reads:

> "No gain or loss shall be recognized upon the receipt by a corporation of property distributed in complete liquidation of another corporation, if the corporation receiving such property was on the date of the adoption of the plan of liquidation and has continued to be at all times until the receipt of the property the owner of stock (in such other corporation), possessing at least eighty per centum (80%) of the total combined voting power of all classes of stock entitled to vote, and the owner of at least eighty per centum (80%) of the total number of shares of all other classes of stock (except nonvoting stock which is limited and preferred as to dividends)."

It seems clear that the nonrecognition principle embodied in G.S. 105-144(c) was to permit a corporation to simplify its corporate structure, and to relieve a parent corporation from tax liability liquidation gains realized in a particular year as a result of corporate liquidation. However, the instant case on the precise basic question above stated does not involve taxation of liquidation gains or the public policy embodied in G.S. 105-144(c). The instant case is concerned with the application of the net economic losses provisions of G.S. 105-147(9)(d), and the only pertinent public policy considerations are those which underlie this particular section of the statute.

The net economic losses deduction claimed by plaintiff is described and defined in G.S. 105-147(9)(d). The pertinent parts of G.S. 105-147 so far as the instant case is concerned on the precise basic question above stated are as follows:

> "§ 105-147. Deductions. In computing net income there shall be allowed as deductions the following items:
>
> * * *
>
> "(9) Losses of such nature as designated below:
>
> * * *
>
> "(d) Losses in the nature of NET ECONOMIC LOSSES sustained in any or all of the five preceding income years arising from business transactions or to capital or property as specified in (a) and (b) above subject to the following limitations:

"1. THE PURPOSE in allowing the deduction of net economic loss of a prior year or years is that of granting some measure of RELIEF TO TAXPAYERS WHO HAVE INCURRED ECONOMIC MISFORTUNE or who are otherwise materially affected by strict adherence to the annual accounting rule in the determination of taxable income, and the deduction herein specified does not authorize the carrying forward of any particular items or category of loss except to the extent that such loss or losses shall RESULT IN THE IMPAIRMENT OF THE NET ECONOMIC SITUATION of the taxpayer such as to result in a net economic loss as hereinafter defined.

"2. The net economic loss for any year shall mean the amount by which allowable deductions for the year other than contributions, personal exemptions, prior year losses, taxes on property held for personal use, and interest on debts incurred for personal rather than business purposes SHALL EXCEED INCOME FROM ALL SOURCES IN THE YEAR INCLUDING ANY INCOME NOT TAXABLE UNDER THIS ARTICLE." (Emphasis ours.) ("2" is quoted as it appears prior to its being rewritten by the 1963 Session of the General Assembly. As rewritten in Ch. 1169, p. 1610, 1963 Session Laws, it reads:

"2. The net economic loss for any year shall mean the amount by which allowable deductions for the year other than personal exemptions, non-business deductions and prior year losses shall exceed income from all sources in the year including any income not taxable under this Article.")

The General Assembly was under no constitutional or other legal compulsion to permit a net economic loss or losses deduction for a corporation from taxable income in a subsequent year or years. It enacted the carry-over provisions of G.S. 105-147(9)(d) "purely as a matter of grace, gratuitously conferring a benefit but limiting such benefit to the net economic loss of the taxpayer after deducting therefrom the allocable portion of such taxpayer's nontaxable income." *Rubber Co. v. Shaw, Comr. of Revenue*, 244 N.C. 170, 92 S.E. 2d 799.

It appears from the agreed statement of facts that during plaintiff's fiscal and tax year ending 30 June 1960, it liquidated two wholly-owned subsidiaries and realized a gain of $4,120,418.65. This gain was not included in plaintiff's state taxable income for the year 1960, because the gain qualified for nonrecognition under the provisions of G.S. 105-144(c). Even though this liquidated gain of $4,120,418.65 did not constitute taxable income to plaintiff, it seems manifest that it did in fact constitute a gain and increased plaintiff's assets for the year by $4,120,418.65 over the value of plaintiff's two wholly-owned subsidiaries as carried in plaintiff's assets before the liquidation.

For its three fiscal and tax years ending 30 June 1958, 1959, and 1960, plaintiff had net operating losses apportionable to North Carolina under G.S. 105-134 in the total amount of $231,546.63. G.S. 105-147(9)(d)(2), in force at all times relevant here, provides in relevant part: "The net economic loss for any year shall mean the amount by which allowable deductions for the year * * * shall exceed income from all sources in the year including any income not taxable under this article."

G.S. 105-132(1) reads: "The word 'taxpayer' includes any individual, corporation, or fiduciary subject to the tax imposed by this article."

G.S. 105-140 reads: "The words 'net income' mean the gross income of a taxpayer, less the deductions allowed by this article."

G.S. 105-141(a) reads in relevant part: "The words 'gross income' mean the income of a taxpayer derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, business, commerce or sales, or dealings in property, whether real or personal, located in this or any other state or any other place, growing out of the ownership or use of or interest in such property, also from interest, rent, dividends, securities, or the transactions of any business carried on for gain or profit, *or gains or profits, and income derived from any source whatever and in whatever form paid.*" (Emphasis ours.)

In our opinion, and we so hold, plaintiff's gain in the amount of $4,-120,418.65 realized from the sale of its two wholly-owned subsidiaries by reason of our statutory definition of "gross income" constitutes "income from all sources in the year including any income not taxable under this article," as stated in G.S. 105-147(9)(d)(2). Consequently, plaintiff is not entitled to any net economic losses deduction as sought in its complaint, and is not entitled to recover anything sought in this suit, because as stated in the agreed statement of facts "this gain [$4,-120,418.65] alone would more than offset the $231,546.63 in operating losses without regard to the treatment given the $97,730. in dividends."

The Federal cases and statutes relied on by plaintiff are clearly distinguishable. We are here concerned with our own statutes.

Having reached this conclusion, the question presented for decision in plaintiff's brief reading: "When dividends received by a parent corporation from a subsidiary are deductible under G.S. Sec. 105-147 (7) (because all of the subsidiary's income was subject to taxation by North Carolina) does the parent thereby receive nontaxable income which must be offset against its operating losses in computing the G.S. Sec. 105-147(9)(d) net operating loss deduction?", has become moot.

The agreed statement of facts support Judge Riddle's judgment, and no error of law appears on the face of the record. The judgment below is

Affirmed.

STATE v. WILLIE SMITH.

(Filed 23 July, 1965.)

1. Criminal Law § 143—

A plea of *nolo contendere* does not preclude defendant from prosecuting an appeal.

2. Statutes § 2—

Trade within the purview of Art. II, § 29 includes any employment or business embarked in for gain or profit.

3. Statutes § 5—

Where a statute gives authority to a county to regulate the operation of "public pool rooms, billiard parlors, dance halls, and any club," the doctrine of *ejusdem generis* applies, and the word "club" must be construed "nightclub."

4. Statutes § 2—

A statute authorizing a single county to regulate the operation of pool rooms, dance halls, and nightclubs located within 300 yards of the property of any public school or church building is void as a local act regulating trade. Constitution of North Carolina, Art. II, § 29.

5. Counties § 1—

The exercise of the police power by a county will not be declared void because the regulation recites an invalid statute as the grant of power for the enactment if there are other valid authorizations for such enactment.

6. Statutes § 2—

The fact that a statute is local and regulates trade does not render it void if the regulation of trade is merely incidental or consequential and if the regulation prohibits all of a certain type of activity on Sunday and its primary effect is not the regulation of trade but the requirement of proper observance of Sunday.

7. Statutes § 4—

A statute may be constitutional in part and unconstitutional in part, and if its parts are separate and independent the valid part may stand and the invalid part be rejected.

8. Statutes § 2; Counties § 3.1—

Where the only effect of an ordinance is to proscribe designated commercial activities on Sunday, such ordinance may not be upheld under G.S. 153-9(55), since the proscription of the ordinance is entirely commercial.

9. Counties § 3.1; Constitutional Law § 24—

Defendant was charged with operating a nightclub between the hours of 2:00 a.m. and 3:00 a.m. on Sunday under a county ordinance proscribing certain commercial activities between the hours of 2:00 a.m. until midnight on Sunday on property within 300 yards of any public school or church building. *Held:* The ordinance is unreasonable and discriminatory and violates due process, since its proscriptions have no reasonable relationship to the maintenance of peace and quiet during the operation of public schools or during church services.

APPEAL by defendant from *Martin, S. J.,* November 30, 1964 Special Criminal Session of FORSYTH.

This criminal action tests the constitutionality of a county ordinance. Defendant herein unsuccessfully attempted to test it in *Smith v. Hauser,* 262 N.C. 735, 138 S.E. 2d 505.

Defendant is the owner of the Walkertown Country Club, located in a structure which is approximately 280 yards from a Baptist church building in rural Forsyth County outside the city limits of any incorporated town. This church never holds services after 11:00 p.m. or before daylight. For the past ten years defendant has operated this club, except on holidays, only one night a week, Saturday. He charges an admission fee and sells sandwiches, soft drinks, potato chips, tobacco, and similar items. To assist him, he employs 13 persons, of whom 5 are musicians — a drummer, saxaphone player, guitar player, and two vocalists form a "combo." Defendant also has a phonograph. There are no loud speakers outside the building. Most of the patrons of this club do not arrive until 11:00 p.m. or afterwards, and defendant usually operates until approximately 3:00 a.m. on Sunday.

On the night of April 25, 1964, between 100 and 150 persons came to defendant's club. They were dancing, sitting in parties at various tables, talking, having snacks to eat and something to drink. From 11:00 p.m. until 3:00 a.m., when defendant discontinued operations for the night, there was much coming and going at the club. When defendant closed his club at 3:00 a.m. on April 26, 1964, a deputy sheriff arrested him under a warrant, issued by the Clerk of the Municipal Court of the City of Winston-Salem, which charged:

"Willie Smith on or about the 26th day of April 1964, at and in the County aforesaid and outside the jurisdiction of the City of Winston-Salem, and the Town of Kernersville being the owner and operator of a club where persons associate for common purpose,

which club and the club building wherein it was operated was and is located within 300 yards of the property on which is located a church building, did unlawfully and wilfully operate said club and play music therein after the hour of two o'clock A. M. and until three o'clock A. M. on Sunday, April 26, 1964, in violation of the ordinance of the Board of Commissioners of Forsyth County, duly enacted on April 20, 1964, adopted pursuant to authority granted by Chapter 1071 of the North Carolina Sessions Laws of 1953 as amended by Chapter 943 of the North Carolina Session Laws of 1961, against the statute in such cases made and provided and against the peace and dignity of the State. . . ."

By Sess. Laws of 1953, ch. 1071, the legislature authorized the Board of Commissioners of Forsyth County, *inter alia,* "in all portions of Forsyth County not embraced within the jurisdictions of the City of Winston-Salem and the Town of Kernersville," after public notice and hearing, and upon adoption of an appropriate resolution setting forth in full the power or powers to be exercised: "(3) To regulate and license the operation of pool rooms, billiard parlors, and other establishments of like kind." By Sess. Laws of 1961, ch. 943, this section was rewritten to read as follows:

"(3) To regulate or prohibit the operation of public poolrooms, billiard parlors, and dance halls, and any club where persons may associate for a common purpose, which club building is located within 300 yards of the property on which is located any public school or church building."

Sess. Laws of 1953, ch. 1071, § 4, made the violation of any resolution adopted in accordance with its provisions a misdemeanor punishable by a fine not exceeding $50.00 or imprisonment not exceeding 30 days, with each day's violation being a separate offense. On April 20, 1964, after reciting compliance with the requirements of the two acts and that "the health, morals, comfort, safety, convenience, and welfare of the people" required such action, the Board of Commissioners duly adopted the following resolution:

"BE IT RESOLVED by the Board of Commissioners for the County of Forsyth, pursuant to Chapter 1071, 1953 Session Laws, as amended by Chapter 943, 1961 Session Laws of the General Assemblies of North Carolina, the following regulation is hereby in all respects adopted:

'It shall be unlawful for any person, firm, corporation or association and same are hereby prohibited from operation between

> the hours of 2:00 o'clock a.m., on Sunday and 12:00 o'clock midnight Sunday, any club where persons may associate for a common purpose, which club is located within 300 yards of the property on which is located any public school or church building, and at any such club all music shall cease at 1:00 o'clock a.m. on Sunday and same shall not be resumed until after 12:00 o'clock midnight on Sunday; that this regulation shall be applicable in all portions of Forsyth County not embraced within the jurisdiction of the City of Winston-Salem and the Town of Kernersville.' "

After trial and conviction in the Winston-Salem Municipal Court, defendant appealed to the Superior Court of Forsyth County, where, before plea, he demurred and moved to quash the warrant, for that, *inter alia,* Sess. Laws of 1953, ch. 1071, as amended by Sess. Laws of 1961, ch. 943, violates N. C. Const., Art. II, § 29; and Art. I, § 17. Judge Martin overruled the demurrer and denied, by the entry of a formal order, the motion to quash.

Defendant then entered a plea of *nolo contendere* to the charge contained in the warrant. After hearing the State's evidence, which was uncontradicted and is detailed above, the court entered judgment that defendant pay a fine of $25.00 and the costs. Upon the grounds previously urged in support of his demurrer and motion to quash, defendant then moved in arrest of judgment. Judge Martin denied this motion, as well. Defendant appeals, assigning as error the overruling of his motions and the judgment against him.

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

Hatfield and Allman and Roy G. Hall, Jr., for defendant appellant.

SHARP, J. Defendant is not precluded by his plea of *nolo contendere* from prosecuting this appeal, *United States v. Bradford,* 160 F. 2d 729 (2d Cir.), as he would not have been by a plea of guilty. For the purpose of this case only, that plea has the effect of a plea of guilty. *Fox v. Scheidt,* 241 N.C. 31, 84 S.E. 2d 259; 22 C.J.S., Criminal Law § 425(4) (1961). In *State v. Warren,* 113 N.C. 683, 684, 18 S.E. 498, 498, it is said:

> "The defendant having pleaded guilty, his appeal could not call in question the facts charged, nor the regularity and correctness in form of the warrant. * * * The appeal could only bring up for review the question whether the facts charged, and of which the

defendant admitted himself to have been guilty, constitute an offense punishable under the laws and constitution."

Defendant's first challenge to the resolution is that its source, Sess. Laws of 1953, ch. 1071, § 1(3), as amended by Sess. Laws of 1961, ch. 943, § 1½(3), is a local act regulating trade and is therefore void under N. C. Const., Art. II, § 29, which prohibits the General Assembly from passing any local, private, or special act regulating, *inter alia,* trade. The Attorney General contends, on the contrary, that the acts in question are not within the prohibition of N. C. Const., Art. II, § 29, but are a legitimate legislative exercise of the police power. He relies upon *State v. Chestnutt,* 241 N.C. 401, 85 S.E. 2d 297, in which it was held that a local act prohibiting *all* motor-vehicle racing on Sunday in Wake County did not violate N. C. Const., Art. II, § 29, but was a proper exercise of the State police power by the legislature. See Note, 36 N.C.L. Rev. 537. Speaking through Bobbitt, J., the Court said, however, that, "were the statute directed solely against labor, *e.g.,* compensated employment, or trade, *e. g.,* business ventures, for profit, in relation to the conduct of motor vehicle races on Sunday in Wake County, the question posed would be serious indeed." *State v. Chestnutt, supra* at 403, 85 S.E. 2d at 299.

Both the enactments in question here apply only to Forsyth County and are clearly local acts. *McIntyre v. Clarkson,* 254 N.C. 510, 119 S.E. 2d 888. When they authorize the Forsyth County Board of Commissioners to regulate public pool rooms, billiard parlors, and dance halls, they purport to regulate trade, for, under the previous decisions of this Court, trade "within the meaning of Article II, Section 29 of our Constitution, includes any employment or business embarked in for gain or profit." *Speedway, Inc. v. Clayton,* 247 N.C. 528, 533, 101 S.E. 2d 406, 410; *accord, State v. Dixon,* 215 N.C. 161, 1 S.E. 2d 521; *State v. Worth,* 116 N.C. 1007, 21 S.E. 204. When, to this enumeration of pool rooms, billiard parlors, and dance halls, the General Assembly added "and any club where persons may associate for a common purpose," Sess. Laws of 1961, ch. 943, § 1½(3), did it mean only a club operated as a business venture, "a commercial establishment serving food . . . and often featuring music, dancing and other forms of entertainment: nightclub," or did it also mean to include "an association of persons for social and recreational purposes or for the promotion of some common object (as literature, science, political activity) usu. jointly supported and meeting periodically, membership in social clubs usu. being confirmed by ballot and carrying the privilege of use of the club property"? These and similar definitions of *club* are to be found in Webster's New International Dictionary (3d Ed. 1961). If, instead of *club,* the

General Assembly had used the term *night club,* a designation which nowadays we readily understand to mean only a commercial enterprise, no one would question its meaning. In the instant case we entertain no doubt whatever that in Sess. Laws of 1953, ch. 1071, § 1(3), as amended by Sess. Laws of 1961, ch. 943, § 1½(3), the legislature used the word *club* to mean only one having a business character. The doctrine of *ejusdem generis* is applicable. It is conceivable that the members of a chess club, a discussion group reading "The Great Books," a chamber-music group, or even a bridge club might become so enthralled by their activities that for their own protection someone should impose a curfew upon them, but we cannot imagine that either the General Assembly or the County Commissioners of Forsyth would attempt to do it. Ch. 1071, Sess. Laws of 1953, as amended by Sess. Laws of 1961, ch. 943, is therefore a local act purporting to authorize Forsyth County to regulate trade and is violative of N. C. Const., Art. II, § 29. It follows that the resolution cannot be sustained under this void grant of power. Can it be sustained under the general grant of police powers in G.S. 153-9(55) to 52 counties, including Forsyth? If in an ordinance or a resolution there is a misrecital of the source of power by which it is passed, it is still valid if there is in fact authority for its enactment. 62 C.J.S., Municipal Corporations § 414(c) (1949); 5 McQuillan, Municipal Corporations § 16.14 (1949 Ed.).

Ch. 1060, §§ 1—1½, Sess. Laws of 1963, codified as G.S. 153-9(55), provides:

> "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 supervise, regulate, or suppress or prohibit in the interest of public morals, public recreations, amusements, and entertainments; 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. . . .*" (Italics ours.)

In *Surplus Co. v. Pleasants,* 264 N.C. 650, 142 S.E. 2d 697, we held that G.S. 153-9(55), insofar as it purported to authorize only 52 of the 100 counties to regulate and prohibit *the sale of goods, wares, and merchandise on Sunday,* was a local act regulating trade and thus a violation of N. C. Const., Art. II, § 29. The Raleigh ordinance involved, enacted pursuant to G.S. 153-9(55) and purporting to make it unlawful to conduct or engage in or carry on within the city on Sunday any business except certain specified types thereof, was, therefore, also void. It does

not necessarily follow, however, that the entire section is unconstitutional. " 'A statute may be valid in part and invalid in part. If the parts are independent, or separable, but not otherwise, the invalid part may be rejected and the valid part may stand, provided it is complete in itself and capable of enforcement.' 82 C.J.S., Statutes § 92. Our decisions are in accord." *Constantian v. Anson County,* 244 N.C. 221, 228, 93 S.E. 2d 163, 168.

When enacted by cities and towns under *general* laws, Sunday-observance ordinances which are reasonable and do not discriminate within a class of competitors similarly situated have been upheld as a valid exercise of delegated police power. *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. All such ordinances, when they proscribe buying and selling, whether it be, say, tangible merchandise or a ticket to an amusement or a sporting event, regulate trade under the broad definition of trade which has been adopted by this Court. Since, however, these city ordinances are passed under general laws, G.S. 160-52 and G.S. 160-200(6), (7), and (10), with reference to them we have no conflict between the exercise of the police power and N. C. Const., Art. II, § 29. *State v. McGee,* 237 N.C. 633, 75 S.E. 2d 783. But the General Assembly has not by general law delegated to counties the same authority it has to cities and towns. *Surplus Co. v. Pleasants, supra.* An act is not invalid merely because it is local unless it violates some constitutional provision. *Speedway, Inc. v. Clayton, supra.* N. C. Const., Art. II, § 29, does not forbid local acts passed in the exercise of delegated police power if they do not relate to the matters therein prohibited. *State v. Chestnutt, supra.* See *State v. Dixon, supra* at 177, 1 S.E. 2d at 527 (dissent). "Within extremely broad limits the state legislatures may control practices in the business-labor field, as long as specific constitutional prohibitions are not violated. . . ." 16 C.J.S., Constitutional Law § 188 (1956).

When a county or a city attempts to pass, under a local grant of police power, a Sunday-observance ordinance whose only effect is to regulate trade, the legislation must yield to N. C. Const., Art. II, § 29, whether the purported authority to pass it be specifically conferred in the act or not. *Surplus Co. v. Pleasants, supra; Treasure City v. Clark,* 261 N.C. 130, 134 S.E. 2d 97. If the ordinance prohibits all of a certain type of activity on Sunday — as, *e.g.*, motor-vehicle racing, which might or might not be commercial —, its exercise of police power does not conflict with N. C. Const., Art. II, § 29, for its regulation of trade is merely incidental, or consequential. *State v. Chestnutt, supra.*

Although the power "to define, prohibit, abate, or suppress all things detrimental to the health, morals, comfort, safety, convenience and wel-

fare of the people" granted in G.S. 153-9(55) survived the excision by *Surplus Co. v. Pleasants, supra,* of the next words, *"including but not limited to the regulation and prohibition of the sale of goods, wares and merchandise on Sunday,"* yet that language does not empower the 52 counties to which the statute applies to enact legislation whose effect on trade is not merely incidental. The grant of police power in G.S. 153-9 (55) survives to the extent it violates no constitutional prohibition. The Forsyth County resolution is aimed at a species of activity which is entirely commercial; so it may not be sustained under G.S. 153-9(55). N. C. Const., Art. II, § 29; *State v. Chestnutt, supra.*

The resolution here would, however, have to fail in any event under defendant's second challenge to its constitutionality. The classification of night clubs into (1) those "located within 300 yards of the property on which is located any public school or church building," and (2) all others, for the purpose of closing the former from 2:00 a.m. until 12:00 midnight on Sunday, is both unreasonable and discriminatory. Since schools are not in session at all between 2:00 a.m. and 12:00 midnight on Sunday, the apparent end sought by the resolution is the keeping of quiet in the vicinity of church services on Sunday. This is a legitimate aim of the police power, yet the means here employed to achieve that end exceed what is reasonably necessary to accomplish such an end. Church services are not held during the wee hours of Sunday morning. From 2:00 a.m. until 7:00 a.m., at the earliest, churches are not open. No sound reason appears why during these hours any night clubs should be closed lest it disturb public worship. In this aspect the resolution is unreasonable in its means employed. Nor does reason appear why during these hours a classification on the basis of 300 yards or any other distance is necessary. Herein the resolution is discriminatory.

For these reasons the resolution denies substantive due process. U. S. Const., Amend. XIV, § 1; N. C. Const., Art. I, § 17. See *Winston-Salem v. R. R.,* 248 N.C. 637, 105 S.E. 2d 37; *State v. Ballance,* 229 N.C. 764, 51 S.E. 2d 731.

> " 'Due process' has a dual significance, as it pertains to procedure and substantive law. As to procedure it means 'notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a competent and impartial tribunal having jurisdiction of the cause.' 12 Am. Jur. 267, § 573; 16 C.J.S., Constitutional Law, § 569, p. 1156. In substantive law, due process may be characterized as a standard of reasonableness, and as such it is a limitation upon the exercise of the police power. 6 R.C.L. 433-446; 11 Am. Jur. 998, 1073-1081; 16 C.J.S., Constitutional Law, § 569, p. 1156." *Skinner v. State,* 189 Okla.

235, 238, 115 P. 2d 123, 126, *reversed on other grounds* 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655, *conformed to* 195 Okla. 106, 155 P. 2d 715.

See *Surplus Store, Inc. v. Hunter,* 257 N.C. 206, 211, 125 S.E. 2d 764, 767.

Incidentally, it is noted that in the resolution the 300 yards is to be measured not from the church building itself, but from the property line on which the building is located. A church able to purchase adjoining property might, at will, put its line within 300 yards of the club. This, of course, is not the situation here, *i.e.*, not the particular application of the resolution. *Chicot County Dist. v. Bank,* 308 U.S. 371, 377, 60 S. Ct. 317, 320, 84 L. Ed. 329, 334.

Nothing in this record suggests that defendant's night club is now a nuisance which disturbs public worship. Indeed, the evidence is that defendant has never operated his night club during daylight hours on Sunday. If his business should become a nuisance, there is plenty of law to abate it. Gen. Stats., ch. 19; see *Andrews v. Andrews,* 242 N.C. 382, 88 S.E. 2d 88; *Morgan v. Oil Co.,* 238 N.C. 185, 77 S.E. 2d 682.

The resolution under which defendant was sentenced being void, the judgment of the court below is

Reversed.

KENNETH W. GLACE AND WIFE, FRANCES GLACE v. THE TOWN OF PILOT MOUNTAIN.

(Filed 23 July, 1965.)

1. Municipal Corporations § 15—

Where a municipality operates a sewage disposal system which, even though operated in a non-negligent manner, constitutes a nuisance, permanent in character, by reason of noxious odors which diminish the value of abutting property, the property owner may recover damages as for a partial taking of property by eminent domain, and plaintiff's evidence in this case *held* sufficient to be submitted to the jury on the theory of such taking.

2. Same; Eminent Domain § 2—

Where a municipality operates a sewage disposal plant, permanent in nature, which constitutes a nuisance amounting to a partial taking of abutting property, a temporary cessation of the operation of the plant does not abate the owner's action for permanent damages, and the municipality upon payment of such damages acquires a permanent easement which it may or may not exercise in the future as it sees fit.

3. Eminent Domain § 5—

Where the evidence makes out a *prima facie* case of a partial taking of property by reason of odors emanating from defendant's sewage disposal plant, an instruction that plaintiff could recover only for the impairment of the market value of his property by reason of noxious odors cannot be held prejudicial on defendant municipality's appeal, since the instruction amounts to a charge that the compensation was the difference between the fair market value of the property before and after the taking, and only plaintiff could object to the failure of the court to charge upon the right of the jury to award interest.

4. Evidence § 55—

Where plaintiff testifies in regard to noxious odors on his land emanating from defendant's abutting sewage disposal plant, it is not error to permit him to read a telegram, sent to the municipal officials a few months after the plant began operation, to the effect that plaintiff was forced to abandon his home by reason of the odors, the testimony being competent to corroborate plaintiff's testimony at the trial.

5. Appeal and Error § 41—

Exception to the admission of evidence cannot be sustained when evidence of like import has theretofore been introduced without objection.

6. Eminent Domain § 5—

Where plaintiff in his action to recover compensation for a partial taking of his land does not demand interest and does not object to the failure of the charge to submit to the jury the right to award interest, and there is no agreement of the parties that interest should be added to any recovery or that there had been a partial taking, the act of the court in allowing interest from the date the cause of action arose is error, and the judgment will be corrected to allow interest only from the date of the judgment, with computation of interest as part of the cost from date of the verdict to the entry of judgment. G.S. 24-5.

7. Appeal and Error § 28—

The failure of the judgment to conform to the verdict is an error appearing on the face of the record, and such error may be corrected on appeal without service of case on appeal.

APPEAL by defendant from *McLaughlin, J.*, September 1964 Civil Session of SURRY; and by plaintiffs from *Johnston, J.*, January 1965 Session of SURRY.

This action was begun on February 4, 1963, to recover the diminished value of plaintiffs' homeplace resulting from a nuisance, the operation of a sewage disposal plant emitting foul and deleterious gases in close proximity to plaintiffs' home.

The jury found plaintiffs' property had been permanently damaged by the construction and operation of defendant's disposal system. It assessed damages. Judgment was entered for the amount found by the jury, with interest thereon from a date fixed by the court. The amount

reported by the jury, plus interest, was adjudged compensation for the easement acquired. Defendant excepted and appealed.

Hudson, Ferrell, Petree, Stockton, Stockton & Robinson; W. F. Maready; R. C. Vaughn, Jr., for plaintiffs.

Norman and Read for defendant.

DEFENDANT'S APPEAL

RODMAN, J. If a municipal corporation, by the construction and operation of a sewage disposal system or other facility, pollutes the air or otherwise creates a nuisance, permanent in character, thereby diminishing the value of property in proximity to the operation, the municipality is liable for the damage done. Since a municipality has the right to condemn property for the construction and operation of sewage systems and related facilities, permanent damages may, at the instance of the property owner, be assessed when the maintenance of the facility in a non-negligent manner results in injury to the property of an abutting owner, amounting to a limited taking. These principles have been declared so repeatedly and consistently that they are not now open to question. *Spaugh v. Winston-Salem,* 249 N.C. 194, 105 S.E. 2d 610; *Eller v. Board of Education,* 242 N.C. 584, 89 S.E. 2d 144; *McKinney v. High Point,* 237 N.C. 66, 74 S.E. 2d 440; *McLean v. Mooresville,* 237 N.C. 498, 75 S.E. 2d 327; *Raleigh v. Edwards,* 235 N.C. 671, 71 S.E. 2d 396; *Veazey v. Durham,* 232 N.C. 744, 59 S.E. 2d 429; *Bruton v. Light Co.,* 217 N.C. 1, 6 S.E. 2d 822; *Ivester v. Winston-Salem,* 215 N.C. 1, 1 S.E. 2d 88; *Clinard v. Kernersville,* 215 N.C. 745, 3 S.E. 2d 267; *Gray v. High Point,* 203 N.C. 756, 166 S.E. 911; *Wagner v. Conover,* 200 N.C. 82, 156 S.E. 167; *Rhodes v. Durham,* 165 N.C. 679, 81 S.E. 938; *Donnell v. Greensboro,* 164 N.C. 330, 80 S.E. 377; *Moser v. Burlington,* 162 N.C. 141, 78 S.E. 74.

The jury could find from the evidence: Plaintiffs' home is situate on the south side of N. C. Highway 268. The lot contains 1.8 acres. It is situate "a short distance" west of Pilot Mountain. Plaintiffs purchased the lot in 1947. They erected a home in 1948. They lived there until 1962. In 1959, defendant remodeled its sewage disposal system. It constructed two lagoons, which have a surface area of 5 acres. They vary in depth, averaging perhaps 4 or 5 feet. They have concrete sides. The effluent from the town's sewers emptied into the lagoons. Work on the lagoons was completed in the late summer or fall of 1959. No objectionable odors were observed at that time, but in April or May 1960, "these ponds deteriorated and got real ripe and commenced to smell and the ponds just ceased to function as proper ponds and started issuing these

horrible odors. The odors are so horrible it is really hard to put it in words." When not supplied with adequate oxygen, "the sulphur comes off in the gas such as hydrogen sulphide. * * * this gas smells like rotten eggs. It is also toxic. The word 'toxic' means poisonous. * * * it kills people, animals."

Defendant's lot, on which the lagoons were constructed, is on the opposite side of the driveway from plaintiffs' home. One of the lagoons is only 100 yards from plaintiffs' property, and 500 feet from plaintiffs' residence. The odors are less intense on bright, sunshiny days than on cloudy days or at night.

Witnesses for plaintiffs and for defendant disagreed with respect to the intensity of the odors and the frequency with which the fumes pollute the atmosphere surrounding plaintiffs' property. Defendant's witnesses estimate the deleterious odors can be detected only one-third of the time. Plaintiffs' witnesses assign a much higher percentage of time in which plaintiffs' home is affected by the pollution.

Witnesses for plaintiffs and for defendant disagree as to the amount of damage which plaintiffs have suffered. Plaintiffs' witnesses put the damage at $18,000-$20,000. Defendant's witnesses estimate the damage at $500-$1,000. Male plaintiff, a chemical engineer with extensive experience in sanitary engineering, protested the construction of the lagoons in 1959, and prophesied the result of which he is now complaining.

The effective method of reducing or eliminating the odors is the incorporation of oxygen in the effluent. Defendant sought by various means to eliminate or control the production of gas. It used aerators. It raised and lowered the water level in the ponds. It also used sodium nitrate. The Town Clerk and Treasurer testified: "Incidentally, it's [sodium nitrate] the only thing we have found which will work. However, it is too doggoned expensive. We can't use it on a continuing basis. We have been using it when the odor got obnoxious."

Plaintiffs moved from their home to Elkin in 1962. They assigned as the reason for moving the offensive odors emanating from the lagoons. Defendant, in an effort to rectify the conditions complained of, has let contracts for the construction of aerators. These aerators will, by paddles stirring the water, mechanically incorporate oxygen. To construct these aerators, it was necessary to drain the lagoons. Defendant, some 5 or 6 weeks prior to the trial, drained the lagoons. After the drainage, no offensive odors were given off.

Defendant asserts that since the nuisance had terminated, plaintiffs were not entitled to permanent damages.

There is no intent on the part of defendant to abandon its sewage system, or the use of the lagoons. The lagoons will be empty only so long as necessary to install the areators.

The jury has found the operation has impaired, and will continue to impair, the value of plaintiffs' property. Plaintiffs' right of action can not be defeated by temporary cessation of use, or by a change in the manner in which the plant is operated. The rule here applicable was stated by Moore, J. in *Midgett v. Highway Commission,* 260 N.C. 241, 132 S.E. 2d 599. He said: "Once the cause of action has occurred by the infliction of damage to the property, the taking is a *fait accompli.* This is true because the government had the authority to invade the property rights of the landowner and to appropriate them to public use in the first instance, and the owner had no right to abate the nuisance. His only remedy is a single action for permanent damage to his property by reason of the taking. The government has an easement to continue the obstruction permanently, and whether it will continue to maintain the obstruction, alter it, or remove it altogether is optional with the government."

The court properly overruled defendant's motion for nonsuit. It properly submitted the issue of permanent damages to the jury.

The court instructed the jury that plaintiffs could only recover "for the impairment of the market value of the property by noxious odors as alleged in the Complaint." Defendant complains of this charge. But when the charge is read as a whole, and interpreted in the light of the evidence, we do not think the jury could have misunderstood the yardstick given it to measure the amount of compensation due plaintiffs, that is, the difference between the fair market value of the property before the taking and the fair market value of the property immediately following the taking.

The yardstick the jury was instructed to use is not subject to criticism by defendant. *Barnes v. Highway Commission,* 250 N.C. 378, 109 S.E. 2d 219; *Statesville v. Anderson,* 245 N.C. 208, 95 S.E. 2d 591; *Gallimore v. Highway Comm.,* 241 N.C. 350, 85 S.E. 2d 392. Whether plaintiffs could complain because the jury was not informed of its right to allow interest does not arise on defendant's exceptions.

Having protested the installation of lagoons in close proximity to his home, male plaintiff, in the spring of 1961, sent a telegram to the city officials, stating, the "sewage stench forces me to abandon my home." Plaintiff was permitted, over defendant's objection, to read the telegram. True, plaintiffs did not leave their home until some months later, but the message was competent to corroborate plaintiffs' testimony that the air was malodorous, and not sweetly perfumed. *Walker v. Baking Co.,* 262 N.C. 534, 138 S.E. 2d 33; *Stott v. Sears, Roebuck and Co.,* 205 N.C. 521, 171 S.E. 858; Stansbury's N. C. Evidence, § 51.

Feme plaintiff was permitted, over defendant's objection, to testify that on one occasion, when the odor was particularly offensive, a small child was made sick. There was uncontradicted evidence that the gas coming from the lagoons was toxic. Other witnesses had testified, without objection, that the odor had produced sickness, nausea and vomiting. The assertion of prejudicial error in permitting the witnesses to testify cannot be sustained. *Hall v. Atkinson,* 255 N.C. 579, 122 S.E. 2d 200; *Stockwell v. Brown,* 254 N.C. 662, 119 S.E. 2d 795; *Lookabill v. Regan,* 247 N.C. 199, 100 S.E. 2d 521.

The last of defendant's assignments of error which requires discussion is directed to the judgment. To determine the amount which plaintiffs were entitled to recover, the court submitted this issue:

> "If so, what permanent damage, if any, is the plaintiff entitled to recover?
>
> "ANSWER: $9,000."

Notwithstanding the verdict, the court adjudged plaintiff "recover of the defendant, The Town of Pilot Mountain, the sum of Nine Thousand ($9,000.00) Dollars *with interest at six (6%) per cent per annum from June 1, 1960, until paid* as permanent damages * * *."

Plaintiffs, when they filed their complaint, did not specifically ask for interest. They did not request the court to charge the jury that they were entitled to an allowance of interest, nor did they except to the charge defining the yardstick to be used in measuring damages. There was no agreement that interest should be added to the sum fixed by the jury. There is evidence from the plaintiffs that their right of action accrued in April or May 1960, but that fact has not been established by admission of defendant, agreement of the parties or by jury verdict. The court erred by adjudging defendant liable for damages not awarded by the jury. *Board of Education v. McMillan,* 250 N.C. 485, 108 S.E. 2d 895; *Yancey v. Highway Com.,* 221 N.C. 185, 19 S.E. 2d 489; *Durham v. Davis,* 171 N.C. 305, 88 S.E. 433; *R. R. v. Manufacturing Co.,* 166 N.C. 168 (184), 82 S.E. 5.

The judgment will be corrected by deleting the clause requiring payment of interest from June 1, 1960 to September 23, 1964, the date the judgment was signed. Interest, of course, accrues on the amount fixed by the jury from September 23, 1964, until paid, G.S. 24-5. In addition, the Clerk will compute and add as part of the cost interest from the date the jury rendered its verdict until September 23, 1964, when the judgment was signed, G.S. 24-7.

Modified, as here directed, the judgment from which defendant appeals is affirmed.

Modified and affirmed.

PLAINTIFF'S APPEAL

The jury returned its verdict in the action for damages on Friday, September 18, 1964. The parties then stipulated in open court that the judgment and appeal entries could be signed after the expiration of the session and out of the district. Pursuant to this stipulation, judgment was mailed to Judge McLaughlin. He signed the judgment on September 23. He mailed the judgment to the Clerk. It was received by the Clerk in due course. When Judge McLaughlin signed the judgment on the 23rd, he noted defendant's objections and exceptions thereto, and its notice of appeal. On October 5, 1964, defendant presented additional appeal entries to Judge McLaughlin. He, on that date, signed an order reciting: "Defendant as appellant was by consent and the order of the Court allowed 90 days in which to prepare and serve case on appeal, and plaintiffs as appellees 30 days after such service in which to serve countercase or exceptions."

Defendant, on December 31, 1964, served its statement of case on appeal, which included the exceptions on which it relied, and its assignments of error. On February 7, 1965, counsel for plaintiffs gave notice that it would move, at the January 1965 Session of Surry Superior Court, for an order dismissing defendant's appeal, assigning as the reason for the motion the failure to serve case on appeal in due time. This motion was heard by Judge Johnston, at the time fixed in the notice. He denied plaintiffs' motion. Plaintiffs excepted and appealed.

Plaintiffs supplement their appeal from Judge Johnston's order denying their motion by a motion in this Court to dismiss the appeal because of the failure to serve case within the stipulated time.

We are of the opinion that the order signed by Judge McLaughlin on October 5, 1964, allowing 90 days in which to serve case on appeal, fairly interpreted, meant the time to serve case would run from October 5, 1964, and not from the expiration of the September 1964 Session of Surry Superior Court.

We need not, however, decide that question since error appears on the face of the record. The judgment signed did not conform to the verdict. Defendant was entitled to have that error corrected without the service of a case on appeal. *Little v. Sheets,* 239 N.C. 430, 80 S.E. 2d 44; *Board of Education v. McMillan, supra; Wiggins v. Tripp,* 253 N.C. 171, 116 S.E. 2d 355.

On plaintiffs' appeal
Affirmed.

JESS R. CONNOR v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY.

(Filed 23 July, 1965.)

1. Courts § 20—

Where action is brought here on an insurance policy issued in another state to a resident of that state, the substantive laws of that state must be applied here.

2. Insurance § 60—

Insurer in a liability policy does not waive failure of insured to give notice by employing counsel to investigate under a reservation of rights, but insurer does waive failure to give notice as required by the policy if it undertakes to defend the action and breaches the duty to act diligently and in good faith in making such defense.

3. Insurance § 62—

Where plaintiff, in his action against the tort-feasor's insurer after return of judgment unsatisfied against the tort-feasor, admits the absence of the tort-feasor from the trial, the burden is upon plaintiff to establish reasonable justification of the tort-feasor's absence from the trial, and when the evidence is conflicting insurer is not entitled to nonsuit.

4. Same—

Failure of insured to give notice of accident and failure of insured to cooperate in defense of an action brought against him by the party injured in a collision with the insured's car, are separate, and submission of a single issue of waiver of both requirements, with the confusion augmented by a charge to the effect that the act of insurer in filing answer would waive a subsequent breach by insured of his obligation to cooperate in the defense, must be held for prejudicial error, the evidence being conflicting as to whether insured's absence from the trial against him and his failure to cooperate was justified.

APPEAL by defendant from *Olive, E.J.*, Second Week, October 26, 1964 Civil Session of GUILFORD (Greensboro Division).

On July 1, 1962, Hill Wesley Auton (Auton), a resident of Roanoke, Virginia, was riding in his car in Guilford County. Catherine H. Moore (Moore) was acting as chauffeur for Auton. The Auton car collided with a car operated by plaintiff Connor. He was injured.

State Farm Mutual Automobile Insurance Company (State Farm) had, prior to the collision, issued to Auton an Assigned Risk automobile liability insurance policy, insuring Auton, as owner, and any person operating his car with his permission, against liability resulting from the operation of the vehicle. This policy was in force when the collision with the Connor car occurred.

The policy contained these provisions:

"When an accident occurs written notice shall be given by or on behalf of the insured to the Company or any of its authorized agents, as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and all reasonably obtainable information respecting the time, place and circumstances of the accident, the names and addresses of the injured and of available witnesses.

"No action shall lie against the Company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until 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.

"The insured shall cooperate with the Company and, upon the Company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits."

In November 1962, Connor instituted an action in the Superior Court of Guilford County (Greensboro Division) against Auton and Moore to recover compensation for injuries sustained when his car was struck by the Auton car. Auton and Moore were in that action represented by counsel selected and paid by State Farm. That case was tried on April 10, 1963 in Auton's absence. Connor recovered judgment against Auton and Moore for $2,500 and costs.

Plaintiff in this action seeks to hold State Farm liable under its policy for the sum recovered in his action against Auton and Moore.

Defendant denied liability to plaintiff, specifically pleading failure of its insured to comply with the quoted provisions of the policy.

Plaintiff replied. He alleged State Farm had waived compliance with the policy provisions and, by its conduct in defending the action in Guilford County in the absence of Auton and Moore, was estopped to deny its liability.

To determine the rights of the parties, the court submitted and the jury answered issues as follows:

"1. Did the insured, Hill Wesley Auton, give to the defendant, State Farm Mutual Automobile Insurance Company, notice of the accident which occurred on July 1, 1962, as soon as practicable under the terms of the policy of insurance sued upon?

"Answer: No.

"2. Did the insured, Hill Wesley Auton, cooperate with the defendant, State Farm Mutual Automobile Insurance Company, in accordance with the terms of the policy of insurance sued upon?

"Answer: ....

"3. If not, did the defendant, by defending the said Hill Wesley Auton, waive the failure to give notice and cooperate?

"Answer: Yes.

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

"Answer: $2,500.00 and interest from April 12, 1963, until paid."

Judgment was entered in conformity with the verdict. Defendant excepted and appealed.

Holt, McNairy and Harris for defendant appellant.
Hoyle, Boone, Dees & Johnson; J. B. Winecoff for plaintiff appellee.

RODMAN, J. The contract on which plaintiff relies was issued in Virginia to a resident of that state. The rights and obligations of insured and insurer are fixed by the laws of Virginia. *Roomy v. Insurance Co.*, 256 N.C. 318, 123 S.E. 2d 817.

The Assigned Risk policy was issued to Auton, as permitted by § 38.1-264 of the Code of Virginia. The policy provisions quoted above may be incorporated in Assigned Risk policies issued in Virginia and will there be enforced as those provisions are interpreted by the courts of that state. *Virginia Farm Bureau Mutual Insurance Co. v. Saccio*, 204 Va. 769, 133 S.E. 2d 268.

We do not understand plaintiff in the present action challenges the validity of the quoted policy provisions. He bases his right to recover on an asserted waiver of those provisions, or an estoppel against defendant to rely on the policy provisions.

There is conflict in the evidence with respect to the date insured notified defendant of the collision with the Connor car. Defendant's evidence fixes the date as September 26, 1962; plaintiff's evidence tends to show notice was given earlier than the date claimed by defendant.

Shortly after defendant was notified of the accident, Auton and Moore agreed in writing that defendant might "investigate, negotiate, settle, deny or defend any claim arising out of an accident," and such action "shall not waive any of the rights" of insured or insurer under the contract of insurance. Thereafter, State Farm employed counsel to

represent Auton and Moore. This was not a waiver of any prior failure to comply with obligations imposed on insured by the policy.

When State Farm undertook the defense of Connor's action for damages, it owed its insured the duty to act diligently and in good faith. *Alford v. Insurance Co.*, 248 N.C. 224, 103 S.E. 2d 8; *Lumber Co. v. Insurance Co.*, 173 N.C. 269, 91 S.E. 946; *Home Indemnity Co. v. Snowden*, 264 S.W. 2d 642; *State Automobile Ins. Co. v. York*, 104 F. 2d 730; 29A Am. Jur., Insurance § 1464. If it failed in the performance of that duty, insured's failure to give notice of the accident became immaterial.

By express policy language, the insured is required to cooperate, attend hearings and trials and give evidence. He has a duty equal to that of the insurer to act diligently and in good faith. Hence when an insured fails, without justification, to attend the trial of his case in accordance with his promise, the insurer has the right to assert noncompliance with the cooperation provision of the policy.

We do not understand that appellee challenges the fact that Auton was duty bound to assist in the defense of the Connor case; or that it was Auton's duty, if he could, to be present when the case was tried in Greensboro. Plaintiff's position is that Auton was unavoidably detained and prevented from participating in the trial of Connor's action for damages.

Having judicially admitted by his pleadings that Auton did not attend the trial, the burden rested on plaintiff in this action to establish reasonable justification for Auton's absence, and the conduct of counsel employed by State Farm, estopping it from asserting Auton's failure to cooperate. He contends State Farm should have secured a continuance when requested by Auton or, failing to secure a continuance, it should have sought leave to withdraw.

The evidence relating to Auton's nonattendance and his reason for not attending is subject to more than one inference. Testifying as a witness for plaintiff in the present action, he said:

> "I then got a letter from State Farm, telling me they were defending the case under a reservation of rights. They told me the names of the attorneys and told me I had a duty to cooperate with those attorneys. I received a letter ten days to two weeks prior to April 10, 1963, telling me the case had been set for trial on that date. Afterwards, I told Mr. Martin I would be able to go down there and would go. * * * Neither Miss Moore nor I attended the trial on April 10, 1963. * * * I wrote to my attorneys in North Carolina that I would be there for trial. I told them Catherine Moore, my main witness, was in Goochland. This was the 3rd or 4th of April."

Explaining his failure to attend the trial, he testified his car was stolen on the 6th or 7th of April. The thief was apprehended and charged with larceny. The larceny case was set for trial in Roanoke on April 10. Auton was subpoenaed as a witness in the larceny case. He notified insurer's representative that, because required to be in Virginia on April 10, he would not be able to go to Greensboro on that date. He further testified: "I told Mr. Martin [insurer's agent] three days before the trial in Greensboro to get it postponed and that Miss Moore, whom I wanted as a witness, was in Women's Prison at Goochland."

Martin, on the other hand, testified he made several trips to Auton's home on April 9 to be assured that Auton would be in Greensboro the next day. He was unable to locate Auton until about 7:30 or 8:00 p.m. on the 9th. At that time, he reminded Auton that the Connor case would be tried in Greensboro the next day, and that it was imperative that Auton should attend. Not until then did insurer know that Auton was not planning to attend.

There is evidence from which it could be inferred that the criminal court in Virginia, being informed that Auton was expected to be in Greensboro on the 10th, continued the criminal case until a later date. This continuance afforded Auton time to go to Greensboro for the trial of his case. The evidence is not specific on the question of whether insurer requested a continuance of the Connor case when it learned that Auton would not attend. One might infer from the record that an effort was made by the insurer to secure a continuance of the Greensboro case, but this effort was unsuccessful. The record is silent on the question of whether insurer attempted to secure the attendance of defendant Moore or, failing in that because of her imprisonment, if she was imprisoned, to take her deposition.

Because of the conflict in the testimony, the court properly overruled defendant's motion for nonsuit.

The question presented for jury determination by issues one and two are unrelated. Defendant objected to the third issue. The pleadings and testimony made defendant's participation in the trial in Greensboro in April 1963 crucial on the question of liability. If defendant negligently proceeded to trial in the absence of insured, and without the benefit of their testimony, insurer would be liable. Did insurer seek a continuance when informed insured would not attend the trial? Was insured's nonattendance deliberate and without expectation of ever attending, as State Farm's agent implies? If so, should not insurer have then asserted its rights under the policy and requested permission for counsel to withdraw? See 7 Am. Jur. 2d, Automobile Insurance §§ 183 and 184; Anno: 70 A.L.R. 2d 1205, *et seq.*

The issue, as submitted, was confusing. It called for answers to two unrelated questions. The answers might well differ. The issue, as submitted, would not determine the rights of the parties. Submission was error. *Edge v. Feldspar Corp.*, 212 N.C. 246, 193 S.E. 2; *Emery v. R. R.*, 102 N.C. 209, 9 S.E. 139.

The confusion resulting from the way the third issue was formulated is best shown by the inquiry directed by the jury to the court and the court's response.

After a few minutes' deliberation, the jury returned for further instructions. It inquired if the first issue was answered "No," whether it would be necessary to answer issues two and three. In response to this request, the court charged: "Ladies and Gentlemen of the Jury, if you answer the first issue 'No,' you need not answer the second issue, but you would then go to the third issue." Defendant properly assigns this portion of the charge as error.

The error in this instruction is emphasized by defendant's 10th exception to that portion of the charge which reads:

> "On this issue, the plaintiff contends that you should be satisfied from the evidence and by its greater weight, if you have answered either one of these other issues 'Yes,' this plaintiff contends that you should be satisfied from the evidence and by its greater weight that the defendant waived that failure to give notice or failure to cooperate by going ahead and handling the case and defending the case and also looking after it and leading Auton to believe they were going ahead under the policy of insurance and not going to insist on those terms, or in other words, waive those terms and if they hadn't been, if they didn't consider themselves liable on the policy of insurance, they would just not have done anything about it, but they went on and, therefore, they waived those rights and by doing so, that they were not insisting on it and that, therefore, they had waived it, and that you should be so satisfied by the greater weight of the evidence and answer this third issue 'Yes.'"

The jury could well understand from the charge given that the filing of an answer by insurer for defendant would constitute a subsequent waiver of insured's breach of his obligation to cooperate. In no other portion of the charge does the court give the jury any rule to determine whether insurer had waived its rights, or by its conduct was estopped to claim the benefit of the cooperation clause of the policy.

For the reasons given, defendant is entitled to and there must be a

New trial.

VIVIAN W. COBB v. JERRY A. CLARK AND REBECCA C. CLARK.

(Filed 23 July, 1965.)

1. Courts § 20—

In an action here to recover for a negligent injury inflicted in another state, the laws of such other state govern the right of action, with procedural questions arising on the enforcement of such right to be determined by the laws of this State.

2. Negligence § 36—

Under the laws of the State of Georgia, in which this cause of action arose, a house guest is an invitee.

3. Same—

Under the laws of the State of Georgia, where this cause of action arose, as well as under the laws of this State, an invitee who exceeds his invitation and goes to areas not open to his use becomes a mere licensee.

4. Negligence § 37f—

Evidence that a house guest, occupying the status of an invitee under the laws of the state in which the cause of action arose, in the absence of her host, turned off the light in her bedroom, walked down a dimly lit hall, and, because of the inadequate illumination, opened the cellar door instead of the nursery door, and fell down the steps to her injury, *is held* insufficient to be submitted to the jury on the issue of negligence, since plaintiff herself was responsible for the lack of light in the hall.

APPEAL by plaintiff from *Mallard, J.*, November 19, 1964 Civil Session of ALAMANCE.

This is an appeal from a judgment sustaining a demurrer to the complaint for failure to state a cause of action.

B. Gordon Gentry; Jordan, Wright, Henson & Nichols for plaintiff appellant.

Cooper & Cooper; Sanders & Holt for defendant appellees.

RODMAN, J. Summarily stated, the complaint alleges these facts: Defendants are husband and wife. They own and occupy a home in Atlanta, Georgia. Plaintiff is the mother of *feme* defendant. Plaintiff, her husband and another daughter of plaintiff were invited to spend Christmas 1963 at defendants' home. Accepting the invitation, they arrived in Atlanta about 6 p.m. on Sunday, December 22. The invitation to spend Christmas with defendants imposed an obligation on plaintiff to assist in decorating a nursery in the new home, which defendants had purchased some five or six weeks previously, and "in making preparation for the Christmas holiday season."

Performing her contractual obligation, plaintiff had, on the 24th, assisted in preparing supper. She also fixed a turkey to roast for Christmas dinner. She finished her work about 10:30 p.m. She then went to a bedroom for an alarm clock. Male defendant was there. He left. Plaintiff followed him into the hall, intending to go from the bedroom to the nursery. "When the plaintiff came out of the bedroom into the hall the light was turned off in the bedroom. The light in the hallway was not on. The light from the den dimly lit the hall. To turn on the light it was necessary to go across the hall to a switch on the wall.

"Within approximately two and one-half feet from the bedroom door was the door to the nursery. The bathroom door was approximately three feet from the bedroom door. That the door to the basement which opened inward into the stairway was about two feet from the bedroom door and that there was no lock on this door or any other way to keep the door from being opened inadvertently."

Counsel for plaintiff were asked, on oral argument, to supplement the description of the floor plan as given in the complaint. We understand from the explanation then given that the hall is approximately two and one-half feet wide. The door to the basement is at one end of the hall. The bedroom and den are on one side of the hall, the bedroom being nearest the end of the hall where the door opened into the basement. On the other side of the hall, and nearest to the basement door, was a bathroom; beyond that, and further away from the door to the basement, was the nursery.

Plaintiff, when she came from the bedroom, instead of crossing the hall to the nursery door as she intended, turned away from the nursery and went to the end of the hall to the door leading to the basement. She opened that door. She alleges she thought it was the door leading to the nursery. She stepped inside to turn on the light and, when she did so, fell down the stairway.

She alleges defendants were negligent in these particulars: (1) In permitting the door to the basement to open into the stairway rather than into the hall; (2) in not having a light in the stairway; (3) in not having a handrail in the stairway on the right-hand side, but in putting the handrail on the left-hand side and beyond the door, thereby requiring a person going to the basement to descent three steps before being able to reach the handrail; (4) in permitting the stairway to be constructed with different height risers, the distance from the floor of the hall to the first step being different from the other steps; (5) in not keeping the door to the basement locked "to prevent anyone from inadvertently opening the door and stepping into the stairway"; (6) in having a door opening into the basement in close proximity to the doors of the nursery and bathroom; the negligent manner in which the

doors of the several rooms were located, coupled with the negligent failure to keep the door to the basement locked, and the manner in which the stair leading from the hallway to the basement floor was constructed, constituted a failure by defendants to exercise "ordinary care in keeping their premises in a safe condition for an invitee in violation of Georgia Code S. 105-401," proximately causing plaintiff's injuries.

Plaintiff was injured in Georgia. Her right of action, if any, is determined by the law of Georgia. When she seeks to enforce those rights in courts outside of Georgia, procedural questions arising in the enforcement are determined by the laws of the state where enforcement is sought. *Kirby v. Fulbright,* 262 N.C. 144, 136 S.E. 2d 652; *Frisbee v. West,* 260 N.C. 269, 132 S.E. 2d 609; *Shaw v. Lee,* 258 N.C. 609, 129 S.E. 2d 288; *Knight v. Associated Transport, Inc.,* 255 N.C. 462, 122 S.E. 2d 64.

The rule generally applied to determine the liability of a host to a social guest for injuries sustained during the visit because of some asserted defect in the premises is to treat the guest as a mere licensee — and not as an invitee. "Minor services performed by a guest for the host during the course of a visit will not change the status of the guest from a licensee to an invitee." *Murrell v. Handley,* 245 N.C. 559, 96 S.E. 2d 717.

Here, plaintiff bases her right to recover on Title 105, § 401 of the Code of Georgia. That section provides: "Where the owner or occupier of land, by express or implied invitation, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries occasioned by his failure to exercise ordinary care in keeping the premises and approaches safe."

Plaintiff's status in the home of defendant was, on the facts alleged in the complaint, by the quoted Georgia statute, changed from that of a licensee to that of an invitee. *Campbell v. Eubanks,* 107 Ga. App. 527, 130 S.E. 2d 832; *Martin v. Henson,* 95 Ga. App. 715, 99 S.E. 2d 251; *Flint River Cotton Mills v. Colley,* 71 Ga. App. 288, 30 S.E. 2d 426.

The Georgia Court of Appeals, in its syllabus to the decision in *Martin v. Henson, supra,* summarizes the law of that state on the relation between host and guest in this language: "The status of invitee involves mutuality of interest. Mutuality of interest required to make one on the premises of another an invitee means that the subject matter of the enterprise must be mutual to the extent that each party is lawfully interested therein, or that there is common interest or mutual advantage involved."

The law of this State imposes on an occupant of land who invites another to his premises the duty to exercise ordinary care to keep the premises in a reasonably safe condition. *Jones v. Pinehurst, Inc.,* 261

N.C. 575, 135 S.E. 2d 580; *Shaw v. Ward Co.,* 260 N.C. 574, 133 S.E. 2d 217; *Raper v. McCrory-McLellan Corp.,* 259 N.C. 199, 130 S.E. 2d 281; but the law of Georgia, by the language of its statute (105-401), enlarges the obligation of the host to the invitee. Under the Georgia law: "An owner of premises must, as to invitees, exercise ordinary care to keep premises safe, not *reasonably* safe." Court's syllabus, *Martin v. Henson, supra.*

As previously stated, plaintiff's right to recover is measured by the law of Georgia. But the sufficiency of the allegations in the complaint, liberally construed, G.S. 1-151, must be determined by the law of this State.

The obligation imposed on a host to keep his property in safe condition is, by the law of north Carolina and the law of Georgia, limited to the areas the guest is expected to use. When an invitee exceeds his invitation and goes to areas not open to his use, he ceases to be an invitee — he is a mere licensee. *Cupita v. Country Club,* 252 N.C. 346, 113 S.E. 2d 712; *Francis v. Drug Co.,* 230 N.C. 753, 55 S.E. 2d 499; *Wilson v. Dowtin,* 215 N.C. 547, 2 S.E. 2d 576; *Ellis v. Refining Co.,* 214 N.C. 388, 199 S.E. 403; *Augusta Amusements v. Powell,* 93 Ga. App. 752, 92 S.E. 2d 720; *Cooper v. Anderson,* 96 Ga. App. 800, 101 S.E. 2d 771.

Plaintiff does not allege she was expected to use the basement. Normally, one who invites another to visit in his home does not expect the guest to be prowling in either the attic or the basement. He is under no obligation to protect a guest against defects in those places.

Fairly analyzed, the complaint does not seek to impose liability on defendants because of the defects in the facilities for reaching the basement floor. What plaintiff complains of is defendants' failure to guard against the conduct and mistakes of plaintiff.

It is difficult to visualize defendants' home from the description given in the complaint and on oral argument. One may well surmise that it is not a large home. The hall is about 30 inches wide. (This conclusion is based on the fact that the doors to the nursery and bedroom on opposite sides of the hall were, as plaintiff alleges, two and one-half feet apart.) No description is given of the route one is expected to take in going from the kitchen, where plaintiff had been helping her daughter, to the nursery or other rooms. There is no allegation that the plan or manner of construction violated the building code of Atlanta, or any law of Georgia. There is nothing in the complaint to indicate that plaintiff was not informed of the purposes served by each of the doors described in the complaint. The door to the den, we were told, is at the opposite end of the hall from the door to the basement. The light from the den was sufficient to dimly illuminate the hall. This inadequate il-

lumination caused plaintiff to mistake the door she wanted to use; but plaintiff was responsible for the lack of light in the hall. She turned off the light in the bedroom. Neither of the defendants was present when plaintiff turned off the bedroom light and started across the hall.

Plaintiff's injuries were the consequence of her conduct. She now seeks to impose liability on defendants because of their failure to anticipate the mistakes which she made, which mistakes resulted in her unfortunate fall and injuries.

The law applicable to the factual situation described in the complaint was stated by Felton, Chief Judge of the Georgia Court of Appeals, in this language: "'One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what, as it is sometimes said, is only remotely and slightly probable.' *Yarborough v. Cantex Mfg. Co.*, 97 Ga. App. 438, 440, 103 S.E. 2d 138, 140 and cit. 'The general test in such cases is not whether the injurious result or consequence was possible, but whether it was probable; that is, likely to occur according to the usual experience of persons.' *Whitaker v. Jones, McDougald, Smith, Pew Co.*, 69 Ga. App. 711, 716, 26 S.E. 2d 545, 548." *Covington v. S. H. Kress & Company*, 102 Ga. App. 204, 115 S.E. 2d 621. That statement of the law accords with earlier decisions. *Misenhamer v. Pharr*, 99 Ga. App. 163, 107 S.E. 2d 875; *McCrory Stores Corporation v. Ahern*, 65 Ga. App. 334, 15 S.E. 2d 797.

Our cases are in accord. *Insurance Co. v. Chevrolet Co.*, 253 N.C. 243, 116 S.E. 2d 780; *Lemon v. Lumber Co.*, 251 N.C. 675, 111 S.E. 2d 868.

Lake v. Cameron, 64 Ga. App. 501, 13 S.E. 2d 856, relied on by plaintiff, is factually different and this difference produces different results. There, a patient at a clinic was told by the receptionist to go to a room to unrobe and put on a smock then given her. She proceeded along a narrow, dimly lit hallway and stopped in front of two adjacent doors. Neither was marked. One gave entrance to a dressing room, the other to a basement. Plaintiff was unaware of the fact that both doors did not lead to dressing rooms. She inquired of the receptionist if she should enter, and was told to do so. She opened the door to the basement and fell.

There, defendant's agent, aware of plaintiff's danger, gave instructions which caused plaintiff's injuries. Here, plaintiff created the condition causing her fall.

The judgment sustaining the demurrer is

Affirmed.

FLORENCE JEAN CLEMMONS, PLAINTIFF v. RUBY B. KING, ORIGINAL DEFENDANT, AND MYRTLE CLEMMONS STRICKLAND, ADDITIONAL DEFENDANT.

(Filed 23 July, 1965.)

1. Torts § 4—

An original defendant is not entitled to have another joined for contribution unless such other is a joint tort-feasor which plaintiff could have sued at his election.

2. Torts § 2—

In order to constitute two or more persons joint tort-feasors it is necessary that they act together in committing the wrong or that the independent acts of each unite in point of time and place in causing the injury.

3. Torts § 4—

An original defendant may deny negligence, allege that the negligence on the part of a third party was the sole proximate cause of the injury, and allege that such third party was guilty of joint and concurring negligence, but it is not sufficient to allege the mere conclusion of concurring negligence, it being required that the original defendant allege acts of such third party which support the conclusion of negligence on the part of such third party and that such negligence was a proximate cause of the injury. G.S. 1-240.

4. Same—

Where the original defendant denies negligence and alleges that the sole proximate cause of the collision was the negligence of a third person, then alleges the mere conclusion that if she were negligent the negligence of such third person concurred and constituted at least one or more of the proximate causes of the collision, without alleging, either conditionally or alternantly, facts sufficient to show joint or concurring negligence on the part of such third party, the original defendant may not maintain the cross-action against such third party for contribution.

APPEAL by original defendant and additional defendant from *Johnson, J.*, August 1964 Session of BRUNSWICK.

Action for personal injuries.

Plaintiff alleges that on February 6, 1964, at about 5:00 p.m., she was a passenger in an automobile being operated by Mrs. Myrtle Clemmons Strickland in a southerly direction on U. S. Highway No. 17 in Supply; that at a point in front of Kirby's Food Center, defendant King, operating a station wagon in a northerly direction and intending to enter the driveway to the food store, suddenly, and without warning, made a left turn across the path of Mrs. Strickland's approaching automobile; and that, as a result, a collision occurred, in which plaintiff was injured.

Answering, Mrs. King denied that she ever left her lane of travel and alleged that the sole proximate cause of the collision was the negligence of Mrs. Strickland, who, failing to keep a proper lookout and to keep her car under control, "suddenly swerved across the center line of the highway and collided with the 1961 Chevrolet automobile driven by Ruby B. King northwardly on U. S. Highway 17 at the same place." Original defendant further alleged:

> "(B)ut if the Court should find that these defendants, or either of them, were in any way negligent in the premises, that the foregoing acts and omissions on the part of Myrtle Strickland were at least one or more of the proximate causes of the collision and any resulting injury or damage sustained by the plaintiff, and such negligence on the part of Myrtle Strickland constitutes at least joint and concurring negligence with any negligence there may have been on the part of these answering defendants, which is again denied, and accordingly the said Myrtle Strickland is at least a joint tort-feasor and should be joined as an additional party defendant in this action so there can be a full and final determination of all matters in controversy arising out of the collision. . . ."

Upon original defendant's motion Mrs. Strickland was made an additional party defendant. In her answer she averred:

> "(A)s she approached Kirby's Food Center, the defendant, Ruby King, who was operating her car in a northwardly direction, suddenly and without warning, made a left-turn directly into the path of this defendant, at such a time and in such a manner that this defendant was wholly unable to avoid the collision which followed. . . ."

At the trial each party offered evidence tending to establish her allegations. The testimony of the investigating highway patrolman, a witness for plaintiff, tended to show that the front of the King station wagon collided with the left front of the Strickland automobile; that he found debris about 2 feet west of the center line of Highway No. 17, a 2-lane highway 24 feet in width; that skid marks of about 50 feet in the west lane stopped just short of the debris; and that original defendant, whom he interviewed in the hospital, said she "started to make a turn and all of a sudden there it was right in front of (her)."

Original defendant, with the consent of plaintiff but not of additional defendant, offered the affidavits of two young men who had been traveling behind her. Their affidavits tended to show: A young boy about 10 years old ran out from the store parking area toward the west edge of the road as additional defendant approached the Kirby Food Center.

When the boy did so, she swerved to her left, crossed the center line, and struck the front of the station wagon, which was almost at a standstill in the northbound lane.

The jury found that plaintiff had been injured by the negligence of original defendant, from whom she was entitled to recover $12,000; and that additional defendant, "by her joint and concurring negligence," had contributed to plaintiff's injuries and damage. Judgment entered on the verdict was that plaintiff recover $12,000 of original defendant and that the latter have and recover contribution from additional defendant "to the extent of one-half of such amount as said original defendant Ruby B. King shall pay on this judgment and costs." Additional defendant appeals, assigning as error the failure of the court to sustain her motion for nonsuit made at the conclusion of original defendant's evidence.

Stipulations made by the parties reveal that the owner of the car operated by Mrs. King had a policy of liability insurance providing $5,000 coverage for any one injured person with Dixie Fire & Marine Insurance Company, and that it has paid or will pay this amount on plaintiff's judgment. Original defendant herself had an identical policy of liability insurance with Nationwide Insurance Company, which denies liability on the ground that it received no notice of the suit. Additional defendant had an identical policy of liability insurance with Criterion Insurance Company. Dixie made "demand upon Criterion for $2,500.00, which is one-half of the amount paid, or to be paid, by it, to the plaintiff." Criterion, contending that it would be liable only for one-half of any amount paid by original defendant *individually*, "declined to apply its liability policy to the satisfaction of the judgment against its insured, Myrtle Strickland." Judge Johnson entered a supplemental judgment, in which he decreed that "Ruby King and her insurer recover nothing from Myrtle Strickland or her insurer by reason of payment to plaintiff by or through Dixie Fire & Marine Insurance Company." From the supplemental judgment original defendant appeals.

Herring, Walton & Parker for plaintiff appellee.
James, James & Crossley for original defendant appellant.
Poisson & Barnhill for additional defendant appellant.

SHARP, J. An original defendant may not invoke the statutory right of contribution, G.S. 1-240, against another party in a tort action unless both parties are liable as joint tort-feasors to the plaintiff in the action, *Hayes v. Wilmington*, 243 N.C. 525, 91 S.E. 2d 673; *Hunsucker v. Chair Co.*, 237 N.C. 559, 75 S.E. 2d 768; *Lovette v. Lloyd*, 236 N.C.

663, 73 S.E. 2d 886, although the plaintiff himself may, at his election, sue any one or all of the tortfeasors. *Pearsall v. Power Co.*, 258 N.C. 639, 129 S.E. 2d 217; *Darroch v. Johnson,* 250 N.C. 307, 108 S.E. 2d 589.

> "To constitute two or more persons joint tort-feasors the negligent or wrongful act of the one must be so united in time and circumstance with the negligent or tortious act of the other that the two acts in fact constitute but one transaction. While neither concert of action nor unity of purpose is required, *there must be concurrence in point of time and place.* The parties must either act together in committing the wrong, or their acts, if independent of each other, must unite in causing a single injury." *Shaw v. Barnard,* 229 N.C. 713, 715, 51 S.E. 2d 295, 296. (Italics ours.) "(In) order for one defendant to join another as a third-party defendant for the purpose of contribution, he must allege facts sufficient to show *joint* tortfeasorship and his right to contribution in the event plaintiff recovers against him. * * * In order to show *joint* tortfeasorship, it is necessary that the facts alleged in the cross complaint be sufficient to make the third party liable to the plaintiff along with the cross-complaining defendant in the event of a recovery by the plaintiff against him." *Hayes v. Wilmington, supra* at 533, 91 S.E. 2d at 680.

To interplead a third party for contribution, however, the law does not require a defendant in a personal-injury suit to make a judicial admission that his negligence was one of the proximate causes of the injury for which plaintiff sues. He may deny negligence and allege, conditionally or alternatively, that *if* he was negligent, the third party's negligence concurred with his as a proximate cause of plaintiff's injuries. *Hayes v. Wilmington, supra.* A defendant is not required to be consistent in his pleading. In a personal-injury suit such as this he is entitled to the following defenses, among others: (1) general denial of negligence; (2) sole negligence on the part of the third party; (3) joint and concurring negligence of the third party. *Freeman v. Thompson,* 216 N.C. 484, 5 S.E. 2d 434. But this liberal rule of pleading is not satisfied when the pleader merely repeats the rule, for it is but a conclusion. An allegation of negligence must give specific information as to the acts complained of, so that the court may determine whether, if established, the acts would constitute negligence. Furthermore, the facts alleged must also show a causal relation between such negligence and the plaintiff's injury. This is true because actionable negligence "is not a fact in itself, but is the legal result of certain facts." *Stamey v. Membership Corp.*, 247 N.C. 640, 645, 101 S.E. 2d 814, 818.

Here original defendant has sufficiently alleged the facts upon which she relied to establish her defense of additional defendant's *sole* negligence; she has not sufficiently alleged, either conditionally or alternatively, facts sufficient to show joint and concurring negligence with Mrs. Strickland. Nowhere does she allege that *if* the jury should find that she crossed the center line into her left lane, additional defendant, at the same time, did likewise. She never deviates one iota from her allegation that additional defendant *alone* crossed the center line and collided with her when she was entirely in the lane for northbound traffic (her proper lane). If this be true, original defendant was in nowise negligent; the negligence of additional defendant, being the sole proximate cause of the collision, constituted a complete defense to plaintiff's action against original defendant. This unamended averment precluded joint tortfeasorship. An allegation that a third party was jointly and concurrently negligent with defendant because she came over the center line into defendant's lane of travel and collided with defendant on defendant's side of the road does not establish joint tortfeasorship. The facts alleged will not support the conclusion.

The evidence at the trial followed the pleadings strictly. Original defendant's evidence tended to show that she, at all times, was on her side of the road; additional defendant's and plaintiff's, that additional defendant was at all times on her right side of the center line. Neither testimony nor physical evidence suggested that either original defendant or additional defendant did any act or omitted to do any act constituting negligence in her own lane of travel. The only issue of fact was, who left her lane to cross the center line? Furthermore, there was no evidence tending to show that original defendant and additional defendant were ever out of their respective lanes of travel at the same time. We cannot, merely because a head-on collision occurred and because each driver claims it to have been the fault of the other in coming into her lane, compromise the case by saying that the collision perhaps occurred in the center of the road, both vehicles straddling the line. Under the pleadings and the evidence in this case, where original defendant and additional defendant each defended only on the ground of the sole negligence of the other, the jury could not answer the first issue, Yes, without exonerating additional defendant. When the jury found that plaintiff was injured by the negligence of original defendant, it necessarily found that she was the one who crossed the center line, and eliminated any question of additional defendant's concurring negligence.

For the failure of original defendant to allege and to offer any evidence tending to show that joint and concurring negligence on the part of herself and additional defendant proximately caused injury to plaintiff, additional defendant's motion for judgment of nonsuit should have

been sustained. The judgment of the court below, insofar as it awards original defendant contribution from additional defendant, is reversed. This disposition of the case renders moot the judge's ruling in the supplemental judgment that neither additional defendant nor her liability-insurance company is liable to reimburse original defendant's liability insurance company for any part of its payment of the judgment which plaintiff secured against original defendant. See, notwithstanding, *Pittman v. Snedeker*, 264 N.C. 55, 140 S.E. 2d 740; *Insurance Co. v. Insurance Co.*, 264 N.C. 749, 142 S.E. 2d 694.

Reversed.

HELEN L. RIEGEL, EXECUTRIX OF THE WILL OF HARRY J. RIEGEL, DECEASED, AND HELEN L. RIEGEL, INDIVIDUALLY, PLAINTIFFS v. WILLIAM D. LYERLY, INDIVIDUALLY AND AS A REPRESENTATIVE OF THE CLASS OF ALL ADULT PERSONS NOW IN BEING AND WHO MIGHT BE HEIRS AT LAW OF HELEN L. RIEGEL, AT THE TIME OF HER DEATH, AND ALL UNBORN PERSONS, UNKNOWN PERSONS AND ALL OTHER PERSONS, WHETHER NOW IN BEING OR HEREAFTER COMING INTO BEING WHICH UNDER THE LAWS OF THE STATE OF NORTH CAROLINA MIGHT NOW OR MIGHT HEREAFTER ACQUIRE SUCH STATUS AS TO BECOME HEIRS OF HELEN L. RIEGEL AT THE TIME OF HER DEATH, DEFENDANTS, AND JOHN D. SHAW, GUARDIAN AD LITEM FOR UNKNOWN HEIRS, ADDITIONAL DEFENDANT.

(Filed 23 July, 1965.)

1. Wills § 32—

The Rule in *Shelley's* Case applies to personalty as well as realty.

2. Constitutional Law § 6—

Settled law may not be changed by judicial fiat, questions of public policy being uniquely the province of the legislative branch of the government.

3. Wills § 32—

A devise and bequest of the remainder of the estate to testator's wife for the term of her natural life with a limited power to invade the *corpus* if the income from the estate were insufficient for her support, with later provision that upon the death of the wife two-thirds of the estate should go to testator's mother and one-third "in fee simple to the heirs at law of my said wife," *held* to transmit to the wife a life estate in two-thirds and a fee simple in one-third of the estate under the Rule in *Shelley's* Case.

APPEAL by defendants from *Riddle, S.J.*, October 5, 1964 Non-Jury Civil Session of MECKLENBURG.

Harry J. Riegel (Riegel), a resident of Mecklenburg County, died testate, March 2, 1961. His will has been probated in Mecklenburg County.

Plaintiff, widow of testator, instituted this action, as a legatee and as executrix, to secure a judgment declaring her individual rights in the property passing under the will.

Item 1 directs plaintiff, the executrix, to pay testator's debts; and Item 2 directs payment of inheritance and other death taxes out of the general funds of the estate, using for that purpose either income or principal, as executrix deems advisable.

Items 3, 4 and 5 read as follows:

> "ITEM III. All the rest, residue and remainder of my estate, real, personal, mixed and otherwise, of which I die seized or possessed, to which I am in any way entitled at the time of my death, or over which I then have any power of appointment by will, I give, devise and bequeath to my beloved wife, Helen L. Riegel, for the term of her natural life, the net income therefrom to be used and enjoyed by her so long as she shall live.
>
> "If the net income payable to my said wife under the terms of this item of my will, supplemented by income, funds and property available to her from other sources, shall not be sufficient comfortably to maintain and support my wife, or to defray medical, surgical or hospital expenses of my wife, then and in that event she shall be permitted to use such sum or sums out of the principal of my estate as shall from time to time be needed for the purposes aforesaid; provided, however, that the amount of principal shall not during any one year exceed the sum of Eighteen Hundred ($1800.00) Dollars.
>
> "ITEM IV. Upon the death of my said wife, Helen L. Riegel, I give and bequeath in fee simple to my mother, Mrs. Goldie R. Cook, of New Lebanon, Ohio, two-thirds (⅔) of the then balance corpus of my estate, and I give and bequeath in fee simple to the heirs-at-law of my said wife the remaining one-third (⅓) of the then balance of the corpus of my estate.
>
> "ITEM V. If my said wife and I should die in or as the result of a common disaster, then I give and bequeath in fee simple all of the rest, residue and remainder of my estate, real, personal, mixed and otherwise, of which I die seized or possessed, to the persons, and in the proportions, as follows:
>
> "(a) One-half (½) to my mother, Mrs. Goldie R. Cook, of New Lebanon, Ohio;

"(b) One-half (½) to my father-in-law and mother-in-law, Mr. and Mrs. William B. Lyerly, of Charlotte, North Carolina, share and share alike, or to the survivor, if one of them should predecease me."

Mrs. Riegel has no descendants. Her mother, Mrs. William Lyerly, died in 1948. Her father's correct name is William *D.* Lyerly.

The court adjudged plaintiff the owner of an estate for her life in the properties passing under Item 3 of the will, with the additional right to use the corpus to the extent authorized in the second paragraph of Item 3; and by Item 4, the absolute owner of an undivided one-third interest in the residuary estate.

Defendants Lyerly and Shaw, as guardian *ad litem,* excepted and appealed.

John D. Shaw for defendant appellants.

Helms, Mullis, McMillan & Johnston; E. Osborne Ayscue, Jr.; William H. Bobbitt, Jr., for plaintiff appellees.

RODMAN, J. The widow's assertion of absolute ownership calls for answers to these questions: (1) Does the rule in *Shelley's* case or a similar rule apply to the disposition of personal property in this State? (2) If so, does the widow, by Item 4 of the Riegel will, acquire absolute ownership in one-third of the residuary estate?

The law in this State, settled by a uniform line of decisions, is that a grant, devise or bequest to A for life, remainder in fee or absolutely to the heirs-at-law of A vests A with an estate in fee simple or absolute unless it is made to appear from other portions of the instrument transferring title that the grantor or testator used the words "heirs-at-law" as *descriptio personae,* and not as words of limitation. It makes no difference whether the grant or gift is real property, real and personal property, or personal property alone. Stated differently, the rule in *Shelley's* case has been consistently applied in North Carolina to the disposition of personal property where the language would require application of the rule in a disposition of real estate.

Seemingly, the earliest case in our reports presenting the question is *Cutlar v. Cutlar,* 3 N.C. 154, decided in 1801. It was there held that a gift of slaves to a mother and son "for their lives, and the life of the longest liver or survivor, remainder to the heirs of the survivor," vested the survivor with title absolute.

The *Cutlar* case was followed in 1812 by *Nichols v. Cartwright,* 6 N.C. 137. There, the court was called upon to pass on the rights of B, under a deed by A which "lent" B, his sister, a female slave for B's

natural life, and "at her death I give the said girl and her increase unto the heirs of my said sister, lawfully begotten of her body, forever." Taylor, C.J., speaking for the court, said: "A rule applied to chattels is, that where a remainder is limited by such words as if applied to realty would constitute an estate tail, the person to whom it is given takes the property absolutely."

In *Ham v. Ham,* 21 N.C. 598, decided in 1837, the court was called upon to construe a will which devised real estate to Caren Ham and bequeathed a negro man and a negro woman to Caren "during her lifetime or widowhood; and then I give them to her lawful heirs for them and their heirs forever." Daniel, J., speaking for a court composed of Ruffin, Daniel and Gaston, said: "The land mentioned in the recited clause of the will, we think, is clearly and absolutely given in fee to Mrs. Ham. And if the subsequent words in the clause which relates to the slaves, had related to the land, then there would be no doubt but Mrs. Ham would be entitled to the whole fee, by force of the rule in *Shelley's* case." He cites numerous English cases to support his assertion. He then says: "Does the rule in *Shelley's* case extend to chattels personal? On this point authorities are not so plenty as they are in the case of terms for years, yet we think, they are not wanting. As it is well established, that the rule extends to terms for years, which, on the death of the termor, go to the executor, and not to the heir; we cannot see, why the rule should not extend to chattels personal, when there is nothing in the will which shows that the testator meant by the word 'heirs,' children, next of kin, or any other class of persons." He cites, in support of his conclusion, *Kent's Commentaries and Gettings v. McDermott,* 7 Cond. End. Ch. Rep. 268, decided by Lord Chancellor Brougham in 1834.

The will interpreted in Floyd v. Thompson, 20 N.C. 616, contained a bequest of slaves in language similar to the language involved in *Ham v. Ham, supra.* The conclusion reached in the *Ham* case was reaffirmed. Chief Justice Ruffin, citing *Ham v. Ham,* said: "We then looked into all the cases in the books within our reach and felt obliged to hold that in such dispositions of personal chattels as this, the entire property vests in the first taker."

In *Payne v. Sale,* 22 N.C. 455, Gaston, J. said: "The doctrine is confessedly founded upon a settled principle of construction, that whatever disposition would amount to an estate tail in land gives the whole interest in personal property. Now, it is a fundamental rule of law that where an ancestor, by any gift or conveyance, takes an estate of freehold in land, and in the same gift or conveyance there is a limitation by way of remainder to the heirs of his body, these words are words of limitation of the estate, and not words of purchase; and, therefore, such

remainder is immediately executed in possession in the ancestor so taking the freehold."

Similar conclusions and statements of the law are made in *Coon v. Rice,* 29 N.C. 217; *Bradley v. Jones,* 37 N.C. 245; *Sanderlin v. Deford,* 47 N.C. 74; *Worrell v. Vinson,* 50 N.C. 91; *Hodges v. Little,* 52 N.C. 145; *Boyd v. Small,* 56 N.C. 39; *Williams v. Houston,* 57 N.C. 277.

In *Williams v. Houston, supra,* Chief Justice Pearson said: "It is unnecessary to enter more fully into the reason of 'the rule,' or to refer to the numerous cases in which it has been held to extend to personal property; it is sufficient to say it is well settled as 'a law of property,' and our case falls directly within its operations."

The application of the rule to personalty, as well as realty, was recognized in *Pless v. Coble,* 58 N.C. 231, but not applied because it appeared from the instrument transferring title that the word "heirs" was not used in its technical sense but as *descriptio personae.*

Chief Justice Pearson's declaration that it was "well settled as 'a law of property' " that the rule of Shelley's case was as applicable to personal property as to real property was made in 1858. Seemingly, the statement then made has been accepted as the law of this State. We have found no decision since that time which challenges that statement. Cases have arisen in which it was necessary to decide whether the rule applied to a particular factual situation, *e.g., Thompson v. Mitchell,* 57 N.C. 441; *Pless v. Coble, supra; Chambers v. Payne,* 59 N.C. 276; *King v. Utley,* 85 N.C. 60; but none deny the application of the rule to personalty.

In *Hooker v. Montague,* 123 N.C. 154, 31 S.E. 705, decided in 1898, the court recognized the rule as applicable to personalty where the estates were of the same character, but the majority held that the rule was not there applicable because the life tenant's estate was equitable and the estate in remainder was legal. This difference in character of the estates prevented a merger.

Looking beyond our borders, we find English cases decided prior to the Revolutionary War hold the rule includes both real and personal property. See *Butterfield v. Butterfield,* decided in 1748, 1 Ves. 132, 153; *Theebridge v. Kilburne,* decided in 1750, 2 Ves. 232; *Garth v. Baldwin,* decided in 1755, 2 Ves. 646.

England in 1925, by statute, Halsbury's Statutes of England, 2d Ed., Vol. 20, § 131, abolished the rule in *Shelley's* case by providing that the word "heirs," or similar words in instruments thereafter executed, should operate "as words of purchase and not of limitation."

An examination of cases decided by appellate courts of sister states shows a marked divergence of opinion with respect to the inclusion of personalty in the rule. See Simes and Smith, The Law of Future In-

terests, 2d Ed., Vol. 1, § 367; 47 Am. Jur. 808, 809; 96 C.J.S. 303. Several states have enacted statutes similar to the English statute.

Unwilling as we are to change the law of property by judicial fiat, we answer the first question in the affirmative. If public policy requires a change, we think it should be made by the Legislature. *Williams v. Hospital,* 237 N.C. 387 (391), 75 S.E. 2d 303; *Menne v. City of Fond Du Lac,* 77 N.W. 2d 703; *Bond v. Midstates Oil Corp.,* 53 So. 2d 149. The change, if made, should apply to instruments thereafter executed. *Trust Co. v. Andrews,* 264 N.C. 531; *Bennett v. Cain,* 248 N.C. 428, 103 S.E. 2d 510; *Wilkinson v. Wallace,* 192 N.C. 156, 134 S.E. 401.

Nowhere in Mr. Riegel's will is there anything to indicate that the words "heirs-at-law" in the bequest reading: "Upon the death of my said wife * * * I give and bequeath in fee simple to the heirs-at-law of my said wife the remaining one-third (1/3) of the then balance of the corpus of my estate," were intended to define the grantee. It follows that the widow took an absolute, "fee simple" estate and that the second question must also be answered "yes." *Tynch v. Briggs,* 230 N.C. 603, 54 S.E. 2d 918; *Ratley v. Oliver,* 229 N.C. 120, 47 S.E. 2d 703; *Rose v. Rose,* 219 N.C. 20, 12 S.E. 2d 688; *Rowland v. Building & Loan Assn.,* 211 N.C. 456, 190 S.E. 719; *Floyd v. Thompson, supra.*

Affirmed.

NORTHGATE SHOPPING CENTER, INC., PETITIONER v. STATE HIGHWAY COMMISSION, RESPONDENT.

(Filed 23 July, 1965.)

1. Eminent Domain § 6—

In an action to recover compensation for land taken by eminent domain, whether the purchase price paid by plaintiff is competent in evidence on the question of value must be determined in accordance with whether, under all the circumstances, including the time elapsing between the purchase and the taking, physical changes in the property taken, changes in its availability for valuable uses, and changes in the use of property in the vicinity which might affect the value, the purchase price fairly points to the value of the property at the time of the taking.

2. Eminent Domain § 5—

In determining the value of property taken by eminent domain, it is permissible for the jury to take into consideration the reasonable probability of a change in the zoning ordinance regulating the property or the issuance of a permit for a nonconforming use.

3. Eminent Domain § 6— Testimony of price paid by plaintiff for tract condemned held competent under facts of this case.

Plaintiff was the owner of a 30-acre tract and a 4.6-acre tract. The 30-acre tract was rezoned for a shopping center. Defendant took by eminent domain .79 acre from the 30-acre tract and 3.94 acres from the 4.6-acre tract. *Held:* It was not prejudicial error to admit testimony of the price paid by plaintiff for the 4.6-acre tract nineteen months prior to the appropriation, there being no physical changes in the property during this interval nor evidence of extensive development or change in the neighborhood, since the change in the rezoning of the 30-acre tract is insufficient in itself to render the evidence incompetent as a guide to value, it being evident from the record that the jury considered the factors augmenting the value of the 4.6-acre tract when added to the 30-acre tract.

4. Trial § 33—

Inadvertence in stating the evidence must be called to the trial court's attention in apt time.

5. Appeal and Error § 42—

An inadvertence in the instructions will not be held for prejudicial error when the inadvertence relates to a minor discrepancy in stating the evidence and it is apparent from the record that such inadvertence could not have affected the result.

APPEAL by petitioner from *May, S. J.*, December 8, 1964, Civil Session of DURHAM.

This is a proceeding under authority of G.S. 136-19, prosecuted in accordance with the directives of G.S., Ch. 40, to recover for the taking by respondent of 4.73 acres of land for highway purposes.

The property is located in the City of Durham and was taken for use in the construction of Project 8.14107 (grading) and Project 8.14108 (paving, etc.), an intersection connecting U. S. Highway 70 Bypass (now Interstate 85) with Gregson Street. The date of taking was 7 November 1958. Commissioners were appointed and filed their award on 28 April 1964. The Clerk of Superior Court affirmed the award over the objection of both parties. Petitioner and respondent excepted and appealed. The cause came on for trial before May, S. J., and a jury; there was a verdict and judgment awarding petitioner $21,000 damages. Petitioner appeals.

Attorney General Bruton, Assistant Attorney General Harrison Lewis, Trial Attorney William W. Melvin, and Brooks and Brooks for Respondent.

Powe & Potter by E. K. Powe and Oliver W. Alphin for Petitioner.

MOORE, J. The principal assignment of error relates to the admission of certain evidence over petitioner's objection.

Prior to 9 April 1957, Northland Investment Company, a corporation (hereinafter "Northland"), had acquired a tract of land containing about 30 acres (the exact acreage is not clear, but hereinafter this land will be referred to as the 30-acre tract). This tract was bounded on the north by Highway 70 Bypass, on the west by Watts Street, on the south by Club Boulevard, and on the east by Gregson Street. Neither Watts nor Gregson Street extended to or intersected 70 Bypass. On 9 April 1957 Northland purchased from the Bertha M. Aldridge estate a 4.6-acre tract adjoining the eastern boundary of the 30-acre tract. At that time the 30-acre tract was zoned "office and institutional," the 4.6-acre tract was zoned "residential." In November 1957 the zoning classification of the 30-acre tract was changed to "shopping center." About the same time the corporate name of Northland was changed to Northgate Shopping Center, Inc. The 4.6-acre tract was not rezoned. On 7 November 1958, 4.73 acres of petitioner's land was taken by respondent for highway purposes to the end that Gregson Street be extended and connected to 70 Bypass. Of the 4.73 acres taken, 3.94 acres were from the 4.6-acre tract, and 0.79 acre from the 30-acre tract.

During the course of the cross-examination of Mr. York, an officer of petitioner, he was asked to state the price Northland had paid for the 4.6-acre tract. Over the objection of petitioner, he was permitted to answer, $12,000.

Before allowing the testimony the court, in the absence of the jury, heard evidence as a basis for determining the admissibility of the testimony. This was proper. *Barnes v. Highway Commission,* 250 N.C. 378, 394, 109 S.E. 2d 219.

The rule governing the competency and admissibility of evidence of purchase price paid by a condemnee for land later appropriated for public use, in a proceeding to recover damages for the taking, is stated in *Highway Commission v. Coggins,* 262 N.C. 25, 29, 136 S.E. 2d 265, thus:

> " 'It is accepted law that when land is taken in the exercise of eminent domain, it is competent as evidence of market value to show the price at which it was bought if the sale was voluntary and not too remote in point of time.' *Palmer v. Highway Commission,* 195 N.C. 1, 141 S.E. 338. When land is taken by condemnation evidence of its value within a reasonable time before the taking is competent on the question of its value at the time of the taking. But such evidence must relate to its value sufficiently near the time of taking as to have a reasonable tendency to show its value at the time of its taking. The reasonableness of the time is dependent upon the nature of the property, its location, and the sur-

rounding circumstances, the criterion being whether the evidence fairly points to the value of the property at the time in question. *Highway Commission v. Hartley,* 218 N.C. 438, 11 S.E. 2d 314."

In determining whether such evidence is admissible, the inquiry is whether, under all the circumstances, the purchase price fairly points to the value of the property at the time of the taking. Some of the circumstances to be considered are the changes, if any, which have occurred between the time of purchase by condemnee and the time of taking by condemnor, including physical changes in the property taken, changes in its availability for valuable uses, and changes in the vicinity of the property which might have affected its value. The fact that some changes have taken place does not *per se* render the evidence incompetent. But if the changes have been so extensive that the purchase price does not reasonably point to, or furnish a fair criterion for determining, value at the time of the taking, when purchase price is considered with other evidence affecting value, the evidence of purchase price should be excluded. *Highway Commission v. Coggins, supra; Redevelopment Commission v. Hinkle,* 260 N.C. 423, 132 S.E. 2d 761; *Highway Commission v. Hartley, supra;* 18 Am. Jur., Eminent Domain, § 351, pp. 994-5.

The 4.6-acre tract was purchased by petitioner 19 months before the appropriation by respondent. There had been no physical change in the property during this interval, and at the time of the taking it was still zoned "residential." The 30-acre tract had been rezoned "shopping center." There is no evidence of extensive development or change in the neighborhood. The record is silent as to any developments of or changes in the 30-acre tract.

Petitioner contends that there were changes so significant that purchase price could not reasonably point to value at the time of taking, and that the admission of this evidence was highly prejudicial. Petitioner points to these facts and contentions: Before the tract was purchased it was "landlocked" and had no access to streets or other public ways. After the purchase it became a part of petitioner's over-all holdings and had access to streets through the 30-acre tract. When the 30-acre tract was zoned "shopping center," the 4.6 acre tract had availability for use as a parking area. There was testimony that a permit to use this tract for parking, a non-conforming use, could have been obtained, though no application had been made for such permit.

Circumstances making property available for a more valuable use would, of course, be a change affecting value. And in determining value it is permissible for the jury to take into consideration the reasonable probability of a change in the zoning ordinance or of a permit for a

non-conforming use. *Barnes v. Highway Commission, supra,* at page 391. However, the so-called changes pointed out by petitioner are not, in consideration of this record as a whole, sufficient to render evidence of purchase price incompetent and of no reasonable probative value. Petitioner paid $12,000 for the Aldridge property; the jury awarded $21,000 damages. It is obvious that the jury considered the other factors affecting value as well as the evidence of purchase price of the Aldridge tract. The assignment of error is not sustained.

As stated above, a portion of the land appropriated by the Highway Commission was derived from the 30-acre tract. 4.73 acres were taken; 3.94 acres from the 4.6-acre tract and 0.79 from the 30-acre tract. This information is taken from a map, respondent's Exhibit 1; all other evidence is unclear on this point. Petitioner makes much of the fact the property appropriated is not exactly coextensive with the property purchased for $12,000, both in its challenge to the competency of the purchase price evidence and its exceptions to the charge.

Petitioner assigns as error a statement in the charge, when the judge was recapitulating the evidence, that "petitioner paid $12,000 for the property in question," contending that the statement left the impression that this was the basic valuation of all of the property and ignored the fact that part of the property taken was zoned "shopping center." We do not agree that the statement necessarily left the impression as contended for by petitioner. Furthermore, the court later charged as a matter of law that "The jury should take into consideration, in arriving at the fair market value of the portion of the land taken, all of the capabilities of the property and all of the uses to which it could have been applied or for which it was adapted which affects its value in the market, and not merely . . . the use to which it was then applied by the owner." Moreover, objection to the trial court's review of the evidence must be called to the court's attention in apt time. *Millikan v. Simmons,* 244 N.C. 195, 93 S.E. 2d 59. There is no evidence in the record, other than difference in zoning classification, that the part taken from the 30-acre tract was more valuable than that taken from the 4.6-acre tract. The maps show that the part taken from the 30-acre tract consists of a narrow strip, 0.22 acres, extending along the northern edge of the right of way of 70 Bypass and a triangular piece, 0.57 acre, abutting the southern edge of the right of way of 70 Bypass and the western line of the 4.6-acre tract. There is no evidence as to the actual use, condition or value of these areas. They are relatively so small that the fact they were not derived from the 4.6-acre tract does not render the evidence of the purchase price of the 4.6-acre tract inadmissible. Nor was the charge, considered as a whole, erroneous in relation to this aspect of the case in view of the paucity of evi-

dence as to the value of these small areas and in the absence of a request for special instructions. *King v. Powell,* 252 N.C. 506, 114 S.E. 2d 265. In reviewing the evidence the court gave petitioner the full benefit of all of its evidence and contentions, especially with respect to zoning classifications and change of conditions. It also stated petitioner's contention that the construction of the highway conferred little or no benefit.

In the trial below we find no error sufficiently prejudicial to warrant a new trial.

No error.

J. NEWELL PATTERSON AND WIFE, OSSIE P. PATTERSON v. ROSS A. BUCHANAN AND WIFE, FRANCES D. BUCHANAN.

(Filed 23 July, 1965.)

1. **Trial § 33—**

   Mere statement of the contentions of the parties is not sufficient, but the trial court is required to explain the law to the jury and apply it to the variant factual situations presented by the evidence.

2. **Appeal and Error § 34—**

   The record must disclose the filing date of every pleading, motion, affidavit, or other document included in the transcript. Rule of Practice in the Supreme Court No. 19(1).

APPEAL by plaintiffs from *Sink, E. J.,* December 14, 1964 Civil Session of HARNETT.

Action of trespass to try title. Plaintiffs allege that since 1936 they have owned and been in possession of the land described in the complaint; that in 1962 defendants trespassed upon their lands and "planted a crop without authorization." They seek to recover damages in the amount of $60.00. Defendants deny plaintiffs' title and allege that they own the property in controversy. They plead title by adverse possession for 20 years and under color of title for 7 years by themselves and those under whom they claim.

Plaintiffs' evidence tends to show: Plaintiffs and defendants are adjoining landowners who derive title from a common source, W. D. Patterson, the grandfather of male plaintiff and the great-grandfather of male defendant. In 1905, W. D. Patterson conveyed a tract of approximately 50 acres to his daughter, Callie Buchanan, and husband. This deed was duly recorded. In 1916, W. D. Patterson conveyed a tract of

approximately 78.35 acres to his son, W. M. Patterson. This deed was duly recorded. These two deeds conveyed contiguous tracts, with a lappage of 3.1 acres. Defendants claim through Callie Buchanan and husband; plaintiffs, through W. M. Patterson. The lappage consists of 1.4 acres of woodland and 1.7 acres of cleared land. Until 1936 W. M. Patterson tended the land now in dispute. At that time male plaintiff was 25 years old, and the lappage had been cleared since he was a very small boy. In 1936, male plaintiff's father acquired the 78.35-acre tract by a commissioner's deed, and, the same year he conveyed the land to male plaintiff. Male plaintiff himself planted the land from 1936 until 1962. Between 1916 and 1962, neither male defendant nor those under whom defendants claim ever tended the lappage. In 1962, defendant planted and harvested a corn crop on it. In 1963, he planted another crop, but plaintiff "disced it up." Neither party attempted to plant the lappage in 1964.

The record does not disclose how or when defendants acquired the 21.1-acre tract which is described by metes and bounds in the answer and which they allege they own. The description refers to a map dated January 6, 1961. It is, however, a part of the 50-acre tract conveyed by W. D. Patterson to Callie Buchanan, male defendant's grandmother, on March 2, 1905.

Defendants offered no evidence, and they made no motion for nonsuit.

The jury answered the first issue, with reference to the title to the lappage, against plaintiffs. From a judgment that plaintiffs have and recover nothing of defendants, plaintiffs appeal, assigning errors in the charge.

Wilson, Bain & Bowen for plaintiff appellants.
Morgan, Williams and DeBerry for defendant appellees.

PER CURIAM. Defendants have the senior paper title to the disputed land. Plaintiffs, however, claim title to it as a result of adverse possession for 7 years under color of title, G.S. 1-38, and also for 20 years, G.S. 1-40, yet they do not plead these statutes.

Plaintiffs assign as error the following portion of his Honor's charge:

> "He (plaintiff) contends that from all of the circumstances you should accept his contentions with respect to what happened and so accept them by the greater weight of the evidence. And, that phrase merely means that evidence outweighing any to the con-

trary. If you shall so find you will answer the first issue 'Yes,' and if you were to fail to so find in that manner you would answer 'No,' and the defendant contends that you should."

The assignment must be sustained. Here, and throughout the charge, his Honor overlooked the requirement of G.S. 1-180 that the judge "shall declare and explain the law arising on the evidence in the case. . . ." A mere statement of the contentions of the parties does not suffice. *Therrell v. Freeman,* 256 N.C. 552, 124 S.E. 2d 522. The judge at no time explained the law as it applies to a lappage, *Whiteheart v. Grubbs,* 232 N.C. 236, 60 S.E. 2d 101; *Currie v. Gilchrist,* 147 N.C. 648, 61 S.E. 581, nor did he attempt to apply that law to the evidence in the case.

The complaint in this action was verified May 4, 1962; the answer, "November ...., 1962." The record contains no other clue as to when this action was instituted or the pleadings filed. The attention of the Bar is once again directed to Rule 19(1) as amended January 1, 1964, which requires, *inter alia,* that the filing date of every pleading, motion, affidavit, or other document included in the transcript on appeal shall appear. See 259 N. C. 753.

For the reason stated there must be a

New trial.

STATE v. WILLIAM MACK SEYMOUR.

(Filed 23 July, 1965.)

Criminal Law § 132—

Where the court does not enter separate judgments but consolidates for judgment and sentence eight cases and enters one judgment thereon, such judgment cannot exceed the maximum for one offense.

ON *certiorari* to review order entered by *Mintz, J.,* at the April, 1965 Session, WAYNE Superior Court.

T. W. Bruton, Attorney General, Andrew A. Vanore, Jr., Staff Attorney for the State.

Henson P. Barnes for defendant appellant.

PER CURIAM. The following appears from the application for *certiorari* and the Attorney General's answer: The defendant was in-

dicted in the Superior Court of Wayne County in eight cases, Nos. 7600 through 7607, each charging house breaking and larceny. At the November Session, 1963, the defendant (and a codefendant, Jarvis Bowen) through counsel, entered pleas of guilty to all charges. "The eight cases were consolidated for purposes of plea and judgment, the court (Cowper, J., presiding) imposed a single sentence of 20 years in the State's Prison . . ."

The defendant, by writ of *habeas corpus* before Judge Mintz, challenged the legality of the sentence upon the ground that one judgment having been entered, the punishment could not exceed ten years. Judge Mintz held the sentence of 20 years was not unlawful and denied relief.

Unquestionably Judge Cowper could have entered a separate judgment in each case and could have provided that sentences run consecutively. However, he consolidated the cases and entered one judgment. That judgment could not exceed 10 years.

The cause is remanded to the Superior Court of Wayne County with directions to vacate the sentence imposed by Judge Cowper and to enter in lieu thereof a sentence which in no event may exceed the statutory limit of 10 years. The prisoner is entitled to credit thereon for the time served.

Remanded for the entry of a proper judgment.

CENTRAL CAROLINA BANK & TRUST COMPANY, TRUSTEE OF THE "THOMAS L. SHEPHERD FUND" UNDER THE LAST WILL AND TESTAMENT OF W. T. SHEPHERD, DECEASED, PETITIONER *v.* ELIZABETH O'KELLY BASS; GAYNELLE O'KELLY BUNTING; PAUL ERVIN DUCKWORTH, HUSBAND OF ROSE LEE McMAHON DUCKWORTH, DECEASED; IMOGENE O'KELLY SMITH; VIRGINIA O'KELLY NICHOLS; MARTHA O'KELLY BROCKETT; CARMA MARTIN EARLEY; LESLIE E. MARTIN, JR.; JOY MARTIN, MINOR, BY THOMAS H. LEE GUARDIAN AD LITEM; DORIS LINDSEY; THOMAS LINDSEY; NANCY CAMPBELL KENNEDY; THELMA C. HALL; THEODORE CAMPBELL; SALLIE BEAVERS; ELLA MAE BEAVERS BELVIN; H. RAYMOND WEEKS, JR., EXECUTOR OF THE ESTATE OF ELSIE BEAVERS WEEKS, DECEASED; S. O. RILEY, HUSBAND OF PEARL RILEY, DECEASED; MRS. JOHN THOMAS BEAVERS, WIDOW OF JOHN THOMAS BEAVERS, DECEASED; NAOMI S. TILLETT; MRS. CATHERINE RIGSBEE, WIFE OF THOMAS EDGAR SHEPHERD, DECEASED, NOW MRS. G. T. RIGSBEE; ARTHUR EARL LUCAS, EXECUTOR OF THE ESTATE OF THOMAS L. SHEPHERD, DECEASED; ARTHUR EARL LUCAS, INDIVIDUALLY; ANNIE MOORE SHEPHERD DENNIS; MARION EUGENE DUCKWORTH AND CATHY YVONNE DUCKWORTH, MINORS, BY W. J. BROGDEN, JR., GUARDIAN AD LITEM; MRS. CORNELIA S. SHEPHERD, EXECUTRIX OF THE ESTATE OF JOHN H. SHEPHERD, JR., DECEASED; AND JOE C. WEATHERSPOON, GUARDIAN AD LITEM FOR ALL PERSONS *in esse* OR NOT *in esse*, KNOWN OR UNKNOWN, HAVING ANY INTEREST IN THE "THOMAS L. SHEPHERD FUND" UNDER THE LAST WILL AND TESTAMENT OF W. T. SHEPHERD, RESPONDENTS.

(Filed 27 August, 1965.)

1. Wills §§ 43, 45—

Testamentary direction that after the death of the life beneficiary of the trust set up in the will the trustee should pay over and deliver the corpus of the estate to testator's "next of kin" requires a distribution to testator's nearest of kin and not to testator's heirs or distributees generally unless it appears that testator intended a distribution under the principle of representation.

2. Wills § 27—

A will should be construed to give effect to the intent of testator as gathered from the language of the instrument considered as a whole in the light of the circumstances confronting testator at the time, and such intent must be given effect unless contrary to some rule of law or at variance with public policy.

3. Same—

Where it is apparent that a word or phrase used in one part of a will has a particular meaning, such meaning will ordinarily be attributed to such word or phrase when used in other instances in the same instrument.

4. Wills § 45—

Judgment that testator made his son's foster daughter the beneficiary of a trust because of his love and affection for her, and not because he mistakenly believed her to be his granddaughter, is not decisive of the

question whether he intended to include her as next of kin to take the corpus of another trust after a life interest to testator's son.

5. Same— Under terms of will in this case, life beneficiaries of income were excluded from next of kin entitled to share in corpus.

The will in this case set up two trusts, one for the benefit of the foster daughter of testator's son with provision that the corpus be paid to her when she attained the age of 25 years, with further provision that should she die before that time without surviving child or children the corpus should be distributed to testator's "next of kin." The other trust was for the benefit of testator's son and provided that upon the death of the son the corpus should be paid to testator's "next of kin." It appeared that the son was an inebriate. *Held:* It being apparent from the language of the will and the surrounding circumstances that testator did not intend to include his son in the classification "next of kin", it follows that testator did not intend to include the foster child of his son as "next of kin" to take the corpus of the trust set up for the benefit of the son.

6. Wills § 38—

Under testator's will the income of two trusts was to be paid to testator's son and to the foster child of testator's son respectively in such proportion as the trustee in its discretion should deem best calculated to achieve the purposes therein set out, with further provision that upon the death of either the income not distributed should be paid to the survivor. *Held:* Income accrued but not distributed to the son at the time of the son's death must be paid to the son's foster daughter and does not pass under the son's will.

7. Wills § 34—

As a general rule a devise or bequest of the remainder to a class vests in members of the class as ascertained at the time of testator's death unless it appears from the terms of the will that testator intended the members of the class to be ascertained at the time of the death of the first taker.

8. Same—

The rule that the law favors the early vesting of estates is not a rule of law but a rule of interpretation and must give way when a contrary intent is apparent from the will.

9. Same—

Whether a remainder is contingent or vested is not dependent upon whether the amount of the estate which will remain for distribution is uncertain but whether the persons who are to take the remainder are uncertain, and therefore the fact that the trustee of the trust set up by will is authorized to invade the corpus for the benefit of the life beneficiary is not determinative of whether the remainder after the life estate is vested or contingent.

10. Same—

Where a will directs that after the termination of the life estate therein set up the corpus should be divided between members of a class, the post-

ponement of the enjoyment of the remainder is ordinarily for the purpose of letting in the prior life estate, and the remainder ordinarily vests at the death of testator unless the will clearly uses "words of futurity" to indicate testator's intent that only those take who answer the roll at the termination of the particular estate.

11. Same—

Testator set up a trust for the benefit of his son for life with provision that at the death of the son the corpus should be distributed to testator's "next of kin." At the time of testator's death the son was the sole member of the class of testator's "next of kin" and it was apparent from the will that testator intended the son to be excluded as a member of the class to take the remainder. *Held:* Since no one could qualify as testator's next of kin as long as the son lived, the remainder is contingent.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by respondents Dennis; Lucas; Bass, Bunting, Tillett, Shepherd (Bass group); Beavers, Belvin, Weeks, Campbell, Hall (Beavers-Belvin group), from *Mallard, J.,* March 30, 1964 Civil Session of DURHAM. This appeal was docketed in the Supreme Court as Case No. 670 and argued at the Fall Term 1964.

This action was brought by petitioner, Central Carolina Bank and Trust Company, the duly qualified and acting trustee under the will of W. T. Shepherd, under the Declaratory Judgment Act, Gen. Stats. ch. I, art. 26, for a construction of the will. All interested parties were properly before the court and waived a jury trial. From the pleadings, stipulations, documentary evidence, and testimony of witnesses, the judge found the following facts, which we have summarized insofar as possible in chronological order. For a better understanding of the facts, portions of the evidence are interpolated, as indicated.

Testator died March 30, 1939, leaving a last will and testament, dated January 11, 1937, which was duly probated. He was predeceased by his parents and his wife. Surviving him was a son, Thomas L. Shepherd, the only child testator ever had; three sisters; and the issue of a deceased sister and of a deceased brother. Also surviving was Annie Moore Shepherd (now Dennis), a 14-year-old girl to whom testator referred in his will as "my granddaughter." She was not, however, as will hereinafter appear, a blood relative of his.

In Item 3 of his will testator bequeathed "to my granddaughter, Annie Moore Shepherd," all the jewelry which had formerly belonged to his wife. In Item 4, he bequeathed his own personal effects, automobile, and household furniture to his son. In Item 5 testator gave all the residue of his estate to Durham Bank and Trust Company, petitioner's predecessor-trustee, upon the conditions and trusts following:

1. To divide said residuary estate into two parts, one such part to consist of three-fifths (3/5) of said residuary estate and to be known and designated as "Thomas L. Shepherd Fund" and the other such part to consist of two-fifths (2/5) of the said residuary estate and to be known and designated as "Annie Moore Shepherd Fund."

2. For and during the joint lives of Thomas L. Shepherd, my son, and Annie Moore Shepherd, my granddaughter, the Trustee shall pay over the net income, both from the said "Thomas L. Shepherd Fund" and the said "Annie Moore Shepherd Fund" as they may respectively be constituted from time to time, to the said Thomas L. Shepherd and/or the said Annie Moore Shepherd, quarterly or more often, in such proportions, either part to each or all to one, as the said Trustee may in its sole, absolute, and unfettered discretion consider best calculated to achieve the purposes hereinafter set out, *viz:*

> It is my hope and purpose that the income from this trust may keep my son and granddaughter in comfort and furnish my granddaughter opportunities for such education and general intellectual advancement as she may wish and my Trustee shall consider advantageous. It is not my purpose that either of them shall be allotted funds which it may appear would probably be used for the advantage of any other person, except a relative of one of them by blood. Neither is it my intention that either shall be allotted amounts which my Trustee may believe or may by experience find is likely to discourage either of them from living a sober, upright, and useful life. Without intending in anywise to restrict the authority and discretion hereinbefore vested in my Trustee, I wish to state that my present opinion is that in the ordinary course of events it would probably be best to give the said Annie Moore Shepherd, my granddaughter, two-fifths (2/5) of the income from the trust and my son, Thomas L. Shepherd, three-fifths (3/5) of such income, reasonably adjusted to any principal distributions which the Trustee may have made to either of them pursuant to the provisions in this will contained.

Upon and after the death of Thomas L. Shepherd or Annie Moore Shepherd the net income thereafter arising from that part of the trust estate not distributable upon the death of that one of them so dying shall be paid to the survivor, quarterly or more often, so long as he or she shall live and any part of the trust estate shall continue in the hands of the Trustee as hereinafter provided.

3. When the said Annie Moore Shepherd, my granddaughter, shall have attained the age of twenty-five years, the Trustee shall pay over and deliver to her the entire principal of the "Annie Moore Shepherd Fund," which it shall have set aside and designated as such, but in the event the said Annie Moore Shepherd shall die prior to attaining the age of twenty-five years, then upon her death the Trustee shall pay over and deliver the entire principal of the said "Annie Moore Shepherd Fund," as then constituted, to her child or children then living, *per stirpes,* but if there be no such child or children then living the principal of such "Annie Moore Shepherd Fund" shall pass to my next of kin, provided that the distribution of the "Annie Moore Shepherd Fund" to Annie Moore Shepherd under the provisions of this paragraph shall not operate to prevent the said Trustee from thereafter paying a part or all of the net income from the said "Thomas L. Shepherd Fund" to Annie Moore Shepherd, as provided in paragraph two (2) of this will.

4. Upon the death of my son, Thomas L. Shepherd, the Trustee shall pay and deliver over the entire principal of the "Thomas L. Shepherd Fund," as then constituted, which it shall have set apart and designated as such, to my next of kin; except that the trusts as to the "Thomas L. Shepherd Fund" may sooner terminate in whole or in part under sub-division "5" of this article.

5. Anything hereinbefore to the contrary notwithstanding, I hereby empower my Trustee, if, in its sole, absolute and unfettered discretion it shall consider such procedure to be for the best interests of my son, Thomas L. Shepherd, to pay and deliver over to my said son, Thomas L. Shepherd, from the principal of the "Thomas L. Shepherd Fund," such sum or sums and/or such asset or assets as it may from time to time deem proper; provided, however, that no distribution shall be made pursuant to this article until five (5) years shall have elapsed after the date of my death; and provided always, that the power given the Trustee in this article to pay and deliver over to my said son, Thomas L. Shepherd, from the principal of the "Thomas L. Shepherd Fund," such sum or sums and/or such asset or assets as it may from time to time deem proper shall immediately and forever cease upon the filing of a suit or action in any court by Thomas L. Shepherd or anyone claiming by, through, or under him against the Trustee disputing this article or the result of the exercise by the Trustee of its discretion hereunder.

The inventory of testator's estate, filed July 1, 1939, valued testator's personalty at $99,120.58; his realty at $79,753.35, a total of $178,-873.93.

On June 26, 1941, testator's son, Thomas L. Shepherd, Jr., instituted an action, Docket No. 8097, by and through his guardian, in the Superior Court of Durham County against Durham Bank and Trust Company for the purpose of securing an adjudication that Annie Moore Shepherd was not a blood relative of testator, thereby to deprive her of any share of the estate.

The pleadings in Case No. 8097 disclosed the following: Testator's son had married Effie M. Rogers on June 23, 1921. The couple were unable to have a child and greatly desired one. In September 1925, when she was 2-3 weeks old, they secured from a child-placing agency the infant who is now Annie Moore Shepherd Dennis. Mrs. Effie Shepherd received the child at the home of her mother in Lynchburg, Virginia, where she had been for some time and where she remained for several months thereafter. She and testator's son then brought the child to the home of his parents in Durham, where they lived for most of their married life. They held out the infant, Annie Moore Shepherd, "as a child born of their marriage," and, although never legally adopted, "she was kept and reared as one born in the family." Testator was "led to believe that the said Annie Moore Shepherd was his grandchild." He became deeply attached to her, and the bond of affection between them was strengthened as she grew older. On April 1, 1928, testator's son and his wife separated. Answering the complaint in Case No. 8097 as guardian of Annie Moore Shepherd, Effie Shepherd (Draper) averred that her separation from Thomas L. Shepherd was caused by his inebriacy and infidelity. In April 1930 Mrs. Shepherd secured in the Superior Court of Durham County a divorce from testator's son. The decree awarded her custody of Annie Moore Shepherd, then approximately 5 years old. Thereafter the child lived with Mrs. Effie Shepherd in Lynchburg, Virginia, and was supported by her. From time to time, however, the child made extended visits in the home of Mr. and Mrs. W. T. Shepherd, where Thomas L. Shepherd continued to make his home the greater part of the time.

On November 23, 1935, Effie Shepherd married H. H. Draper, and, at the request of testator and his wife, Annie Moore Shepherd returned to Durham to live with them permanently. The most cordial relations continued to exist between Mrs. Draper and Mr. and Mrs. W. T. Shepherd. After the death of Mrs. W. T. Shepherd on February 23, 1936, the child continued, except for those periods when he sent her to boarding school, to live with testator until his death. The evidence

tends to show that she referred to him as her grandfather; that he referred to her as his granddaughter and "a wonderful grandchild."

Between the time of his mother's death in 1936 and his father's in 1939, Thomas L. Shepherd was sent to four different institutions, including the State Hospital in Raleigh, for treatment as an inebriate.

Thomas L. Shepherd averred in his complaint in Case No. 8097 that testator had named Annie Moore Shepherd as a legatee in his will because he thought she was his grandchild. His prayer for relief was that his foster daughter be declared no blood relation of testator's and that the trustee be restrained from paying out any income until "the rights of all and any persons referred to as legatees, either directly or indirectly in the said will of W. T. Shepherd, deceased, may be determined by the jury and the court."

The trustee, answering the complaint in Case No. 8097, averred that misapprehension had not caused testator to make Annie Moore Shepherd a beneficiary in his will; that, on the contrary, he had been motivated by "strong and impelling attachments of love and affection" for her as a companion and as an individual. Of the same import were the answers filed by both the guardian *ad litem* and the guardian of Annie Moore Shepherd. Effie Shepherd Draper alleged that she herself had no knowledge that testator had made a will until the institution of the suit; that it was with reluctance and heavy heart that "Tom Shepherd" had now forced her to disclose that Annie Moore Shepherd was not their child and had never been legally adopted; that they had secured the child only because she was barren and not because they wanted to perpetrate a fraud on testator or on any other person. At the hearing before Judge Mallard in the instant case, Annie Moore Shepherd Dennis testified that until 1941, when Case No. 8097 was instituted, she believed Thomas and Effie Shepherd to be her parents.

At the March 1942 Term of the Superior Court of Durham County, Honorable R. Hunt Parker, judge presiding, issues were submitted to a jury and answered as follows:

1. Is Annie Moore Shepherd a child born of and to the marriage of Thomas L. Shepherd and his wife, Effie M. Rogers Shepherd?

Answer: No.

2. Was W. T. Shepherd induced by misrepresentation or fraud practiced upon him by Thomas L. Shepherd, Effie M. Rogers Shepherd, Annie Moore Shepherd or by any other person to name Annie Moore Shepherd as a beneficiary under his will?

Answer: No.

3. Did W. T. Shepherd name Annie Moore Shepherd a beneficiary under his will through misapprehension or mistake of fact on his part coupled with misrepresentation or fraud practiced upon W. T. Shepherd by Thomas L. Shepherd, Effie M. Rogers Shepherd, Annie Moore Shepherd, or by any other person?

Answer: No.

4. Was the supposed relationship of Annie Moore Shepherd to W. T. Shepherd as his supposed granddaughter the sole motive for his making her a beneficiary in his will?

Answer: No.

5. Did W. T. Shepherd make Annie Moore Shepherd a beneficiary in his will by reason of his love and affection for the said Annie Moore Shepherd?

Answer: Yes.

Upon these issues the court adjudged and decreed:

1. That the said Annie Moore Shepherd is not a child born of and to the marriage of the said Thomas L. Shepherd and his wife, the said Effie M. Rogers Shepherd, and that she is not the granddaughter of W. T. Shepherd, deceased.

2. That the said W. T. Shepherd was not induced by misapprehension or fraud practiced upon him to name the said Annie Moore Shepherd as a beneficiary under his said last Will and Testament.

3. That the said Annie Moore Shepherd was not named a beneficiary by the said W. T. Shepherd under his will through misapprehension or mistake of fact induced by misrepresentation or fraud practiced upon the said W. T. Shepherd, deceased.

4. That the supposed relationship of the said Annie Moore Shepherd to the said W. T. Shepherd, deceased, was not the sole motive for the said W. T. Shepherd to name the said Annie Moore Shepherd as a beneficiary under his said Last Will and Testament.

5. That the said W. T. Shepherd made the said Annie Moore Shepherd his beneficiary under his said Last Will and Testament by reason of his love and affection for the said Annie Moore Shepherd.

6. That the said Annie Moore Shepherd be and she is hereby declared to be a beneficiary under the said Last Will and Testament of the said W. T. Shepherd, deceased, to the full extent as set forth by the terms and provisions of the said Last Will and Testament of the said W. T. Shepherd, deceased.

7. That the plaintiff's prayer that Durham Bank and Trust Company, Trustee, be restrained from paying out any income derived from the estate held in trust under the will of W. T. Shepherd, deceased, be and the same is hereby denied, to the end that the Durham Bank and Trust Company may continue in its administration of the Estate of W. T. Shepherd, deceased, under the terms and provisions of the said Last Will and Testament of W. T. Shepherd, deceased, and as by law provided.

8. That the costs of this action be taxed against the corpus of the three-fifths (3/5) of the estate of the said W. T. Shepherd, deceased, referred to as the "Thomas L. Shepherd Fund."

All the parties to this present proceeding or the persons under and through whom they claim were made parties to Case No. 8097 and are bound by the 1942 judgment.

In January 1944 Annie Moore Shepherd married Mr. Dennis. On September 16, 1950, when she reached the age of 25, petitioner distributed to her the corpus of her trust fund, which then amounted to approximately $80,000. Since that date she has received nothing further from testator's estate.

On July 14, 1963, T. L. Shepherd died testate, leaving no widow or issue. He devised and bequeathed all his property to respondent Arthur E. Lucas, whom he also named as his executor. At his death the corpus of the Thomas L. Shepherd fund consisted entirely of personalty and had a total market value of $402,127.36. Accrued but undistributed income amounted to $4,196.73.

When W. T. Shepherd died on March 30, 1939, he left surviving him, in addition to his son, the collateral relations listed below. For convenience they are shown in five family groups, all members dead or living included, and each group headed by testator's brother or sister from whom the members are descended. Those whose names are italicized were living at the time of the death of Thomas L. Shepherd on July 14, 1963. The dates of death for all decedents are shown.

I. Meroe O'Kelly, sister, died February 26, 1900, survived by 3 children:

A. *Elizabeth O'K. Bass.*

B. *Gaynelle O'K. Bunting.*

C. Ida O'K. McMahon, who died November 14, 1955, leaving 1 daughter:

1. Rosa Lee McM. Duckworth, died July 6, 1962. She was survived by her husband, *Paul E. Duckworth,* and 2 children:

a. *Marion E. Duckworth.*
b. *Cathy Y. Duckworth.*

II. Phedelia S. O'Kelly, sister, died February 26, 1941, leaving 2 children:

A. George F. O'Kelly, son, died August 17, 1939, survived by 3 children:

1. *Imogene O'K. Smith.*
2. *Virginia O'K. Nichols.*
3. *Martha O'K. Brockett.*

B. Emma O'K. Martin, daughter, died June 15, 1942, survived by 3 children:

1. *Carma M. Earley.*
2. *Leslie E. Martin, Jr.*
3. Frank C. Martin, died April 2, 1963, survived by 1 child: *Joy Martin.*

III. Lula S. Campbell, sister, died September 19, 1960. She had 4 children:

A. Grace G. Lindsey, died June 12, 1920, leaving 2 children:

1. *Doris M. Lindsey.*
2. *Thomas G. Lindsey.*

B. John Campbell, Jr., died January 23, 1954, leaving 1 child: *Nancy C. Kennedy.*

C. *Thelma C. Hall.*

D. *Theodore Campbell.*

IV. Ida S. Beavers, sister, died March 24, 1941. She had 5 children:

A. *Sallie Beavers.*

B. *Ella Mae B. Belvin*

C. *Elsie B. Weeks,* died testate June 4, 1964, survived by her husband, *H. Raymond Weeks, Jr.,* her executor.

D. Pearl B. Riley, died April 2, 1959, survived by her husband, *S. O. Riley;* no children.

E. John T. Beavers, died March 16, 1935, survived by his wife, *Mrs. John Beavers;* no children.

V. John H. Shepherd, Sr., brother, who died May 18, 1936, survived by 3 children:

A. *Naomi S. Tillett.*

B. Thomas E. Shepherd, died April 28, 1948, survived by his wife, now *Mrs. Catherine Rigsbee;* no children.

C. *John H. Shepherd, Jr.,* died testate March 19, 1964, survived by his wife, *Cornelia S. Shepherd,* his executrix and sole legatee.

Annie Moore Shepherd Dennis contends that, because she was named in the will as testator's granddaughter, its proper interpretation requires that she receive the entire corpus and accrued income of the Thomas L. Shepherd Trust. Arthur E. Lucas contends that, as the sole legatee of Thomas L. Shepherd, he is entitled to the trust income which had accrued prior to the death of Thomas L. Shepherd.

Testator's nieces and nephews and the issue of deceased nieces and nephews all controvert Annie Moore Shepherd Dennis' claim to the corpus of the Thomas L. Shepherd Fund. The nieces and nephews contend that "my next of kin" as used in the will means testator's nearest of kin who were living on July 14, 1963, the date of the death of Thomas L. Shepherd, and that they are entitled to take the entire fund to the exclusion of the issue of their deceased brothers and sisters. The nieces and nephews contend further that the trust income which had accrued prior to Thomas L. Shepherd's death should be added to the principal and distributed to them. The grandnieces and grandnephews and the great-grandnieces and the great-grandnephew contend that "my next of kin" means all those persons living on July 14, 1963, who are the issue of testator's brothers and sisters.

When these conflicting claims arose, petitioner-trustee brought this action, requesting the court to advise it (1) whether the 1942 judgment in Case No. 8097 excluded Annie Moore Shepherd Dennis from being considered testator's next of kin; (2) who, under the will, are "my next of kin" entitled to receive the distribution of the Thomas L. Shepherd Trust Fund; and (3) who is entitled to the undistributed trust income which had accrued prior to Thomas L. Shepherd's death.

After hearing this matter, on April 6, 1964, Judge Mallard found facts in accordance with those detailed above. Pursuant to his findings he concluded, *inter alia:*

> That W. T. Shepherd did not intend for either Thomas L. Shepherd or Annie Moore Shepherd (Dennis) to be included in the term "my next of kin" as he used it in his Last Will and Testament, and the term "my next of kin" does not include either of them.
>
> That in said will, W. T. Shepherd intended to use and did use the term "my next of kin" to describe that person, or those persons, who would take under the laws of descent and distribution as his

heirs at law as of the time of death of Thomas L. Shepherd, and those persons should take the corpus of the "Thomas L. Shepherd Fund," plus the net income thereon accrued since the death of Thomas L. Shepherd to the date of the distribution thereof, *per stirpes* and not *per capita,* and such was the intention of the testator, W. T. Shepherd, deceased.

That the corpus of the "Thomas L. Shepherd Fund" should be paid over and distributed to those persons who would take under the laws of descent and distribution, *per stirpes* and not *per capita,* as heirs at law of W. T. Shepherd as of July 14, 1963.

That the undistributed net income which accrued prior to the death of Thomas L. Shepherd should be paid to Annie Moore Shepherd Dennis.

He ordered distribution as follows:

A. That the said Trustee shall pay to Annie Moore Shepherd Dennis the sum of Four Thousand, One Hundred Ninety-Six Dollars and Seventy-three Cents ($4,196.73), representing the (undistributed) net accrued income on the fund to the date of the death of Thomas L. Shepherd on July 14, 1963.

B. That the said Trustee shall make the following distribution of the Thomas L. Shepherd Fund plus any net income or interest which has accrued thereon since the 14th day of July 1963:

1. Elizabeth O'K. Bass, one fifteenth (1/15).
2. Gaynelle O'K. Bunting, one fifteenth (1/15).
3. Marion E. Duckworth, son of Mrs. Rosa Lee McM. Duckworth, one thirtieth (1/30).
4. Cathy Y. Duckworth, daughter of Rosa Lee McM. Duckworth, one thirtieth (1/30).
5. Imogene O'K. Smith, one-thirtieth (1/30).
6. Virginia O'K. Nichols, one-thirtieth (1/30).
7. Martha O'K. Brockett, one-thirtieth (1/30).
8. Carma M. Earley, one thirtieth (1/30).
9. Leslie E. Martin, Jr., one-thirtieth (1/30).
10. Joy Martin, daughter of Frank C. Martin, one-thirtieth (1/30).
11. Doris Lindsey, one-fortieth (1/40).
12. Thomas Lindsey, one-fortieth (1/40).
13. Nancy C. Kennedy, one-twentieth (1/20).
14. Thelma C. Hall, one-twentieth (1/20).

15. Theodore Campbell, one-twentieth (1/20).
16. Sallie Beavers, one-fifteenth (1/15).
17. Ella Mae B. Belvin, one-fifteenth (1/15).
18. Elsie B. Weeks, one-fifteenth (1/15).
19. Naomi S. Tillett, one-tenth (1/10).
20. Cornelia S. Shepherd, Executrix under the Last Will and Testament of John H. Shepherd, Jr., deceased, one-tenth (1/10).

C. The court costs of this action, including any orders which the Court might make as to compensation, shall be paid by the Trustee.

From this judgment Annie Moore Shepherd Dennis, Arthur E. Lucas, and the 9 nieces and nephews of testator living on July 14, 1963, upon exceptions duly taken, appeal. Each assigns as error the findings of fact and conclusions of law adverse to his financial interest.

Clark & Clark for Nancy Campbell Kennedy, respondent appellee.

Bryant, Lipton, Bryant & Battle for Imogene O'Kelly Smith, Virginia O'Kelly Nichols, Martha O'Kelly Brockett, Leslie E. Martin, Jr., Thomas Lindsey, Doris Moore Lindsey, and Carma Martin Earley, respondents appellees.

W. J. Brogden, Jr., respondent, appellee, guardian ad litem for Marion Eugene Duckworth and Cathy Yvonne Duckworth, minors.

Thomas H. Lee, respondent, appellee, guardian ad litem for Joy Martin, minor.

Hofler, Mount & White for Elizabeth O'Kelly Bass, Gaynelle O'-Kelly Bunting, Naomi S. Tillett and Cornelia S. Shepherd, Executrix of the Estate of John H. Shepherd, Jr., respondents appellants.

Haywood, Denny & Miller for Sallie Beavers, Ella Mae Beavers Belvin, Theodore Campbell, Thelma C. Hall, and H. Raymond Weeks, Jr., Executor of the Estate of Elsie Beavers Weeks, respondents appellants.

Nye, Winders & Mitchell for Annie Moore Shepherd Dennis, respondent appellant.

Nick Galifianakis and Roger S. Upchurch for Arthur Earl Lucas, Individually and as Executor of the Estate of Thomas L. Shepherd, respondent appellant.

SHARP, J. The disposition of the remainder of the Thomas L. Shepherd Fund after the death of the life beneficiary depends upon the answer to three questions: (1) When testator directed the trustee to

distribute the remainder as then constituted "to my next of kin," did he mean his nearest of kin or those who would take from him under the statute of distributions? (2) Did testator intend to include Annie Moore Shepherd Dennis, whom he described in his will as "my granddaughter," in the class he designated as "my next of kin"? (3) Are "my next of kin" to be ascertained at the death of testator or at the death of Thomas L. Shepherd, the life beneficiary?

First. The answer to the first question must be found in a canon of construction. It is the rule in this jurisdiction, as well as in England and a substantial number of the other American jurisdictions, that the words *next of kin* "mean 'nearest of kin' and that in the construction of deeds and wills, unless there are terms in the instrument showing a contrary intent, the words 'next of kin,' without more, do not recognize or permit the principle of representation." *Wallace v. Wallace,* 181 N.C. 158, 163, 106 S.E. 501, 504, *accord: Williams v. Johnson,* 228 N.C. 732, 47 S.E. 2d 24; *Williamson v. Cox,* 218 N.C. 177, 10 S.E. 2d 662; *Knox v. Knox,* 208 N.C. 141, 179 S.E. 610; *Redmond v. Burroughs,* 63 N.C. 242, 245; *Jones v. Oliver,* 38 N.C. 369; Annot., Term "next of kin" used in will, as referring to those who would take in cases of intestacy under distribution statutes, or to nearest blood relatives of designated person or persons, 32 A.L.R. 2d 296, 303; 57 Am. Jur., Wills § 1375 (1948). This rule of construction, like many another of our rules, both of construction and of property, "is grown reverend by age, and is not now to be broken in upon." Kenyon, M. R., in *Jee v. Audley,* 1 Cox 324, 325, 29 Eng. Rep. 1186, 1187 (Ch. 1787).

We perceive nothing in the will of W. T. Shepherd which suggests that he used the words *my next of kin* in any but the usual acceptation of that phrase. We hold, therefore, that they mean his nearest of kin and not his heirs or distributees generally.

Second. The second question, whether testator intended to include Annie Moore Shepherd (Dennis) in the class of his next of kin, is not answered by the 1942 judgment in Case No. 8097. That judgment established that she was not a relative of testator but that he had given her 2/5 of his residuary estate as a beloved individual and not merely as his supposed granddaughter. See *Howell v. Troutman,* 53 N.C. 304; Annot., Fraud or mistake as to relationship or status of legatee or devisee as affecting will, 17 A.L.R. 247. Thus, once again, we face the ever-recurring problem of determining a testator's intent from a consideration of the will itself and the circumstances confronting him. To ascertain such intent, "we must consider the instrument as a whole and give effect to such intent unless it is contrary to some rule of law or at variance with public policy." *Trust Co. v. Taliaferro,* 246 N.C. 121, 127, 97 S.E. 2d 776, 780.

It has been held that certain named persons described by a testator in his will as "my cousins" took under the residuary clause directing distribution among "my relatives hereinbefore named," even though those persons were not legally his cousins. *Seale-Hayne v. Jodrell,* [1891] A. C. 304, *affirming In re Jodrell,* 44 Ch. D. 590 (1890). With reference to a somewhat similar situation in *In re Wood,* [1902] 2 Ch. 542, 546, Vaughan Williams, L. J., said "(T)his is one of those cases in which the testator has created a dictionary for himself, and . . . we must read his will in the light of that dictionary." See 2 Jarman, Wills 1611 (1910 Ed.); 1 Wiggins, North Carolina Wills and Administration of Estates § 134 (1st Ed. 1964).

It seems that those who framed the issues in Case No. 8097 assumed that W. T. Shepherd died in the belief that Annie Moore Shepherd was his grandchild. And here it is argued, on the one hand, that his frequent reference to her in the will as "my granddaughter" is proof positive that testator died in the belief that Annie Moore Shepherd was his grandchild. On the other, it is contended that his will discloses to the discerning that he knew she was not his grandchild and that it reveals a skillful and subtle attempt to protect her status, to provide for her to the extent of 2/5 of his estate, and to insure that the balance after his son's death should go only to his blood kin. He could, of course, have accomplished this purpose in a more direct manner by saying, "to my next of kin, excluding my granddaughter, Annie Moore Shepherd, and her issue, for whom I have heretofore made adequate provision." Be that as it may, the question remains, did he intend to include her when he used the phrase "my next of kin"? Judge Mallard held that testator intended to include in that classification neither her nor his only son. With this construction we agree.

At the time of testator's death, and for more than ten years before, his son had been addicted to drink. Testator, not considering his son competent to manage his business affairs, created the Thomas L. Shepherd Trust. Although he empowered the trustee "in its sole, absolute, and unfettered discretion" to pay to his son such portions of the principal as it might "from time to time deem proper," testator positively prohibited any such payment from the principal sooner than 5 years after his death. The wisdom of this precaution appears from information disclosed by the pleadings in Case No. 8097. In the 3-year period between the death of his mother and that of his father, Thomas L. Shepherd was in four different institutions for treatment for alcoholism. At the time suit No. 8097 was instituted, he had been committed by court order to an institution. Testator specifically stated that it was not his intent that the trustee allot him amounts which it believed, or might "by experience find, likely to discourage a sober, upright and

useful life." That he did not trust his son to abide by his testamentary wishes is shown by the provision of the will which would forever revoke the power of the trustee to pay him any part of the corpus of his trust fund if the son or any one claiming through him should file a suit "disputing" Article Fifth of the will or "the result of the exercise of the trustee of its discretion" thereunder.

At the time testator made his will in 1937, Annie Moore Shepherd was approximately 12 years old. The corpus of her trust fund, which would be hers absolutely if she lived to age 25, was 2/5 of his entire estate, which, according to the inventory filed July 1, 1939, would then have been in excess of $70,000.00. If she died before, leaving no child or children, testator's direction was that the principal of the "Annie Moore Shepherd Fund shall pass to my next of kin." In such event, had Thomas L. Shepherd still been alive, he would have been not only testator's nearest of kin but the only representative of that class and thus, nothing else appearing, entitled to the entire corpus of the Annie Moore Shepherd Fund. Testator having made his son's access to any of the principal of his own trust fund dependent upon the trustee's discretion and having stated his desire that his son have no funds which would discourage a sober life, we entertain no notion that he intended ever to create the possibility that his son acquire such a sum of money in his own right to dissipate, all at one time, as he saw fit. Had testator intended his son to have the income from the corpus of the Annie Moore Shepherd Fund in the event she died before age 25, he would, we think, have added it to the son's own trust fund. Had he intended to give it to him outright, he would undoubtedly have said, "in such event, the principal of this fund shall pass to my son if he then be living." To give an individual the residuum of a trust by referring to him as "my next of kin" instead of by name would indeed be clumsy draftsmanship.

If, when he gave the remainder of the Annie Moore Shepherd Fund to his next of kin in the event of her death before age 25 without children, testator meant to exclude his son, and if, as he did with reference to the remainder of the Thomas L. Shepherd Fund, testator subsequently used the same phrase, may we not assume that he used it with similar meaning, *i. e.*, to exclude his supposed granddaughter? As Denny, J. (now C. J.), said in *Trust Co. v. Green,* 239 N.C. 612, 619, 80 S.E. 2d 771, 776:

> "It is a well settled rule of testamentary construction that 'if it is apparent that in one use of a word or phrase a particular significance is attached thereto by the testator, the same meaning will be presumed to be intended in all other instances of the use by him of the same word or phrase.' *Carroll v. Herring,* 180 N.C.

369, 104 S.E. 892; *Taylor v. Taylor,* 174 N.C. 537, 94 S.E. 7; *Grandy v. Sawyer,* 62 N.C. 8; *Lockhart v. Lockhart,* 56 N.C. 205; *Gibson v. Gibson,* 49 N.C. 425; 57 Am. Jur., Wills, section 1152, page 750, and cited cases; 69 C.J., Wills, section 1131(2), page 77."

We find nothing in this will to indicate that testator used the words *my next of kin* with two different meanings in disposing of the remainders after life estates in the two funds. If the testator did not intend to include his son in the classification "my next of kin," then *a fortiori* he did not intend to include his supposed granddaughter. Annie Moore Shepherd, or her issue, were to have one fund; Thomas L. Shepherd was to have the benefit of the other; and, at his death, testator's next of kin — excluding the only two beneficiaries identified by name — were to have what remained of it. Here, as in *In re Carter's Will,* 99 Vt. 480, 134 Atl. 581, 61 A.L.R. 1005, where the testator devised property to trustees for the benefit of his wife, and his son, with remainder to the testator's heirs at law, "it will be seen that by the creation of said trust fund the testator intended to provide for three classes of beneficiaries," the two life beneficiaries of the trust and, third, his heirs at law. *Id.* at 487, 134 Atl. at 584, 61 A.L.R. at 1010. In this case the third beneficiary is testator's next of kin.

We agree with the court below that testator, under the circumstances here disclosed, did not, in his use of the words "my next of kin," intend to include Annie Moore Shepherd. It follows, therefore, that she is not entitled to share in the corpus of the Thomas L. Shepherd Fund. Under the express provisions of Item 2 of the Fifth Provision of the will, however, she is entitled to the income from it which accrued, but was undistributed, prior to the death of Thomas L. Shepherd, and Judge Mallard so held. The trustee had the absolute discretion, during the joint lives of the trust beneficiaries, to divide the income between them as it saw fit. It had no authority, however, to pay any of it to any other person. Even after Annie Moore Shepherd became 25 and received the corpus of her fund, under Item 3 of Provision Fifth, the trustee had the authority to pay "a part or all of the net income from the 'Thomas L. Shepherd Fund' to Annie Moore Shepherd as provided in paragraph (2) of this will." The fact that she had received nothing from the trust since she became 25 years old is immaterial. That income which accrued, but was undistributed, before the death of Thomas L. Shepherd did so during the joint lives of Thomas L. Shepherd and Annie Moore Shepherd Dennis. It not having been paid to Thomas L. Shepherd during his lifetime, only Annie Moore Shepherd Dennis is entitled to it.

Third. When did the remainder in the Thomas L. Shepherd Fund vest?

> " 'As a general rule, the death of the testator is the time at which the members of a class are to be ascertained in case of a gift to the testator's heirs, next of kin, or other relatives, unless the context of the will indicates a clear intention that the property shall go to the heirs, next of kin, or other relatives at a different time, such as at the time of distribution, or at the death of the first taker, or at the date of the execution of the will. . . . Where the gift is to the heirs or next of kin of another than the testator, it ordinarily refers to the death of such other, unless the context of the will manifests that the class shall be determined at a different time, such as the time of distribution.' " *Witty v. Witty,* 184 N.C. 375, 379, 114 S.E. 482, 484.

The rule is succinctly stated in *Yarn Co. v. Dewstoe,* 192 N.C. 121, 124 133 S.E. 407, 409:

> "As a general rule where a devise is made to one for life and after his death to the testator's next of kin, the next of kin who are to take are the persons who answer that description at the death of the testator and not those who answer the description at the death of the first taker. (Citations omitted.) It is otherwise, however, where it appears from the terms of the will that some intervening time is indicated." Accord, *Pridgen v. Tyson,* 234 N.C. 199, 66 S.E. 2d 682; *Privott v. Graham,* 214 N.C. 199, 198 S.E. 635; *Trust Co. v. Lindsay,* 210 N.C. 652, 188 S.E. 94; *Baugham v. Trust Co.,* 181 N.C. 406, 107 S.E. 431; *Jenkins v. Lambeth,* 172 N.C. 466, 90 S.E. 513; *Rives v. Frizzle,* 43 N.C. 237; *Jones v. Oliver, supra.*

According to Annot., Time as of which members of class described as testator's "heirs," "next of kin," "relation," etc., to whom a future gift is made, are to be ascertained, 49 A.L.R. 174, 177, this is a rule "so universally recognized as to render superfluous a full citation of the cases which support it, that, in the absence of clear and unambiguous indications of a different intention to be derived from the context of the will, read in the light of the surrounding circumstances, the class described as testator's heirs, or next of kin, or relations, or such persons as would take his estate by the rules of law if he had died intestate, to whom a remainder or executory interest is given by the will, is to be ascertained at the death of the testator. One of the reasons adduced in support of this rule of construction is that it gives the words of description their natural and *prima facie* meaning. A reason more frequently brought forward is the preference of the law for a construction which will vest an estate at the earliest opportunity." Supplementing annotations are found in 127 A.L.R. 602; 169 A.L.R. 207. *Accord,*

57 Am. Jur., Wills § 1279 (1948). This is not, however, "a rule of substantive law which the courts are imperatively required to follow, but is a rule of interpretation adopted as tending to ascertain correctly the intent of the testator, and may be departed from where a different meaning is disclosed from a proper perusal of the entire instrument." *Jenkins v. Lambeth, supra* at 469, 90 S.E. at 514.

If the remainder here be held to have vested at the death of testator, only the issue of Phedelia S. O'Kelly, Lula S. Campbell, and Ida S. Beavers, the three sisters of testator who were living at his death, will take. If it be held to vest at the death of the life beneficiary, testator's nieces and nephews living on that day will answer the roll call as his nearest of kin.

The nieces and nephews who are children of Meroe S. O'Kelly and John H. Shepherd, Sr. contend that the will of W. T. Shepherd, read in the light of the circumstances attendant upon its execution, manifests an intent contrary to the general rule and that testator's next of kin should be determined as of the death of the life beneficiaries for that (1) the trustee had the power, during the life of Thomas L. Shepherd, either to invade the principal or to turn it all over to him free of the trust; and (2) the trustee was directed, at the death of Thomas L. Shepherd, to pay and deliver over the corpus as then constituted to testator's next of kin.

(1) "(A) remainder is not made contingent by uncertainty as to the amount of the estate remaining undisposed of at the expiration of the life estate *but by uncertainty as to the persons who are to take.*" (Italics ours.) 33 Am. Jur., Life Estates, Remainders, and Reversions § 87 (1941).

> "(T)he fact that a remainder is vested does not imply any certainty as to the quantity and value of the remainderman's interest, since a remainder may be vested, although the amount of the estate remaining undisposed of at the expiration of the particular estate is uncertain, as where the first taker is given a power of appointment or disposition, with remainder limited over in default of the exercise of such power." 31 C.J.S., Estates § 69 (1964).

In *Woodman v. Woodman,* 89 Me. 128, 35 Atl. 1037, the testatrix conveyed her estate to trustees during the lives of her husband and daughters and that of the survivor, with power of sale should their support require it. She devised the remainder, upon the termination of the trust, to named beneficiaries. In holding that these persons took a vested remainder, the court said: "We think that, according to principle and the weight of authority, a remainder is not made contingent by an uncertainty as to the amount of the property that may remain un-

disposed of at the expiration of the particular estate, the life tenant having the power of disposal." *Id.* at 136, 35 Atl. at 1040. *Accord, Johnson v. Superior Court,* 68 Ariz. 68, 199 P. at 2d 827; *Gilmore v. Gilmore,* 197 Ga. 303, 29 S.E. 2d 74; *President & Fellows of Harvard College v. Balch,* 171 Ill. 275, 49 N.E. 543; *Ducker v. Burnham,* 146 Ill. 9, 34 N.E. 558, 37 Am. St. Rep. 135; *Railsback v. Lovejoy,* 116 Ill. 442, 6 N.E. 504; *Pointer v. Lucas,* 131 Ind. App. 10, 169 N.E. 2d 196; *Heilman v. Heilman,* 129 Ind. 59, 28 N.E. 310; *Ghormley v. Kleeden,* 155 Kan. 319, 124 P. 2d 467; *Abbot v. Danforth,* 135 Me. 172, 192 Atl. 544; *Roberts v. Roberts,* 102 Md. 131, 62 Atl. 161, 1 L.R.A. (N.S.) 782; *Robertson v. Robertson,* 313 Mass. 520, 48 N.E. 2d 29; *Ashbaugh v. Wright,* 152 Minn. 57, 188 N.W. 157; *Uphaus v. Uphaus,* Mo., 315 S.W. 2d 801; *Cruikshank v. Cruikshank,* 39 Misc. Rep. 401, 80 N.Y.S. 8; *Mitchell v. Knapp,* 54 Hun. 502, 8 N.Y.S. 40, *aff'd* 124 N.Y. 654, 27 N.E. 413; *Medlin v. Medlin,* Tex. Civ. App., 203 S.W. 2d 635; *Reilly v. Huff,* Tex. Civ. App., 335 S.W. 2d 275; *In re Ivy's Estate,* 4 Wash. 2d 1, 101 P. 2d 1074; *In re Downs' Estate,* 243 Wis. 303, 9 N.W. 2d 822. "The corpus of the estate might be diminished, but the right to the balance remained unaffected." *Abbott v. Danforth, supra* at 176, 192 Atl. at 546. The life tenant's power of sale "could only be considered as a circumstance bearing upon the intent of the testator; for it is not the uncertainty as to the quantum or condition of the estate, but uncertainty as to the persons to take, that would render the estate contingent." *Heilman v. Heilman, supra* at 65, 28 N.E. at 312. In *President & Fellows of Harvard College v. Balch, supra,* where the particular estate was given in trust for a life beneficiary, it was held that a power to invade the corpus during the existence of the life estate had nothing to do with the vesting of the remainder, but that the estate vested subject to the power. *"If the power is so exercised as to dispose of all the estate, nothing may be left to go to the remainderman.* But the remainder is not made contingent because it is uncertain whether the power will be exercised." *Id.* at 282, 49 N.E. at 545. (Italics ours.) "The uncertainty as to the amount does not prevent the vesting of the right. * * * The intervening trust will not prevent this result." *Mitchell v. Knapp, supra* at 505, 8 N.Y.S. at 42. *Accord, Gilmore v. Gilmore, supra; President & Fellows of Harvard College v. Balch, supra; Roberts v. Roberts, supra; Cruikshank v. Cruikshank, supra; In re Ivey's Estate, supra.*

The rule stated above is the rule in North Carolina. In *Jackson v. Langley,* 234 N.C. 243, 246, 66 S.E. 2d 899, 901, this Court, speaking through Denny, J. (now C. J.), said:

> "(T)he mere fact that John Alfred Langley, Sr., the trustee, was given the right to use the income from or corpus of the trust

estate for his own benefit in the event certain enumerated emergencies arose, did not in any way affect or delay the vesting of the estate in John Alfred Langley, Jr., to any greater extent than if the trustee had been given a life estate with the power to use the corpus, or any part thereof for his own use. The overwhelming weight of authority, including our own decisions, supports the view that in such cases the estate vests in the ultimate beneficiary upon the death of the testator, subject to be divested of such portion thereof as may be required to meet the authorized needs of the life tenant or other designated person."

In *Rudisill v. Hoyle,* 254 N.C. 33, 118 S.E. 2d 145, the testator devised his residuary estate, both real and personal, to his wife for life, with power to sell any part of the property which, in her sole discretion, was necessary for her support and maintenance, with limitation over to *R* and *K* of all property "remaining unused or unconsumed or converted into other property" at the time of her death. In an opinion by Moore, J., who distinguished those devises which limit the gift to a life estate and those which attempt to make a gift over after a devise in fee, the Court held that the wife took a life estate with power of disposition in fee for the purposes stated in the will and that *R* and *K* took "a vested remainder in equal shares and in fee 'in and to all . . . property . . . remaining unused or unconsumed or converted into other property at the time or her (the wife's) death.'" *Id.* at 45, 118 S.E. 2d at 154.

(2) The canon of construction known as the "divide and pay over rule," *i.e.,* that, where the only words of gift are found in the direction to divide and pay over at a future time, futurity is annexed to the substance of the gift and it is contingent, does not apply "where the division is postponed for the convenience of the fund or property, as for the purpose of letting in a prior gift for life to another. In such a case the estate will be vested, and not contingent, and the vesting will not be deferred until the division." *President & Fellows of Harvard College v. Balch, supra* at 282, 49 N.E. at 545; *accord,* 39 Am. Jur., Life Estates, Remainders, and Reversions § 112-114 (1941). In *Witty v. Witty, supra,* the testator was survived by his wife and five children. He devised his land to his wife for life and at her death or remarriage he directed that the land be sold and "divided among my lawful heirs." At the death of the wife all five children were dead. None left children. The only one who married was the last to die, and his wife survived him. The Court held that the testator's lawful heirs were determined as of the date of his death; that they were his five children; that the title to the whole of the lands vested in the last surviving child and

passed to his wife and his adopted son as his devisees. The Court said, *per* Stacy, J. (later C. J.):

> "Again, the fact that the direction is to sell the realty at the expiration of the preceding particular estate and to divide the proceeds derived therefrom ordinarily will not affect the general rule as to when the remainder is to vest. * * * It is provided that the remainder after the life estate is to be divided equally among 'my lawful heirs' *simpliciter,* and this imports a division among those who were the heirs of the testator at his death, and who took in right at that time, though they were not to come into actual possession and enjoyment until the previous benefit, intended for their mother, should terminate by her death." *Id.* at 379, 381, 114 S.E. at 485, 486.

In *Satterfield v. Stewart,* 212 N.C. 743, 745, 194 S.E. 459, 461, it was said:

> "The provision that the land should be sold after the death of the life tenant and upon the death or marriage of the three daughters, and the proceeds divided equally among said daughters, their heirs and assigns, cannot be held to delay the vesting of the title in said daughters. *Witty v. Witty, supra.*" *Accord, Coddington v. Stone,* 217 N.C. 714, 9 S.E. 2d 420.

Where, however, apart from the words *divide and pay over* themselves, the will clearly used "words of futurity" indicating the testator's intent that only those should take who answer the roll call at the termination of the particular estate, the devise will be contingent. See *Parker v. Parker,* 252 N.C. 399, 113 S.E. 2d 899; *Carter v. Kempton,* 233 N.C. 1, 62 S.E. 2d 713; *Knox v. Knox, supra.*

Without more, neither the power of the trustee to divest the remaindermen of any share in the corpus nor testator's direction to divide and pay over the remainder to a class after the death of the life tenant will create a contingent remainder. There is, however, a third consideration, which is not discussed in the briefs. Thomas L. Shepherd, the life tenant, was testator's only son. At the time of testator's death he was, therefore, the sole member of the class, *i. e.*, "my next of kin," to which the remainder at his death was given. In this situation the courts divide as to whether the members of the class taking the remainder are to be ascertained at the death of the testator or of the life tenant.

> "Some of the cases appear to have taken the view that, where the person taking the particular estate is, at testator's death, the sole member of the class to whom the limitation over is made, it is a necessary inference that the gift over shall vest in the persons

> answering the description at the termination of the particular estate. But the great weight of authority is to the effect that the fact that, at the time of the making of the will, the person to whom a particular estate is given will presumably be, at the testator's death, the sole member of the class to whom the same property is limited, is not of itself sufficient to overcome the presumption that the membership of the class is to be ascertained at testator's death." Annot., Time as of which members of class described as testator's 'heirs,' 'next of kin,' 'relations,' etc., to whom a future gift is made, are to be ascertained, 49 A.L.R. 174, 182, supplemented in 127 A.L.R. 602, 607; 169 A.L.R. 207, 210.

The question frequently arises in a contest between the devisee of a precedent estate and the next of kin of the testator. To some courts it does not seem incongruous "that a person who takes a life interest by virtue of a particular gift to him nominatim should also take a further interest, either alone or jointly with others, as the case may be, under a gift in the same will to a class. * * * On the other hand, it has been held that where the life tenant is the sole heir or next of kin at the death of the testator, the remainder will be considered as given to the person answering the description at the termination of the estate for life, and since the persons who may at that time be entitled to take the estate are uncertain, the remainder is contingent. The true rule seems to be that the fact that the life tenant is also among the members or is the sole member of the class is not determinative of the question whether the remainder is vested or contingent, but is but one circumstance to be considered in determining the nature of the remainder and the time when the members of the class are to be determined." 33 Am. Jur., Life Estates, Remainders, and Reversions § 139 (1941); see Annot., Right of devisee of precedent estate to take under limitation over to heirs or next of kin of testator, 30 A.L.R. 2d 393, 416, 424.

We have found no North Carolina case right in point, and none has been cited. In *Grantham v. Jinnette,* 177 N.C. 229, 98 S.E. 724, the testator, an illegitimate, devised all his property to his wife for life and directed that at her death it be sold and divided among his "legal heirs." In a contest between the widow's heirs and the University, her heirs claimed that the widow was both life tenant and remainderman. "The University contended that the widow could not be a life tenant and heir; that the statute makes a widow heir only when the property is not disposed of by will; that this testator did dispose of his property by will, and the widow was not therefore his heir; and that therefore, the testator, as to the remainder in fee, was without heirs. The Court held this to be correct, and that the fee escheated to the University. There was no question before the Court as to whether the re-

mainders were vested or contingent." (This interpretation of *Grantham v. Jinnette, supra,* was made by Stacy, J. (later C. J.), in *Witty v. Witty, supra* at 382, 114 S.E. at 486). In *Grantham v. Jinnette, supra* at 233, 98 S.E. at 726, we find this dictum: "The fact that at the time of the making of the will the person to whom a particular estate was given will presumably be at the testator's death, the sole member of the class to whom the same property is limited, and the use of terms importing plurality in the membership of the class and requiring a *division* among them, while not conclusive of an intent to postpone the ascertaining of the membership of the class, are other indications of such an intention properly to be taken into consideration."

Where the life tenant is the sole member of the class to which the remainder is given, the courts, in ascertaining the testator's intent, have held: (1) the will created a vested remainder subject to the life estate but excluding the life tenant, *Close v. Benham,* 97 Conn. 102, 115 Atl. 626; *Abbott v. Danforth, supra; In re Carter's Will, supra;* (2) the will created a vested remainder, the remaindermen being determined at the testator's death, with no exclusion of the life tenant, and the mere circumstance that the devisee of the precedent estate is the sole heir is not sufficient to show that the testator intended heirs or next of kin to be ascertained at any time other than his death, *Weil v. Converse,* 273 Ala. 495, 142 So. 2d 345; *Clardy v. Clardy,* 122 S.C. 451, 115 S.E. 603; (3) the will created a contingent remainder in those who answered the roll call at the death of the life tenant, *Boston Safe Deposit & Trust Co. v. Waite,* 278 Mass. 244, 179 N.E. 624; *Heard v. Read,* 169 Mass. 216, 47 N.E. 778; *Irvine v. Ross,* 339 Mo. 692, 98 S.W. 2d 763; *Oleson v. Somogyi,* 90 N.J. Eq. 342, 107 Atl. 798; *Boyd v. Fanelli,* 199 Va. 357, 99 S.E. 2d 619, and where the life tenant is the beneficiary of a spend-thrift trust, the implication is clear that the testator did not intend the life tenant to have an interest in the remainder which would then be liable for his debts, *Boston Safe Deposit & Trust Co. v. Waite, supra.* For more extensive citations see Annot., Right of devisee of precedent estate to take under limitation over to heirs or next of kin of testator, 30 A.L.R. 2d 393, 416, 424.

In this case the devisee of Thomas L. Shepherd refrains from making the futile argument that he is entitled to the corpus of the Thomas L. Shepherd Fund. As we have heretofore indicated, it seems quite clear that testator intended to exclude his son, the life tenant, from the class of his next of kin, and that the son took no interest in the remainder. Of course, the trustee, at any time prior to his death, could have exercised its power to give him the corpus, but this it never did. That possibility, therefore, does not bear upon the question confronting us. Strictly speaking, since the son, the only member of the class of testator's next

of kin, was excluded from the remainder, as long as he lived there was no one who could qualify as testator's next of kin. The son and Annie Moore Shepherd, the supposed granddaughter, both being excluded from that classification, testator's three surviving sisters were his next closest kin, but we have already decided that the phrase my *next of kin* here means "my nearest of kin." It does not mean "my next nearest of kin," an offbeat meaning. Therefore, testator's next of kin could not be ascertained until the son's death, and the remainder is contingent. Where the remainder is limited to a testator's next of kin, *i. e.*, his nearest of kin, and where the life tenant is himself the sole nearest of kin, it seems to us impossible to determine the takers of the remainder during the life tenancy, if the life tenant is himself to be excluded.

An additional consideration fortifies, we think, this conclusion. Testator's three sisters living at his death were related to him in the second degree. Had the remainder vested in them at testator's death, it would have opened to let in any children born thereafter to the life tenant, *Parker v. Parker, supra; Fleetwood v. Fleetwood,* 17 N.C. 222; but, as grandchildren are also related to a grandparent in the second degree, testator's afterborn grandchildren would have shared in his estate with his surviving sisters. Such a result would be possible only under a will giving property to the class "my next of kin" in the usual acceptation of that phrase, since, under the statute of distributions, collaterals are excluded if there are any lineals. In this case, it was much more likely that the life tenant would have children than that testator's sisters should survive the life tenant. The possibility that collaterals in the second degree would share with second-degree lineals strongly suggests that testator did not intend the remainder to vest until the death of his son. It is not likely that he should want his unnamed grandchildren, if any, to share equally with the estates of his sisters who survived him. He designated no takers by name; he simply resorted to a class designation, and all members of the class would be of the same degree of kinship to him if the roll is called at the death of the life tenant. In form and phraseology the devise under consideration here is indistinguishable from that in *Witty v. Witty, supra,* and, but for the fact that the life tenant here was the sole representative of the class, testator's next of kin, this case would in fact be indistinguishable from *Witty v. Witty, supra.* This fact, however, makes the difference between the vested remainder in *Witty* and the contingent remainder here. In *Jones v. Oliver, supra,* testator devised property to his wife for life, remainder to her children, and, if none, to be equally divided among his and his wife's next of kin. The wife died without issue, and the question arose "at what period is the next of kin to be looked for?" Daniel, J., speaking for this Court, said:

"(H)ere we see nothing, in the language of the will or in the circumstances of the parties to lead us to suppose that the testator meant to exclude any of the persons, who were next of kin of himself or of his wife at his death, in favor of persons, who might happen to answer the description at the death of his wife without having issue. *If the wife had been one of the next of kin, herself, as it is clear the testator intended she should have but a life estate, the argument would be strong that the next of kin at her death were in the testator's contemplation." Id.* at 373. (Italics ours.)

We hold that the will of W. T. Shepherd manifests an intent that his next of kin be ascertained at the death of Thomas L. Shepherd. Those who answered the roll call on that date were his nieces and nephews: Elizabeth O'K. Bass, Gaynelle O'K. Bunting, Thelma C. Hall, Theodore Campbell, Sallie Beavers, Ella Mae B. Belvin, Elsie B. Weeks, Naomi S. Tillett, and John H. Shepherd, Jr.

The case is remanded for judgment in accordance with this opinion.

Error and remanded.

PARKER, J., took no part in the consideration or decision of this case.

CAROL HARRISON v. RICHARD DIX HANVEY.

(Filed 27 August, 1965.)

1. Process § 9—

In order to sustain service of process by publication plaintiff must show that the case is one in which service by publication is authorized by statute and that the service by publication has been made in accordance with statutory requirements.

2. Same—

Service of process by publication is in derogation of the common law and statutes authorizing such service are to be strictly construed, both in regard to grant of authority and in regard to the mechanics of such service.

3. Same; Constitutional Law § 24—

A resident of the State who has departed with intent to defraud his creditors or to avoid service of process, or a resident who keeps himself concealed in the State with like intent, is amenable to service of process by publication under G.S. 1-98.2(6).

4. Same—

An affidavit that a resident of the State has departed the State, without averment that the departure was with the intent to defraud creditors or

avoid service of process, is insufficient basis for an order of service of process upon such resident by publication, such intent being equally required for service by publication on a departing resident as on a resident who conceals himself within the State. G.S. 1-98.2(6).

5. Same—

Even though averment that defendant was concealing himself in the State with intent to defraud his creditors or to avoid service of process may be sufficient to support an order for service by publication, the court upon special appearance and motion to set aside such service must hear evidence and find the facts.

6. Same— Evidence held insufficient to show intent to defraud creditors or to avoid service so as to support service under G.S. 1-98.2(6).

This action was instituted to recover for personal injuries sustained by plaintiff in an automobile accident. Plaintiff's evidence tended to show that defendant could not be found in the county of his residence, that his mother and mother-in-law had not seen him for twelve months or more, that he had left his rooming house without forwarding address, etc., but there was no evidence that defendant knew that the action would be or had been instituted. *Held:* The evidence is insufficient to show that defendant had departed the State with intent to defraud his creditors or to avoid the service of process, or that he was concealing himself herein with like intent, and motion entered by defendant's insurer to quash service by publication on the defendant should be allowed.

7. Process § 9—

Affidavit for service of process by publication under G.S. 1-98.4 must show the name and residence of the person to be served or, if they are unknown, that diligent search and inquiry had been made to discover such residence and, even if unknown, they must be set forth with as much particularity as is known to the applicant, and the fact that defendant could not be found at his last residence does not eliminate this requirement, since the clerk is required to mail a copy of the notice to such address and such notice might be forwarded to defendant notwithstanding his absence from his last known residence.

8. Same—

Application for service of process by publication must advise defendant not only as to the time limit for making his defense but also that upon his failure to appear plaintiff would apply to the court for the relief sought.

9. Same; Constitutional Law § 24—

The purpose of publication is to give notice, and publication of notice of service must be in a newspaper most likely to give notice to defendant notwithstanding the omission of such requirement in the statute, G.S. 1-99(1), since due process so requires.

APPEAL by defendant from *McConnell, J.*, November-December 1964 Civil Session of IREDELL.

This action for damages for personal injuries was first instituted by the issuance of summons and the filing of a complaint on May 4, 1961.

The summons directed the Sheriff of Mecklenburg County to summon "Richard Dix Hanby, 1705 South Boulevard, Charlotte, N. C." The complaint alleges that plaintiff, a resident of New York, was, while a passenger in the automobile of Richard Dix Hanby, a resident of North Carolina, injured by his negligence (specified) on July 17, 1960, in Iredell County.

On May 10, 1961, the Sheriff of Mecklenburg County returned the summons endorsed "after due and diligent search Richard Dix Hanby not to be found in Mecklenburg County." An alias summons was issued to Mecklenburg County on July 31, 1961, and returned on August 14, 1961, similarly endorsed. On July 15, 1963, plaintiff amended her complaint by changing the spelling of defendant's name from "Hanby" to "Hanvey." The following day, July 16, 1963, summons was issued for Hanvey and forwarded with the following notation: "Richard Dix Hanvey has lived at 1705 South Boulevard, Charlotte; 2430 North Brevard, Charlotte, and 1029 Louise Ave., Charlotte." This summons was returned July 26, 1963, unserved. Thereafter summonses were issued on October 2, 1963; December 10, 1963; March 6, 1964; June 2, 1964; August 25, 1964; and November 24, 1964. Each was returned unserved with the notation that after due and diligent search Richard Dix Hanvey was not to be found in Mecklenburg County.

On July 15, 1963, the day the complaint was amended, W. R. Battley, attorney for plaintiff, made an affidavit in which he averred, *inter alia:*

> "That after due and diligent search, the defendant, Richard Dix Hanvey, cannot be found within the State of North Carolina and service of process cannot be had on the defendant within the State of North Carolina.
>
> "That the plaintiff has a valid cause of action against the defendant for personal injuries received arising out of an automobile accident caused by the negligence of the defendant.
>
> "That the defendant at the time of the automobile accident on the 17th day of June, 1960 *(sic)* was a resident of this state but has departed the state, or keeps himself concealed in this state to avoid service of summons."

Upon this affidavit, on the same day, the Clerk of the Superior Court of Iredell County ordered: "that service of process in the above entitled action upon Richard Dix Hanvey be made by publication in the Statesville Record and Landmark, a newspaper published in Statesville, Iredell County, North Carolina, once a week for four (4) successive weeks, of the Notice issued by the undersigned as provided by General Statutes 1-99.2."

Pursuant to this order the following notice was published on July 16, 23, 30, and August 6, 1963:

"To: RICHARD DIX HANVEY.

"Take Notice that a verified complaint seeking relief against you has been filed in the above entitled action.

"The nature of the relief sought is as follows: The plaintiff seeks damages for personal injuries received in an automobile accident caused by the negligence of the defendant.

"You are required to make defense to such pleading not later than the 2nd day of September, 1963."

At the time of the accident complained of defendant's automobile was covered by a policy of liability insurance issued by Grain Dealers Mutual Insurance Company (Insurer), affording coverage of $5,000.00. On December 10, 1963, plaintiff's counsel forwarded a copy of the complaint to Insurer, to advise it that it had 30 days from December 12, 1963, in which to answer or otherwise plead. Upon receipt of this letter Insurer referred the matter to the firm of Smith, Moore, Smith, Schell & Hunter, Attorneys, who immediately sought to locate defendant through the adjusting firm which handled the investigation of the accident in 1960. It reported to counsel that neither defendant's mother nor his mother-in-law had seen defendant in a year; that defendant had not gotten in touch with the adjusting firm, with Insurer, or with counsel; and that "his whereabouts are unknown." This information is contained in an affidavit dated December 2, 1964, by Richmond G. Bernhardt, Jr., Attorney, of counsel for Insurer.

On January 6, 1964, counsel for Insurer, pursuant to its right and obligation to control and defend the litigation against its insured, entered a special appearance and moved the court "to order the purported service of process on this defendant by publication be quashed, that the order for service of process by publication be set aside, and that the action be dismissed for want of jurisdiction over this defendant" for that: (1) no personal service of process has been made on defendant and no property attached; (2) G.S. 1-98.2(6), which purports "to establish in personam jurisdiction in cases of this kind," is unconstitutional as a violation of due process; (3) there has been no hearing to determine judicially that defendant has departed the state, and service of process upon him based solely upon the affidavit of counsel deprives him of due process of law; (4) plaintiff has failed to comply with G.S. 1-98.4(1); (5) the form of notice failed to comply with G.S. 1-99.3, in that it did not warn defendant that upon his failure to make defense plaintiff would apply to the court for the relief sought;

(6) the clerk failed to mail a notice of the service of process to defendant as required by G.S. 1-99.2; (7) the newspaper in which the notice was published in Iredell County was not calculated to give defendant, a one-time resident of Mecklenburg County, notice of the pending action, and, therefore, deprived him of due process.

When the matter was heard on December 3, 1964, counsel for plaintiff filed an additional affidavit, wherein he recited the unsuccessful efforts of the sheriff to locate defendant in Charlotte and his own efforts to locate him through the Department of Motor Vehicles, which informed him that when defendant's driver's license expired September 9, 1963, it was not renewed. Judge McConnell entered an order in which he held that plaintiff had met the statutory provisions relating to service by publication and that the service of summons in this case was valid. He also overruled defendant's challenges to the constitutionality of G.S. 1-98.2(6). Defendant excepted and appealed.

Battley & Frank by W. R. Battley for plaintiff appellee.
Smith, Moore, Smith, Schell & Hunter by Richmond G. Bernhardt, Jr., for defendant appellant.

SHARP, J. To sustain service upon defendant by publication, plaintiff must show: (1) that the case is one in which service by publication is authorized by statute; and (2) that the questioned service has been made in accordance with statutory requirements. Counsel for defendant denies that defendant is a member of the class defined by G.S. 1-98.2(6), the statute under which plaintiff proceeds. He asserts that, even if defendant were a member of that class, a personal judgment against him based on constructive service would violate due process. He further contends that, in any event, plaintiff has not fulfilled the statutory requirements for service by publication.

Service of process by publication is in derogation of the common law. Statutes authorizing it, therefore, are strictly construed, both as grants of authority and in determining whether service has been made in conformity with the statute. *Jones v. Jones,* 243 N.C. 557, 91 S.E. 2d 562; *Nash County v. Allen,* 241 N.C. 543, 85 S.E. 2d 921; *Comrs. of Roxboro v. Bumpass,* 233 N.C. 190, 63 S.E. 2d 144.

This action is neither *in rem* nor *quasi in rem* (see *Bernhardt v. Brown,* 118 N.C. 700, 705, 24 S.E. 527, 528); it is an action *in personam* for a money judgment against a defendant who was a resident of the state at the time the cause of action arose. Plaintiff has not attempted to serve defendant under G.S. 1-105.1. She has attempted service under G.S. 1-98.2(6), which authorizes publication "where the defendant, a resident of this state, has departed therefrom or keeps himself concealed

therein *with intent to defraud his creditors or to avoid the service of summons.*" (Italics ours.) Plaintiff's counsel takes the position that the italicized prepositional phrase applies only to the second predicate, and that service by publication is authorized upon his affidavit that defendant, a resident of North Carolina, "has departed the state, or keeps himself concealed in this state to avoid service of the summons"; that he cannot, after due and diligent search, be found in North Carolina; and that service of process cannot be had upon him within the state.

Before we can pass upon the sufficiency of plaintiff's affidavit, to bring defendant within the class of persons defined by G.S. 1-98.2(6), we must determine the meaning of the statute. Since no comma separates the two predicates in G.S. 1-98.2(6), it is our view, and we hold, that the intent to defraud creditors or to avoid the service of summons must be shown both as to departure and as to concealment. This interpretation is, in effect, the wording of G.S. 1-440.3(4), the statute which specifies the grounds for attachment. It was likewise thus spelled out in the Code of 1883, § 218(2) (C.C.P., § 83), which authorized service by publication "where the defendant, being a resident of this state, has departed therefrom, with intent to defraud his creditors or to avoid the service of summons, or keeps himself concealed therein *with like intent.*" (Italics ours.) The italicized words were eliminated from the Code of 1883, § 218(2), by P. L. of 1895, ch. 334. Minus these words § 484(2) of the Consolidated Statutes of 1919 was identical with the Code of 1883, § 218(2), and its identical language was carried forward in G.S. 1-98(2). Sess. Laws 1953, ch. 919, rewrote the statute relating to service by publication, but G.S. 1-98.2(6) is in the wording of G.S. 1-98(2). See 31 N.C.L. Rev. 391.

In *Church v. Miller,* 260 N.C. 331, 132 S.E. 2d 688, the plaintiff sought to obtain service of process upon the individual defendant by publication. The affidavit alleged that "after due and diligent search, said defendant, although a resident of North Carolina, cannot be found in this state and personal service cannot be made upon him in this state." The complaint, however, alleged that defendant was not a resident of North Carolina. Although basing our decision on the proposition that G.S. 1-98.2(6) does not authorize service of process by publication on a nonresident, the Court noted, *per* Denny, C.J., that "there is no allegation in the affidavit or in plaintiff's complaint, alleging that the defendant left the state with the intent to defraud his creditors or to avoid service of process." *Id.* at 334, 132 S.E. 2d at 690. If a defendant is, in fact, a resident of North Carolina who has departed the state with intent to defraud his creditors or to avoid service of process or who keeps himself concealed in the State with like intent, he is

amenable to service by publication if it is made in conformity with the statutory requirements.

> "(T)he authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state. The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties. * * * The responsibilities of that citizenship arise out of the relationship to the state which domicile creates. That relationship is not dissolved by mere absence from the state. The attendant duties, like the rights and privileges incident to domicile, are not dependent on continuous presence in the state. One such incidence of domicile is amenability to suit within the state even during sojourns without the state, where the state has provided and employed a reasonable method for apprising such an absent party of the proceedings against him." *Milliken v. Meyer,* 311 U.S. 457, 463, 85 L. Ed. 278, 283, 61 S. Ct. 339, 343, 132 A.L.R. 1357, 1361; *accord, Allen v. Superior Court,* 41 Calif. 2d 306, 259 P. 2d 905; 42 Am. Jur., Process §§ 67, 70 (1942); Restatement, Conflict of Laws §§ 47, 75 (1934).

The great majority of cases which have considered the question have not applied to *residents* the doctrine of *Pennoyer v. Neff,* 95 U.S. 714, 24 L. Ed. 565, that a judgment *in personam* rendered in a state court against a nonresident upon constructive service cannot be enforced even in the state where it was rendered. They "have sustained the validity of a personal judgment recovered against a resident or a domestic corporation upon substituted or constructive service of process where he or it could not be personally served within the state, and the constitutionality of statutes authorizing such service has pretty generally been sustained so far as residents are concerned." 126 A.L.R. 1475. A number of cases, however, reach a contrary conclusion. The character of the service usually plays a determinative role in a decision whether the service will be sustained. For a full discussion and collection of cases see Annot., Substituted service, service by publication, or service out of the state, in action in personam against resident or domestic corporation, as contrary to due process of law, 126 A.L.R. 1474, supplemented in 132 A.L.R. 1361.

The meanings attached to the terms *personal, constructive,* and *substituted* service are so varied that individual statutes must be examined. In general, however, *personal service* means actual service of process upon defendant personally, wherever accomplished; *constructive service,* service by newspaper publication; *substituted service,* service upon

some member of defendant's family at his usual place of abode or upon a statutory agent. *Service by mail* is self-explanatory. Comment, Personal Jurisdiction over Absent Natural Persons, 44 Calif. L. Rev. 737. Personal service on a resident outside the state or substituted service at his place of abode is much more likely to be sustained than is constructive service, which, of all the methods, is the least likely to give notice. As Mr. Justice Jackson pointed out in *Mullane v. Central Hanover B. & T. Co.,* 339 U.S. 306, 315, 94 L. Ed. 865, 874, 70 S. Ct. 652, 658:

> "It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed."

In *Milliken v. Meyer, supra,* the personal judgment of a Wyoming court was upheld against a resident who had been *personally served* in Colorado pursuant to the Wyoming statutes which provided:

> "Personal service out of state. In all cases where service may be made by publication under the provisions of this chapter, personal service of a copy of the summons and the petition in said action may be made out of the state. . . ." Wyo. Comp. Stat. 1920, § 5641.
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> "Service by publication may be had in either of the following cases: . . . 6. In actions where the defendant, being a resident of this state, has departed from the county of his residence with the intent to delay or defraud his creditors, or to avoid the service of a summons, or keeps himself concealed with like intent." Wyo. Comp. Stat. 1920, § 5636.

In *McDonald v. Mabee,* 243 U.S. 90, 61 L. Ed. 608, 37 S. Ct. 343, L.R.A. 1917F 458, after an action on a note was instituted against the defendant in Texas, he left to establish a home elsewhere, his family remaining there in the meanwhile. The defendant subsequently returned to Texas for a short time and then established his domicile in Missouri. The only service upon him was by publication in a newspaper once a week for four weeks after his final departure. The court held the judgment based upon such service void, but, speaking through Mr. Justice Holmes, said:

"Perhaps in view of his technical position and the actual presence of his family in the state, a summons left at his last and usual place of abode would have been enough. But it appears to us that an advertisement in a local newspaper is not sufficient notice to bind a person who has left a state, intending not to return. To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done." *Id.* at 92, 61 L. Ed. at 610, 37 S. Ct. at 344, L.R.A. 1917F at 459.

Personal service, either within or without the state, undoubtedly affords the defendant the greatest degree of protection, for it gives him actual notice. The defendant who leaves the state temporarily and in good faith and is amenable, with reasonable effort, to personal service while absent, may well argue that he is entitled to it. But a defendant who leaves the state with the intent to defraud his creditors or to avoid the service of process does not merit similar solicitude. 42 Am. Jur., Process § 72 (1942); 72 C.J.S., Process § 56b (1951). See Comment, Personal Jurisdiction over Absent Natural Persons, 44 Calif. L. Rev. 737, 741. If he conceals his whereabouts well enough, he renders personal service impossible either within or without the state. If a defendant has fraudulently fled the state or successfully keeps himself concealed therein, a plaintiff with a good cause of action may be greatly disadvantaged and the defendant will profit from his fraud unless the plaintiff can serve him with process by publication. Of necessity, often no better notice can be given. No citizen and resident of a state should be allowed, by flight, temporary absence, or concealment, to escape his legal obligations and thwart the efforts of the courts of his state to enforce the rights of others against him.

Skala v. Brockman, 109 Neb. 259, 190 N.W. 860, involved the validity of service by publication under a Nebraska statute which provided for service by publication "in all actions where the defendant, being a resident of the state, has departed therefrom, or from the county of his residence, with intent to delay or defraud his creditors or to avoid the service of a summons or keep himself concealed therein with like intent." The plaintiff sued defendant, his lessee, "for a chattel mortgage on crops." He alleged in his complaint and affidavit for publication that the defendant was a resident of Cuming County; that he had departed and *absconded* from the county with intent to delay and defraud the plaintiff in the collection of the debt sued on; that he was keeping himself concealed with like intent and with intent to avoid service of summons in said action; and that it was impossible to serve him with summons in the state. A copy of the summons was left at the defendant's

last known residence on the farm, and the plaintiff also served summons by publication. Two days after the completion of such service the defendant appeared specially and moved to dismiss the action for lack of jurisdiction of the court over his person. He averred that 5 days before the institution of the action he had moved to Indiana with the intention of abandoning his domicile in Nebraska and permanently residing there. Upon the hearing the lower court found the facts to be that the defendant had departed the county and state of his residence to hinder and delay his creditors and to avoid service of summons. It sustained *the service by publication,* but not the substituted service. Upon appeal, the Supreme Court of Nebraska held that, under the statute quoted above, an absconding resident might be served with summons by publication and that the plaintiff had fully complied with the statutory requirement for such service.

Definitions and discussions of absconding debtors are usually found in cases involving attachment statutes. Such definitions, however, are equally applicable here. We have found no better exposition than the one which appears in *Stafford v. Mills*, 57 N.J.L. 574, 578, 32 Atl. 7, 8:

> "An absconding debtor is one who, with intent to defeat or delay the demands of his creditors, conceals or withdraws himself from his usual place of residence beyond the reach of process. It is not necessary that he depart from the limits of the state in which he has resided. * * * But in this, as in many other matters, each case must depend upon its own peculiar distinctive facts and circumstances, and the intent can be drawn from the acts of the defendant. One is naturally held to have intended the results of his own acts. * * * In one case it (evading process) may be by concealment in his own house. It may consist in going from place to place so quickly as to evade meeting with service or process anywhere. There is a limit to the creditors' search for him, else he might never be served with process, and no attachment would ever be sustained. The creditor is bound to ascertain, if he can do so by all natural ordinary means at hand, his debtor's whereabouts, in order to serve him with process, but this obligation has its limits in reason and common sense. A debtor may, by a careful watch of the action of the creditors, or by information from others, elude his creditors for an indefinite time, and yet he might produce proof of having been seen in so many places that it would seem reasonable that service of process could be made. So it can be perceived that concealment, with intent to defeat or delay his creditors, has a relative significance. It must depend upon the facts of each case, and they must be such, and of such probative force and effect, that

the court can conclude that the debtor was eluding the service of process; that he intended to do it, and that his conduct or concealment was such as to lead his creditors to the natural belief that he absconds, and when this state of affairs exists the debtor becomes subject to the writ of attachment as an absconding debtor."

Counsel for defendant cites *Bernhardt v. Brown, supra,* in support of defendant's contention that a valid judgment may not be obtained against a defendant served under G.S. 1-98.2(6) without attachment of property. That case is not authoritative here. It involved the validity of three judgments in attachment obtained in the court of a justice of the peace against a domestic corporation whose officers could not be found in the state. The court held the judgments void because, although the Code of 1883, § 218(7) (the same as G.S. 1-98(8), repealed in 1953), permitted service by publication on officers of the corporation, the General Assembly had failed, *casus omissus,* to authorize attachment of the property of a domestic corporation in such instances. The case did not involve the Code of 1883, § 218(2), as there was no suggestion that the officers had absconded or concealed themselves to avoid service. Any reference, therefore, to the necessity of attachment when proceeding under § 218(2) was *dictum.*

We now come to the question whether the affidavit upon which the order of publication was secured and those affidavits considered by the judge upon the hearing are sufficient to support his conclusions that this is a case falling within the terms of G.S. 1-98.2(6); and that the statutory provisions relating to service by publication have been met. Plaintiff has not alleged that defendant has departed the state with intent to defraud his creditors. She has alleged that he has departed the state or, in the alternative, that he keeps himself concealed here to avoid his creditors. As heretofore pointed out, under G.S. 1-98.2(6), the mere departure of a resident from the state will not authorize *service by publication* in an action such as this. Plaintiff's right to service by publication must arise, therefore, if at all, on the alternative allegation that defendant keeps himself concealed herein to avoid service of process.

Although the weight of authority is to the contrary (see Annot., Sufficiency of affidavit as to due diligence in attempting to learn whereabouts of party to litigation, for the purpose of obtaining service by publication, 21 A.L.R. 2d 929), yet this Court held in *Brown v. Doby,* 242 N.C. 462, 87 S.E. 2d 921, that an averment in the words of the statute of the ultimate fact "that, after due diligence, personal service cannot be had within the state," was a sufficient compliance with statutory requirements without stating any of the probative, or evidentiary, facts. Assuming that the same rule would apply to an averment of ab-

sconding or concealment, the court must hear the evidence, find the facts, and determine the validity of the service, when a defendant, upon a motion to vacate an order for publication and to quash the service based upon it, questions the sufficiency of the affidavit or evidence upon which plaintiff proceeds or offers evidence contradicting it. *Brown v. Taylor*, 174 N.C. 423, 93 S.E. 982; *Cooper v. Wyman*, 122 N.C. 784, 29 S.E. 947; 72 C.J.S., Process § 112 (1951). The affidavits before Judge McConnell, taken as true, establish these facts: On July 17, 1960, defendant was a resident of Charlotte, North Carolina. On that day a cause of action for damages for personal injuries arose in plaintiff's favor against him in Iredell County. On May 4, 1961, approximately 10 months later, plaintiff brought this action in Iredell County. On May 10, 1961, and on August 14, 1961, the sheriff of Mecklenburg County reported that defendant could not, after diligent search, be found in Mecklenburg County. So far as the record discloses, he made no further effort to find defendant until July 26, 1963, almost two years later. Between then and November 24, 1964, he made six additional fruitless searches. Defendant has not renewed his North Carolina driver's license. When, at an undisclosed date, Insurer's adjusting firm sought information as to his whereabouts from his mother and his mother-in-law, one reported she had not seen him for 12 months, the other, for two years. The address on his driver's license was a rooming house in Charlotte, the operator of which told plaintiff's counsel (also at an undisclosed date) that defendant had departed, leaving no address, "about 6 months prior to the date affiant talked to her." Conceding, *arguendo*, that defendant's failure to renew his North Carolina driver's license and the failure of the sheriff to find him in Charlotte constitute evidence of his departure from the state, yet there is no averment that his purpose in departing was to defraud creditors or avoid service of process. Furthermore, unless the inability of counsel and the sheriff to locate defendant in Mecklenburg County be held evidence of absconding or concealment, there is no such evidence. Nothing in the affidavits suggests that defendant ever knew that plaintiff intended to sue him as a result of the accident on July 17, 1960. Compulsory liability insurance does not connote compulsory litigation. Plaintiff made no effort to find defendant for 10 months after the accident. There is no evidence that defendant owed any debts of any kind or that he was having domestic troubles. Adjusters reported no contact with his wife. We think this evidence is insufficient to establish that defendant keeps himself concealed in the state in order to avoid service of process.

Furthermore, plaintiff has not complied with the statutory requirements for service of process by publication. To secure an order for such

service, in his affidavit the applicant must state, *inter alia,* in addition to averring facts which show the action to be one of those specified in G.S. 1-98.2, the name and residence of the person to be served; or, if they are unknown, that diligent search and inquiry have been made to discover such name and residence; and that they are set forth as particularly as is known to the applicant. G.S. 1-98.4(b)(1). "The affidavit required to support an order for service of summons by publication is jurisdictional. The omission therefrom of any of the essential averments on which an order for substitute service is predicated is fatal." *Comrs. of Roxboro v. Bumpass, supra* at 193, 63 S.E. 2d at 146.

Notwithstanding that the officer's report of the accident out of which this action arose contained defendant's address as taken from his driver's license, and that thereafter plaintiff's attorney learned of two more addresses, the attorney's affidavit of July 15, 1963, upon which the order for service by publication was obtained, contains no reference to the residence of defendant. Although it alleges that after due and diligent search defendant cannot be found within the state and service of process cannot be had on him within the state, there is no averment in the words of the statute that diligent search and inquiry have been made to discover his residence and that it is set forth as particularly as is known to plaintiff. The supplemental affidavit made on December 3, 1964, which affidavit the judge considered in passing on a motion to dismiss, specifically avers that neither plaintiff's counsel nor the sheriff was able to find defendant at the address shown on his driver's license and that the sheriff did not find him at either of the other two addresses. The failure to find defendant at his last known address, however, does not eliminate the requirement that the applicant for an order allowing service by publication should set out the residence of defendant "as particularly as is known to the applicant." If no address is known, or has never been known, the applicant should so state. G.S. 1-99.2(c) requires the clerk of the court, within five days after the issuance of the order for service of process by publication, to mail a copy of the notice "to each party whose name and residence or place of business appear in the verified pleading or affidavit pursuant to the provisions of G. S. 1-98.4." After doing so he is required to make a certificate at the bottom of his order that the notice has been duly mailed. This requirement that the clerk of the superior court mail a notice to the party being served by publication at the best address the applicant can furnish — usually the last known address — is no formal gesture of deference to due process. As every practicing attorney and law-enforcement officer knows, there are among certain classes those persons who would feel an obligation to forward or deliver a letter to one being sought, but who

would feel obliged to give a lawyer or a deputy sheriff no information whatever as to the whereabouts of the one sought.

Failure of a party to receive a copy of the notice mailed as required by G.S. 1-99.2(c) does not invalidate the service of process by publication. A failure to mail the notice when an address is available, however, is a different matter. In *Jones v. Jones, supra,* the applicant failed to meet the requirements of G.S. 1-98.4(b)(1) and (2), and the record failed to show that the clerk of the superior court had mailed the copy of notice as required by G.S. 1-99.2(c). This Court held "the purported service of process by publication" to be fatally defective and the judgment entered on it void. See also *Harmon v. Harmon,* 245 N.C. 83, 95 S.E. 2d 355, wherein a judgment was vacated for failure of the clerk of the superior court to mail the notice.

We note other defects in plaintiff's attempt to perfect this service by publication. The published notice to defendant, had he read it, would have informed him that he was required to make defense not later than September 2, 1963. It omitted, however, to inform him of the penalty for failing to make defense. It did not include the following clause, which is contained in the form of notice prescribed by G.S. 1-99.3: "and upon your failure to do so the party seeking service against you will apply to the court for the relief sought." Had this been the only defect in the publication procedure, the absence of the clause might not have been fatal, but this defect is one of several.

Prior to its repeal in 1953, G.S. 1-99, in specifying the manner of publication, required the clerk of the superior court to direct the publication of the notice "in one or two newspapers to be designated as most likely to give notice to the person to be served." Since the enactment of Sess. Laws of 1953, ch. 919, § 1, codified, *inter alia,* as G.S. 1-99(1), the requirement has been that the clerk make an order for service of process by publication "in a designated newspaper, which newspaper must be one qualified for legal advertising pursuant to G.S. 1-597." Notwithstanding the omission of the statutory requirement that the notice be published in a newspaper most likely to give notice to the defendant, due process still requires it. In lieu of personal service, publication in the newspaper which is most likely to reach the defendant is the least that ought to be required. Plaintiff in this case is a resident of New York; defendant, at the time of the institution of the suit, was, according to the complaint, a resident of Mecklenburg County. Although the record is silent on the matter, presumably that county was also the residence of defendant's mother and of his mother-in-law. Nothing gives any inkling that a notice published in Iredell County, in the *Statesville Record and Landmark,* would ever come to defendant's at-

tention. Under the facts as they appear from the affidavits in this case the publication should have been made in Mecklenburg County. The dangers and abuses which could arise from the publication of process in newspapers in localities foreign to defendant are too apparent to require comment. The purpose of publication is to give notice to the party named in the notice. Publication in an obscure paper or one far removed from any location with which defendant has ever had any contact will not constitute service of summons by publication. See *Webber v. Curtiss,* 104 Ill. 309; *Briggs v. Briggs,* 135 Mass. 306. "The means employed must be such as one desirious of actually informing the absentee might reasonably adopt to accomplish it." *Mullane v. Central Hanover B. & T. Co., supra* at 315, 94 L. Ed. at 874, 70 S. Ct. at 657.

We hold that the purported service of process by publication in this proceeding is fatally defective for the reasons (1) that plaintiff has neither alleged nor shown that defendant, with intent to defraud his creditors or to avoid service of process, has departed this state, nor shown that he is concealing himself herein with like intent; and (2) that plaintiff has failed to satisfy the mechanics of the publication statutes. The order denying defendant's motion to quash the service upon him by publication is

Reversed.

MORPUL, INC. v. MAYO KNITTING MILL, INC.

(Filed 27 August, 1965.)

1. Patents § 1—

While only a Federal Court has jurisdiction of an action involving the construction of the patent laws, a State court has jurisdiction of an action to enforce the payment of royalties or license fees.

2. Patents § 2—

If the means or method used by the licensee of the patent would infringe the patent but for the license, such licensee is liable for the royalties specified in the licensing agreement.

3. Appeal and Error § 49—

Where the referee's findings, approved by the judge, are supported by the evidence, the only question presented on appeal is whether the facts found support the legal conclusions of the court below.

4. Patents § 2—

Where there is no essential conflict in the evidence and the case presents only whether the method or means used by the licensee was an application

of prior art or was covered by the patent, the licensee's liability for royalties may be determined as a question of law.

5. Pleadings § 28—

Plaintiff may recover only upon the case made out in his pleading.

6. Patents § 2—

Under the doctrine of equivalents, a person may not avoid liability for the use of a patent by merely varying the details of the patented method or by merely reversing the motion of the parts of a machine to accomplish the same purpose, but if the desired result is achieved by another and a non-equivalent method, no liability arises.

7. Same—

A patent must be construed with reference to the distinctive features of the prior art, and the prior art may diminish the extent of the patent, since the patent cannot be held to include the prior art.

8. Same—

Plaintiff's method for elongating the stitch in knitting the cuff of socks was by the patented method of modifying the machine by inserting an auxiliary stitch cam or other means or apparatus to lower the needles of the machine. Defendant obtained the same result of enlongating the stitch, without any modification of the machine, solely by adjusting the machine so as to raise the cylinder in the conventional way under the prior art. *Held:* The patent was not upon the product, and defendant was not liable for royalties under his license.

9. Costs § 3—

In a reference, the judge has discretion to apportion the costs. G.S. 6-21(6).

10. Reference § 8—

Where order affirming the report of the referee is treated by the parties as a judgment, the Supreme Court may do so in order to dispose of the appeal, but nevertheless the cause must be remanded for judgment in accordance with the report of the referee as amended by the court.

APPEAL by plaintiff from *McLaughlin, J.*, January 4, 1965 Civil Session of GUILFORD (Greensboro Division).

This appeal involves two actions in contract by an assignee-licensor against its licensee for royalties for the use of a patent.

Plaintiff is a North Carolina corporation engaged in the business of licensing certain patents and trademarks to the hosiery industry. Defendant is a North Carolina corporation engaged in the manufacture and sale of hosiery. On May 1, 1955, plaintiff and defendant entered into a written agreement whereby plaintiff gave to defendant a non-exclusive license to use U. S. Patents No. 2,420,771; 2,466,885; 2,473,-677, which it owned, as well as for the use of its trademark "Morpul." Defendant agreed, *inter alia:* (1) to pay plaintiff, on or before the

10th day of each month, 5¢ per dozen pairs of hosiery manufactured under the foregoing patents or bearing the legends: "This is MORPUL, the Action Cuff, Reg. U. S. Pat. Off." and "Pat. 2420771 and other Patents (M-100)" (these legends were to be placed on all hosiery manufactured *or* sold under plaintiff's letters patent); (2) to comply with specified standards of quality and construction, which standards were applicable to all licensees of the patents, failure of licensee to comply with these standards, within 30 days after notice, terminating its license; (3) to submit to plaintiff for approval "each new construction of hosiery" before offering it for sale; and (4) to use its best efforts "to promote the use and develop the inventions and the trademark" and to report to licensor any infringement by unlicensed persons.

In addition to the patents listed in the contract of May 1, 1955, plaintiff acquired on or about October 23, 1959, U. S. Pat. No. 2,716,876 (the Surratt patent) and immediately notified defendant by letter that it was privileged to use the Surratt patent upon the terms of the license of May 1, 1955.

Plaintiff's first action was instituted on May 1, 1961, in the Greensboro Municipal County Court. The complaint alleges merely that defendant is obligated by contract to pay plaintiff royalties upon the sale of hosiery covered by plaintiff's patents and that, upon sales and shipments made prior to and including May 31, 1960, defendant owes plaintiff $2,962.50. Defendant admitted a contract to pay plaintiff royalties upon the sale and shipment of hosiery covered by its patent, but denied that it owed plaintiff any sum under the contract. The judge of the Municipal County Court rendered judgment on November 20, 1961, in favor of plaintiff for the amount prayed, and defendant appealed to the Superior Court.

On May 7, 1963, plaintiff filed an action against defendant in the Superior Court for royalties allegedly due for sales during the period June 1, 1960 — March 31, 1963. In its second action plaintiff alleges:

Defendant has employed the Surratt patent in the manufacture of styles 825, 826, 530, and 840 and has, from time to time, used plaintiff's trademark "Morpul" on style 565. Use of the Surratt patent consisted of employing an auxiliary stitch cam on defendant's machines, "except that auxiliary stitch cams have been omitted on some machines," and the same results obtained "by elevating the needle cylinder relative to the sinkers." Defendant's methods of knitting the styles of socks in question "consisted of the sequences of knitting steps recited in plaintiff's Surratt patent." As a result of this use of the Surratt patent, for the period May 31, 1960 — March 31, 1963, under the terms of the 1955 contract between them, defendant owes plaintiff $21,645.17, with interest.

Answering, defendant admitted its obligation to pay plaintiff the royalties specified in the contract for all hosiery manufactured and delivered under the patent license. It denied, however, that it had ever actually "infringed" or used the Surratt patent in the manufacture of style numbers 825, 840, 530, and 565, but admitted that in 1959, when it first began to produce these styles, it marked them with transfers which had been ordered in conformity with the contract of May 1, 1955; that when it realized these styles "were being marked with the identification symbol number 'M-100,' this was discontinued" and the styles were thereafter marked with "Ezy-Doz-It" transfers. Defendant averred that since May 31, 1960, it had not marked styles 530, 565, 825, and 840 with any legend, number, or symbol identified with plaintiff.

The Superior Court consolidated the two cases for trial and entered an order of compulsory reference naming Mr. J. A. Kleemeier, Jr., referee, who heard the evidence of both parties and thereafter made his findings of fact and conclusions of law. His findings of fact and his conclusions of law are hereinafter summarized:

Immediately after the receipt of plaintiff's letter of October 23, 1959, authorizing it to use the Surratt patent, defendant did use it in the manufacturing of sock styles 505 and 507. For this use it has paid and continues to pay the royalties specified in the licensing contract. The hosiery involved in this action is five styles of men's socks, defendant's numbers 565, 840, 825, 826, and 530. A declining market for styles 505 and 507 caused defendant to begin manufacturing the sock styles in controversy, for which latter styles it has paid plaintic no royalties. These socks have long, elastic, mock-rib cuffs containing stitches substantially longer than those in the plain-knit foot. In the knitting process elastic yarn is laid in front of alternate stitches. In making these socks defendant did not use the combed cotton yarn required for hosiery manufactured under plaintiff's patent and trademarks.

Prior to May 31, 1960, the period covered by the first suit, defendant manufactured and sold at least 42,902 dozen pairs of crew socks upon which it imprinted the trademark "Morpul," plaintiff's patent No. 2,420,771, or the identification symbol which plaintiff had given defendant or another of its licensees. As to these socks the referee concluded that, under the contract, defendant was liable to plaintiff for the specified royalties whether the hosiery contained any of the "licensed patented inventions" or not, and that defendant owed plaintiff the sum of $2,145.10, with interest on the varying amounts comprising that total from the specified dates. Plaintiff did not except to this finding and conclusion.

Since June 1, 1960, defendant has manufactured and shipped 431,302.5 dozen pairs of sock styles 825, 826, 840, 530, and 565. None of

these were imprinted with any marking identified with plaintiff's patents, trademark, or license. (Defendant controverts plaintiff's contention that in the manufacture of these styles it employed the means or methods disclosed by the Surratt patent, and this is the one question raised by the pleadings.)

The letters issued to Julian H. Surratt for his patent begin: "This invention relates to circular knitting machines and, more especially, to an improved method and apparatus for producing elastic fabric such as hosiery." It states one of its objectives as being:

> ". . . to provide an improved method and apparatus, for making elastic fabric wherein an elastic strand is laid in in front of some of the needles or alternate needles and in back of the other needles and the inelastic or body yarn is fed to the needles by the conventional fingers at the throat plate. Immediately past the throat plate, the needles are lowered to a position substantially lower than the position to which they are normally lowered during the forming of normal stitches so that, although the stitches are then drawn over the body portions of the sinkers, very elongated loops are formed thus resulting in a fabric which can be stretched to a much greater extent than conventional fabrics where the elastic yarn is laid in and the needles are lowered only to their normal lowered position in a stitch-forming operation."

Another objective is to provide:

> ". . . an auxiliary stitch cam with pattern controlled means for moving the auxiliary stitch cam into and out of operative position below one of the conventional stitch cams. The auxiliary stitch cam, when in operative position, serves as an extension to the lower portion of the conventional stitch cam. Thus, during the knitting of elastic portions of a stocking or other tubular fabric, the auxiliary stitch cam moves the needles to an abnormally lowered position during the forming of the stitches to form very elongated loops with the body yarn as it is drawn over the body portions of the sinkers and, during plain knitting of inelastic portions of a stocking or other tubular fabric, the auxiliary stitch cam is withdrawn from operative position so the needles are lowered by the corresponding conventional stitch cam to the normal lowered position to draw stitches of normal length over the body portions of the sinkers."
>
> "(T)he Surratt patent claims in issue, namely, Claims 7 and 9 through 14, expressed in terms of apparatus in Claim 7 and in terms of method in Claims 9 through 14, is the combination in the

operation of a circular knitting machine of knitting with body yarns, feeding an elastic strand to the body yarn in advance of knitting, and lowering the knitting machine needles to an abnormally low or substantially lower position or level as compared with the position or level to which they are lowered during ordinary knitting, to form elongated body yarn loops or stitches.

"The sole apparatus claim of the Surratt Patent in issue, Claim 7, recites this patented invention in terms of means for manipulating the knitting machine needles, sinkers and feed fingers, including means for lowering the needles to an abnormally low level as compared to the level to which they are normally lowered during ordinary knitting to produce very elongated loops with the elastic strand laid in front of alternate body yarn loops and in back of the others."

Although claim 7 makes no mention of the auxiliary stitch cam referred to in the statement of the patent's objectives, the evidence reveals that this is the only apparatus by which Surratt lowered the needle to acquire the elongated stitch.

"The method claims of the Surratt Patent in issue, Claims 9 through 14, define this patented invention in terms of method steps, including the step of lowering the needles to a substantially lower than normal level (Claims 9, 10, 13 and 14) or to an abnormally low level as compared to the position or level to which they are lowered during ordinary knitting (Claims 11 and 12) to draw relatively elongated loops or stitches of greater than normal length from the body yarn. In addition, some of these claims recite raising of the needles after feeding of the elastic strand to cause the needle latches to pass above the elastic strand, resulting in the elastic strand being laid in the body yarn loops, but the other method claims are not limited to laying in the elastic strand."

Defendant did not use the auxiliary stitch cam disclosed by the Surratt patent in the manufacturing of the sock styles here involved. These styles were manufactured:

". . . on circular knitting machines of the Scott and Williams B-5 type. Each of these styles had an elastic mock-rib top portion and a plain knit foot portion. In knitting the mock-rib top portion of each style the knitting machine was operated to feed an elastic strand and two ends of body yarn to the knitting machine needles with the elastic strand fed in advance of the body yarn feed and with the needles manipulated to lay the elastic strand in the body

> yarn without forming stitches in the elastic strand. The body yarn was engaged in the hooks of the needles and drawn over the body portions of the sinkers to form stitches upon downward movement of the needles. The movement of the needles to draw the stitches was controlled by stationary stitch cams (and the body yarn stitches in knitting the top portion were formed slightly longer than in the foot portion) by raising the needle cylinder, which effected a raising of the sinkers supported on the cylinder to increase the distance between the position of the yarn on the sinkers and the hooks of the needles, causing the needles to draw loops or stitches of body yarn longer than those drawn during ordinary knitting. The needles did not shift with the cylinder (but were retained in their normal fixed vertical path by stationary cams). Shifting of the needle cylinder vertically was effected in a conventional manner, without any additional attachment, and as commonly performed on conventional Scott and Williams B-5 machines of the type disclosed in Scott United States Patent Number, 1,152,850, issued September 7, 1915, and on various other types of Scott and Williams circular knitting machines, such as types K, KN and others."

In brief summary, under the Surratt patent an elongated stitch is obtained by means of an auxiliary stitch cam, which causes the needles to be lowered to a level below that to which they are lowered during the knitting of stitches of normal length. The Mayo machines have no means of abnormally lowering the needles. The cams remain stationary. and the elongated stitches in the cuff portion of the socks in controversy are made by raising and lowering the cylinder of the B-5 knitting machines, a method employed in knitting machines since 1915. According to the evidence, this is done without any modification of the pins which raise the cylinder. The stitch length can be controlled within the limits of the machine, and the method described in Claim 7 of the Surratt patent ("and means for lowering the needles to abnormally low level") is not employed. The raising of the needle cylinder does not affect the position of the needles, which move in the same path on the same place regardless of the movement of the cylinder. Both the Mayo and the Surratt methods get the elongated stitch by increasing the distance between the needle hooks and the position of the body yarn on the sinkers, and the end result, or product, might be indistinguishable.

Upon the undisputed fact, the referee found, both in his findings of fact and in his conclusions of law, that none of the socks in controversy in the second suit were manufactured under the Surratt patent or under any other patent listed in the license agreement of May 1, 1955;

that the Surratt and the Mayo means and methods produced substantially the same results, but the Mayo method of raising the needle cylinder to obtain elongated stitches in the cuff of the socks was not an equivalent of any of the means or methods disclosed by the Surratt patent, nor was it a mere inversion or reversal of the motion of elements contained in the means or methods disclosed by the Surratt patent. He found, therefore, that plaintiff is entitled to recover nothing in the second action.

Plaintiff filed exceptions to the report and waived its reservation of jury trial. By consent, Judge McLaughlin heard the arguments upon the exceptions and considered the evidence and briefs of the parties. He adopted both the referee's findings of fact and his conclusions of law, with one exception. He modified the assessment of costs by directing that the costs of the reference be allocated ⅓ to defendant and ⅔ to plaintiff, the referee having allocated ½ the costs to each party.

From the judgment of the Superior Court affirming the referee's report, plaintiff appealed.

David Rabin, McNeill Smith and Jack Floyd for plaintiff appellant.

McLendon, Brim, Holderness & Brooks by Thornton H. Brooks; Bridgers, Horton & Britt by H. Vinson Bridgers; and B. B. Olive for defendant appellee.

SHARP, J. "Only a Federal Court has jurisdiction to consider an action involving the construction of the patent laws, the validity of a patent, or questions of infringements. (Citations.) * * * But not every case involving rights conferred by the patent laws is beyond the jurisdiction of state courts. When the action is brought on a contract, or in tort, with respect to the exercise of a patent right the state court has jurisdiction (citations); or to enforce the payment of royalties or license fees, 40 Am. Jur., 653." *Coleman v. Whisnant,* 225 N.C. 494, 499, 35 S.E. 2d 647, 651. See Annot., Jurisdiction of state court over actions involving patents, 167 A.L.R. 1114, 1123.

Infringement of a patent is an unauthorized use of it. Black's Law Dictionary 920 (4th Ed., 1957). Plaintiff here does not sue for infringement, as it had authorized defendant to use the patent in question; and defendant, being a licensee, is estopped to assert the invalidity of the patent. *Freeman v. Altvater,* 66 F. 2d 506 (8th Cir.). Plaintiff sues for the royalties which defendant agreed to pay *if* it made use of the patent. As the referee pointed out, however, whether the means or method used by a licensee would infringe the patent but for the license determines whether such means or method is covered by the license. Although defendant, as licensee, cannot use "the state of the art" to

destroy the patent, yet "the state of the art may be used to construe and narrow the claims of the patent, conceding their validity. The distinction may be a nice one but seems to be workable." *Freeman v. Altvater, supra* at 507.

The findings of fact of the referee, approved by the judge, are conclusive on appeal if there is any competent evidence to support them. *Murphy v. Smith,* 235 N.C. 455, 70 S.E. 2d 697. A careful examination of the record discovers that the referee's findings here are supported by such evidence and that, in essential part, the evidence is not in conflict. The only question, therefore, is whether the facts found support the legal conclusion that the Mayo method of producing the sock styles in question is covered by the Surratt patent.

> "In *United States v. Esnault-Pelterie,* 303 U.S. 26, 30, 58 S. Ct. 412, 414, 82 L. Ed. 625, the Supreme Court said: '* * * where, with all the evidence before the court, it appears that no substantial dispute of fact is presented, and that the case may be determined by a mere comparison of structures and extrinsic evidence is not needed for purposes of explanation, or evaluation of prior art, or to resolve questions of the applications of descriptions to subject-matter, the questions of invention and infringement may be determined as questions of law.'" *Sbicca-Del Mac v. Milius Shoe Co.,* 145 F. 2d 389, 396 (8th Cir.).

The other questions debated in the briefs, (1) whether defendant has estopped itself by its original use of plaintiff's trademark and patent number to deny liability for the royalties in suit, and (2) whether defendant has breached its contract to promote the trademark and the use of defendant's patents and thereby rendered itself liable for royalties, are not raised by the pleadings. "A plaintiff cannot make out a case which he has not alleged." *Calloway v. Wyatt,* 246 N.C. 129, 133, 97 S.E. 2d 881, 884.

One does not avoid liability for the use of the method of a patent by varying the details of the method or of its apparatus. *Lever Bros. Co. v. Procter & Gamble Mfg. Co.,* 139 F. 2d 633 (4th Cir.). Neither a reversal of the motion of parts of a machine to accomplish the same purpose, *Wachs v. Balsam,* 38 F. 2d 50 (2d Cir.); *Reece Button-Hole Ma. Co. v. Globe Button-Hole Ma. Co.,* 61 Fed. 958 (1st C.C.A.), nor a shifting from the horizontal to the vertical without change of function, *International Banding Mch. Co. v. American Bander Co.,* 9 F. 2d 606 (2d Cir.), will avoid infringement. Thus, if defendant has achieved the mock-ribbed, laid-in elastic cuff by a method equivalent to that of plaintiff, than it is liable; if it has achieved the same result by another, non-equivalent, method, it is not liable for the royalties in suit.

The Surratt patent is not on a product, but on a process which uses an apparatus. It does not purport to arrogate the result.

The doctrine of equivalents in the law of patents evolved to prevent the pirating of an invention by minor variations.

> "The essence of the doctrine is that one may not practice a fraud on a patent. * * * The wholesome realism of this doctrine is not always applied in favor of a patentee but is sometimes used against him. Thus, where a device is so far changed in principle from a patented article that it performs the same or a similar function in a substantially different way, but nevertheless falls within the literal words of the claim, the doctrine of equivalents may be used to defeat the patentee's action for infringement. *Westinghouse v. Boyden Power Brake Co.*, 170 U.S. 537, 568. In its early development, the doctrine was usually applied in cases involving devices where there was equivalence in mechanical components. * * * Today the doctrine is applied to mechanical or chemical equivalents in compositions or devices. * * * What constitutes equivalency must be determined against the context of the patent, the prior art, and the particular circumstances of the case. Equivalence, in the patent law, is not the prisoner of a formula and is not an absolute to be considered in a vacuum." *Graver Tank Co. v. Linde Air Prod. Co.*, 339 U.S. 605, 608, 94 L. Ed. 1097, 1102, 70 S. Ct. 854, 856.

The doctrine originated in *Winans v. Denmead,* 56 U.S. (15 How.) 330, 14 L. Ed. 717.

It appears from the face of the Surratt patent, as well as from the evidence, that it is not a pioneer patent, but merely an improvement on the prior art. The same product was obtainable by means of the prior art, indeed by means of older patents owned by plaintiff and included in the license agreement of May 1, 1955. Under these circumstances, the patent would, as a general rule, on an issue of infringement, be given a narrow construction. *Miller v. Eagle Manufacturing Co.*, 151 U.S. 186, 38 L. Ed. 121, 14 S. Ct. 310, but, as between licensor and licensee, the courts will give to the claims of the patent in suit as liberal an interpretation as can be justified. Nevertheless, a licensee is not estopped to show the limits of the licensed patent by evidence of the prior art or by any other relevant fact. *Freeman v. Altvater, supra.*

Although the evidence with reference to the language of the Morpul and the Mayo methods is not in dispute, the conclusions of the patent experts who interpreted them are in dispute. Mr. Paul Bell, whom the referee found "to be qualified as an expert in the area of patent claim interpretation," testified for plaintiff that "the Mayo method appears

to be the same as the Surratt method" in that it simply reversed two or more mechanical parts. In both methods the elongated stitch is obtained by increasing the distance between the needle hooks and the position of the body yarn on the sinkers. The application for Surratt's patent was prepared in the office of Mr. Bell, who was then "aware of the fact that circular knitting machines were capable and were on the market for producing longer stitches in various portions of the circular knit fabric." One of defendant's witnesses said that the Mayo method of raising the cylinder, the conventional way of lengthening the stitch, is "old in the art"; that the apparatus and method in the Surratt patent are conventional, except for the lowering of the needles *by means of* the auxiliary stitch cam. Mr. Dalbert U. Shefte, whom the parties stipulated to be "a patent attorney, qualified to interpret patents," testified for defendant that, in his opinion, the Mayo method does not come under the Surratt patent because it is limited "to an auxiliary stitch cam or other *means* for abnormally lowering the needles," and the Mayo machines do not use the auxiliary cam or any other means for lowering the needles. "The Surratt patent," he testified, "contains apparatus and method claims. It is not based upon obtaining an elongated stitch, but on abnormally lowering the needles."

Mr. Julian H. Surratt, the inventor to whom the patent was issued, testified that he brought forth his "invention" for the purpose of producing a sock of the type Morpul then had on the market, "but only doing it in a different way." At that time the Morpul method, under the Crawford patent, was to pass the body of the yarn over the nib, or high portion, of the sinker. When Mr. Surratt sold his patent to Morpul, he did not reserve a license to himself. Nevertheless, he is now manufacturing socks with mock-ribbed tops containing laid-in rubber. He said that the Mayo machines which manufactured the socks in controversy do not operate according to his patent. He explained: When the auxiliary cam of his patent is out of action, the distance between the platform of the sinker and the needle hook is the normal distance, which determines the length of the stitch in the foot portion of the sock, but "when the auxiliary cam is actuated the needle is lower relative to the top of the sinker and that distance is the determining factor." Although claim 7 of the Surratt patent does not specify the particular "means of lowering the needles to an abnormally low level as compared to the level to which they are normally lowered during ordinary knitting to produce very elongated loops with the elastic strand laid in front of alternate loops and in back of others," both the specifications in the patent and the evidence interpreting the patent establish it beyond a peradventure that no means other than the auxiliary stitch cam have ever been attempted in connection with the Surratt patent.

The essence of the Surratt patent is the insertion of the auxiliary stitch cam (or some other, presumably possible but unidentified, "means") into the machine. Mr. Surratt said, "As far as I know, all that I used to draw the abnormally elongated stitch was the auxiliary stitch cam." The auxiliary stitch cam — or some other, similar apparatus which must be inserted into a circular knitting machine — is clearly what differentiates the Surratt patent from the prior art. The patent must be referred to the distinctive features of the prior art, even as against a licensor, and the patent will not be held to include the prior art. Had defendant used the auxiliary stitch cam or inserted any other means or apparatus into its Scott and Williams B-5 circular knitting machines, by which means or apparatus the needles were lowered to an abnormally low level to produce an elongated stitch, it would have used the patent. But this it has not done. It has not, therefore, "infringed." *Leader Plow Co. v. Bridgewater Plow Co.,* 237 Fed. 376 (4th C.C.A.). It has merely used standard machines, known to the industry for 50 years, and, without adding attachments of any kind, has attained the elongated stitch. Surely, under these circumstances, it ought to be able to use its machine to make any stitch of which the machine is capable, without incurring liability to the owner of a patent whose apparatus and method are not used. Obviously, the Scott and Williams B-5 machine, patented for 50 years, is capable, by means of adjustment, not modification, of doing what defendant is doing. "It is the use of the whole of that which a purchaser buys when the patentee sells to him a machine. . . ." 40 Am. Jur., Patents § 152 (1942). How could we say that defendant is using plaintiff's patent by using, in an unmodified way, a machine long since patented by another? Where, as in textiles, "the cross-lights of the prior art," *Wachs v. Balsam, supra* at 51, are many, a later patent cannot so easily diminish an earlier one. It is just the other way around. We concur with the referee and the judge below that, notwithstanding that it is plaintiff's licensee, defendant and has not used the Surratt patent, during the period of the second suit; and we affirm their conclusions of law.

The division of the costs of the reference was within the judge's discretion. G.S. 6-21(6). We note, however, that Judge McLaughlin, with the exception of the one item of cost, merely affirmed, *ipsis verbis,* the referee's report, without entering any judgment upon it. G.S. 1-194; G.S. 1-195. But the parties have treated his order as a judgment, and, to dispose of the appeal, so do we. The case is remanded to the Superior Court for judgment in accordance with the report as amended by Judge McLaughlin.

Remanded for judgment.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1965

CURTIS BRADLEY RAPER, ADMINISTRATOR OF CURTIS BRADLEY RAPER, JR. v. CLARENCE C. BYRUM AND JAMES CLARENCE BYRUM, AND CLARENCE C. BYRUM, GUARDIAN AD LITEM OF DEFENDANT, JAMES CLARENCE BYRUM, A MINOR.

(Filed 22 September, 1965.)

1. Negligence § 26—

Since the burden of proof on the issue of contributory negligence is upon defendants, a motion for judgment of involuntary nonsuit upon that ground should be allowed only when plaintiff's evidence, considered alone and taken in the light most favorable to him, together with all inferences favorable to him which may reasonably be drawn therefrom, so clearly establishes the defense that no other conclusion can reasonably be drawn.

2. Negligence § 11—

It is not necessary that contributory negligence be the sole proximate cause of the injury in order to bar recovery, it being sufficient for this purpose if it be one of the proximate causes thereof.

3. Automobiles § 41g—

Evidence permitting a reasonable inference that the driver of a vehicle along a dominant highway having a speed limit of 55 miles per hour drove at a speed of some 60 miles per hour and entered an intersection with a servient highway without reducing speed, is sufficient to be submitted to the jury on the issue of negligence. G.S. 20-141(a, b, c).

4. Automobiles § 7—

A motorist is required to keep a reasonable lookout in his direction of travel and is charged with having seen what he would have seen had he looked.

5. Automobiles § 17—

A motorist on a dominant highway does not have an absolute right of way but is under duty not to exceed a speed which is reasonable and prudent under the circumstances, and the duty to keep his vehicle under control, to keep a reasonably careful lookout, and to take such action as an ordinarily prudent person would take to avoid colliding with persons or vehicles upon the highway; nevertheless when he sees that a motorist has stopped his vehicle on the servient highway before entering the intersection, he may assume until the last moment that such motorist will not enter the intersection directly in his path of travel.

6. Automobiles § 41a—

In order to make out his case, plaintiff must introduce evidence tending to show negligence on the part of defendant and also that such negligence was a proximate cause of the accident.

7. Automobiles § 42g—

Plaintiff's own evidence tending to show that his intestate, driving along a servient highway, brought his vehicle to a stop at a point where he had a clear view of the dominant highway to his left for at least a quarter of a mile, that intestate then drove into the intersection at a speed of less than five miles per hour and was struck by defendant's car when intestate had driven some four or five feet into the intersection *is held* to disclose contributory negligence as a matter of law on the part of intestate.

8. Automobiles § 37—

This action involved a collision at an intersection between vehicles driven respectively by plaintiff's intestate and defendant. There was no contention that traffic on the road was in any way a factor in causing the collision. *Held:* Testimony of a third driver as to his speed in approaching the intersection and concerning the absence of traffic meeting him, is irrelevant and was properly excluded.

9. Appeal and Error § 41—

The exclusion of evidence which is merely accumulative and, moreover, would have further supported the judgment of nonsuit cannot be held prejudicial on plaintiff's appeal.

APPEAL by plaintiff from *Copeland, S.J.*, March 1965 Special Session of PASQUOTANK.

Action for wrongful death. The complaint alleges that in the late afternoon or early evening of January 25, 1964, a 1951 Ford automobile, driven by the plaintiff's intestate, north on Road No. 1139 (Body

Road), and a 1964 Chevrolet automobile, owned by the defendant Clarence C. Byrum as a family purpose automobile and driven, as his agent, by his minor son, the defendant Clarence Byrum, east on Road No. 1152 (Halstead Boulevard), collided at a right angle intersection of the two roads in Pasquotank County and that, as a result of the collision, the plaintiff's intestate sustained bodily injuries from which he died five days later without regaining consciousness. It alleges that the minor defendant was negligent in that he drove at a speed of 60 miles or more per hour which was greater than was reasonable under the prevailing conditions; did not decrease his speed when approaching the intersection; did not keep a proper lookout and did not yield the right of way to the automobile driven by the plaintiff's intestate, who, having first stopped in obedience to a stop sign, was proceeding slowly into the intersection; and that such negligence was the proximate cause of the collision and of the death of the plaintiff's intestate.

The answer denies all allegations of negligence on the part of the defendants and alleges that, if they were negligent in any respect, the plaintiff's intestate was guilty of contributory negligence in entering the intersection without bringing his automobile to a stop in obedience to the stop sign facing him, in failing to yield the right of way to the automobile driven by the minor defendant and in failing to keep a proper lookout, all of which is denied in the reply filed by the plaintiff.

At the conclusion of the evidence offered by the plaintiff, the court entered judgment as of nonsuit, from which the plaintiff appeals, assigning as error the granting of the motion therefor and the sustaining of objections to certain evidence offered by the plaintiff.

John H. Hall for plaintiff appellant.
LeRoy, Wells & Shaw for defendant appellees.

LAKE, J. Since the burden of proof on the issue of contributory negligence is upon the defendants, a motion for judgment of involuntary nonsuit upon that ground should be allowed only when the plaintiff's evidence, considered alone and taken in the light most favorable to him, together with all inferences favorable to him which may reasonably be drawn therefrom, so clearly establishes the defense that no other conclusion can reasonably be drawn. *Cowan v. Transfer Co.*, 262 N.C. 550, 138 S.E. 2d 228; *Waters v. Harris*, 250 N.C. 701, 110 S.E. 2d 283; *Johnson v. Thompson*, 250 N.C. 665, 110 S.E. 2d 306; *Morrisette v. Boone Co.*, 235 N.C. 162, 69 S.E. 2d 239; Strong's N. C. Index, Negligence, § 26, and cases there cited.

Contributory negligence by the plaintiff's intestate which is one of the proximate causes of his death is a bar to the plaintiff's recovery of damages therefor. *Scott v. Telegraph Company*, 198 N.C. 795, 153 S.E. 413. It is not necessary that the negligence of the plaintiff's intestate be the sole proximate cause. *Badders v. Lassiter*, 240 N.C. 413, 82 S.E. 2d 357.

Consequently, the judgment below must be affirmed if the evidence, considered in the light most favorable to the plaintiff, together with all inferences favorable to him which may reasonably be drawn therefrom, either (1) fails to show any negligence on the part of the minor defendant which was one of the proximate causes of the collision and resulting death of plaintiff's intestate; or (2) affirmatively shows, so clearly that no other conclusion can reasonably be drawn therefrom, that the plaintiff's intestate was negligent in the operation of the Ford automobile in one or more of the respects alleged in the defendants' answer and that such negligence by him was one of the proximate causes contributing to his own death. *Ramey v. R. R.*, 262 N.C. 230, 136 S.E. 2d 638; *Williamson v. Randall*, 248 N.C. 20, 102 S.E. 2d 381; *Edwards v. Vaughn*, 238 N.C. 89, 76 S.E. 2d 359; *Lyerly v. Griffin*, 237 N.C. 686, 75 S.E. 2d 730; *Matheny v. Motor Lines*, 233 N.C. 673, 65 S.E. 2d 361.

The evidence, all of which was introduced by the plaintiff, when so considered with all inferences in his favor reasonably drawn therefrom, shows:

Shortly after 5 p.m., on January 25, 1964, the 1951 Ford, driven by the plaintiff's intestate, and the 1964 Chevrolet, driven by the minor defendant, collided in the right angle intersection of Body Road (Rural Paved Road No. 1139) and Halstead Boulevard (Rural Paved Road No. 1152) in Pasquotank County. Plaintiff's intestate was driving north on Body Road, the servient highway. The minor defendant was driving east on Halstead Boulevard, the dominant highway. The sky was cloudy and there had been a heavy rain some two hours earlier. Neither car had its lights on. The intersection is in open country and the maximum speed limit on Halstead Boulevard is 55 miles per hour. An official State Highway stop sign was erected at the intersection facing the plaintiff's intestate, on his right side of Body Road, as he approached the intersection, with which he was familiar. On the south side of Halstead Boulevard (the minor defendant's right), some 600 feet west of the intersection, there was an official State Highway sign warning that there was an intersection ahead.

Each driver was accompanied by one male passenger. Plaintiff's intestate and his passenger, Richard McGraw, who was sitting in the right front seat of the Ford, were both knocked unconscious by the

force of the collision. Plaintiff's intestate died five days later, without ever regaining consciousness, from injuries received in the collision. McGraw had been drinking from a bottle of whiskey which he had in the automobile, but plaintiff's intestate had not drunk any of it and was not under the influence of intoxicating liquor.

As the plaintiff's intestate approached the intersection he stopped beside the stop sign. There is no evidence as to whether he looked in either direction along Halstead Boulevard or, if he did, what he saw. A motorist stopped at that point could see to his left (the direction from which the minor defendant approached) for at least a quarter of a mile along Halstead Boulevard. McGraw looked to his right and saw no approaching traffic, but before he had time to look to his left, plaintiff's intestate started into the intersection at a speed less then five miles per hour. When about half the length of the Ford automobile had gotten into the intersection the collision occurred. McGraw never saw the Chevrolet driven by the minor defendant before the collision.

The glass in the left front window of the Ford, driven by the plaintiff's intestate, had been partially broken out before the collision and a piece of cardboard was fastened by tape over the hole, but the window was rolled three-fourths of the way down so that the cardboard did not obstruct the view.

The most extensive damage to the Ford was at the left fender and left front door. The most extensive damage to the Chevrolet, driven by the minor defendant, was at the right front. Debris, including glass and metal fragments, was found in the intersection three feet from the south edge of Halstead Boulevard (the side from which plaintiff's intestate entered the intersection). There were no tire marks west or south of that point. Tire marks, indicating sideways movement of the Ford to its right, extended 132 feet from the debris, across a triangular traffic island five inches in height, to where the Ford came to rest in the ditch on the north side of Halstead Boulevard, east of Body Road. The Chevrolet, driven by the minor defendant, came to rest in the same ditch 139 feet from the point where the debris lay in the intersection, tire marks running to it from that point.

The minor defendant stated to the investigating patrolman that he "could have been" driving at least 60 miles per hour and that he first realized there was something in front of him when he got right at the intersection and "saw something black and sparks."

From the evidence it is a reasonable inference, though not a necessary one, that as he approached and entered the intersection the minor defendant was, as alleged in the complaint, driving the Chevrolet at a speed in excess of 55 miles per hour and in excess of the maximum speed which would have been reasonable and prudent under the conditions

then prevailing, and failed to reduce his speed in approaching and entering the intersection. If so, he was driving in violation of the statute, G.S. 20-141(a, b, c), and was guilty of negligence. *Rouse v. Jones,* 254 N.C. 575, 119 S.E. 2d 628.

It is also a reasonable but not a necessary inference from this evidence that the minor defendant, as he approached and entered the intersection, did not keep a reasonable lookout in the direction in which he was traveling, as he was under a duty to do. *Rhyne v. Bailey,* 254 N.C. 467, 119 S.E. 2d 385; *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330. A motorist who does not keep such a lookout is nevertheless charged with having seen what he could have seen had he looked, and his liability to one injured in a collision with his vehicle is determined as it would have been had he looked, observed the prevailing conditions and continued to drive as he did.

However, even though the inference be drawn that the minor defendant did not maintain a proper lookout as he approached the intersection, the evidence of the plaintiff necessarily leads to the conclusion that, had he done so, he would have seen the Ford, driven by the plaintiff's intestate, approach the intersection on Body Road and come to a complete stop, as he was required to do by the statute in view of the State Highway stop sign duly erected and facing him. G.S. 20-158. When the plaintiff's intestate again put the Ford in motion, he proceeded not more than half the length of his car into the intersection before the collision occurred. The necessary inference is that when the plaintiff's intestate moved forward into the intersection from the south, the Chevrolet, driven by the minor defendant, was so near to the west side of the intersection that the plaintiff's intestate was required by the statute to yield the right of way and not to enter the intersection until the Chevrolet had passed. G.S. 20-158. *Primm v. King,* 249 N.C. 228, 106 S.E. 2d 223; *Matheny v. Motor Lines, supra.*

"The driver on a favored highway protected by a statutory stop sign does not have the absolute right of way in the sense he is not bound to exercise care toward traffic approaching on an intersecting unfavored highway. It is his duty, notwithstanding his favored position, to observe ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar circumstances. In the exercise of such duty, it is incumbent upon him in approaching and traversing such an intersection (1) to drive at a speed no greater than is reasonable and prudent under the conditions then existing, (2) to keep his motor vehicle under control, (3) to keep a reasonably careful lookout, and (4) to take such action as an ordinarily prudent person would take in avoiding collision with persons or vehicles upon the highway when, in the exercise of due care, danger of such collision

is discovered or should have been discovered." *Blalock v. Hart,* 239 N.C. 475, 80 S.E. 2d 373.

Nevertheless, "the operator of an automobile, traveling upon a designated main traveled or through highway and approaching an intersecting highway, is under no duty to anticipate that the operator of an automobile approaching on such intersecting highway will fail to stop as required by the statute, and, in the absence of anything which gives or should give notice to the contrary, he will be entitled to assume and to act upon the assumption, even to the last moment, that the operator of the automobile on the intersecting highway will act in obedience to the statute, and stop before entering such designated highway." *Hawes v. Refining Co.,* 236 N.C. 643, 74 S.E. 2d 17; *Blalock v. Hart, supra; Scott v. Darden,* 259 N.C. 167, 130 S.E. 2d 42. It is even more reasonable for him to assume until the last moment that a motorist on the servient highway who has actually stopped in obedience to the stop sign will yield the right of way to him and will not enter the intersection until he has passed through it.

It is not enough for the plaintiff to show that the minor defendant was negligent in driving at an excessive speed, in failing to reduce his speed as he approached and entered the intersection, or in failing to maintain a reasonable and proper lookout. The burden is also upon the plaintiff to prove that such negligence by the minor defendant was one of the proximate causes of the collision and of his intestate's death. The plaintiff's evidence shows that his intestate, after first coming to a stop in obedience to the stop sign, drove into the intersection when the automobile of the defendants was so near to it that a collision was a virtual certainty. It might well be concluded that this was the sole proximate cause of the collision. See: *Loving v. Whitton,* 241 N.C. 273, 84 S.E. 2d 919; *Marshburn v. Patterson,* 241 N.C. 441, 85 S.E. 2d 683. However, it is not necessary to decide this point.

Even if the negligent act of the plaintiff's intestate in driving into the intersection under the circumstances established by the plaintiff's evidence was not the sole proximate cause of the collision and his resulting death, it was one of the proximate causes, a contributing cause, and is sufficient to bar the plaintiff's recovery in this action. *Badders v. Lassiter, supra; Howard v. Melvin,* 262 N.C. 569, 138 S.E. 2d 238.

G.S. 20-158(a) makes it unlawful for the driver of a vehicle upon the servient highway at an intersection, at which a stop sign has been duly erected by the State Highway Commission, to fail to stop in obedience to the stop sign and yield the right of way to vehicles approaching on the designated main traveled highway. The statute then provides: "No failure so to stop, however, shall be considered contributory negligence *per se* in any action at law for injury to person or property; but the

facts relating to such failure to stop may be considered with the other facts in the case in determining whether the plaintiff in such action was guilty of contributory negligence."

The plaintiff's evidence shows that his intestate brought his Ford automobile to a stop at a point where he had a clear view of the dominant highway to his left for at least a quarter of a mile. If he looked in that direction he must have seen the automobile driven by the minor defendant approaching at what the plaintiff says was a high rate of speed and very close to the intersection. If he did not look and observe it he is nevertheless charged with having seen what he could have seen. In this respect, the same rule applies to him as applies to the minor defendant.

"The right of one starting from a stopped position to undertake to cross an intersection would depend largely upon the distance from the intersection of approaching vehicles and their speed, and unless under the circumstances he would reasonably apprehend no danger of collision from an approaching vehicle it would be his duty to delay his progress until the vehicle had passed." *Matheny v. Motor Lines, supra; Badders v. Lassiter, supra; Edwards v. Vaughn, supra; Jordan v. Blackwelder,* 250 N.C. 189, 108 S.E. 2d 429; *Wooten v. Russell,* 255 N.C. 699, 122 S.E. 2d 603.

The plaintiff's evidence permits no other reasonable conclusion but that his intestate brought his automobile to a stop at a point where he had an unobstructed view of the defendants' automobile approaching on the dominant highway, and that he resumed his progress into the intersection at a very slow rate of speed when the defendants' automobile was so near to the intersection and moving at such a speed that in the exercise of reasonable prudence he should have seen that he could not cross in safety. His entry into the intersection in this manner and under these conditions was negligence and was one of the proximate causes of the collision and of his death, if not the sole proximate cause thereof.

The defendants' motion for judgment as of nonsuit was, therefore, properly granted.

The plaintiff also assigns as error the action of the court in sustaining objections to certain proposed testimony by the plaintiff's witness Norrell concerning his own speed as he proceeded on Halstead Boulevard toward the intersection in question and concerning the absence of traffic meeting him. This evidence had no relation whatever to the collision in question and the objections to it were properly sustained.

The plaintiff's remaining assignments of error were to the sustaining of objections to proposed testimony by his witness William Raper to

the effect that the cardboard taped on the window of the Ford did not obstruct the driver's view. Had this evidence been admitted it would have been merely cumulative and would have further supported the judgment of nonsuit. Its exclusion did not prejudice the plaintiff.

The judgment below is

Affirmed.

STATE v. ALBERT JENNINGS PAINTER.

(Filed 22 September, 1965.)

1. Criminal Law § 71—

Intoxication of defendant does not render his confession incompetent but merely goes to its weight unless defendant's intoxication amounts to mania.

2. Same—

The evidence disclosed defendant had been drinking a large quantity of liquor each day and was intoxicated when arrested, that he was placed in jail, that the next morning he asked to see an FBI agent, that he was taken to a conference room, and that during the interrogation he became sick and was given a drink of whiskey to steady his nerves. *Held:* The evidence does not show that defendant was intoxicated to the point of mania or that he was given whiskey to induce a confession, and the circumstances in regard to intoxicants does not render his confession incompetent.

3. Same—

Evidence that defendant asked to talk with an FBI agent, that he was taken to a conference room and told of his right to representation by an attorney, his right to remain silent and that anything he said might be used against him, and that thereafter defendant voluntarily made the confession offered in evidence, with no evidence to the contrary, *held* sufficient to support a ruling admitting the confession in evidence.

4. Same—

While the better practice is for the court to determine the voluntariness of a confession upon a *voir dire* in the absence of the jury, where there is plenary evidence to sustain a finding that the confession was voluntary, and no evidence to the contrary, and defendant merely objects to the admission of the confession but offers no evidence in regard to its voluntariness, the ruling of the court admitting the confession amounts to a finding that the confession was voluntary, and the absence of a specific finding of voluntariness is not fatal.

5. Criminal Law § 34; Forgery § 2—

In a prosecution for forgery and issuing a forged instrument, G.S. 14-119, G.S. 14-120, evidence that defendant had theretofore forged checks

other than those specified in the indictment may be competent on the question of intent.

6. Criminal Law § 82—

The trial court has discretionary authority to permit the solicitor to ask leading questions in proper instances.

7. Criminal Law § 71; Constitutional Law § 29—

Whether a confession offered in evidence is voluntary and competent is a question of law and fact for the court and not an issue of fact for the jury, and defendant's objection on the ground that the question should have been submitted to the jury is untenable.

APPEAL by defendant from *Campbell, J.*, January 1965 Criminal Session of BUNCOMBE.

Criminal prosecution on an indictment containing two counts. The first count charges defendant with the forgery of the following cheque, a violation of G.S. 14-119:

"Dec. 16, 1964 No..........

"FIRST NATIONAL BANK EXCHANGE — [Roanoke, Va.]

"PAY TO THE ORDER OF ALBERT PAINTER—Road Supt.
116994 $48.00

Forty-Eight Dollars...DOLLARS

"Road Expense Motor Freight
R. S. Painter"

The second count charges him with thereafter uttering this forged cheque, a violation of G.S. 14-120.

Plea: Not guilty. Verdict: Guilty as charged in both counts in the indictment.

From a judgment of imprisonment of not less than eight years or more than ten years on each count, said sentences to run concurrently, defendant appeals.

Attorney General T. W. Bruton and Deputy Attorney General Ralph Moody.

Joseph C. Reynolds for defendant appellant.

PARKER, J. The State's evidence shows these facts: On 16 December 1964 defendant came into the store of The Sports Mart, Inc., in Asheville, operated by Gene Wike, represented himself as a safety officer for Motor Freight, and said he would like to select a trophy to present one of his drivers. He had a brief case with him, and was wear-

ing a freight officer's cap and a black jacket. He had safety badges on his cap, three on each side, and a motorman's badge on the top. He selected a trophy which, with tax added, cost $8.19, told Wike he would have to give him an expense cheque, and asked if he would accept it. He showed Wike his driver's license with his name and home town on it, and a cheque already filled out on its face, drawn on a bank in Roanoke, Virginia, which is described in the indictment above. Wike told him he would accept the cheque, and defendant endorsed the cheque on its back, signing his name Albert Painter and writing beneath it the motor number appearing on his identification. He gave the cheque to Wike, and Wike gave him the trophy and $39.81 in money. After defendant left the store, Wike took a second look at the cheque and noticed that the "R's" in the signature on the cheque were so similar to the "R's" in the endorsement that they must have been made by the same man. Whereupon, he called the bank in Roanoke, Virginia. After talking to the bank in Roanoke, he went to police headquarters in Asheville and made a report. Two days later Wike went to the jail in Asheville with Mr. Allison to identify defendant. Defendant said, "What is going on here?" Mr. Allison replied, "Do you know this gentleman?" Defendant said: "Yes, I know him. What is going on?" Allison had some papers and defendant evidently saw the cheque and said: "Can't I take care of this cheque and get out of this situation?" Wike ran the cheque defendant gave him through the collection department of the First Union National Bank, and it was never paid.

About 11 p.m. on 17 December 1964, police officers arrested defendant in Asheville. He was driving a U-Drive-It car and wearing a cap with safety badges on it. Defendant had been drinking. In the car was a brief case, which defendant said was his. In the brief case was a cheque book and a cheque written out as follows:

"Nov. 23, 1964 No. 5-H

"FIRST NATIONAL BANK EXCHANGE
ROANOKE, VA.

116994

"PAY TO THE ORDER OF ALBERT PAINTER (Road Supt.) $48.00

".. DOLLARS

"Road Expense Motor Freight"

Defendant said this cheque was his. Defendant had on his person $47.89 when arrested. He was placed in jail.

Defendant assigns as error the admission in evidence over his objection and exception of an extrajudicial confession of guilt made by defendant on 18 December 1964 to FBI agent Robert Moore and J. C. Chandley, a detective sergeant of the Asheville Police Department.

The State's evidence in respect to the circumstances surrounding the making of the extrajudicial confession of guilt by defendant is as follows, as shown on direct examination of Sergeant Chandley, which we summarize, except when quoted:

About 11 p.m. on 17 December 1964 the police in Asheville arrested defendant and carried him to police headquarters. He was drinking, so he was put in jail. The next morning Chandley started to talk with defendant, who said he thought his case was an FBI case, because the cheque was written on an out-of-state bank, and he wanted to see the FBI. Pursuant to defendant's request, he called Robert Moore, the FBI agent in Asheville. Moore came to police headquarters, and he, Moore, and defendant went into the interrogation room. Moore showed defendant his badge and identification and told him Chandley was with the Asheville Detective Department, and they wanted to go over some cheques. Defendant said it was all right. Moore told defendant that he had a right to have a lawyer and that he could make a telephone call; he also explained to him his rights as to making a statement or declining to make a statement, and that if he made a statement, it might be used against him. After Moore made these statements, defendant said he understood them. Defendant made no request to see a lawyer or to make a telephone call to anyone. Whereupon, he and Moore talked to defendant between three and four hours, and the defendant got sick and they quit for a while. Defendant said he had been drinking from two to three pints of liquor a day. He "obtained a little drink for him to steady him up because he was sick; he was almost ready to go into D.T.'s."

At this point in Chandley's testimony, he was asked as to the conversation between him, defendant and agent Moore. Defendant objected, his objection was overruled, and he excepted. Defendant's counsel stated he "was objecting on the grounds that by the officer's own testimony this alleged confession was procured under coercion and under such circumstances that this man's constitutional rights were violated." Defendant made no request, according to the preferable practice set forth in *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, 28 A.L.R. 2d 1104, that the judge conduct a preliminary inquiry in the absence of the jury in respect to the competency of his statement and that he be permitted to testify as to the circumstances surrounding his making the statement, and neither did he request permission to offer any testimony in respect thereto. Neither did he ask permission to cross-

examine Chandley to show, if he could, that his statements to Chandley and Moore were not in fact voluntary or not understandingly made because of his mental and physical condition. Defendant merely relied upon his objection and exception as to the competency of the confession. The judge made no finding of fact in respect to the competency or incompetency of the confession, but merely overruled defendant's objection in respect to its being offered in evidence by the State.

This is a summary of the conversation between Chandley and defendant, narrated by Chandley on direct examination: The cheque over there and another one were placed in front of the defendant and he admitted writing the cheque. He asked defendant why he signed R. S. Painter and not like the others, and defendant said he "goofed." He asked defendant if he knew what it meant by signing R. S. Painter to it, and defendant said "he knew it meant forgery." He showed him nine cheques. Defendant said he had built time in Kentucky for cheques, that he got out in October of last year, got to drinking and running around, and started writing cheques again. He went from Kentucky to Tennessee, to Knoxville, where he rented a U-Drive-It car in Knoxville. He worked in Tennessee and then came to Asheville and rented a Hertz U-Drive-It. He got a case that had been taken out of the U-Drive-It car and asked defendant if it was his and he said yes. He showed him a cheque and defendant said it was his. A book of blank cheques was in the case. Defendant said he would go to the hotel at night and borrow a typewriter. Defendant said he "goofed" when he signed the cheque R. S. Painter. He showed defendant about five cheques and also four other cheques. Defendant said he wrote the cheques.

The circumstances surrounding the making of the confession by defendant as shown by cross-examination of Chandley are as follows: "I picked the defendant up on the night of the 19th [*sic*] about 11:00 o'clock. He was not drunk. He was drinking. We put him in jail and saw him the next morning about 9:00 or 9:15 o'clock. The defendant told me he had been drinking 2 to 3 pints of liquor a day. I did not know the man but could tell he was a drinking man. He looked some different from what he does now. He turned sick while we were talking to him. He just turned real white. He said he would like to see a doctor. I interrogated him for three or four hours. He got so bad that I got a drink from the Chief to settle his nerves. He said he was sick because he hadn't had anything to eat and had been drinking. They only served coffee in jail that morning."

FBI agent Robert Moore was not called as a witness by the State. The State's evidence consisted of the testimony of Wike and Chandley. After the State rested its case, defendant stated he desired to call

Moore. Moore was called, and defendant's counsel talked with him. After such conversation, defendant "in open court voluntarily waived the appearance of agent Moore of the FBI." Defendant did not testify as to the circumstances surrounding the making of his extrajudicial confession and offered no evidence.

In respect to intoxication of accused at time of confession as affecting its admissibility, Bobbitt, J., said for the Court in *S. v. Isom,* 243 N.C. 164, 90 S.E. 2d 237, 69 A.L.R. 2d 358:

> "Ordinarily, intoxication of an accused person does not render inadmissible his confession of facts tending to incriminate him. But the extent of his intoxication when the confession was made is relevant; and the weight, if any, to be given a confession under the circumstances disclosed is exclusively for determination by the jury. 20 Am. Jur., Evidence, sec. 525; 22 C.J.S., Criminal Law, sec. 828; Annotation: 74 A.L.R. 1102 *et seq.,* and supplemental decisions. See, *S. v. Bryan,* 74 N.C. 351."

See also *S. v. Stephens,* 262 N.C. 45, 136 S.E. 2d 209, and annotation to the *Isom* case in 69 A.L.R. 2d 361 *et seq.*

Ordinarily, the fact that an extrajudicial confession of crime is made after intoxicants have been furnished the accused by police officers having him in custody is not sufficient, according to the weight of authority, to render the confession inadmissible, although there is contrary authority. 2 Wharton's Criminal Evidence, 12th Ed. by Anderson, Ch. 7, Confessions and Admissions, § 388, Intoxication; 23 C.J.S., Criminal Law, § 828, pp. 229-30; 20 Am. Jur., Evidence, § 525, Intoxication, p. 449; Annot., 74 A.L.R., p. 1104; Annot., 69 A.L.R. 2d, p. 368.

Commonwealth v. Chance, 174 Mass. 245, 54 N.E. 551, 75 Am. St. Rep. 306, was a murder case. Defendant objected to the introduction in evidence by the commonwealth of incriminating statements made by him in conversations with officers. Holmes, C.J., afterwards a member of the U. S. Supreme Court, said for a unanimous Court:

> "It is argued further that the conversations were not voluntary in view of the defendant's confinement, recent recovery from a fit of delirium tremens, etc. We have no disposition to make the rule of exclusion stricter than it is under our decisions. It goes to the verge of good sense, at least: *Regina v. Baldry,* 2 Den. C. C. 430, 445, 446; *Regina v. Reeve,* 12 Cox C. C. 179, 180; *Hopt v. People,* 110 U.S. 574, 584. The finding that the conversations were voluntary was fully warranted: See *Commonwealth v. Bond,* 170 Mass. 41."

This is said in Annot. 69 A.L.R. 2d 369: "A number of courts have recognized that proof of intoxication amounting to 'mania' or a condition in which the person confessing is unconscious of the meaning of his words renders a confession made by a person while in such state inadmissible." In support of the statement, cases are cited from eleven states and from the District of Columbia.

There are no discrepancies in the evidence with respect to the circumstances surrounding the making of an extrajudicial confession of guilt by defendant to agent Moore and Sergeant Chandley. All the evidence is to this effect: Defendant was drinking when he was arrested about 11 p.m. on 17 December 1964 and placed in jail. He had been drinking two or three pints of intoxicating liquor a day. When Sergeant Chandley started to talk to him next day, defendant said he thought his case was an FBI case, because the cheque was written on an out-of-state bank, and he wanted to see the FBI. Pursuant to his request, Chandley called Robert Moore, the FBI agent in Asheville. Moore came to police headquarters, and he, Chandley, and defendant went into the interrogation room. Moore showed defendant his badge and identification and told him Chandley was with the Asheville Detective Department. FBI agent Moore told defendant in detail of his constitutional rights. When he finished, defendant said he understood them. Defendant made no request to see a lawyer or to make a telephone call. There is nothing in the evidence with respect to the circumstances surrounding the making of the confession by defendant to indicate he was intoxicated or under the influence of intoxicating liquor at the time he made his confession, though it seems clear that the defendant during his conversation with the officers became jittery and sick by reason of his prior heavy drinking and lack of breakfast, and said he would like to see a doctor, and in Chandley's opinion he "was almost ready to go into D.T.'s." However, there is no evidence before us that defendant did go into delirium tremens. Chandley gave him a drink of intoxicating liquor, not to induce a confession, but to settle his nerves. There is no evidence to indicate that defendant's confession was induced by promises, or inducements, or hope or fear, or coercion, or threats, or violence. All the evidence, without contradiction or discrepancy, shows his confession was voluntarily made and was the product of a free will and a conscious understanding of what he was saying, and this is true although Sergeant Chandley gave him a drink of intoxicating liquor to steady his nerves. Consequently, the extrajudicial confession of guilt by defendant was properly admitted in evidence. *S. v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344; *S. v. Davis,* 253 N.C. 86, 116 S.E. 2d 365, *cert. den.* 365 U.S. 855, 5 L. Ed. 2d 819; *S. v. Rogers, supra.* Defendant relies upon *Escobedo v. Illinois,* 378 U.S.

478, 12 L. Ed. 2d 977, and *Massiah v. United States,* 377 U.S. 201, 12 L. Ed. 2d 246. These cases are easily factually distinguishable.

It is true the judge made no specific finding of fact that the confession was voluntary. In *S. v. Litteral,* 227 N.C. 527, 43 S.E. 2d 84, the Court said:

> "While it is the better practice for a judge on a *voir dire* respecting an alleged confession to make his finding as to the voluntariness thereof and enter it in the record, a failure so to do is not fatal. Voluntariness is the test of admissibility, and this is for the judge to decide. His ruling that the evidence was competent of necessity was bottomed on the conclusion the confession was voluntary."

Such a "conclusion the confession was voluntary" is supported by all the evidence in the case, and there is nothing in this record upon which a contrary conclusion could be based.

In respect to the statement in defendant's confession about building time in Kentucky for cheques and writing cheques and in respect to other cheques, this is said in 23 Am. Jur., Forgery, § 59:

> "[It] is generally held that proof of similar acts of forgery or of uttering is admissible as bearing on the question of the intent with which the act of forgery or uttering of forged paper for which the defendant has been informed against was committed."

Defendant assigns as errors the court's permitting the solicitor for the State to ask Sergeant Chandley leading questions as to what FBI agent Moore told defendant as to his constitutional rights. The allowance of leading questions is a matter entirely within the discretion of the trial judge, and his rulings will not be disturbed on appeal, at least in the absence of abuse of discretion. Stansbury, N. C. Evidence, 2d Ed., § 31, p. 59. No abuse of judicial discretion here appears. All these assignments of error are overruled.

Defendant made no motion for judgment of compulsory nonsuit. In his brief he makes no contention that the State's evidence is insufficient to carry its case to the jury.

Defendant in his brief contends that the trial judge erred in failing to submit the issue of voluntariness of defendant's confession to the jury: that the question of voluntariness of the confession was a question of fact and not a question of law, and that all questions of fact should be determined by the jury and not the judge. This assignment of error and contention are overruled. The law is firmly established in this jurisdiction that the trial judge is required to determine the question as to whether a confession is voluntary or not before he permits it

to go to the jury, and when the trial court finds upon consideration of all the testimony that the confession was voluntarily made, his finding is not subject to review, if it is supported by competent evidence. *S. v. Rogers, supra; S. v. Barnes, supra.*

All defendant's assignments of error have been examined and all are overruled. In the trial below we find

No error.

LINDA FAULKNER BUCK, BY HER NEXT FRIEND, ELMER L. FAULKNER v. UNITED STATES FIDELITY & GUARANTY COMPANY.

(Filed 22 September, 1965.)

1. Insurance § 47.1—

"Uninsured vehicle" as used in an uninsured motorist endorsement in a policy of automobile insurance must be construed in accordance with the language and interpreted in the light of the purport and intent of the endorsement and the pertinent statutes to protect the insured and any operator of insured's car with insured's consent against injury caused by the negligence of uninsured or unknown motorists, and such coverage is not affected by the language or statutory compliance of a liability policy, if any, on the other vehicle involved in the collision.

2. Statutes § 5—

A statute must be construed to ascertain and put into effect the legislative intent.

3. Insurance § 3—

An insurance contract must be liberally construed in accordance with its purport and intent.

4. Insurance § 47.1—

An automobile upon which a liability policy has been issued is nevertheless an uninsured vehicle within the intent and purview of the statutes and an uninsured motorist endorsement if the policy on such automobile does not cover the liability of a person using the vehicle and inflicting injury on the occasion of the collision in question. G.S. 20-279.21(b) (3).

5. Same—

Plaintiff was injured while driving, with permission of the owner, a vehicle covered by a policy of insurance having an uninsured motorist endorsement. Judgment was obtained against the driver of the other car involved in the collision but no judgment was obtained against the owner of the other car because of the adjudication that the driver was operating the vehicle without the knowledge or consent of the owner, and execution on the judgment was returned unsatisfied. *Held:* Plaintiff was within the

coverage of the uninsured motorist endorsement on the policy on the car driven by her.

APPEAL by plaintiff from *Bone, E. J.*, May 24, 1965 Civil Session of PITT.

Plaintiff, Linda Faulkner Buck, a minor, by Elmer L. Faulkner, her father and next friend, instituted this action November 12, 1964, to recover $5,000.00 from defendant, United States Fidelity & Guaranty Company, under the uninsured motorist endorsement attached to and constituting an integral part of an automobile liability policy issued by defendant to Elmer L. Faulkner and providing coverage with reference to the operation of his 1953 Mercury.

The pleadings and stipulations establish the facts narrated below.

On November 30, 1963, plaintiff was operating her father's said Mercury, with his permission, along U. S. Highway #117. A Chevrolet truck owned by Stackhouse, Inc. (Stackhouse) and operated by Roy Lewis Cowles (Cowles) crashed into the rear of said Mercury, causing plaintiff to sustain severe and permanent personal injuries.

On February 6, 1964, plaintiff, by her father and next friend, instituted an action in the Superior Court of Pitt County to recover damages in the amount of $15,000.00, alleging the injuries plaintiff sustained as a result of said collision were caused by the negligent operation of said truck by Cowles as agent for Stackhouse. Cowles did not answer. Stackhouse, answering, denied, *inter alia*, the alleged agency.

At September 28, 1964 Session of Pitt Superior Court, upon trial of said prior action, plaintiff recovered a verdict and judgment for $9,000.00 against Cowles, but recovered nothing from Stackhouse, the jury having determined that Cowles was not operating the truck as agent of Stackhouse. Execution issued October 13, 1964, on the judgment against Cowles proved "of no avail" and said judgment remains unsatisfied.

The policy issued by defendant, United States Fidelity & Guaranty Company, to plaintiff's father was in full force and effect at the time of said collision of November 30, 1963.

Pertinent provisions of the endorsement on which this action is based, appearing under the caption or title, "PROTECTION AGAINST UNINSURED MOTORISTS INSURANCE," are quoted below.

"In consideration of the payment of the premium *for this endorsement*, the Company agrees with the Named Insured, subject to the limits of liability, exclusions, conditions and other terms of this endorsement and to the applicable terms of the policy:

INSURING AGREEMENTS

"I. DAMAGES FOR BODILY INJURY AND PROPERTY DAMAGE CAUSED BY UNINSURED AUTOMOBILES.

"To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of:

"(a) bodily injury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury,' sustained by the Insured;

"(b) (Relates to property damage and is not applicable.) caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile.

* * * * * *

"II. DEFINITIONS.

* * * * * *

"(c) UNINSURED AUTOMOBILE. The term 'uninsured automobile' means:

> (1) with respect to damages for bodily injury and property damage an automobile with respect to the ownership, maintenance or use of which there is, in the amounts specified in the North Carolina Motor Vehicle Safety and Financial Responsibility Act, neither (i) cash or securities on file with the North Carolina Commissioner of Motor Vehicles nor (ii) a bodily injury and property damage liability bond or insurance policy, *applicable to the accident with respect to any person or organization legally responsible for the use of such automobile;* or * * *." (Our italics.)

It was stipulated that the Stackhouse truck, operated by Cowles on the occasion of the collision, "was covered by a standard automobile liability insurance policy issued to Stackhouse, Inc., which was in full force and effect and covered all of the risks which were required by law to be covered, but said policy did not cover injuries inflicted by the negligence of one who was driving said motor vehicle without the permission of the owner."

The parties waived trial by jury and agreed that the court might find from the evidence any essential facts not established by the pleadings or stipulations and decide the case by answering the following issue, to wit:

"Was Roy Lewis Cowles, at the time of the collision referred to in paragraph fifth of the complaint, operating an 'uninsured vehicle' within

the definition and meaning of said term as contained in North Carolina General Statute, Chapter 20, Section 279.21, Subsection b(3) and Policy # AF 5766338 issued by United States Fidelity & Guaranty Company, defendant, to Elmer Lloyd Faulkner, as named insured?"

After hearing evidence offered by both sides with relation thereto, Judge Bone found as a fact that Cowles, at the time of the collision, was operating the Stackhouse truck "without the permission, knowledge or consent of Stackhouse, Inc., or any of its officers, agents, or employees."

It was stipulated, if the issue submitted by agreement should be answered, "Yes," plaintiff was entitled to recover of defendant the full sum of $5,000.00, together with the costs of this action; but, if said issue should be answered, "No," plaintiff was not entitled to recover any amount from defendant.

Upon the facts admitted and found, Judge Bone, being "of the opinion that the motor vehicle driven by Roy Lewis Cowles at the time of plaintiff's injury was not an 'uninsured vehicle' within the meaning of the issue set forth above," answered said issue, "No," and entered judgment for defendant. Plaintiff excepted and appealed.

Gaylord & Singleton for plaintiff appellant.
M. E. Cavendish for defendant appellee.

BOBBITT, J. Uninsured motorists coverage "is designed to further close the gaps inherent in motor vehicle financial responsibility and compulsory insurance legislation." 7 Am. Jur. 2d, Automobile Insurance § 135, p. 460. It "is intended, within fixed limits, to provide financial recompense to innocent persons who receive injuries, and the dependents of those who are killed, through the wrongful conduct of motorists who, because they are uninsured and not financially responsible, cannot be made to respond in damages." Annotation: 79 A.L.R. 2d 1252, 1252-53.

G.S. 20-279.21(b)(3), in pertinent part, provides: "No policy of bodily injury liability insurance, covering liability arising out of the ownership, maintenance, or use of any motor vehicle, shall be delivered or issued for delivery in this State with respect to any motor vehicle registered or principally garaged in this State unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in subsection (c) of § 20-279.5, under provisions filed with and approved by the Insurance Commissioner, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-

run motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom."

G.S. 20-279.21(b)(3) was enacted as Chapter 640, Session Laws of 1961, entitled "An Act to amend G.S. 20-279.21 defining motor vehicle liability insurance policy for financial responsibility purposes so as to include protection against *uninsured motorists.*" (Our italics.)

The quoted statutory provision uses but does not define the term "uninsured motor vehicles." The term "uninsured automobile" is defined in the uninsured motorist endorsement attached to and an integral part of the automobile liability policy issued by defendant to plaintiff's father. The wording of the issue submitted by the parties as determinative implies agreement that the meaning of the term "uninsured motor vehicle" as used in the quoted statutory provision and of the term "uninsured automobile" as used in said policy endorsement is the same.

While the liability of Stackhouse, if any, was insured by a "standard automobile liability insurance policy" issued to it, Stackhouse incurred no liability in connection with the operation of its truck on the occasion when plaintiff was injured. Since the truck was operated by Cowles "without the permission, knowledge or consent" of Stackhouse, the Stackhouse policy was not "applicable to the accident with respect to any person or organization legally responsible for the use" of the truck. Under the admitted and established facts, on the occasion of the collision Cowles was the only person legally responsible for the use of the Stackhouse truck. It is not contended that any automobile liability insurance policy applicable to the accident in which plaintiff was injured provides coverage for the liability of Cowles in connection therewith.

Admittedly, the automobile liability insurance policy issued to Stackhouse with reference to its truck complied with the requirements of G.S. 20-279.21 (a) and (b). However, the present action is on the contract between plaintiff's father and defendant, namely, the uninsured motorists endorsement, and decision herein depends upon the provisions of *that* contract and not upon those of the policy issued to Stackhouse.

Defendant contends the Stackhouse truck was in fact an insured vehicle. If the term "insured vehicle" were given a literal interpretation, fire, theft or collision insurance thereon would negate the status of the truck as an uninsured vehicle. Obviously, the term "uninsured vehicle," when used in an uninsured motorists endorsement, must be interpreted in the light of the fact that such endorsement is designed to protect the insured, and any operator of the insured's car with the insured's

consent, against injury caused by the negligence of uninsured or unknown motorists.

Well-established legal principles include the following: (1) The "primary rule of construction of statutes is to ascertain and declare the intention of the legislature, and carry such intention into effect to the fullest degree." 50 Am. Jur., Statutes § 223. (2) "An insurance contract or policy should be liberally construed to accomplish the purpose or object for which it is made." 44 C.J.S., Insurance § 297(a).

In our view, both the intent of the legislation and the wording of the endorsement impel the conclusion that an automobile on which an automobile liability insurance policy has been issued is uninsured within the meaning of said endorsement unless such policy covers the liability of the person using it and inflicting injury on the occasion of the collision or mishap.

The question presented and decided is one of first impression in this jurisdiction. Indeed, Application of Travelers Indemnity Company, 235 N.Y.S. 2d 718, *affirmed,* without written opinion, 246 N.Y.S. 2d 1015, is the only case disclosed by our research involving a closely analogous factual situation. There, although other questions are discussed at greater length, the holding is in accord with the decision reached herein.

In *Hardin v. Insurance Co.,* 261 N.C. 67, 134 S.E. 2d 142, where the hearing was on demurrer to defendant's plea in bar, this Court considered identical provisions of an uninsured motorist endorsement in relation to a wholly different factual situation. There, the demurrer admitted the car was an "insured automobile." Moreover, the automobile liability insurance policy covering the car was applicable to the collision in which the plaintiff was injured and covered the liability of the operator thereof. This Court decided the car *did not become* an "uninsured automobile" by reason of the subsequent receivership and insolvency of the liability insurer. It is noted that G.S. 20-279.21(b)(3) was amended by Chapter 156, Session Laws of 1965, so as to preclude the result reached by this Court in *Hardin v. Insurance Co., supra.*

The conclusion reached is that the issue submitted by the parties as determinative should have been answered, "Yes," and that the court erred in answering it, "No." For the error indicated, the judgment of the court below is vacated. The cause is remanded with direction that said issue be answered, "Yes," and that judgment be entered in favor of plaintiff for $5,000.00, together with the costs of this action, in accordance with the stipulation.

Error and remanded.

MARY HARDESTY WALLSEE v. CAROLINA WATER COMPANY AND TOWN OF MOREHEAD CITY.

(Filed 22 September, 1965.)

1. **Municipal Corporations § 12—**

Evidence that the holder of a municipal water franchise maintained a water meter box which had been sunk in the ground some seven or eight inches below the level of the adjacent unpaved street, leaving an open hole above, that such condition had existed for six or seven months, and that both the municipality and the water company had been warned of this condition as constituting a danger to pedestrians, and that plaintiff was injured when she stepped into the hole and fell, *held* sufficient to be submitted to the jury on the issue of actionable negligence of the municipality and water company.

2. **Negligence § 11—**

The law imposes upon a person *sui juris* the duty to exercise the care of a reasonably prudent person to protect himself from injury, the standard of care being constant while the degree of care varies with the exigencies of the situation and the danger to be avoided.

3. **Same—**

Mere forgetfulness or inattention to a known danger will not constitute contributory negligence when it is due to conditions which would divert the attention of a reasonably prudent person, but if under the circumstances an ordinarily prudent person would not have forgotten or been inattentive to the danger, such forgetfulness or inattention constitutes negligence.

4. **Municipal Corporations § 12— Evidence held to show inattention to known danger, constituting contributory negligence as matter of law.**

Plaintiff's evidence, considered in the light most favorable to her, tended to show that she was cognizant of the danger to pedestrians from a water meter box which had sunk some seven or eight inches below the level of the street, that she had reported this condition both to the municipality and the water company, that as she left her home and turned to walk parallel to the street her attention was diverted by the barking of her dog, that she turned to admonish the dog to keep it from following her, and that when she turned back she stepped into the hole of the water meter box and fell to her injury. *Held:* Plaintiff's own evidence discloses contributory negligence barring recovery as a matter of law.

5. **Negligence § 11—**

Contributory negligence need not be the sole proximate cause of an injury to bar recovery, but it is sufficient for this purpose if it contributes to the injury as a proximate cause or one of them.

6. **Negligence § 26—**

When plaintiff's own evidence, considered in the light most favorable to him, affirmatively shows contributory negligence so clearly that no other conclusion can be reasonably drawn from the evidence, defendant's motion to nonsuit should be allowed.

7. Negligence § 11—

What constitutes contributory negligence as a matter of law cannot be determined by inflexible rule but must be decided in accordance with the facts in each particular case.

APPEAL by plaintiff from *Cowper, J.*, June 1965 Session of CARTERET.

Civil action to recover damages jointly and severally from both defendants for personal injuries sustained by plaintiff when she fell on Fisher Street in the town of Morehead City due to a hole in the street where Carolina Water Company had placed a water meter box.

Carolina Water Company filed a separate answer denying any negligence on its part, and alleging as a further defense that if it should be established that it was negligent, then plaintiff was guilty of contributory negligence.

The town of Morehead City filed a separate answer denying any negligence on its part, and alleging conditionally as a further defense that plaintiff was guilty of contributory negligence, and further alleging that if it should be established that it was negligent and the Water Company was negligent, which it denies, and that plaintiff was free from contributory negligence, then its negligence was secondary and the Water Company's negligence was primary, and it would be entitled to indemnification from the Water Company.

Plaintiff alleged the following facts in her complaint, which each defendant in its answer admitted to be true:

> "On or about the 3rd day of May, 1963, the defendant Water Company, duly licensed for the purpose, was engaged in the business of supplying, for profit, the Town of Morehead City and its other patrons with water, for both commercial and domestic purpose, and was operating as owner a system of aqueducts and pipes for water delivery, and in connection with its operation the said Water Company also used meters, placed in meter boxes, for measuring the quantity of water supplied its different customers, and all of which was done through franchise arrangement with the defendant Town of Morehead City."

Carolina Water Company admitted in its answer "that on or about the 3rd day of May, 1963, this defendant was using a water meter on the north side of Fisher Street near its intersection with 22nd Street in the Town of Morehead City, North Carolina, and that the meter was encased in a box with top dimensions of about 10 x 20 inches."

The parties stipulated as follows:

> "Fisher Street (the one concerned with in this case) in Morehead City was and is sixty (60) feet wide, unpaved, and that all

of the sidewalks of the Town that are paved are five (5) feet wide and two (2) feet from the property line."

This is a summary of plaintiff's evidence, except when quoted: On 3 May 1963 plaintiff, a woman 63 years old, lived in a house at 2112 Fisher Street, which is on the north side of the street, with her daughter and son-in-law. She had been living there seven or eight years. During this period she walked along Fisher Street many, many times, and other pedestrians used this street. There was always grass along Fisher Street: at some seasons more than others. In Fisher Street in front of the house in which plaintiff lived, Carolina Water Company had placed a water meter box with top dimensions of about 10 x 20 inches about seven feet from the property line of plaintiff's home. For six or seven months prior to May 1963 this water meter box had been in a hole about six inches below the level of Fisher Street according to an allegation in the complaint, and about seven or eight inches, or about 12 or 14 inches, below the level of Fisher Street according to the evidence. There was grass around this hole, but the lid of the meter box could be seen. Plaintiff in using Fisher Street many, many times passed by this hole where the water meter box was and knew the hole was there. Plaintiff testified:

"The meter box was there near my place. It was sunk down in the ground at least 7 or 8 inches if not further. It has been in that condition for 6 or 7 months. I had made complaint about it to Mr. Gillikin, the one who reads the meters and told him someone was going to get hurt in that meter box; that some of the children were playing ball in the street and maybe some grown person was going to fall in it and get hurt. I told him about it several times. . . . I called the City, the place where the truck was that has charge of the street. They call it the Street Department, and told the one that answered the telephone and he said he would tell Mr. Waters, head of the Street Department."

On the afternoon of 3 May 1963, she was keeping house for her daughter, looking after the children. They had come home from school and wanted her to go to a grocery store about a block and a half away to get them some "hot dogs." She testified as follows:

"I came out of the house and down the step and turned on what would be a sidewalk if it was paved, and when I started around like I was going out towards the street my little dog started barking, and not thinking I turned around to tell her to go back, that I'd be back in a few minutes — I didn't want her following me because I was afraid she'd get hit, and when I turned back around

both feet went in this water meter hole and I fell over on the ground."

She testified as to the occurrence on cross-examination as follows:

> "My dog come barking, as I said, and I turned around for to tell her to go back. When I turned around she was sitting on the porch and I said, 'You stay there until I come back.' I was looking at her then. It was a little rat terrier and fice, mixed. I was not stepping backwards. When I turned around I was standing still. I turned around and I looked toward the porch and she was sitting right in front of the doorsteps on the porch and I said, 'You lay down, I'll be back in a few minutes.' When I turned back around both feet went in the hole."

V. C. Simmons, a witness for plaintiff, and another person were riding in an automobile in the vicinity of 22nd and Fisher Streets passing by plaintiff's house. He heard plaintiff holler, stopped the car, jumped out and ran over to her. He testified:

> "She was sitting on the ground with one foot in the hole. We picked her up and carried her into the house. The hole was about 12 or 14 inches deep. It looked like a hill built up around the hole. There was some amount of grass and the main water thing was sitting down approximately six inches under it where the grass was. * * * She was sitting down and hollering, 'Oh, my Lord, my leg, my leg!' "

In the fall she sustained a fracture of the external malleolus of the fibula in the left leg and a fracture of the fifth metatarsal in her right foot.

From a judgment of compulsory nonsuit as to both defendants entered at the close of plaintiff's evidence, she appeals.

Harvey Hamilton, Jr., and Luther Hamilton, Sr., for plaintiff appellant.

George H. McNeill for the Town of Morehead City defendant appellee.

Barden, Stith, McCotter & Sugg by L. A. Stith for Carolina Water Company defendant appellee.

PARKER, J. Plaintiff's evidence considered in the light most favorable to her would permit a jury to find the following facts and to draw the following legitimate inferences therefrom, *Bridges v. Graham,* 246 N.C. 371, 98 S.E. 2d 492:

Carolina Water Company, through franchise arrangement with the town of Morehead City, placed on Fisher Street in the town of Morehead City a water meter box, with top dimensions of about 10 x 20 inches, in front of plaintiff's home. For six or seven months prior to 3 May 1963 this water meter box had been sunk down in the ground at least seven or eight inches below the level of Fisher Street leaving an open hole above. This open hole above the meter box created a dangerous condition in Fisher Street to pedestrians using the street. Plaintiff knew this dangerous condition was in the street and reported it several times to Carolina Water Company, and also reported it to the town of Morehead City. Neither defendant did anything to remedy this dangerous condition in Fisher Street, to prevent injury to pedestrians using the street, although each had actual knowledge of it, and the character of the hole in Fisher Street was such that injury to pedestrians using this street might reasonably be anticipated by defendants. On 3 May 1963 plaintiff stepped in this hole, fell, and was seriously injured. Plaintiff's evidence would permit a jury to find that each defendant was negligent, and that the negligence of each proximately caused her injuries. *Washington Gaslight Co. v. District of Columbia,* 161 U.S. 316, 40 L. Ed. 712; *Gregg v. Wilmington,* 155 N.C. 18, 70 S.E. 1070; *Oklahoma Natural Gas Co. v. Hancock, Okla.,* 272 P. 2d 450; 63 C.J.S., Municipal Corporations, §§ 863(a) and 867; 19 McQuillin, Municipal Corporations, 3d Ed., § 54.91; *Fitzgerald v. Concord,* 140 N.C. 110, 52 S.E. 309; *Faw v. North Wilkesboro,* 253 N.C. 406, 117 S.E. 2d 14; *Bailey v. Asheville,* 180 N.C. 645, 105 S.E. 326; *Gasque v. Asheville,* 207 N.C. 821, 178 S.E. 848; *Ferguson v. Asheville,* 213 N.C. 569, 197 S.E. 146. *Gettys v. Marion,* 218 N.C. 266, 10 S.E. 2d 799, and *Rivers v. Wilson,* 233 N.C. 272, 63 S.E. 2d 544, are factually distinguishable.

The Honorable Luther Hamilton, Sr., a former distinguished jurist and a learned and scholarly lawyer, with his customary frankness and fairness to the Court, states in his brief for plaintiff:

> "AS TO CONTRIBUTORY NEGLIGENCE ON THE PART OF THE PLAINTIFF: We concede that, except for the attention of the plaintiff being diverted momentarily by the barking of her little dog, there would have been no excuse for her stepping into the meter box hole. She knew of its existence, had passed it many times, and was afraid that she herself or somebody else might fall in, and, knowing of its presence, always before had evaded or avoided it, while passing that way 'many, many times.' The barking of her little dog reminded her, or at least suggested the probability, that she was about to be followed by it and that she was unwilling to have it 'follow her down the street' for fear it might get run over

or hurt. * * * Plaintiff turned around to admonish the dog, and as she stepped forward in turning back, without having had time to redirect her attention to where she was going, the next step, made as she turned, put her right into the hole of the water meter box."

Plaintiff contends that the barking of her little dog diverted her attention or mind from her known danger of the open hole above the water meter box, and that the question of whether or not she was guilty of negligence proximately contributing to her injuries should be submitted to a jury under the law as stated in 65 C.J.S., Negligence, § 120, p. 726, which is quoted with approval in *Dennis v. Albemarle,* 242 N.C. 263, 87 S.E. 2d 561, and also in *Walker v. Randolph County,* 251 N.C. 805, 112 S.E. 2d 551, from the *Dennis* case. This statement of law is as follows:

> "When a person has exercised the care and caution which an ordinarily prudent person would have exercised under the same or similar circumstances, he is not negligent merely because he temporarily forgot or was inattentive to a known danger. To forget or to be inattentive is not negligence unless it amounts to a failure to exercise ordinary care for one's safety. Regard must be had to the exigencies of the situation, and the circumstances of the particular occasion. Circumstances may exist under which forgetfulness or inattention to a known danger may be consistent with the exercise of ordinary care, as where the situation requires one to give undivided attention to other matters, or is such as to produce hurry or confusion, or where conditions arise suddenly which are calculated to divert one's attention momentarily from the danger. In order to excuse forgetfulness of, or inattention to, a known danger, some fact, condition, or circumstance must exist which would divert the mind or attention of an ordinarily prudent person; mere lapse of memory is not sufficient, and, if, under the same or similar circumstances, an ordinarily prudent person would not have forgotten or have been inattentive to the danger, such conduct constitutes negligence."

The law imposes upon a person *sui juris* the duty to exercise ordinary care to protect himself from injury, and the degree of such care should be commensurate with the danger to be avoided. *Rosser v. Smith,* 260 N.C. 647, 133 S.E. 2d 499; *Alford v. Washington,* 244 N.C. 132, 92 S.E. 2d 788. 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. *Greene v. Meredith,* 264 N.C. 178, 141 S.E. 2d 287.

Plaintiff, according to her own testimony, knew that the water meter box "was sunk down in the ground at least 7 or 8 inches if not further," below the level of Fisher Street, and had been for 6 or 7 months. During this time she passed it many, many times. She knew the hole had created a dangerous condition in the street for pedestrians using the street. She testified: "I had made complaint about it to Mr. Gillikin, the one who reads the meters and told him someone was going to get hurt in that meter box; that some of the children were playing ball in the street and maybe some grown person was going to fall in it and get hurt. I told him about it several times. * * * I called the City, the place where the truck was that has charge of the street. They call it the Street Department, and told the one that answered the telephone and he said he would tell Mr. Waters, head of the Street Department."

Considering plaintiff's evidence in the light most favorable to her, it compels the inescapable conclusion — no other conclusion can be reasonably drawn therefrom — by any person of fair and sound judgment that under the same or similar circumstances the barking of a little pet dog on the porch, which apparently desired to follow its owner to a nearby grocery store, would not have diverted the mind or attention of an ordinarily prudent person and caused him to forget or to be inattentive to the known danger of a dangerous hole in the sidewalk he was using, the perilous character of which he had reported with the statement "someone is going to get hurt in that meter box," and that under all the circumstances as shown by plaintiff's own evidence, her stepping into this hole and falling, a hole she knew was in the sidewalk and had reported to defendants with the statement "someone is going to get hurt in that meter box," constituted a failure to exercise that degree of care and caution to protect herself from injury that an ordinarily prudent person under like conditions of known danger and foreseeability of injury would exercise, and was negligence, and that such negligence on her part was one of the proximate causes contributing to her injuries.

"Plaintiff's negligence need not be the sole proximate cause of the injury to bar recovery. It is enough if it contribute to the injury as a proximate cause, or one of them." *Badders v. Lassiter*, 240 N.C. 413, 82 S.E. 2d 357.

It is firmly established in the adjective law of this State that when the defendant pleads contributory negligence, and plaintiff's own evidence, considered in the light most favorable to him, affirmatively shows such contributory negligence on his part so clearly that no other conclusion can be reasonably drawn therefrom, defendant is entitled to have his motion for judgment of compulsory nonsuit sustained. *Ramey*

v. R. R., 262 N.C. 230, 136 S.E. 2d 638; *Edwards v. Vaughn*, 238 N.C. 89, 76 S.E. 2d 359; *Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307.

Walker v. Randolph County, supra, is factually distinguishable, in that, *inter alia,* plaintiff was in the courthouse "intent on finding a notice of sale at the time she fell down the stairway," she had never been in that part of the courthouse before, and never realized the stairway was there until she fell down it. *Dennis v. Albemarle, supra,* is also factually distinguishable, in that, *inter alia:* "Plaintiff was watching for the wire but did not see it. He knew the wire was there, but did not know its height. He attributed his inability to see it, in part, to the presence of the trees, some fifty to seventy-five feet high." See also the opinion on rehearing of the *Dennis* case, 243 N.C. 221, 90 S.E. 2d 532.

No inflexible rule can be laid down as to what constitutes contributory negligence as a matter of law, as each case must be decided on its merits. Plaintiff by her own evidence has proven herself out of court on the ground of contributory negligence. *Lincoln v. R. R.*, 207 N.C. 787, 178 S.E. 601. The conclusion we have reached finds support in our following decisions: *Burns v. Charlotte,* 210 N.C. 48, 185 S.E. 443; *Oliver v. Raleigh,* 212 N.C. 465, 193 S.E. 853; *Houston v. Monroe,* 213 N.C. 788, 197 S.E. 571; *Watkins v. Raleigh,* 214 N.C. 644, 200 S.E. 424; *Finch v. Spring Hope,* 215 N.C. 246, 1 S.E. 2d 634; *Welling v. Charlotte,* 241 N.C. 312, 85 S.E. 2d 379. See also *O'Neill v. City of St. Louis,* Supreme Court of Missouri, Division No. 1, 239 S.W. 94. The judgment of compulsory nonsuit below is

Affirmed.

HARVEY McDARIS AND P. NOVIE PIPES v. BREIT BAR "T" CORPORATION AND M. JACK BREITBART.

(Filed 22 September, 1965.)

1. Adverse Possession § 23—

When a party introduces a deed in evidence which he intends to use as color of title, he must, in order to give legal efficacy to his possession, prove that the boundaries described in the deed cover the land in dispute.

2. Same—

Where plaintiff introduces a deed as color of title and then offers testimony permitting the inferences that he went upon the land with a surveyor who had owned or had an interest in the land and who knew the property, that the surveyor pointed out the corners to him, and as a consequence

plaintiff was familiar with the lines of the property "as contained in the deed", *held* some evidence fitting the description of the deed to the land, even though part of the evidence should have been excluded as a conclusion had objection been made.

3. Adverse Possession § 22; Evidence § 35—

Testimony to the effect that the boundaries of the land claimed fitted the description of the land as set forth in the deed asserted as color of title, *held* incompetent as a conclusion, it being proper for the witness to testify only as to the facts from which the conclusion may be drawn by the jury.

4. Appeal and Error § 51—

Upon appeal from the court's refusal of motion for nonsuit, incompetent evidence admitted without objection must be considered, since if objection had been entered plaintiff might have introduced competent evidence in proof of the matter in question.

5. Adverse Possession § 1—

In order to acquire title by adverse possession plaintiff must have occupied the land under known and visible boundaries, and where the court fails to instruct the jury in regard to this essential element a new trial must be awarded. G.S. 1-38.

APPEAL by defendants from *Martin, S. J.*, June 21, 1965, Session of BUNCOMBE.

James S. Howell and Oscar Stanton for plaintiffs.

Van Winkle, Walton, Buck & Wall and Herbert L. Hyde for defendants.

MOORE, J. This is an action in ejectment, instituted 18 October 1963. Defendants appeal from judgment, conforming to the jury's verdict, declaring plaintiffs the owners and entitled to the possession of the land described in the complaint.

Plaintiffs' claim of ownership is based on adverse possession "under known and visible lines and boundaries and under color of title, for seven years." G.S. 1-38; *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142. For color of title plaintiffs rely on a deed from the Board of Tax Supervision of Buncombe County, executed and recorded 29 August 1946. The deed recites: "The property herein was acquired by the party of the first part through foreclosure of tax lien." Plaintiffs went into possession of land in 1946 and continued in possession until 1963 when they were ousted by defendants.

Defendants deny that plaintiffs have any title or interest in the land, and assert that plaintiffs' "color of title" was divested by reason of the foreclosure of a subsequent tax lien (lien of taxes for the year 1946). Corporate defendant claims title by virtue of a deed from the

Board of Tax Supervision for Buncombe County, dated 20 May 1963. Individual defendant is an agent of corporate defendant.

The land is described in plaintiffs' deed as follows:

> ". . . in Buncombe County, North Carolina, to wit: Beginning on a chestnut tree, the beginning corner of lot number one, and runs with the line of lot number one as follows: South 15 degrees West 29 poles to a planted stone; thence South 1 degree West 45 poles to a stake in said S. P. Munday and Rice heirs line, corner of lot number one; thence East with Munday and Rice heirs line, 24 poles to a stake; thence North 20 degrees East 90 poles to a water oak in said Munday and Jump lines; thence North 87 degrees West 12 poles to a chestnut oak; thence North 86 degrees West 35 poles to the beginning; and being the same property described in a certain deed of record in Deed Book 469, page 221, in the office of the Register of Deeds for Buncombe County, N. C., containing twenty acres, more or less, in Reems Creek Township."

The same description is incorporated in corporate defendant's deed by reference.

The trial below proceeded upon the theory that the sole question for determination is whether plaintiffs acquired ownership by adverse possession under color of title.

There are thirty-five assignments of error. Defendants stress their exception to the court's refusal to allow their motion for nonsuit. They contend that plaintiffs introduced no proof that the description in their deed fits the land they held in possession.

A deed offered as color of title is such only for the land designated and described in it. *Norman v. Williams,* 241 N.C. 732, 86 S.E. 2d 593; *Locklear v. Oxendine,* 233 N.C. 710, 65 S.E. 2d 673; *Barfield v. Hill,* 163 N.C. 262, 79 S.E. 677. "A deed cannot be color of title to land in general, but must attach to some particular tract." *Barker v. Railway,* 125 N.C. 596, 34 S.E. 701. To constitute color of title a deed must contain a description identifying the land or referring to something that will identify it with certainty. *Carrow v. Davis,* 248 N.C. 740, 105 S.E. 2d 60; *Powell v. Mills,* 237 N.C. 582, 75 S.E. 2d 759. "Parol evidence is admissible to fit the description to the land. G.S. 8-39. 'Such evidence cannot, however, be used to enlarge the scope of the descriptive words.' " *Baldwin v. Hinton,* 243 N.C. 113, 90 S.E. 2d 316. The purpose of parol evidence is to fit the description to the property, not to create a description. *Thompson v. Umberger,* 221 N.C. 178, 19 S.E. 2d 484. Plaintiffs are required to locate the land by fitting the description to the earth's surface. *Andrews v. Bruton,* 242 N.C. 93, 86 S.E. 2d 786. When a party introduces a deed in evidence which he intends to use as color

of title, he must, in order to give legal efficacy to his possession, prove that the boundaries described in the deed cover the land in dispute. *Smith v. Fite,* 92 N.C. 319. He must not only offer the deed upon which he relies for color of title, he must by proof fit the description in the deed to the land it covers — in accordance with appropriate law relating to course and distance, and natural objects and other monuments called for in the deed. *Trust Co. v. Miller,* 243 N.C. 1, 89 S.E. 2d 765; *Skipper v. Yow,* 238 N.C. 659, 78 S.E. 2d 600; *Williams v. Robertson,* 235 N.C. 478, 70 S.E. 2d 692; *Locklear v. Oxendine, supra; Smith v. Benson,* 227 N.C. 56, 40 S.E. 2d 451.

The only evidence in the record, favorable to plaintiffs, bearing upon the boundaries and location of the land described in the deed is certain testimony of Harvey McDaris, one of the plaintiffs. This testimony is in substance as follows (the greater portion is copied from the record verbatim): I am familiar with the lines of the property as contained in the deed introduced here. I had B. B. Bible, a surveyor, to go with me immediately after Marshall Orr and I got the deed. He went over the property with me. I had it surveyed. I was there with Mr. Bible. I knew him real well. He pointed out every corner to me on it. Defendants built a fence around it in 1963, put a narrow gate up and put a lock on the gate. The land lies north and south. It is more of a long strip of land. It goes down on the Reems Creek side below the spring quite a little ways and lies back up on the north side of the Rice Knob. The Scenic Highway runs through it. About a third of the property lies north of the highway. I did not mark the lines by putting a blaze on trees or anything like that. Mr. Bible pointed out each corner. I am not a surveyor. I had Mr. Bible survey the property. He didn't draw a map. He did not write up any report of that survey. Neither I nor Mr. Bible staked any corners. Mr. Bible knew the property. He told me he knew the property. Mr. Bible told me he had been on the property numbers of times and that he knew the property and could point out the corners to me. When he was on that property with me, he had his transit with him. Just the two of us together. Didn't have anyone else.

Mr. B. B. Bible was dead at the time of the trial below. Defendants introduced in evidence a deed (recorded in book 469, at page 221, of the Registry of Buncombe County) in their chain of title. It may be inferred from this deed that either B. B. Bible or his wife owned the land or an interest therein in 1934 and prior.

It was incumbent upon plaintiffs to show that the evidences of lines and corners on the land corresponded to the designations and descriptive terms in their deed. The description in plaintiffs' deed specifiies the lines and boundaries by courses and distances and refers to natural ob-

jects and monuments by which the property may be located and identified — "chestnut tree," "the beginning corner of lot number one," "the line of lot number one," "a planted stone," "S. P. Munday and Rice heirs line," "a water oak in Munday and Jump lines," "a chestnut oak." We find in the record no evidence tending to explain, locate or make certain the said calls and descriptive terms of the deed with relation to the land itself. Thus, plaintiffs failed to fit the description to the land according to the usual and accepted mode of trial procedure. *Duckett v. Lyda,* 223 N.C. 356, 26 S.E. 2d 918. We call attention to the following excerpt from the statement of facts in *Brown v. Hurley,* 243 N.C. 138, 139, 90 S.E. 2d 324.

> "The plaintiff offered the testimony of a surveyor and others, tending to fit the description contained in these deeds to the land claimed by him. There was evidence as to the location of corners, marked trees, and other natural objects. One line runs along the top of a ridge. Another line follows an old road. The property was surveyed in 1903, 1923, and in 1939, and the surveyor's markings were found and identified by the witnesses."

See also *Holmes v. Sapphire Valley Company,* 121 N.C. 410, 28 S.E. 545.

Plaintiffs' evidence permits the following inferences: B. B. Bible was a surveyor. In 1934 and prior thereto he, or his wife, owned or had an interest in the land in question. He knew the property and had been on it "numbers of times." He pointed out the corners to McDaris. As a consequence, McDaris is familiar with the lines of the property "as contained in the deed" of plaintiffs.

We are of the opinion that this constitutes some evidence that the description fits the land — more than a scintilla. *James v. R. R.,* 236 N.C. 290, 72 S.E. 2d 682. However, it is certainly the irreducible minimum of evidence on this essential point which will suffice to take plaintiffs' case to the jury. Furthermore, the testimony of McDaris that Bible surveyed the land and pointed out the corners to him, and that he, McDaris, is familiar with the lines of the property "as contained in the deed," was admitted over the objection of defendants. The evidence was not competent for the purpose of fitting the description to the land. ". . . evidence *dehors* the deed is admissible to 'fit the description to the thing' *only* when it tends to explain, locate, or make certain some call or descriptive term used in the deed. It is the deed that must speak. The oral evidence must only interpret what has been said therein." *Ducket v. Lyda, supra.* McDaris' statement that he was familiar with the boundaries "as contained in the deed," is a conclusion which the jury might draw from competent evidence, but the wit-

ness is not permitted to do so. *Memory v. Wells,* 242 N.C. 277, 87 S.E. 2d 497. Notwithstanding the incompetency of the testimony, we must consider it on the motion for nonsuit. Evidence erroneously admitted will nevertheless be considered on appeal in passing upon the sufficiency of plaintiff's evidence to withstand nonsuit, since the admission of such evidence may have caused plaintiffs to omit evidence of the same import. *Early v. Eley,* 243 N.C. 695, 91 S.E. 2d 919; *Midgett v. Nelson,* 212 N.C. 41, 192 S.E. 854.

On the first (adverse possession) issue, the court instructed the jury as follows:

> ". . . when you come to this first issue, members of the jury, you will remember that the plaintiff has the burden of proof on it and if the plaintiff has satisfied you by the greater weight of the evidence that they (1) received and recorded deed constituting color of title as the Court has instructed you as to the meaning of color of title, conveying the property described in the Complaint, and (2nd) that the plaintiffs have held said property continuously, adversely, notoriously, openly and extensively for a period of seven years following the recording of said deed, then it would be your duty to answer the first issue YES. If the plaintiffs have failed to so satisfy you, it would be your duty to answer the first issue NO."

The court erred in failing to charge that plaintiffs must also show that such possession was under known and visible lines and boundaries. G.S. 1-38. There must be known and visible boundaries such as to apprise the true owner and the world of the extent of the possession claimed. *Barfield v. Hill,* 163 N.C. 262, 79 S.E. 677. Nowhere in the charge did the court instruct the jury that there must be "known and visible lines and boundaries" or explain the meaning of this phrase. Defendants' exception to this omission is well taken, and they are entitled to a new trial.

Other assignments of error are not discussed. The matters involved may not arise upon a retrial.

New trial.

JOHN G. KLEIBOR v. GEORGE H. ROGERS, TRADING AS ROGERS HATCHERY.

(Filed 22 September, 1965.)

1. Appeal and Error § 3—

Where the parties and the lower courts treat the trial court's denial of defendant's plea in bar on the ground of *res judicata* as an order sustaining a demurrer to the plea, the Supreme Court may so treat the order, and such ruling affects a substantial right and is appealable. G.S. 1-277.

2. Infants § 4; Parent and Child § 4—

Negligent injury to an unemancipated child gives rise to a cause of action on behalf of the child to recover damages for pain and suffering, permanent injury and impairment of earning capacity after attaining majority; and to a cause of action by the parent for loss of services and earnings of the child during minority and expenses incurred for necessary medical treatment for the child's injuries.

3. Judgments § 29—

Nothing else appearing, a judgment dismissing on the ground of contributory negligence an action instituted in behalf of a minor child by his mother as next friend to recover damages for negligent injury does not bar a subsequent action instituted by the child's father to recover damages for loss of services and earnings of the child during minority and for expenses incurred for medical treatment of his son's injuries, there being no allegation that the father controlled or participated in the institution or prosecution of the prior action.

4. Judgments § 28—

Ordinarily a plea of *res judicata* may be maintained only where there is identity of parties, subject matter and issues.

APPEAL by defendant from *McLean, J.*, January 1965 Special Civil Session of BUNCOMBE.

This action was instituted August 31, 1962, in the General County Court of Buncombe County.

Plaintiff alleges John B. Kleibor, Jr., plaintiff's unemancipated nine-year old son, sustained personal injuries November 12, 1960, when struck by a truck owned by defendant and negligently operated by defendant's agent. He seeks to recover damages of $10,000.00 for loss of the services and earnings of his son during minority and for expenses incurred for necessary medical treatment of his son's injuries.

Answering, defendant denied negligence and pleaded conditionally, in bar of plaintiff's right to recover, the contributory negligence of plaintiff's said son.

In addition, defendant pleaded, as a bar to plaintiff's action, the following: On June 5, 1961, John B. Kleibor, Jr., by his mother and next friend, Lillian Kleibor, plaintiff's wife, instituted an action against

this defendant in the General County Court of Buncombe County. The complaint in said prior action alleged the same facts as those alleged in the complaint herein. Upon trial of said prior action in said General County Court before the judge and a jury, the jury, by their verdict, found that the (minor) plaintiff in said prior action had "by his own negligence contributed to his injuries and plaintiff was not awarded damages in any amount." Judgment for the defendant in accordance with said verdict was entered in said court on December 6, 1961. Defendant herein "pleads said final judgment based on the merits as *res judicata* in bar of plaintiff's right to maintain this action and . . . by reason of said prior judgment plaintiff is estopped to prosecute this action."

The agreed case on appeal states: "The Court (General County Court) construed the contentions of the defendant as a plea in bar and after studying the pleadings concluded that said plea in bar should be overruled and denied. By Order signed August 18, 1964, the Court held that said 'Plea in Bar should be overruled and denied.' The defendant objected and excepted to the ruling of the Court and . . . filed written Notice of Appeal to the Superior Court . . ."

In the Superior Court, after hearing on defendant's said appeal, Judge McLean "ORDERED AND ADJUDGED that the Judgment of the General County Court overruling and denying the defendant's Plea in Bar be and the same is hereby affirmed." Defendant excepted and appealed, assigning as error "the signing of the Order overruling and denying defendant's Plea in Bar."

Williams, Williams & Morris and James F. Blue, III, for plaintiff appellee.

Clarence N. Gilbert for defendant appellant.

BOBBITT, J. In this Court, during oral argument, it was stated that the judgment roll in the prior action was considered by the General County Court and by Judge McLean. The judgment, which sets forth the issues and the jury's answers thereto, is the only portion thereof appearing in the record on appeal. Our only information as to the pleadings in the prior action is derived from defendant's allegations herein.

It seems clear the hearings related solely to the sufficiency of defendant's pleading, treating as incorporated therein the judgment roll in the prior action. The argument in plaintiff's brief assumes the two actions are based on the injuries sustained by plaintiff's minor son on November 12, 1960, and that recovery therefor was denied in the minor

son's separate action because the jury found him guilty of contributory negligence.

Apparently, the case was considered by the court below *as if* plaintiff had demurred to the plea in bar based on alleged *res judicata* or had moved to strike defendant's allegations relating to the prior action. The courts below simply *overruled* and *denied* defendant's plea in bar. We construe these orders as holding in substance that defendant's allegations, if true, are insufficient to constitute *res judicata* and a bar to plaintiff's action. So construed, the orders in effect sustained a demurrer to defendant's said plea in bar. If so considered, defendant had the right of immediate appeal. An order or judgment which *sustains* a demurrer to a plea in bar affects a substantial right and a defendant may appeal therefrom. G.S. 1-277; *Shelby v. R.R.*, 147 N.C. 537, 61 S.E. 377; *Mercer v. Hilliard,* 249 N.C. 725, 728, 107 S.E. 2d 554; *Hardin v. Insurance Co.*, 261 N.C. 67, 134 S.E. 2d 142.

Where an unemancipated minor child is injured by the negligence of another, two causes of action arise: (1) An action on behalf of the child to recover damages for pain and suffering, permanent injury and impairment of earning capacity after attaining majority; and (2) an action by the parent, ordinarily the father, for (a) loss of the services and earnings of the child during minority and (b) expenses incurred for necessary medical treatment for the child's injuries. *Shipp v. Stage Lines,* 192 N.C. 475, 479, 135 S.E. 339; *White v. Comrs. of Johnston,* 217 N.C. 329, 333, 7 S.E. 2d 825; *Ellington v. Bradford,* 242 N.C. 159, 86 S.E. 2d 925; 3 Lee, North Carolina Family Law § 241, p. 105, note 1.

With reference to the two causes of action now under consideration, the prior action in behalf of the minor and the present action by the father, the parties are different and the causes of action are different. *Ellington v. Bradford, supra.* An attempt to combine the two actions in one suit would constitute a misjoinder of parties and causes of action and such suit would be subject to dismissal if defendant demurred on that ground. *Thigpen v. Cotton Mills,* 151 N.C. 97, 65 S.E. 750; *Campbell v. Power Co.,* 166 N.C. 488, 82 S.E. 842; *Ellington v. Bradford, supra.*

Plaintiff has alleged facts sufficient to constitute a cause of action and which, nothing else appearing, entitle him to maintain this action. Defendant does not contend otherwise.

Unquestionably, the contributory negligence of his minor son, *if established in this action,* would constitute a bar to plaintiff's recovery herein. See Lee, op. cit. p. 118, note 53, for supporting authorities. Defendant alleged this action is barred by the contributory negligence of plaintiff's minor son. No question is presented as to this particular plea in bar. The sole question presented on this appeal is whether the

fact the contributory negligence issue was answered, "Yes," in the prior action, standing alone, constitutes a bar to this action.

In *Rabil v. Farris,* 213 N.C. 414, 196 S.E. 321, the defendants based their plea in bar to the father's action solely on the fact the jury, in the prior action on behalf of the plaintiff's two-year old child, had answered the negligence issue, "No." The father, plaintiff in the second action, was appointed and had acted as next friend in the prosecution of the prior action on behalf of his minor child. No additional facts with reference to the father's connection with the prior action were alleged. This Court, by a vote of four to three, held defendants' plea in bar should have been overruled.

While subsequent decisions of this Court have cited *Rabil v. Farris, supra,* with apparent approval, none has involved a like factual situation. It was distinguished factually by Denny, J. (now C.J.), in *Thompson v. Lassiter,* 246 N.C. 34, 37, 97 S.E. 2d 492. For further comment on *Rabil v. Farris, supra,* see Lee, op. cit. § 241, p. 117; 36 N.C.L.R. 462.

It is noteworthy that, under our decisions, where a father prosecutes an action on behalf of his minor child and *seeks to recover therein* the damages which the father himself otherwise would be entitled to recover in his own separate action therefor, and no objection is interposed by the defendant, the father thereby waives his individual rights against the defendant. *Pascal v. Transit Co.,* 229 N.C. 435, 50 S.E. 2d 534; *Shields v. McKay,* 241 N.C. 37, 84 S.E. 2d 286; *White v. Osborne,* 251 N.C. 56, 59, 110 S.E. 2d 449; *Doss v. Sewell,* 257 N.C. 404, 409-410, 125 S. E. 2d 899. However, the prosecution of a minor son's personal injury action on his behalf by his mother as next friend is not a bar to the father's independent action for loss of the services and earnings of his son during minority and for expenses incurred for necessary medical treatment of his son's injuries. *Smith v. Hewett,* 235 N.C. 615, 70 S.E. 2d 825.

The present appeal does not require a reconsideration of our decision in *Rabil v. Farris, supra,* with reference to a factual situation such as that considered therein. Here, the prior action was instituted on behalf of the minor by his mother, Lillian Kleibor, as next friend. The present plaintiff was not in any capacity a party to that action.

Ordinarily, the plea of *res judicata* may be maintained only where there is an identity of parties, of subject matter and of issues. *Coach Co. v. Burrell,* 241 N.C. 432, 85 S.E. 2d 688; *Reid v. Holden,* 242 N.C. 408, 88 S.E. 2d 125; *Thompson v. Lassiter, supra; Masters v. Dunstan,* 256 N.C. 520, 124 S.E. 2d 574.

Moreover, defendant has alleged no facts sufficient to invoke the rule stated in Restatement of Judgments, § 84, quoted in *Light Co. v. In-*

surance Co., 238 N.C. 679, 79 S.E. 2d 167, and in *Thompson v. Lassiter, supra,* to wit: "A person who is not a party but who controls an action, individually or in co-operation with others, is bound by the adjudications of litigated matters as if he were a party if he has a proprietary or financial interest in the judgment or in the determination of a question of fact or of a question of law with reference to the same subject matter or transaction; if the other party has notice of his participation, the other party is equally bound." Defendant does not allege that the father, the present plaintiff, participated in any manner in the institution or prosecution of the prior action.

Treating the orders of the courts below as in effect sustaining a demurrer to said plea in bar and as striking the allegations with reference thereto from defendant's pleading, the order of Judge McLean is affirmed. Defendant, if so advised, may move for leave to amend. G.S. 1-129; G.S. 1-163.

Affirmed.

RAYMOND A. WANNER, EXECUTOR OF THE ESTATE OF ALICE H. McNIEL, DECEASED v. RAYMOND P. ALSUP.

(Filed 22 September, 1965.)

1. Automobiles § 33—

The mere fact that a pedestrian attempts to cross a street at a point other than a crosswalk is not sufficient, standing alone, to support a finding of contributory negligence as a matter of law. G.S. 20-174(a)(e).

2. Automobiles §§ 42a, 45; Negligence § 26—

Contributory negligence does not warrant nonsuit when plaintiff alleges and introduces evidence sufficient to raise the issue of last clear chance for the determination of the jury.

3. Automobiles § 42k—

Where the evidence discloses that intestate, dressed in white, was walking diagonally northeast in crossing a north-south street, that she was plainly visible for some distance, and that defendant, driving north, made no attempt to avoid striking her, did not sound his horn or give any warning of his approach, did not slow down, stop or turn, and struck her when she had gotten within a very short distance of the east curb of the street, *held* to take the case to the jury on the issue of last clear chance, and the granting of nonsuit was error.

APPEAL by plaintiff from *Campbell, J.*, February-March 1965 Civil Session of BUNCOMBE.

Plaintiff, as executor of the last will and testament of Alice H. McNiel, who died on 22 January 1964 as a result of injuries received from being struck by defendant's automobile on 21 January 1964, brings this action against the defendant to recover for injuries sustained by plaintiff's testatrix and for her wrongful death.

Plaintiff's evidence tends to show that on 21 January 1964, about 4:50 p.m., testatrix, a dental technician, dressed in white shoes, white stockings, white dress, and a blue or grey sweater, parked her automobile parallel and next to the curb on the west side of Valley Street (a north-south street, 42 feet wide), in Asheville, North Carolina. Testatrix got out of her parked car on the driver's, or left, side, facing south in the direction from which defendant was approaching. Defendant was driving in his right lane, close to the center of the street, some 40 to 60 feet in front of a taxicab operated by one Charles Scarborough. Scarborough was approximately 320 feet distant at the time, and saw testatrix standing by her parked car facing toward him and the defendant. Defendant was traveling at approximately 30 to 35 miles an hour. Valley Street is straight and slightly upgrade in this vicinity and there was no obstruction between testatrix and defendant and there was no other traffic in this vicinity at the time. Testatrix looked to her left and started walking in a normal manner across the street diagonally to her left, in a northeasterly direction, toward the entrance of the place of business of the International Truck and Tractor Company on the east side of Valley Street, where the testatrix had an appointment. Defendant continued traveling about the center of his right lane, followed by Scarborough. Scarborough's vision of testatrix became obstructed by defendant's car as testatrix reached approximately the center of the street. Defendant continued driving in a straight course approaching testatrix, without reducing his speed, sounding his horn, applying his brakes, or turning his car in any manner whatsoever, to the left or right, and struck testatrix with the right front fender of his automobile. Testatrix suffered several broken bones and internal injuries and died as a result of her injuries about 2:40 a.m. the following morning.

There was no pedestrian crosswalk where the testatrix attempted to cross the street.

The defendant in his answer alleged that plaintiff's testatrix was guilty of contributory negligence in that she attempted to cross the street at a point other than a crosswalk and was, therefore, barred from recovery.

The plaintiff in his reply pleaded the failure of the defendant to avail himself of the last clear chance of avoiding a collision with plaintiff's testatrix.

At the close of plaintiff's evidence the trial judge granted defendant's motion for judgment as of nonsuit, holding as a matter of law that plaintiff's testatrix was contributorily negligent and therefore barred from recovery. The plaintiff excepted to the judge's ruling and appeals, assigning error.

Meekins, Packer & Roberts by William C. Meekins for plaintiff.
Van Winkle, Walton, Buck & Wall by O. E. Starnes, Jr., for defendant.

DENNY, C.J. The appellant assigns as error the ruling of the court below in granting the defendant's motion for judgment as of nonsuit at the close of plaintiff's evidence, on the ground that such evidence established the contributory negligence of plaintiff's testatrix as a matter of law.

The real question for determination is whether or not the plaintiff's evidence was sufficient to carry the case to the jury on the issues of negligence, contributory negligence, last clear chance, and damages, which issues were raised by the pleadings.

The mere fact that plaintiff's testatrix attempted to cross Valley Street at a point other than a crosswalk is not sufficient, standing alone, to support a finding of contributory negligence as a matter of law. This Court, in *Bank v. Phillips,* 236 N.C. 470, 73 S.E. 2d 323, in construing subsections (a) and (e) of G.S. 20-174 in connection with this question, said:

> "Here, the evidence discloses that the intestate was crossing the street diagonally within the block, at a point which was neither at an intersection nor within a marked crosswalk, and the evidence discloses no traffic control signals at the adjacent intersections. Therefore, under the provisions of G.S. 20-174(a) it was intestate's duty to 'yield the right of way to all vehicles upon the roadway.'
>
> "If it be conceded that the intestate failed to yield the right of way as required by this statute, even so, it was the duty of the defendant, both at common law and under the express provisions of G.S. 20-174(e), to 'exercise due care to avoid colliding with' the intestate. * * *
>
> "Nor may the evidence tending to show that intestate failed to yield the right of way as required by G.S. 20-174(a) be treated on this record as amounting to contributory negligence as a matter of law, particularly so in view of the testimony to the effect that intestate at the time he was struck had reached a point about

10 feet from the west curb of the street. Our decisions hold that failure so to yield the right of way is not contributory negligence *per se,* but rather that it is evidence of negligence to be considered with other evidence in the case in determining whether the actor is chargeable with negligence which proximately caused or contributed to his injury. (Citations omitted.)"

Likewise, in *Williams v. Henderson,* 230 N.C. 707, 55 S.E. 2d 462, this Court said:

> "While a driver of a motor vehicle is not required to anticipate that a pedestrian seen in a place of safety will leave it and get in the danger zone until some demonstration or movement on his part reasonably indicates that fact, *Tysinger v. Dairy Products,* 225 N.C. 717, 36 S.E. 2d 246, he must give warning to one on the highway or in close proximity to it, and not on a sidewalk, who is apparently oblivious of the approach of the car or one whom the driver in the exercise of ordinary care may reasonably anticipate will come into his way. *Trainor's Adm'r. v. Keller,* 79 S.W. 2d 232.
>
> "It is his duty to sound his horn in order that a pedestrian unaware of his approach may have timely warning. If it appears that the pedestrian is oblivious for the movement of the nearness of the car and of the speed at which it is approaching, ordinary care requires him to blow his horn, slow down, and, if necessary, stop to avoid inflicting injury. (Citations omitted.)
>
> "He must make certain that pedestrians in front of him are aware of his approach. 2 Blash. Auto 370, sec. 2142. * * *"

The appellee relies heavily upon *Blake v. Mallard,* 262 N.C. 62, 136 S.E. 2d 214, to support the ruling of the court below. This case is readily distinguishable from the instant case. The facts in the *Blake* case were, in effect, that plaintiff, a colored woman, dressed in dark clothing, attempted to cross a six-lane highway, at night, at a point other than a crosswalk. The defendant's car was observed some 200 yards away, traveling in plaintiff's direction, at an estimated speed of 60 miles per hour. When plaintiff was in the fourth lane, she observed defendant's car 45 feet away and began to run, but was struck by defendant's car. Nonsuit of plaintiff was properly affirmed by this Court because it was not shown by the evidence that plaintiff was oblivious to defendant's approaching car. In fact, the evidence was to the contrary. Moreover, there was no evidence tending to show that defendant had notice in time and an opportunity to avoid striking plaintiff.

The plaintiff's evidence in the instant case was to the effect that testatrix was plainly visible for "a long distance," but that defendant made no attempt to avoid striking her or to warn her of his approach; nor did he slow down, stop, or try to turn away from the testatrix when he came in close proximity to her when she had reached within a very short distance of the curb on the eastern side of the street.

A plaintiff may not recover on the original negligence of a defendant if the jury should find that plaintiff was guilty of contributory negligence. However, "The contributory negligence of the plaintiff does not preclude a recovery where it is made to appear that the defendant, by exercising reasonable care and prudence, might have avoided the injurious consequences to the plaintiff, notwithstanding plaintiff's negligence; * * *." *Ingram v. Smoky Mountain Stages, Inc.,* 225 N.C. 444, 35 S.E. 2d 337, and cited cases.

"The doctrine of last clear chance is the humane rule of law that imposes upon a person the duty to exercise ordinary or due care to avoid injury to another who has negligently placed himself in a situation of danger, and who he can reasonably apprehend is unconscious thereof or is unable to avoid the danger." Strong's North Carolina Index, Vol. III, Negligence, § 10, page 456, where numerous cases on the subject are cited.

In our opinion, the plaintiff's evidence was sufficient to carry the case to the jury on the issues hereinabove set out and the court below committed error in sustaining defendant's motion for judgment as of nonsuit, and we so hold.

Reversed.

STATE v. WILBURN HORNBUCKLE.

(Filed 22 September, 1965.)

1. **Assault and Battery §§ 9, 15; Homicide § 10— Private citizen has right to interfere to prevent felonious assault on third person.**

   Defendant's evidence to the effect that he was driving his car with two male passengers on the front seat and a male and female passenger on the back seat, that prosecuting witness, one of the front seat passengers, made advances toward the girl, that when she paid no attention to him he became angry and struck at her with a knife, that defendant saw the prosecuting witness start to strike the girl again, that he grabbed the arm of the prosecuting witness, stopped the car and in wrestling the knife away from the prosecuting witness cut him, *held* sufficient to require an instruction as to the right of defendant to interfere and fight in the defense of his

passenger, and a charge which gives defendant's contentions with respect to his right to fight in defense of his passenger but which fails to explain and declare the law arising on the evidence in the case is error.

2. Criminal Law § 107—

It is prejudicial error for the court to fail to instruct the jury on substantive features of the case arising on the evidence, even though there is no prayer for special instructions.

APPEAL by defendant from *Froneberger, J.*, February Session 1965 of JACKSON.

This is a criminal action in which the defendant was indicted for a felonious assault with a deadly weapon, to wit, a knife, with intent to kill, not resulting in death but inflicting serious bodily injuries upon the prosecuting witness, Willard Williamson.

The State's evidence tends to show that on the night of 29 July 1962 the prosecuting witness, Willard Williamson, was assaulted by the defendant, Wilburn Hornbuckle, who inflicted various knife wounds requiring over 100 stitches. Williamson testified that he was riding in the front seat of Hornbuckle's automobile; that Hornbuckle was driving and that Charlie Owl was sitting on Williamson's right; that Myrtle Driver and James Consene were riding on the back seat; that they had purchased a gallon of home-brew and were riding around drinking; that Hornbuckle stopped the car, opened the door, stepped out and started cutting him with a knife. The evidence further tends to show that there was no friction or trouble between defendant and Williamson prior to the cutting; that the others got out of the car but got back in the car soon thereafter and Hornbuckle continued to drive around and told Williamson that he would not let him out of the car, saying, "I am on probation and you are not going to mess me up." Hornbuckle continued driving for about an hour before Williamson opened the door and rolled out down an embankment and hid until he could secure aid from the Shady Lane Motel nearby.

The defendant's evidence tends to show that Hornbuckle was driving the car, Charlie Owl was in the middle and Williamson was on the right front seat, with Consene and Myrtle Driver on the back seat; that Williamson had requested Hornbuckle to take him home; while on the way, Williamson began drinking liquor from a bottle he had on his person when he entered defendant's car, would not get out of the car at his home and asked to be taken to his mother's; that he would not get out of the car when he arrived at his mother's home and continued to ride around with the defendant, drinking, cursing and attempting to hold the hand or date Myrtle Driver in the back seat; that she would not pay any attention to him and that Williamson became angry and suddenly took his knife and struck at Myrtle Driver; that defendant

saw the knife and as Williamson started to strike at Myrtle Driver again, the defendant grabbed the arm of Williamson, stopped the car and wrestled the knife away from him; that in the process of getting the knife, Williamson was cut; that he did not intentionally cut Williamson and that the yellow-handled knife the defendant took from Williamson belonged to the prosecuting witness. Defendant's evidence was to the further effect that no one bought or drank any home-brew; that no one drank any liquor while defendant was driving around during the time in question except the prosecuting witness. The testimony of defendant's witness, James Consene, corroborated the defendant's version as to what happened during the evening of 29 July 1962.

At the time of the trial, Myrtle Driver, according to the testimony, was living in South Dakota and was not available as a witness for the trial. Charlie Owl was not offered as a witness by the State or the defendant. Whether he was available or not was not disclosed.

The jury returned a verdict of guilty of assault with a deadly weapon. The court imposed a sentence of fifteen months, and the defendant appeals, assigning error.

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

Marcellus Buchanan, III, T. D. Bryson, Jr., attorneys for defendant.

DENNY, C.J. The evidence of the State and that of the defendant is in sharp conflict. The prosecuting witness testified that he had no knife and never attempted to use one. On the other hand, the defendant testified that the prosecuting witness tried to cut Myrtle Driver with a yellow-handled knife and that he intervened and took the knife away from the prosecuting witness to keep him from cutting Myrtle Driver who was a guest passenger in the defendant's automobile.

The defendant assigns as error the failure of the court below to charge the jury that he as a private citizen had the right to interfere in order to prevent the prosecuting witness from committing a felonious assault on Myrtle Driver.

The State concedes that the defendant's evidence was sufficient to require an instruction as to the right of the defendant as a private citizen to interfere with and prevent the prosecuting witness from committing a felonious assault on Myrtle Driver who was a guest passenger in his car.

In 41 C.J.S. Homicide, § 385, page 188, *et seq.*, it is said: "Where there is evidence which tends to support the issue that the homicide or assault was committed by accused in defense of the person of another,

the court should fully, correctly, and explicitly instruct as to the law on this point as applied to the facts of the case. * * *"

The law with respect to the right of a private citizen to interfere with another to prevent a felonious assault upon a third person is well stated in *S. v. Robinson,* 213 N.C. 273, 195 S.E. 824, where Winborne, J., later C.J., said: "If the defendant * * * had a well-grounded belief that a felonious assault was about to be committed on * * * (another), he had the right and it was his duty as a private citizen to interfere to prevent the supposed crime. The principle of law is well settled in this State. *S. v. Rutherford,* 8 N.C. 457; *S. v. Roane,* 13 N.C. 58; *S. v. Clark,* 134 N.C. 698, 47 S.E. 36.

"The failure of the court to instruct the jury on substantive features of the case arising on the evidence is prejudicial error. This is true even though there is no special prayer for instructions to that effect. *S. v. Merrick,* 171 N.C. 788, 88 S.E. 501; *S. v. Bost, supra* (189 N.C. 639, 127 S.E. 689); *S. v. Thornton, supra* (211 N.C. 413, 190 S.E. 758); *School Dist. v. Alamance County,* 211 N.C. 213, 189 S.E. 873."

In the instant case, the court in its charge to the jury gave the defendant's contentions with respect to his right to defend Myrtle Driver but failed to explain and declare the law arising on the evidence presented by the defendant. This constituted prejudicial error. *S. v. Bryant,* 213 N.C. 752, 197 S.E. 530; *S. v. Robinson, supra; Keith v. Lee,* 246 N.C. 188, 97 S.E. 2d 859; *Therrell v. Freeman,* 256 N.C. 552, 124 S.E. 2d 522.

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

New trial.

STATE v. CLARENCE WILLIE LOWTHER.

(Filed 22 September, 1965.)

1. Criminal Law § 98—

In a prosecution in which the State relies upon circumstantial evidence it is the duty of the court, upon motion to nonsuit, to determine whether there is substantial evidence of each essential element of the offense charged and of defendant's guilt thereof, and it is the function of the jury to say whether the circumstances in evidence are so connected and related as to point unerringly to guilt, and to exclude to a moral certainty every other reasonable hypothesis except that of guilt.

2. Criminal Law § 106—

In this prosecution in which the State relied upon circumstantial evidence, the court's charge that the circumstances or conditions relied upon

must be such as are not only consistent with guilt but inconsistent with innocence, *held* an insufficient statement of the intensity of proof necessary to warrant a verdict of guilty on circumstantial evidence, it being necessary for that purpose that the circumstances be so connected or related as to point unerringly to defendant's guilt and exclude any other reasonable hypothesis, the burden remaining upon the State to satisfy the jury beyond a reasonable doubt of defendant's guilt.

APPEAL by defendant from *Morris, J.*, March 1965 Session of CHOWAN.

Criminal prosecution upon an indictment charging defendant on 7 January 1965 in one count with feloniously breaking and entering a shop and dwelling house occupied by Claude Rogers, wherein merchandise, money and personal property were, with intent to commit larceny, and in a second count on the same date and in the same place with the larceny of $7 in U. S. currency, the property of Claude Rogers, and of $20 in U. S. currency, the special property of Claude Rogers by virtue of bailment.

Plea: Not guilty. Verdict: Guilty.

From a judgment of imprisonment for 18 months, defendant appeals.

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

George E. Tillett; Samuel S. Mitchell and Romallus O. Murphy for defendant appellant.

PARKER, J. The State's evidence was amply sufficient to carry the case to the jury on both counts in the indictment. Defendant made no motion for judgment of nonsuit, makes no contention in his brief that the State's evidence was insufficient to carry the case to the jury on both counts in the indictment, and his only assignments of error are to the charge.

Defendant assigns as error this part of the charge:

"Now as I stated to you the State relies upon what is known as circumstantial evidence. Now circumstantial evidence, gentlemen of the jury, is a recognized and accepted instrumentality in North Carolina, in the ascertainment of the truth, and is highly acceptable in matters of most grave moment, but the circumstances and conditions relied upon must be such as are not only consistent with guilt, but must be inconsistent with innocence."

A reading of the entire charge shows that the above quotation is the only instruction in respect to circumstantial evidence given by the court to the jury.

When the State relies upon circumstantial evidence to convict, it seems that not infrequently counsel and at times the trial court have been confused as to "the rules for testing the quantum of proof necessary (1) to carry a case to the jury, and (2) thereafter to warrant the jury in returning a verdict of guilty." *S. v. Moore,* 262 N.C. 431, 137 S.E. 2d 812.

"In all fairness it may be observed that [in respect to circumstantial evidence] some of the decisions of this Court have not tended to clarify the distinction between the court's and the jury's functions." *S. v. Davis,* 246 N.C. 73, 97 S.E. 2d 444.

The rule in respect to the sufficiency of circumstantial evidence to carry the case to the jury is lucidly stated in an opinion by Higgins, J., in *S. v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431, as follows:

> "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. To hold that the court must grant a motion to dismiss unless, in the opinion of the court, the evidence excludes every reasonable hypothesis of innocence would in effect constitute the presiding judge the trier of the facts. Substantial evidence of guilt is required before the court can send the case to the jury. Proof of guilt beyond a reasonable doubt is required before the jury can convict. What is substantial evidence is a question of law for the court. What that evidence proves or fails to prove is a question of fact for the jury."

This has been quoted with approval in whole or in part in *S. v. Davis, supra; S. v. Horner,* 248 N.C. 342, 103 S.E. 2d 694; *S. v. Parrish,* 251 N.C. 274, 111 S.E. 2d 314; *S. v. Haddock,* 254 N.C. 162, 118 S.E. 2d 411; *S. v. Thompson,* 256 N.C. 593, 124 S.E. 2d 728. The rule as stated in the *Stephens* case has been approved as recently as the Fall Term 1964 in *S. v. Moore, supra.*

No set form of words is required which the court must use to convey to the jury the rule relating to the degree of proof required for conviction on circumstantial evidence in a criminal case. *S. v. Shook,* 224 N.C. 728, 32 S.E. 2d 329. This Court has consistently held that circumstantial evidence is sufficient to justify a conviction when, and only when, the circumstances proved are consistent with the hypothesis that the accused is guilty, and at the same time are inconsistent with the hypothesis that he is innocent and with every other reasonable hypothesis except that of guilt. In brief, if all the material circumstances proven are of such a nature and so connected or related as to point unerringly to guilt, and to exclude to a moral certainty every other reasonable hypothesis except that of guilt, a conviction is warranted. If all the circumstances taken together are as compatible with innocence as with guilt, the jury should acquit. Unless the circumstantial evidence, as the jury finds it to be, meets the above standard to convict, the jury should acquit, and it is the duty of the court to so instruct it. *S. v. Potter,* 252 N.C. 312, 113 S.E. 2d 573; *S. v. Davis, supra; S. v. Smith,* 236 N.C. 748, 73 S.E. 2d 901; *S. v. Needham,* 235 N.C. 555, 71 S.E. 2d 29; *S. v. Jarrell,* 233 N.C. 741, 65 S.E. 2d 304; *S. v. Webb,* 233 N.C. 382, 64 S.E. 2d 268; *S. v. Minton,* 228 N.C. 518, 46 S.E. 2d 296; *S. v. Jones,* 215 N.C. 660, 2 S.E. 2d 867; *S. v. Madden,* 212 N.C. 56, 192 S.E. 859; *S. v. Plyler,* 153 N.C. 630, 69 S.E. 269; *S. v. West,* 152 N.C. 832, 68 S.E. 14; *S. v. Wilcox,* 132 N.C. 1120, 44 S.E. 625; *S. v. Brackville,* 106 N.C. 701, 11 S.E. 284; 23 C.J.S., Criminal Law, § 907.

When the State relies on circumstantial evidence, in whole or in part, to convict, it is for the jury to determine the weight and credit, if any, to be given the circumstances shown in evidence and the inferences to be drawn therefrom. Consequently, the question whether the circumstances shown in evidence are of such a nature and so connected or related as to point unerringly to defendant's guilt and to exclude any other reasonable hypothesis involves questions of fact to be resolved by the jury. Of course, when the State relies upon circumstantial evidence, in whole or in part, to convict, it must satisfy the jury beyond a reasonable doubt of defendant's guilt before it is entitled to a verdict of guilty.

When the court's charge on circumstantial evidence, which is challenged by an assignment of error, is tested by what we have consistently held as to the intensity of proof necessary to warrant a jury's returning a verdict of guilty on circumstantial evidence, it appears that the court's charge on circumstantial evidence is inadequate and prejudicial, and entitles defendant to a

New trial.

STATE v. TOMMY TESSNEAR.

(Filed 22 September, 1965.)

1. Intoxicating Liquor § 13a—

In this prosecution for possession of nontaxpaid whiskey and for possession thereof for the purpose of sale, the State's evidence *held* sufficient to overrule defendant's motions of nonsuit.

2. Criminal Law § 101—

Prima facie evidence justifies but does not compel a finding of the ultimate fact to be proved, and in a criminal case such evidence coupled with other evidence must establish defendant's guilt beyond a reasonable doubt.

3. Intoxicating Liquor § 10—

G.S. 18-11 authorizes but does not compel a jury to infer that the possessor of nontaxpaid whiskey possessed the whiskey for the purpose of sale.

4. Intoxicating Liquor § 15; Criminal Law § 108—

In a prosecution for possession and possession for the purpose of sale of intoxicating liquor, an instruction that possession of any quantity of nontaxpaid whiskey "raises a deep presumption" that the possession was for the purpose of sale *held* prejudicial error as an expression of opinion in violation of G.S. 1-180.

5. Criminal Law § 80—

Where defendant does not testify or offer evidence of his good character, the State is precluded from showing his bad character for any purpose.

6. Same; Intoxicating Liquor § 12—

In a prosecution for possession and possession for the purpose of sale of intoxicating liquor, evidence that defendant's house had the reputation of having whiskey for sale is incompetent as hearsay.

7. Searches and Seizures § 2—

It is not required that the officer using a search warrant be the one who made the affidavit.

APPEAL by defendant from *Clarkson, J.*, March 1965 Session of RUTHERFORD.

Defendant was first tried in the Recorder's Court of Rutherford County upon a warrant which charged him (1) with the possession of nontaxpaid whiskey in violation of G.S. 18-48, and (2) with the possession of nontaxpaid liquor for the purpose of sale in violation of G.S. 18-50. From conviction and judgment in the Recorder's Court defendant appealed to the Superior Court where he was tried *de novo*. The State's evidence tends to show:

About 2:30 p.m. on December 24, 1964, the Sheriff of Rutherford County and three of his deputies went to defendant's home with a search warrant. Defendant was not there when they arrived but appeared in about ten minutes. When the sheriff told Mrs. Tessnear that

he had a search warrant she slammed the door and ran toward the sink. He knocked the door open and from the kitchen sink retrieved two plastic containers. One contained half a gallon of nontaxpaid whiskey; the other, a quart. "Shot glasses" were in a cabinet over the sink. Six or eight people were sitting around the kitchen table drinking. Around the home the officers found sacks and boxes containing 50-60 liquor bottles. There were also numerous jars and plastic jugs. In a bedroom the officers found "a lady standing up against the dresser trying to hide three pints of taxpaid whiskey." From time to time during the preceding summer the officers had watched defendant's premises. They had observed much traffic in and out of the house, and had seen and "picked up" numerous drunks who had come from there. Taxis brought people who went in without packages and came out in 5-8 minutes carrying paper bags.

Over defendant's objection, each of the State's witnesses testified that for at least six years defendant's house had had the reputation "of having whiskey for sale." The admission of this evidence is the basis of defendant's assignment of error No. 2. Defendant himself did not testify. His wife's sister-in-law, one of the women present when the officers searched defendant's premises, testified in his behalf that the nontaxpaid whiskey they found in the sink belonged to her; that she had just taken it from her husband at a turkey shoot and had brought it into the house only five minutes before the sheriff arrived.

In his charge the judge told the jury that the possession of any quantity of nontaxpaid whiskey is unlawful and "raises a deep presumption that it was had for the purpose of sale." Defendant assigns the quoted portion as error.

The jury returned a verdict of "guilty to both charges." From a judgment of imprisonment, defendant appeals.

T. W. Bruton, Attorney General, Charles W. Barbee, Jr., Assistant Attorney General for the State.

J. Nat Hamrick for defendant appellant.

SHARP, J. The State's evidence was sufficient to overrule defendant's motions of nonsuit. *State v. Ryals,* 244 N.C. 75, 92 S.E. 2d 443; *State v. Harrison,* 239 N.C. 659, 80 S.E. 2d 481; *State v. Avery,* 236 N.C. 276, 72 S.E. 2d 670. He is, however, entitled to a new trial for the error he assigns in the charge. The possession of any quantity of nontaxpaid liquor is, without exception, unlawful and, under G.S. 18-11, such possession is *prima facie* evidence that such liquor is kept for the purpose of being sold. *State v. Guffey,* 252 N.C. 60, 112 S.E. 2d 734; *State v. Hill,* 236 N.C. 704, 73 S.E. 2d 894. *Prima facie* evidence is

evidence sufficient to justify, but not to compel, a finding of the ultimate fact to be proved. *Finance Co. v. O'Daniel*, 237 N.C. 286, 74 S.E. 2d 717. It must be weighed by the jury like any other evidence and considered along with all the other evidence in the case before the jury reaches its verdict. "In criminal cases this evidence, coupled with other evidence, must establish defendant's guilt beyond a reasonable doubt. Defendant is entitled to have the jury scrutinize this evidence as it does all of the other evidence with a presumption of innocence in his favor." *State v. Bryant*, 245 N.C. 645, 648, 97 S.E. 2d 264, 267; Stansbury, North Carolina Evidence § 203 (2d Ed. 1963).

From the mere possession of nontaxpaid whiskey G.S. 18-11 authorizes, but does not compel, the jury to infer that the possessor intended to sell the whiskey. The statute raises a permissible inference. Stansbury, *op. cit. supra*, § 215. In characterizing it "a deep presumption" the trial judge expressed an opinion as to the strength of the evidence. Such an expression is prohibited by G.S. 1-180. *State v. Anderson*, 263 N.C. 124, 139 S.E. 2d 6. In *State v. Benton*, 226 N.C. 745, 40 S.E. 2d 617, defendant was granted a new trial because the trial judge told the jury, when it reported it could not reach a verdict, that the evidence was "rather clear" and the jury should agree if possible. In *Bonner v. Hodges*, 111 N.C. 66, 15 S.E. 881, the judge charged the jury that a circumstance shown in the evidence was "a strong badge of fraud." In granting a new trial, Avery, J., speaking for the Court, said, "(U)nder our statute it is only where the law gives to testimony an artificial weight that the judge is at liberty to mention the sufficiency of proof at all in delivering his instructions to the jury." *Id.* at 68, 15 S.E. at 882. *Accord, Earnhardt v. Clement*, 137 N.C. 91, 49 S.E. 49.

Under the circumstances here, the admission of evidence tending to show the general reputation of defendant's premises was also error. Defendant was not charged with maintaining a nuisance, G.S. 19-1. Therefore, G.S. 19-3, which makes evidence of the general reputation of the place admissible for the purpose of proving the nuisance is not applicable. Since defendant neither testified as a witness nor offered evidence of his good character, the State was precluded from showing his bad character for any purpose whatever. *State v. McLamb*, 235 N.C. 251, 69 S.E. 2d 537; *State v. Nance*, 195 N.C. 47, 141 S.E. 468; Stansbury, *op. cit. supra*, §§ 104, 108. *A fortiori*, evidence as to the bad reputation of defendant's premises was inadmissible here.

In *State v. Springs*, 184 N.C. 768, 114 S.E. 851, defendant was charged with the unlawful possession of spirituous liquors for the purpose of sale. At the trial he testified in his own behalf and also offered evidence tending to show his good character. Over objection, the State was allowed to offer testimony which "was received as substantive evi-

dence, that Springs' place had a bad reputation for whiskey selling." *Id.* at 769, 114 S.E. at 852. On appeal, defendant was awarded a new trial because he had, "in effect, been erroneously convicted by means of hearsay evidence. . . ." *Id.* at 772, 114 S.E. at 853. The Court said that in the prosecution of offenses against the prohibition laws "evidence of general reputation of the place where the specific offense is alleged to have been committed [is inadmissible], unless . . . it has been made competent by some valid statute. . . ." *Id.* at 771, 114 S.E. at 852. It specifically disapproved *State v. McNeill,* 182 N.C. 855, 109 S.E. 84, in which such evidence had been admitted for the purpose of corroborating the State's evidence that the sheriff had found liquor on defendant's premises.

In *State v. Turpin,* 203 N.C. 11, 164 S.E. 926, a character witness for defendant testified that the reputation of her filling station "has been liquor." Stacy, C. J., said: "The evidence respecting the reputation of defendant's garage for selling liquor was hearsay and should have been excluded." *Id.* at 12, 164 S.E. at 926. In Annot., 68 A.L.R. 2d 1300, 1302, North Carolina is included among those jurisdictions which hold "that evidence of the general reputation of defendant's premises is inadmissible in prosecutions for liquor law violations involving a charge of unlawful sale or possession of intoxicants at particular premises."

Defendant's contention that the search of his premises was illegal because the officer conducting the search did not make the affidavit upon which the warrant was issued is untenable. *State v. Shermer,* 216 N.C. 719, 6 S.E. 2d 529.

For the errors designated, however, it is ordered that there be a New trial.

EVELYN C. DIXON v. BANK OF WASHINGTON, ADMINISTRATOR OF THE ESTATE OF DAVID CLARK, DECEASED.

(Filed 22 September, 1965.)

1. Limitation of Actions § 16—

A denial of allegations constituting the basis of plaintiff's cause of action is a sufficient pleading of the statute of frauds.

2. Executors and Administrators § 24a—

Allegations to the effect that plaintiff rendered personal services to decedent, that she received no compensation therefor, but that she undertook and continued the services "upon the understanding" that intestate would recompense her by will should he predecease her, *held* sufficient, liberally

construed and considered in context, to allege a mutual understanding and not merely a unilateral understanding on plaintiff's part.

3. Pleadings § 12—

Allegations in the complaint must be liberally construed with a view to substantial justice between the parties, giving the pleader every reasonable intendment in his favor. G.S. 1-151.

4. Executors and Administrators § 14a—

Plaintiff's evidence in this case *held* sufficient to sustain a finding that plaintiff rendered, and intestate received, personal services under the mutual understanding that plaintiff would be compensated therefor by will.

5. Executors and Administrators § 24b—

Where there is allegation and evidence that plaintiff rendered services to intestate under agreement that she would be compensated therefor by will, plaintiff's cause of action does not arise until the death of intestate without making testamentary provision as agreed, and therefore plaintiff's recovery is not limited to the three years preceding intestate's death.

APPEAL by defendant from *Fountain, J.*, April 1965 Civil Session of BEAUFORT.

Plaintiff's action is to recover compensation for personal services she rendered her uncle, David Clark, from 1955 until his death, intestate, on May 30, 1963.

After hearing evidence offered by plaintiff and by defendant, the court submitted the following issues: "1. Did the intestate, David Clark, enter into an agreement with the plaintiff as alleged in the complaint? 2. If so, did the plaintiff render services to David Clark in accord with the agreement as alleged in the complaint? 3. What is the reasonable value of the services rendered David Clark by the plaintiff?"

The jury answered the first and second issues, "Yes," and the third issue, "$15.00 per week, $6,240.00." Judgment for plaintiff, in accordance with the verdict, was entered. Defendant appealed.

John A. Wilkinson and James R. Vosburgh for plaintiff appellee.
Carter & Ross and L. E. Mercer for defendant appellant.

BOBBITT, J. The only exceptions brought forward in appellant's brief challenge the sufficiency of plaintiff's allegations and evidence to support a recovery for services rendered by plaintiff to David Clark *more than three years* prior to his death.

Decision requires that plaintiff's allegations and evidence be considered in relation to the well-established legal principles stated below.

"When services are performed by one person for another under an agreement or mutual understanding (fairly to be inferred from their

conduct, declarations and attendant circumstances) that compensation therefor is to be provided in the will of the person receiving the benefit of such services, and the latter dies intestate or fails to make such provision, a cause of action accrues in favor of the person rendering the services." *Stewart v. Wyrick*, 228 N.C. 429, 431, 45 S.E. 2d 764, and cases cited; *Speights v. Carraway*, 247 N.C. 220, 222, 100 S.E. 2d 339.

"The remedy of the promisee who has rendered personal services in consideration of an oral contract to devise real estate void under the statute of frauds is an action on implied *assumpsit* or *quantum meruit* for the value of the services rendered." *Pickelsimer v. Pickelsimer*, 257 N.C. 696, 699, 127 S.E. 2d 557, and cases cited.

"When personal services are rendered with the understanding that compensation is to be made in the will of the recipient, payment therefor does not become due until death, and the statutes of limitation do not begin to run until that time." *Stewart v. Wyrick, supra*, p. 432; *Doub v. Hauser*, 256 N.C. 331, 337, 123 S.E. 2d 821.

While there are contradictions in the evidence as to their extent and value, there is plenary evidence plaintiff rendered personal services to David Clark, including washing, ironing, cooking and nursing, from 1955 until his death, intestate, on May 30, 1963, at the age of 79. Plaintiff alleged the services she rendered were reasonably worth a total of $14,820.00 based on $30.00 per week from September 1955 to May 1960 and on $50 per week from May 1960 until David Clark's death.

After alleging she rendered such services from August 1955 to May 30, 1963, plaintiff continued: "That for these services she received no compensation, but that she undertook and continued them *upon the understanding* that her uncle, who had never married and had no children, would recompense her *by will* should he predecease her, which in view of the difference in ages and his condition was extremely probable." (Our italics.) The allegations of paragraph 6 of the complaint, which include those quoted above, were denied by defendant. Such denial is a sufficient plea of the statute of frauds. *Pickelsimer v. Pickelsimer, supra*, p. 699, and cases cited.

Defendant contends the quoted allegation "is an entirely insufficient declaration of a specific contract." It would construe the expression, "upon the understanding," as limited to plaintiff's unilateral understanding rather than as a mutual understanding or agreement between plaintiff and David Clark. However, we are required to construe plaintiff's allegations liberally, "with a view to substantial justice between the parties," G.S. 1-151, and "contrary to the common-law rule, every reasonable intendment is to be made in favor of the pleader." *Joyner v. Woodard*, 201 N.C. 315, 317, 160 S.E. 288; 3 Strong, N. C. Index,

Pleadings § 12, p. 624. When considered in context, it is our opinion, and we so hold, that the quoted allegations are sufficient to allege a mutual understanding or agreement that plaintiff was to be compensated by will for the services she rendered David Clark. Plaintiff so intended, the trial judge so understood and defendant was not misled.

Plaintiff alleged generally that David Clark agreed to compensate her by will. Her evidence tends to show the manner in which he agreed to compensate her. The testimony of plaintiff's mother tends to show that, as compensation for plaintiff's services, David Clark, in the presence of plaintiff, promised and agreed (in 1955 and several times thereafter) that "he would make her in his will his little old farm down here, . . . all he had . . ." This and other testimony, when considered in the light most favorable to plaintiff, was sufficient to sustain a finding that plaintiff and David Clark entered into the alleged agreement.

It may be conceded there was ground for defendant's contention that there was no agreement but a unilateral expression by David Clark of his appreciation of plaintiff's kindness to him and of his then intention concerning his disposition of "his little old farm." Compare *Johnson v. Sanders*, 260 N.C. 291, 132 S.E. 2d 582. However, the jury, after the court had reviewed the respective contentions, resolved the issues in favor of plaintiff.

For the reasons stated, the verdict and judgment will not be disturbed.

No error.

STATE v. JOSEPH LANDRUM VANDIVER, JR.

(Filed 22 September, 1965.)

1. Criminal Law § 78; Bigamy § 2—

In a prosecution for criminal cohabitation in violation of G.S. 14-183, the legal wife of defendant is a competent witness to prove a valid, subsisting marriage at the time defendant contracted the second marriage. G.S. 8-57.

2. Indictment and Warrant § 4—

Where some of the evidence before the grand jury is competent and some incompetent, a motion to quash the indictment for the admission of incompetent evidence will not be allowed, since the courts will not inquire as to how far the incompetent testimony contributed to the finding of a true bill.

3. Indictment and Warrant § 13—

A motion for a bill of particulars is addressed to the discretion of the trial court and the denial of such motion will not be disturbed in the absence of a showing of abuse of discretion. G.S. 15-143.

4. Criminal Law § 87—

The trial court has discretionary authority to consolidate indictments against the male and female partners for bigamous cohabitation. G.S. 14-183.

5. Bigamy § 2— Evidence of guilt of bigamous cohabitation held sufficient to be submitted to jury.

The State's evidence tending to show that the male defendant had a lawful and subsisting marriage at the time he contracted a second marriage in another state, that the partners to the second marriage returned to this State where the female continued to live in her apartment, and that the male defendant went to her apartment practically every evening and that his automobile was parked there all night, *is held* sufficient to be submitted to the jury on the question of defendants' guilt of cohabitation in this State following a bigamous marriage outside the State, which marriage would be punishable as bigamous if contracted within the State. G.S. 14-183.

APPEAL by defendant from *Campbell, J.*, April 1965 Criminal Session of BUNCOMBE.

Criminal prosecution on an indictment charging that defendant, late of Buncombe County, being a married man, on 14 September 1964 did feloniously contract a bigamous marriage with Frances Hall Young in Greenville, South Carolina, and that the said defendant did feloniously thereafter cohabit with the said Frances Hall Young in Buncombe County, North Carolina, a violation of G.S. 14-183.

Plea: Not guilty. Verdict: Guilty.

From a judgment of imprisonment with a recommendation that he be placed on work release (G.S. 148-33.1(a)), defendant appeals.

Attorney General T. W. Bruton, Assistant Attorney General Charles W. Barbee, Jr., and Staff Attorney Leon H. Corbett, Jr., for the State.

Shelby E. Horton, Jr., for defendant appellant.

PARKER, J. Before pleading to the indictment, defendant moved to quash the indictment on the ground that his legal wife testified before the grand jury that found the indictment here a true bill. Defendant's daughter also testified before the grand jury. The court denied his motion, and he assigns this as error. This assignment of error is overruled.

By virtue of the express provisions of G.S. 8-57, defendant's legal wife was a competent witness before the grand jury, which was con-

sidering an indictment against him charging him with a violation of the provisions of G.S. 14-183, "to prove the fact of marriage and facts tending to show the absence of divorce or annulment proceedings wherein the husband and wife were parties, in cases of bigamy, or in cases of criminal cohabitation in violation of the provisions of G.S. 14-183." In *S. v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334, the Court said:

> "It is a well-settled principle of law in this State that an indictment will not be quashed, on a motion made in apt time, when some of the testimony before the grand jury given by a witness who is not disqualified is competent and some incompetent, because a court will not go into the barren inquiry of how far testimony which was incompetent contributed to the finding of an indictment as a true bill."

Defendant assigns as error the denial of his motion, made before pleading to the indictment, for a bill of particulars. The granting or denial of defendant's motion was within the discretion of the court and is not subject to review, except for palpable and gross abuse thereof. G.S. 15-143; *S. v. Lippard,* 223 N.C. 167, 25 S.E. 2d 594; *S. v. Scales,* 242 N.C. 400, 87 S.E. 2d 916. We have examined the record as it relates to the court's denial of his motion for a bill of particulars, and no abuse of judicial discretion appears. This assignment of error is overruled.

There was an indictment against Frances Hall Young charging bigamous cohabitation by her with defendant, in violation of G.S. 14-183. Defendant assigns as error the order of the court, on motion of the solicitor for the State, consolidating for trial this case with the case of defendant for the same offense. This assignment of error is overruled. The court had authority to order the consolidation. G.S. 15-152; *S. v. Grundler,* 251 N.C. 177, 111 S.E. 2d 1; *S. v. Bryant,* 250 N.C. 113, 108 S.E. 2d 128; *S. v. Combs,* 200 N.C. 671, 158 S.E. 252.

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 and defendant's evidence favorable to the State, considered in the light most favorable to the State, *S. v. Avent,* 253 N.C. 580, 118 S.E. 2d 47, show the following facts:

Defendant and Christine Vandiver were lawfully married on 26 February 1943. They lived together as man and wife until defendant in November 1963 left their home in the Dunbar Apartments in the city of Asheville or in the Asheville area, Buncombe County. Three children were born of their marriage. Christine Vandiver is living, and

the marriage between her and defendant has not been dissolved by divorce or annulled.

Frances Hall Young, a married woman, separated from her husband but not divorced, in 1964 lived in the Skyland Apartments in Skyland, Buncombe County. On 14 September 1964 she and defendant were married to each other in Greenville, South Carolina, which would have been punishable as bigamous if entered into in North Carolina.

After Frances Hall Young and defendant were married in South Carolina, they returned to Buncombe County, and Frances Hall Young continued to live in the Skyland Apartments in Skyland. Thereafter until December 1964 defendant went to her apartment practically every evening, and his 1963 blue Valiant station wagon frequently would be parked there all night and was so seen by other tenants of the apartment building. There is plenary evidence, which it would serve no useful purpose to narrate here, tending to show defendant and Frances Hall Young during this period of time had sexual intercourse several times weekly with each other in her apartment.

G.S. 14-183 makes cohabitation in this State following a bigamous marriage outside of this State, which marriage would be punishable as bigamous if contracted within this State, a separate offense. This is an offense tending to debase and demoralize society and to degrade the institution of marriage. The State's evidence, and defendant's evidence favorable to it, would legitimately permit, but not compel, a jury to be satisfied beyond a reasonable doubt that defendant contracted a bigamous marriage with Frances Hall Young in South Carolina, which would have been punishable as bigamous if entered into in North Carolina, and that thereafter they returned to North Carolina and from then until December 1964 they ostensibly lived or dwelled together as man and wife at night in her apartment in Skyland and there several times weekly in her apartment engaged in sexual intercourse, and that such acts were of a continuing and not a transitory nature. The evidence was sufficient to carry the case to the jury, and the judge correctly denied defendant's motion for judgment of compulsory nonsuit made at the close of all the evidence. *S. v. Setzer,* 226 N.C. 216, 37 S.E. 2d 513; 10 Am. Jur. 2d, Bigamy, "D. Sexual Intercourse; Cohabitation," § 16; Black's Law Dictionary, 4th Ed., "Cohabit or Cohabitation," p. 326; 2 Wharton's Criminal Law and Procedure, Anderson Ed. (1957), Ch. 26, Bigamy, § 714, p. 523; 14 C.J.S., Cohabitation, p. 1312.

Defendant has a number of exceptions as to the admission and exclusion of evidence, which he assigns as error. We have examined all of them with care, and all are without merit and are overruled.

Defendant has no exception to the charge.

In the trial below we find
No error.

HORACE LAWRENCE, EMPLOYEE v. HATCH MILL, A DIVISION OF DEERING MILLIKIN, INC., EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER.

(Filed 22 September, 1965.)

1. Master and Servant § 45—

An injury must result from an accident in order to be compensable under the North Carolina Workmen's Compensation Act. G.S. 97-2(6).

2. Master and Servant § 63—

Claimant's testimony that at the time of his back injury he was reaching for a hanger from a box about four feet high in the same way that he had performed that duty of his employment for more than a year, *held* insufficient to support a finding that the back injury was the result of an accident.

3. Master and Servant § 93—

While the findings of the Industrial Commission are conclusive if supported by competent evidence, whether the evidence is sufficient to support the findings is a question of law for the court.

APPEAL by plaintiff, employee, from *McLean, J.*, February 1965 Session, POLK Superior Court.

This proceeding originated as a compensation claim before the North Carolina Industrial Commission for injuries the plaintiff alleged he suffered by accident arising out of and in the course of his employment as a member of the Hatch Mill maintenance crew engaged in repairing and servicing the mill machinery. The parties stipulated all pertinent facts involved in the claim, with one exception: was the plaintiff's injury caused by accident arising out of and in the course of his employment?

The Deputy Commissioner, in addition to medical testimony, heard the evidence of the claimant and his two fellow employees, made findings of fact favorable to the claimant, and awarded compensation. The Full Commission, on review, adopted the findings and affirmed the award. The Superior Court reversed the Commission upon the ground the evidence was insufficient to show injury by accident and remanded the cause to the Industrial Commission with direction to deny the claim. The plaintiff appealed.

Jones & Jones by Robert A. Jones, McCown, Lavendar & McFarland by Wm. A. McFarland for plaintiff appellant.

Van Winkle, Walton, Buck and Wall by Roy W. Davis, Jr., for defendant appellees.

HIGGINS, J. The plaintiff's evidence disclosed that he had worked in the employer's textile mill for more than 11 years. During the year and a half preceding his injury, he was a member of the maintenance crew which serviced and overhauled the mill machinery. His duties included grinding the carding machines.

At the time of his injury the plaintiff was in the act of removing from a tool box one of the two hangers by which the grinding apparatus was attached to the carding machine. Each hanger weighed approximately 47 pounds. The claimant testified: "I reached over in this box about four feet high to pick up a hanger whenever the pain caught me in the back." He testified he had been doing this same type of work two or three times a day for more than a year. After describing the manner of his injury, he said that was the way he always did it. The sum total of his evidence is that at the time of his injury he was performing his duties in the usual and customary way. This evidence is insufficient to support a finding of injury by accident.

"The North Carolina Workmen's Compensation Act does not provide compensation for injury, but only for injury by accident. G.S. 97-2(6). . . . To sustain an award of compensation in ruptured disc cases the injury to be classed as arising by accident must involve more than merely carrying on the usual and customary duties in the usual way. *Turner v. Hosiery Mill,* 251 N.C. 325, 111 S.E. 2d 185; *Holt v. Mills Co.,* 249 N.C. 215, 105 S.E. 2d 614. . . . Accident involves the interruption of the work routine and the introduction thereby of unusual conditions likely to result in unpredicted consequences." *Harding v. Thomas & Howard Co.,* 256 N.C. 427, 124 S.E. 2d 109. "A back injury or hernia suffered by an employee does not arise by accident if the employee at the time was merely carrying out his usual and customary duties in the usual way." *Pardue v. Tire Co.,* 260 N.C. 413, 132 S.E. 2d 747.

In the cases where recovery has been allowed, the evidence has shown an interruption of the usual work routine or the introduction of some new circumstance not a part of that routine. *Keller v. Wiring Co.,* 259 N.C. 222, 130 S.E. 2d 342; *Searcy v. Branson,* 253 N.C. 64, 116 S.E. 2d 175, and cases therein cited.

In compensation cases the Commission finds the facts. If the findings have evidentiary support in the record, they are conclusive. However, the question whether the evidence is sufficient to support the

findings is one of law to be determined by the courts. The Legislature has provided that the Workmen's Compensation Act shall be liberally construed but it does not permit either the Commission or the courts to hurry evidence beyond the speed which its own force generates.

The evidence in this record is insufficient to sustain the finding of injury by accident. The judgment of the Superior Court is

Affirmed.

STATE v. LAWRENCE GUFFEY.

(Filed 22 September, 1965.)

1. Criminal Law § 99—

Testimony of the prosecuting witness tending to identify defendant as one of the perpetrators of the offense established by the evidence, even though there be contradictions and discrepancies in the State's evidence as to identity, is sufficient to overrule nonsuit.

2. Criminal Law § 107—

A charge presenting the principal features of the evidence relied on respectively by the prosecution and the defense is sufficient, G.S. 1-180, and if defendant desires further elaboration on a subordinate feature he must tender request therefor.

3. Robbery § 1—

In order to constitute common law robbery there must be a taking of personal property, although the value of such personal property is not material if the taking is by force or putting the owner in fear.

4. Robbery § 2—

An indictment for robbery that charges that defendant did by force take, steal and rob the prosecuting witness "of the value of one thousand dollars" is insufficient to charge the offense of common law robbery, since the indictment must describe the property sufficiently to show that the property is the subject of robbery.

5. Same—

A charge in the bill of indictment must be complete in itself and may not be aided as to an essential element of the offense by averment in the prior warrant.

6. Criminal Law § 121—

Arrest of judgment for insufficiency of the indictment does not entitle defendant to his discharge, since the State, if it so elects, may put defendant on trial upon a proper indictment.

APPEAL by defendant from *Clarkson, J.*, March 1965 Session of RUTHERFORD.

Criminal action. Defendant was convicted on a charge of common law robbery, and judgment was entered imposing an active prison sentence.

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

Hamrick & Hamrick for defendant.

MOORE, J. A former appeal in this case was heard by us at the Spring Term 1964. A new trial was awarded because of error in the admission of evidence. Our opinion on that appeal contains a general statement of the facts. *State v. Guffey,* 261 N.C. 322, 134 S.E. 2d 619.

Appellant's assignments of error, in the present appeal, relating to the denial of his motion for nonsuit and to the charge are not sustained. The question whether the testimony of the prosecuting witness, tending to identify appellant as one of the robbers, has any probative force was for the jury. "Contradictions and discrepancies, even in the State's evidence, are for the jury to resolve, and do not warrant nonsuit." 1 Strong: N. C. Index, Criminal Law, § 99; *State v. Bass,* 255 N.C. 42, 120 S.E. 2d 580. In instructing the jury the court is not required to recapitulate all of the evidence. The requirement of G.S. 1-180 that the judge state the evidence is met by presentation of the principal features of the evidence relied on respectively by the prosecution and defense. A party desiring further elaboration on a subordinate feature of the case must aptly tender request for further instructions. 1 Strong: N. C. Index, Criminal Law, § 107; *State v. Davis,* 246 N.C. 73, 97 S.E. 2d 444.

In this Court appellant, for the first time, moved in arrest of judgment on the ground that the indictment is defective upon its face and is insufficient. *State v. Dunston,* 256 N.C. 203, 123 S.E. 2d 480. The indictment in pertinent part alleges:

> "That Lawrence Guffey . . . unlawfully, wilfully, and feloniously did make an assault on Ben Hudson and him in bodily fear and danger of his life did put, and take, steal and rob him of the value of One Thousand Dollars, from the person and possession of the said Ben Hudson, then and there did unlawfully, wilfully, feloniously, forcibly and violently take, steal and carry away. . . ."

Appellant contends that the indictment is fatally defective in that it does not describe the property taken.

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. *State v. Lawrence,* 262 N.C. 162, 136 S.E. 2d 595; *State v. Stewart,* 255 N.C. 571, 122 S.E. 355. It will be noted that an element of the offense is the taking of money or goods, *i.e.,* personal property.

We have said in a number of cases that in an indictment for robbery the kind and value of the property taken is not material — the gist of the offense is not the taking, but a taking by force or putting in fear. *State v. Sawyer,* 224 N.C. 61, 29 S.E. 2d 34; *State v. Brown,* 113 N.C. 645, 18 S.E. 51; *State v. Burke,* 73 N.C. 83. See also *State v. Mull,* 224 N.C. 574, 31 S.E. 2d 764. However, in these cases the objection was not that there was no description but that the description was insufficient; the indictments described the property in general terms, such as "money."

In our opinion an indictment for robbery must contain a description of the property sufficient, at least, to show that such property is the subject of robbery. To constitute the offense of robbery the property taken must be such as is the subject of larceny. *State v. Trexler,* 4 N.C. 188; 46 Am. Jur., Robbery, § 8, p. 142. Larceny, as a common law offense, is concerned with personal property only and, unless otherwise provided by statute, does not include the severance, taking and carrying away of chattels real. *State v. Jackson,* 218 N.C. 373, 11 S.E. 2d 149. "Any money or personal property, corporeal in nature or capable of appropriation by another than the owner, and which is recognized by law as property, may be the subject of larceny." 32 Am. Jur., Larceny, § 74, p. 983.

The indictment in the instant case does not describe the property or even state that property was taken. It merely states that the accused did "rob him (prosecuting witness) of the value of One Thousand Dollars." What it was that had this value does not appear. In our opinion the indictment is insufficient. G.S. 15-153 does not dispense with the requirement that the essential elements of an offense must be charged in the bill of indictment. *State v. Gibbs,* 234 N.C. 259, 66 S.E. 2d 883. The warrant under which appellant was originally arrested itemizes and describes the property with sufficient particularity. But the warrant does not supply the deficiency in the bill. A charge in a bill of indictment must be complete in itself, and contain all of the material allegations which constitute the offense charged. *State v. Smith,* 241 N.C. 301, 84 S.E. 2d 913. It is an essential of jurisdiction that a criminal offense shall be sufficiently charged in the indictment. *State v. Thornton,* 251 N.C. 658, 111 S.E. 2d 901.

Judgment is arrested. But appellant is not entitled to discharge. The State, if it so elects, may put him on trial upon a proper indictment.

Judgment arrested.

WILLIAM GLENN MURRAY v. COCA-COLA BOTTLING COMPANY OF ASHEVILLE AND LEONARD RAY HOLLIFIELD.

(Filed 22 September, 1965.)

1. Automobiles § 42f—

Evidence tending to show that plaintiff reached a one-lane bridge when defendant driver was some 50 to 60 feet therefrom, that plaintiff was already proceeding across the bridge when defendant driver entered thereon, that plaintiff was in full view at all times after entering upon the bridge, and that plaintiff had traveled some 50 or 60 feet on the bridge when defendant's truck skidded into plaintiff's vehicle, without any evidence that plaintiff was under duty to yield the right of way to defendant, ***held*** insufficient to establish contributory negligence as a matter of law.

2. Negligence § 26—

Nonsuit for contributory negligence is proper only when plaintiff's evidence, taken in the light most favorable to him, so clearly establishes this defense that no other reasonable inference can be drawn therefrom.

APPEAL by defendants from *Martin, S. J.*, April 1965 Regular Session of RUTHERFORD.

Action to recover for personal injuries suffered by plaintiff when the Volkswagen truck he was driving collided with an International pickup truck owned by corporate defendant and operated by individual defendant.

The collision occurred about 8:30 A.M. on 21 February 1961 in Forest City on the old Caroleen Road bridge over CC & O Railroad. The bridge runs north and south, has a wooden surface with railings on each side, and is 80 feet long and 15 feet wide. The road, as it approaches the bridge from the North, is downgrade and winding; the approach from the South is upgrade. There are highway signs facing both approaches warning, "One Lane Bridge." On the morning of the accident it had been raining and the bridge was wet. Plaintiff was proceeding northwardly and after entering the bridge met the pickup which was going southwardly; the vehicles collided. The Volkswagen truck was 5½ feet wide; the International pickup was 6 feet 2 inches wide. Plaintiff was seriously and permanently injured.

The jury found that plaintiff was injured by the negligence of defendants and plaintiff was not contributorily negligent. Damages in the amount of $87,500 were awarded. Judgment was entered in accordance with the verdict.

Oscar J. Mooneyham and James C. Smathers for plaintiff.
Hamrick & Jones and Jones & Jones for defendants.

PER CURIAM. In their brief "Defendants concede that the evidence was sufficient to support a finding that the defendant, Leonard Ray Hollifield, was negligent and that his negligence was one of the proximate causes of the collision," but they contend "That considering all of plaintiff's evidence as true, plaintiff is clearly guilty of contributory negligence on his own statement, and as a matter of law."

The evidence, considered in the light most favorable to plaintiff, presents this account of the occurrence: As plaintiff approached the bridge he was going upgrade. The surface of the bridge is level. The road does not "level off" before entering the bridge. The road is 22 feet wide. As he approached the bridge plaintiff was travelling at a speed of 20 miles per hour, with both right wheels on the right shoulder. When he was about 66 feet from the bridge he saw the pickup truck approaching, and it was about 250 feet from the north edge of the bridge and travelling at about 25 miles per hour. Plaintiff thereafter had the pickup truck in full view all of the time as it came downgrade toward the bridge, but plaintiff did not have the surface of the bridge in view until he reached the south edge of the bridge. When plaintiff was about 10 feet from the bridge he pulled back on the highway with all four wheels and reduced speed to 10 miles per hour. When plaintiff reached and entered the bridge the pickup truck was 50 to 60 feet from the north end of the bridge. Plaintiff travelled on the bridge with his truck about 1 foot from the east edge of the bridge, and had travelled 50 or 60 feet on the bridge when the collision occurred. Defendant Hollifield could see the entire bridge as he approached it. He did not follow the curve in reaching the bridge, but "more or less straightened out the curve, coming right on." As the pickup truck entered the bridge, without stopping, it was in the center of the bridge with the left wheels to the east of the center; the rear of the pickup then went "sideways" to its right and the front "sideways" to its left. Half of the front of the truck was on plaintiff's side. Plaintiff applied brakes and was going about 5 miles per hour when the vehicles collided. Both drivers had travelled this road many times before and were familiar with the bridge and the approaches thereto.

Defendant Hollifield's account of the accident is in sharp conflict with the foregoing version and tends to exonerate him from fault.

The gist of defendants' argument is "that when a reasonable and prudent man approached this bridge under the circumstances . . . and saw a truck approaching the bridge from the opposite direction, . . . he would have stopped his truck before entering the bridge and would have permitted the driver of the approaching truck to cross the bridge in safety" and plaintiff's failure so to do constituted contributory negligence as a matter of law; ". . . the hard fact of the matter is that plaintiff carelessly and recklessly gambled his own safety and proceeded on a reckless course of conduct and unfortunately lost."

We do not agree with defendants' contention. There is evidence from which the jury could find that plaintiff reached and entered the bridge first, defendant Hollifield was 50 to 60 feet from the bridge when plaintiff entered and plaintiff was already proceeding across the bridge when Hollifield entered, plaintiff was in full view of Hollifield at all times after plaintiff entered the bridge, and Hollifield drove upon the bridge in such manner as to cause his vehicle to skid into the path of plaintiff's vehicle when it was so close that collision could not be avoided. There are no circumstances disclosed by plaintiff's evidence which required him, as a matter of law, to yield to Hollifield the right to cross the bridge first. ". . . nonsuit on the ground of contributory negligence should be allowed only when plaintiff's evidence, taken in the light most favorable to him, so clearly establishes this defense that no other reasonable inference or conclusion can be drawn therefrom." 3 Strong: N. C. Index, Negligence, § 26.

All other assignments of error brought forward and discussed in defendants' brief have been carefully and fully considered. They are not sustained.

No error.

CLINTON BUNTON v. DON R. RADFORD AND JAMES D. FAULKNER.

(Filed 22 September, 1965.)

1. Automobiles § 41a; Trial § 26—

Variance between plaintiff's pleading and proof concerning the name of the street on which the collision occurred and the compass directions in which the vehicles were traveling is immaterial and insufficient to require nonsuit when it does not appear that defendant was misled to his prejudice thereby.

2. Automobiles § 55.1—

Judicial findings that the driver of plaintiff's car was not plaintiff's agent, that both drivers were actionably negligent, and that the driver of the other car was the agent of the second defendant, entitles plaintiff to judgment against both defendants for the damages to his car.

APPEAL by plaintiff from *Martin, S.J.*, March 1965 Special Non-Jury Session of BUNCOMBE.

Action for damages to plaintiff's automobile and loss of its use in plaintiff's business resulting from a collision between it and the automobile of the defendant Faulkner, driven by the defendant Radford within the City of Asheville, April 1, 1961. The defendant Faulkner filed an answer alleging a counterclaim for damages to his automobile as a result of the same collision. The record contains no answer by the defendant Radford.

The complaint alleges that, at the time and place of the collision, the plaintiff's automobile was being operated in a westerly direction on Lodge Street, and that the automobile of the defendant Faulkner was being operated in an easterly direction on Lodge Street. These allegations are admitted in the answer of the defendant Faulkner, but in his counterclaim Faulkner alleges that, at the time of the collision, his own automobile was being operated in an easterly direction on Sweeten Creek Road, or U. S. Route 25, and that the automobile of the plaintiff was being operated in a westerly direction thereon. The record contains no reply.

The trial judge, sitting without a jury, found these facts:

The vehicles collided on April 1, 1961, while the automobile of the plaintiff was being operated by his son in a northerly direction on U. S. Highway 25A and that of the defendant Faulkner was being operated thereon in a southerly direction by the defendant Radford. The driver of the plaintiff's automobile was negligent in that he did not keep a proper lookout, operated the vehicle at a speed which was too fast under the prevailing conditions, proceeding from a parked position to a rate of 25 miles per hour in a distance of less than 100 feet, and skidded or slid into the Faulkner car. The defendant Radford (admitted by the answer of Faulkner to have been Faulkner's agent and to have been driving in the course of his employment) was negligent in making a left turn from U. S. Highway 25A into a private driveway without first ascertaining that it could be done in safety, and without maintaining a proper lookout. The plaintiff's automobile was damaged to the extent of $462.72, and the Faulkner car to the extent of $450.00. The plaintiff did not use his automobile in the furtherance of any business.

The trial judge concluded as a matter of law: Both drivers were negligent and the negligence of each was one of the proximate causes of the collision. There was no relationship of agency between the plaintiff and the driver of his automobile. There is a fatal variance between the plaintiff's allegation that his car was being operated in a westerly direction on Lodge Street at or near the intersection of Fairview Road (admitted in the answer) and his proof that it was being operated in a northerly direction on U. S. 25A.

Judgment was entered dismissing the plaintiff's cause of action as of nonsuit on the ground of the variance and dismissing the defendant Faulkner's counterclaim as of nonsuit. The defendant Faulkner did not appeal. The plaintiff-appellant assigns no error other than the nonsuit of his action on the ground of variance.

Uzzell and Dumont by John E. Shackelford for plaintiff.
S. Thomas Walton for defendants.

PER CURIAM. "No variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action upon the merits. Whenever it is alleged that a party has been so misled, that fact and in what respect he has been misled must be proved to the satisfaction of the court; * * * Where the variance is not material as herein provided, the judge may direct the fact to be found according to the evidence, or may order an immediate amendment without costs." G.S. 1-168.

On this record it does not appear that the defendant was misled to his prejudice by the variance between the plaintiff's pleading and proof concerning the name of the street on which the collision occurred and the compass directions in which the vehicles were traveling. Hence the variance was immaterial and was insufficient to support the judgment of nonsuit as to the plaintiff's cause of action. *Zager v. Setzer,* 242 N.C. 493, 88 S.E. 2d 94 (1955).

The trial judge, having found that the defendants were negligent, that their negligence was a proximate cause of the collision, that the driver of the plaintiff's automobile was not the plaintiff's agent, and that the plaintiff was damaged by the collision in the amount of $462.72, and no exception having been taken to any such finding, the plaintiff is entitled, upon the findings of the court, to judgment against the defendants in the amount of $462.72 with interest and costs.

The judgment of nonsuit of the plaintiff's cause of action is reversed and the cause is remanded to the Superior Court of Buncombe County

for the entry of a judgment in favor of the plaintiff against both of the defendants in accordance with the findings of fact heretofore made.

Reversed and remanded.

WILMA ANNE WEEKS, BY HER NEXT FRIEND JAMES E. WEEKS v. MARTIN RAYMOND BARNARD.

(Filed 22 September, 1965.)

1. Automobiles § 42l; Negligence § 16—

A finding by the jury of contributory negligence on the part of a child almost eight years old is upheld upon evidence tending to show that the child looked both ways before crossing the highway to a mail box and then whirled around and ran back into the path of defendant's vehicle when it was some 65 to 75 feet away.

2. Same—

While a child between the ages of 7 and 14 is presumed incapable of contributory negligence, such child may be found to be contributorily negligent if such child fails to exercise that degree of care commensurate with her knowledge, age, capacity, discretion and experience.

APPEAL by plaintiff from *Parker, J.*, January 1965 Civil Session of PASQUOTANK.

Action for personal injuries.

On April 19, 1956 plaintiff lacked 7 days of being 8 years old. On that day, as she attempted to cross a rural paved road 1.8 miles west of Elizabeth City, she was struck and injured by a station wagon driven by defendant. In the collision plaintiff sustained injuries which rendered her unconscious for 15 days. Plaintiff alleges, and at the trial offered evidence tending to show, that the collision and her resulting injuries were proximately caused by defendant's negligence in that he drove the station wagon at an unlawful rate of speed, without keeping a proper lookout and without having it under proper control, and that he failed to sound his horn upon seeing the minor plaintiff near the highway.

In his answer defendant denies that negligence on his part was a proximate cause of plaintiff's injuries, and pleads her contributory negligence in bar of her right to recover. His evidence tended to show: When he was about 200 feet away, traveling in an easterly direction, defendant saw plaintiff come to the north edge of the pavement, look both ways, and cross the highway to safety. She went to a mail box and then "whirled around and ran back into the path of the vehicle" when it was 65-75 feet away. Defendant applied his brakes, pulled to

the left, and struck the child at 15-20 MPH, 5-6 feet from the south side of the road.

At the time of the trial plaintiff lacked about four months of being 17 years old. She had apparently fully recovered from her injuries.

The jury, in answer to the issues submitted, found that plaintiff was injured by defendant's negligence as alleged in the complaint and that plaintiff, by her own negligence, contributed to her injury as alleged in the answer. From a judgment that she recover nothing, plaintiff appeals, assigning errors in the judge's charge on contributory negligence.

Russell E. Twiford; Merrill Evans, Jr.; Aydlett and White for plaintiff appellant.

LeRoy, Wells & Shaw for defendant appellee.

PER CURIAM. Between the ages of 7 and 14, a minor is presumed to be incapable of contributory negligence. *Ennis v. Dupree,* 258 N.C. 141, 128 S.E. 2d 231; *Phillips v. R. R.,* 257 N.C. 239, 125 S.E. 2d 603. This presumption, however, may be overcome by evidence that the child did not use the care which a child of its age, capacity, discretion, knowledge, and experience would ordinarily have exercised under the same or similar circumstances. *Walston v. Greene,* 247 N.C. 693, 102 S.E. 2d 124; *Caudle v. R. R.,* 202 N.C. 404, 163 S.E. 122. A child "must exercise care and prudence equal to his capacity." *Tart v. R. R.,* 202 N.C. 52, 55, 161 S.E. 720, 721; see also *Hughes v. Thayer,* 229 N.C. 773, 51 S.E. 2d 488; Annot., 107 A.L.R. 4, 40, 94. If it fails to exercise such care and the failure is one of the proximate causes of the injuries in suit, the child cannot recover. *Morris v. Sprott,* 207 N.C. 358, 177 S.E. 13; *Tart v. R. R., supra; Foard v. Power Co.,* 170 N.C. 48, 86 S.E. 804, and cases therein cited.

The trial judge fully explained these and all other applicable principles of law to the jury. After carefully considering his charge as a whole we find no reasonable cause to believe that the jury was misinformed or misled by it. A new trial is not warranted.

No error.

STATE v. JAMES E. HOPSON, JR.

(Filed 22 September, 1965.)

Criminal Law § 94—

Defendant objected to cross-examination in regard to his arrest in another state on other charges, asserting that since defendant was not found guilty in such other State of the charges the interrogation was unreasonable. The court stated in overruling the objection that the court thought it just as unreasonable for a man to be sent to jail in such other state for nothing. *Held:* The remark of the court must be held for prejudicial error as reflecting upon the credibility of defendant.

APPEAL by defendant from *Campbell, J.*, May 1965 Session of BUNCOMBE.

Criminal prosecution on warrant charging defendant with larceny of cordwood of the value of $100.00, the property of R. W. Huntly, tried *de novo* in the superior court after defendant's appeal from conviction and judgment in the General County Court of Buncombe County. The jury returned a verdict of "GUILTY OF LARCENY AS CHARGED IN THE WARRANT." Judgment, imposing a sentence of two years, was pronounced. Defendant excepted and appealed.

Attorney General Bruton, Assistant Attorney General Barbee and Staff Attorney Clement for the State.

Riddle & Briggs for defendant appellant.

PER CURIAM. After conviction in the superior court, defendant moved in arrest of judgment. The court properly overruled defendant's said motion on authority of *S. v. St. Clair*, 246 N.C. 183, 97 S.E. 2d 840, where an undistinguishable factual situation was considered.

Defendant did not move for judgment as of nonsuit. Nor does he now contend the State's evidence was insufficient to support the verdict.

Defendant testified he had purchased from a Mr. Paul Allen the wood identified by the State's evidence as that owned by R. W. Huntly. Whether defendant was a credible witness and his testimony worthy of belief were crucial questions for determination.

On cross-examination, defendant admitted he had been in prison in Florida, but testified he was not guilty of anything, did not plead guilty and was not convicted. Immediately thereafter, according to the record, the following occurred:

"Q. How long did you stay in prison for not doing anything?
OBJECTION — OVERRULED.

"A. I don't know how to explain it, but I had a re-trial and they turned me loose.

EXCEPTION #10.

"Q. I'll ask you if you didn't have guns and rings and watches that you'd stolen up here in Buncombe County when you were arrested down there in Florida?

"MR. REAGAN: I think it's unreasonable, the man wasn't found guilty and I think it's unreasonable.

"THE COURT: Well, Mr. Reagan, I think it's just as unreasonable for a man to be sent to jail or prison in Florida for nothing. And I am going to permit the witness to answer the questions that are asked of him.

OVERRULED — EXCEPTION #11."

The question concerning "guns and rings and watches" was not repeated. The cross-examination proceeded to other matters. Mr. Reagan was defendant's trial counsel.

While not so intended, we think it probable the jury understood the court's (quoted) comment as an expression of opinion that defendant's testimony concerning his Florida imprisonment was incredible and therefore defendant should not be considered a credible witness. So considered, the court's inadvertent comment was a violation of G.S. 1-180 and numerous decisions of this Court. "A trial judge in this jurisdiction is not permitted to cast doubt upon the testimony of a witness or to impeach his credibility." *S. v. Smith,* 240 N.C. 99, 102, 81 S.E. 2d 263; 1 Strong, N. C. Index, Criminal Law § 94.

For the error indicated, defendant is entitled to a new trial.

New trial.

STATE OF NORTH CAROLINA v. JAMES H. BRAXTON.

(Filed 22 September, 1965.)

1. **Assault and Battery § 14—**

The evidence in this case *held* sufficient to overrule defendant's motion for judgment as of nonsuit in this prosecution for assault with a deadly weapon with intent to kill.

2. **Assault and Battery § 15—**

It is error for the court to fail to charge upon the principle of self-defense presented by defendant's evidence.

3. Assault and Battery § 17; Criminal Law § 131—

An assault with a deadly weapon with intent to kill is a misdemeanor and sentence of six years in the State's prison is not warranted. G.S. 14-33.

APPEAL by defendant from *Cowper, J.*, 24 May 1965 Criminal Session of CRAVEN.

This is a criminal action in which the defendant was tried, along with his two sons, Jerry and Floyd Braxton, upon a bill of indictment charging the defendants with an assault upon Donald L. Bland with a deadly weapon, to wit, a pistol, with the felonious intent to kill and murder the said Donald L. Bland, inflicting serious injuries not resulting in death.

All the evidence tends to show that this controversy arose in connection with the nonpayment of a bill for food ordered and consumed by one of the Braxtons and his woman companion at the Bland restaurant.

The State's evidence tends to show that the prosecuting witness, Donald L. Bland, was set upon, attacked with fists and brass knuckles, injured and verbally abused by James H. Braxton with the active assistance of his two sons; that the wife of the prosecuting witness, Mrs. Bertha Elizabeth Bland, was also assaulted and abused physically and verbally by one or more of these assailants. During the course of the altercation, the prosecuting witness obtained and used his trained German Shepherd guard dog and some kind of a stick as a weapon. In the course of the altercation and while trying to make his way to the public telephone located outside his premises, for the purpose of calling for the assistance of the law enforcement authorities, the defendant, James H. Braxton, shot the prosecuting witness, seriously injuring him.

The defendant's evidence tends to show that the altercation was started by the prosecuting witness who, it is contended, put his vicious dog on James H. Braxton and his sons, and that the dog did attack them; that James H. Braxton intended to kill the dog but accidentally shot the prosecuting witness. The defendant testified that at the time he fired the shot which hit the prosecuting witness, the dog of the prosecuting witness was attacking one of his sons.

The court directed a verdict of not guilty as to Jerry and Floyd Braxton.

The jury found the remaining defendant "Guilty of Assault with a Deadly Weapon with Intent to Kill." The court imposed a sentence of six years in the State's prison. The defendant appeals, assigning error.

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

Robert D. Wheeler, Wallace & Langley for the defendant.

PER CURIAM. The appellant assigns as error the failure of the court below to sustain his motion for judgment as of nonsuit. In our opinion, the State's evidence was sufficient to require its submission to the jury, and this assignment of error is overruled.

The defendant assigns as error the failure of the trial judge to charge on self-defense. The State concedes error in this respect. *S. v. Greer,* 218 N.C. 660, 12 S.E. 2d 238; *S. v. Davis,* 222 N.C. 178, 22 S.E. 2d 274; *S. v. Todd,* 264 N.C. 524, 142 S.E. 2d 154.

The appellant likewise assigns as error the imposition of a sentence of six years in the State's prison on the verdict rendered by the jury. An assault with a deadly weapon with intent to kill is a misdemeanor. G.S. 14-33; *S. v. Gregory,* 223 N.C. 415, 27 S.E. 2d 140; *S. v. Silvers,* 230 N.C. 300, 52 S.E. 2d 877; *S. v. Troutman,* 249 N.C. 395, 106 S.E. 2d 569.

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

New trial.

STATE OF NORTH CAROLINA v. LESLIE COX.

(Filed 22 September, 1965.)

Constitutional Law § 29; Criminal Law § 139—

The Supreme Court will take notice *ex mero motu* of error in permitting defendant to waive a jury trial in a criminal prosecution in the Superior Court after plea of not guilty.

APPEAL by defendant from *Cowper, J.,* May 1965 Mixed Session of PITT.

Defendant was tried and convicted in the County Court of Pitt County upon a warrant charging him with the unlawful possession, transportation, and possession for the purpose of sale of 39 gallons of nontaxpaid whiskey. From the judgment imposed he appealed to the Superior Court. When the case was called for trial, defendant, through counsel, entered a plea of not guilty; and, with the consent of the solicitor, waived a jury trial. Thereupon Judge Cowper heard the State's evidence — the defendant offered none — and rendered a verdict of "guilty of transporting." From the prison sentence imposed defendant appeals, assigning as error the admission of certain evidence and the failure of the court to allow his motion for nonsuit.

T. W. Bruton, Attorney General, James F. Bullock, Assistant Attorney General for the State.
Roberts & Wooten for defendant appellant.

PER CURIAM. On the face of the record there appears a fatal error which the Court will notice *ex mero motu. State v. Dunston,* 256 N.C. 203, 123 S.E. 2d 480. This case is controlled by *State v. Muse,* 219 N.C. 226, 13 S.E. 2d 229, in which the Court said:

> "When a defendant in a criminal prosecution in the Superior Court enters a plea of not guilty he may not, without changing his plea, waive his constitutional right of trial by jury, *S. v. Hill,* 209 N.C. 53, 182 S.E. 716, the determinative facts cannot be referred to the decision of the court even by consent — they must be found by the jury. *S. v. Allen,* 166 N.C. 265, 80 S.E. 1075." *Id.* at 227, 13 S.E. 2d 229.

Accord: State v. Harper, 235 N.C. 62, 69 S.E. 2d 161; *State v. Horne,* 234 N.C. 115, 66 S.E. 2d 665; *State v. Holt,* 90 N.C. 749.

Since the guilt of defendant has not been established by a verdict, *Sitterson v. Sitterson,* 191 N.C. 319, 131 S.E. 641, the sentence imposed by the judge is a nullity. No trial has been had. The case is remanded to the Superior Court for a trial by jury as the law provides.

Error and remanded.

NORTH CAROLINA STATE HIGHWAY COMMISSION v. WESLEY SWANN AND WIFE, SADIE SWANN.

(Filed 22 September, 1965.)

APPEAL by defendants from *Campbell, J.,* February-March, 1965 Civil Session, BUNCOMBE Superior Court.

The State Highway Commission instituted this proceeding to condemn for highway purposes an easement in perpetuity over a certain lot of land owned and occupied by the defendants in the City of Asheville. The lot contained 1.78 acres and the easement covered 0.77 acres. The Commission filed its declaration of taking and deposited the sum of $3,500.00 as its estimate of the just compensation due for the taking. The defendants refused to accept the tender, alleged they were due $15,000.00, and demanded a jury trial.

In the Superior Court both parties offered evidence. According to the Commission's witnesses the defendants were due $1,700.00 to $2,-100.00; according to the defendants' witnesses, $14,500.00 to $15,000.00. The jury awarded the defendants $2,000.00. From judgment on the verdict, they appealed.

T. W. Bruton, Attorney General, Harrison Lewis, Deputy Attorney General, William W. Melvin, Assistant Attorney General, Millard R. Rich, Jr., Trial Attorney, Lamar Gudger, Associate Counsel for the State.

Robert S. Cahoon for defendant appellants.

PER CURIAM. The defendants assign as error the admission of certain evidence offered by the plaintiff and the exclusion of certain evidence offered by the defendants. The assignments are not sustained insofar as they relate to the evidence admitted by the court. The evidence appears to have been competent for the purposes for which it was offered.

Insofar as the assignments relate to the evidence which the court excluded, the assignments cannot be sustained for the reason that the record fails to disclose what the witnesses would have testified to if permitted. Hence, error in the exclusion of evidence does not appear. *N. C. State Highway Comm. v. Privett,* 246 N.C. 501, 99 S.E. 2d 61.

The refusal of the court to set aside the verdict was discretionary and, in the absence of abuse is not subject to review. In the trial and judgment, we find

No error.

STATE HIGHWAY COMMISSION v. J. B. BATTS AND WIFE, BETTY JOYNER BATTS.

(Filed 29 September, 1965.)

1. Eminent Domain § 7a—

In proceedings to condemn an interest in lands, the court has the power to hear and determine whether the condemnation is for a public use and whether the Highway Commission is entitled to maintain the proceeding. G.S. 136-108.

2. Eminent Domain § 3—

Private property can be taken under the power of eminent domain only for a public use, and what is a public use is a question of law for the trial court, reviewable on appeal.

3. Highways § 1—

The North Carolina State Highway Commission is an agency of the State charged with the duty of establishing and maintaining a State-wide system of highways, and the Commission has such powers as have been delegated to it and those which are necessarily incidental to the purpose for which it was created, including the power of eminent domain, G.S. 136-18(1), G.S. 136-19, G.S. 136-103, but it does not have power to condemn private property to construct a road for the private use of any person or group of persons.

4. Eminent Domain § 3—

"Public use" as related to the exercise of the power of eminent domain is not capable of precise definition applicable to all situations but must be construed with relation to the progressive demands and changing concept of governmental duties and functions, but, even so, it must be related to the carrying out of a public function and not the use by or for particular individuals or for the benefit of particular estates.

5. Same— Uncontradicted evidence held to show that the proposed road was not for a public use.

This proceeding by the State Highway Commission was instituted to condemn an interest in land to construct a road. The uncontradicted evidence was to the effect that the proposed road was to begin at the boundary of a secondary road and run some 3,316 feet and end in a *cul de sac*, and that it would abut five farm properties upon which there were three houses at the time the proceeding was initiated, a fourth house being constructed thereafter and that the five farm properties were occupied by relatives by blood or marriage. *Held:* The evidence discloses that the proposed road was for the substantial and dominant benefit of a private landowner and a few of his relatives and not for a public use, and injunction will lie to enjoin the Highway Commission from proceeding further with such condemnation.

6. Eminent Domain § 7a—

In a proceeding by the State Highway Commission to condemn an interest in lands for a proposed road, an answer alleging that the road was not for a public use states a legal defense, and demurrer *ore tenus* to the answer is overruled.

7. Eminent Domain § 9—

Where employees of the Highway Commission go upon land of a private owner and cut trees upon the right of way of a proposed road, and it is later judicially determined that the road was for a private use and that the Highway Commission had no power to condemn property for the road, the cutting of the trees amounts to an unauthorized trespass for which the Commission, as a State agency, cannot be held liable, since it had no authority to commit the trespass.

HIGGINS, J., dissenting.

DENNY, C.J., and SHARP, J., join in the dissent.

APPEAL by defendants from *Bone, E. J.*, January Special Session 1964 of NASH. Docketed and argued as Case No. 254, Fall Term 1964, and docketed as Case No. 288, Spring Term 1965.

The State Highway Commission, pursuant to the provisions of G.S. 136-103, *et seq.*, and pursuant to a resolution of said commission duly passed, instituted a civil action to condemn and take for public use an estate or interest in lands owned by defendants, beginning on the point of intersection of the common property line of Lovie Anne Joyner and J. B. Batts and wife with the southern right of way boundary of secondary Road 1717, and running thence in a southeasterly direction, approximately 3,316 feet to a point in the property of J. M. Batts, for the purpose of constructing and maintaining a highway known as Project 5.322, Nash County. The action was commenced by the issuance of a summons, the filing of a complaint, the declaration of a taking, and the deposit of estimated compensation. The declaration of taking states that the interest or estate taken is "Easements, in perpetuity, for right of way for all purposes for which the plaintiff is authorized by law to subject the same." An identical action was commenced by the State Highway Commission against Lovie Anne Joyner. The pleadings in the Joyner case are not in the record.

Defendants filed an answer denying that the condemnation and taking was for a public purpose, and alleging that the condemnation and taking of their lands to construct and maintain a road 3,316 feet long ending in a *cul de sac* was for the sole use and private benefit of W. M. Batts and wife, and a few of their relatives, and praying that the court, after final hearing, permanently enjoin plaintiff from proceeding further with the condemnation proceeding, but if this relief be denied by the court, then that the defendants be awarded just compensation for their land taken. Defendants filed in their answer a cross-action asking that they recover $75 for growing timber cut on their land prior to the issuance of the temporary injunction signed by Fountain, J.

Fountain, J., on motion of defendants, issued a restraining order enjoining plaintiff from constructing the proposed highway until a final hearing.

The action came on to be heard before Bone, E. J., at the January Special Session 1964 of Nash "for the purpose of determining whether or not the taking and acquisition of property of the defendants as set forth in the complaint and declaration of taking filed by the plaintiff, State Highway Commission, is for a public use." The attorneys for plaintiff and for defendants stipulated that the matter should be heard by Judge Bone without a jury and upon affidavits. The action of the *State Highway Commission v. Lovie Anne Joyner et al.* was con-

solidated with this case for the purpose of the hearing. Judge Bone, after hearing the affidavits offered by the plaintiff and the affidavits offered by defendants, and the arguments of counsel, made the following FINDINGS OF FACT:

"1. That this action was instituted under the provisions of Article 9 of Chapter 136 of the General Statutes by the filing of a Complaint and Declaration of Taking, deposit of estimated compensation, and issuance of Summons which was duly served on the Defendants; that in said Complaint and Declaration of Taking, Plaintiff alleged that it is necessary to condemn and appropriate an interest or estate in property of Defendants for public use in the construction of Secondary Road 1768 under Project 5.322, Nash County; that Defendants filed Answer denying that said road was for public use for the reason that it was for the sole use and private benefit of Mr. and Mrs. W. M. Batts and a few of their relatives.

"2. That on June 6, 1963, and prior to the institution of this action, the State Highway Commission duly passed a resolution determining that it was necessary to appropriate an easement of right of way across the property of Defendants herein for public use in the construction of Project 5.322, Nash County.

"3. The investigation and consideration of the proposed road by the State Highway Commission prior to said resolution of June 6, 1963, was at the instigation of Mr. and Mrs. W. M. Batts, individuals owning property fronting on the proposed road.

"4. That on August 1, 1963, the State Highway Commission duly passed a resolution placing said proposed Secondary Road 1768 upon the North Carolina Secondary Roads System.

"5. That upon completion, said road will abut upon at least five different properties and will serve four dwellings; that said road will be open to the general public when completed and the public will have a legal right to use said road. That the appropriation of Defendants' property is for the purpose of constructing a State maintained public road."

Based on his FINDINGS OF FACT, Judge Bone made one CONCLUSION OF LAW:

"1. That the appropriation of right of way by the Plaintiff as alleged in the Complaint across property of Defendants herein is for a public use, and the Plaintiff is entitled to maintain this action."

Based upon his findings of fact and his conclusion of law, Judge Bone entered Judgment denying defendants' prayer that the action be dismissed, and retaining the cause for the determination of all other issues raised by the pleadings, including the issue of just compensation. The learned judge further ordered that the temporary restraining order entered by Fountain, J., on 21 October 1963 is continued until the determination by the Supreme Court of the appeal taken from his judgment by defendants, on condition that defendants file with the court a suitable bond in the sum of five hundred dollars. Defendants J. B. Batts and wife filed the required bond.

From the judgment entered by Judge Bone, defendants J. B. Batts and wife and defendant Lovie Anne Joyner appealed to the Supreme Court. Counsel for the State Highway Commission and counsel for Lovie Anne Joyner stipulated that the determination by the Supreme Court of the appeal in the case of *State Highway Commission v. J. B. Batts and wife* would be determinative in the case of *State Highway Commission v. Lovie Anne Joyner* in the Nash County Superior Court.

Attorney General T. W. Bruton, Assistant Attorney General Harrison Lewis, and Trial Attorney Claude W. Harris for the North Carolina State Highway Commission plaintiff appellee.

Don Evans for defendant appellants.

PARKER, J. Defendants first assign as error that Judge Bone erred in finding as a fact that on 6 June 1963 the State Highway Commission duly passed a resolution determining that it was necessary to appropriate an easement of right of way across the property of defendants herein for public use in the construction of Project 5.322, Nash County. Defendants' second assignment of error is that Judge Bone erred in his finding of fact No. 5 "That the appropriation of Defendants' property is for the purpose of constructing a State maintained public road." Defendants' third and last assignment of error, except a formal one to the judgment, is that Judge Bone erred in his conclusion of law "That the appropriation of right of way by the Plaintiff as alleged in the Complaint across property of Defendants herein is for a public use."

Plaintiff offered in evidence an excerpt from the minutes of the State Highway Commission meeting held in Raleigh, North Carolina, on 6 June 1963 with eleven members present. This excerpt from the minutes shows that the following resolution, the material parts of which are quoted here, was introduced by Commissioner Elliott, seconded by Commissioner Webb, and being put to a vote was unanimously carried:

"WHEREAS, right-of-way acquisition in accordance with the preliminary right-of-way plans on file in the Right-of-Way Department has heretofore been determined to be necessary and authorized by the Commission; and

* * *

"WHEREAS, the final plans for the following projects have been prepared and provide for the construction of the sections of highways embraced in said projects within the uniform parallel right-of-way widths as shown on the respective plans, * * * and

"WHEREAS, upon the recommendations of the engineers of the Commission, the Commission finds that such rights of way as shown on the final plans and hereinafter set out are necessary for the construction of said projects;

"NOW, THEREFORE, BE AND IT IS HEREBY RESOLVED AND ORDAINED that the rights of way for the location, construction, relocation and reconstruction of the sections of highways embraced in the following projects shall be as shown in detail on the final plans for said projects, as hereafter identified * * *."

Then follows a description of seven projects, and a description of the eighth project which is as follows:

"*Project 5.322, Nash County:* Grading, drainage and paving from the point of intersection of the common property line of Lovie Anne Joyner and J. B. Batts, *et ux,* with the southern right-of-way boundary of S.R. 1717, and running thence in a southeasterly direction, approximately 3,316 feet to a point in the property of J. M. Batts, with right of way as indicated upon the final plans for said project, the same being identified as Addendum 8 to the minutes of the June 6, 1963 State Highway Commission Meeting and are incorporated herein by reference."

After the eighth project follows a description of four more projects. Then the excerpt from the minutes ends with these words:

"BE IT FURTHER RESOLVED that the Right-of-Way Department is directed to acquire the hereinabove described rights of way, construction easements and control of access and such rights of way, construction easements and control of access as heretofore acquired by the Right-of-Way Department in conformance with said final plans is hereby ratified, and the Attorney General is requested to institute on behalf of the Commission proceedings to acquire rights of way, construction easements and control of access upon determination by the Chief Right-of-Way Engineer and the Attorney

General that it is necessary that such proceedings be instituted to carry forward the right-of-way acquisition for said projects."

Plaintiff further offered in evidence an excerpt from the minutes of the State Highway Commission meeting held in Raleigh, North Carolina, on 1 August 1963 with seventeen members present. This excerpt from the minutes shows the following:

"Acting on the recommendation of Secondary Roads Director Roney, the following additions, deletions, and a correction to a previously approved addition, all pertaining to the Secondary Road System, were approved on a motion made by Commissioner Tate, seconded by Commissioner Elliott, and unanimously carried:
"ADDITIONS:

"County and Petition Number	Length (Miles)	Description, Date of Report "

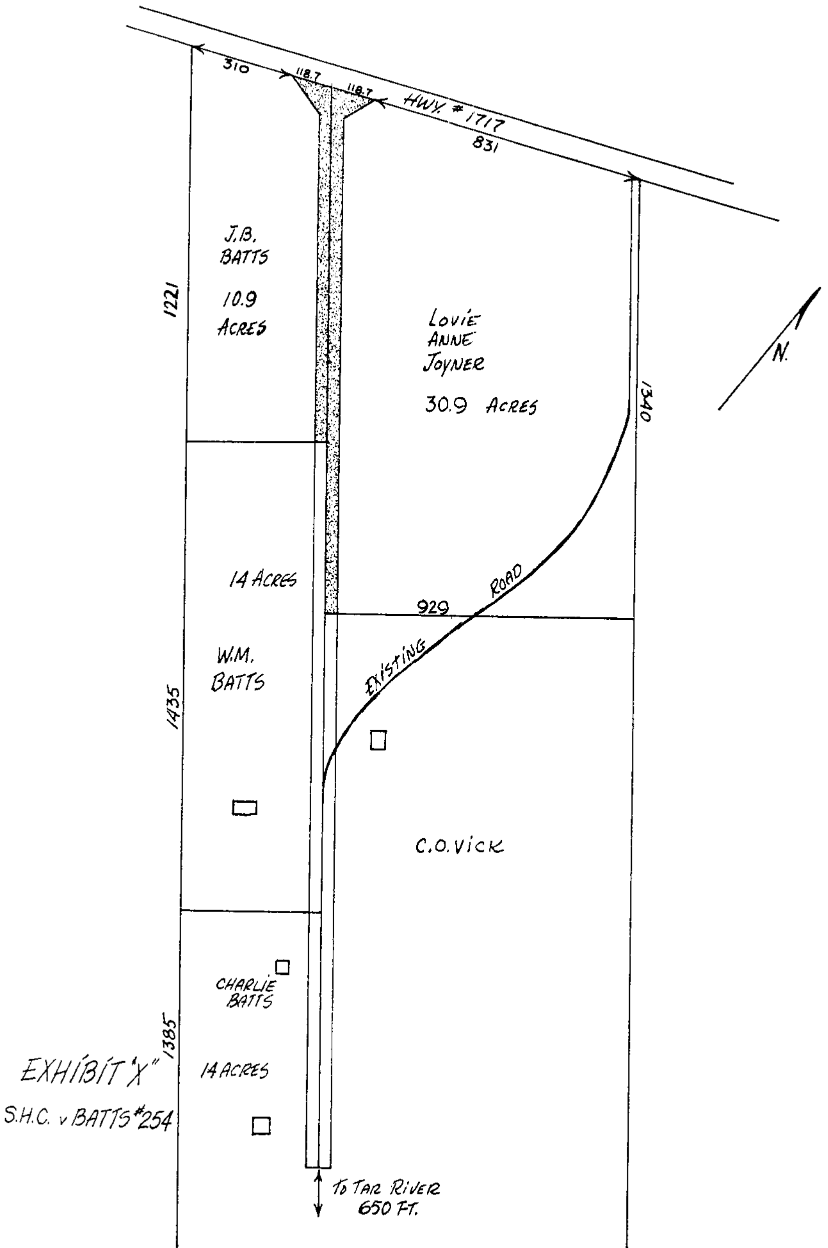
Then follows a list of 77 ADDITIONS from many counties, and in this list the following:

"Nash	6532	0.60	Batts Rd., 7-8-63"

Plaintiff also offered in evidence an affidavit of Donald Thomas Overman to this effect: He is now employed by the State Highway Commission as Safety and Emergency Planning Engineer, and that prior to 13 July 1963 he was District Engineer, Division 4, District 2, which embraces Nash County. He is familiar with Secondary Road 1768, Nash County, known locally as the Batts Road. Prior to 13 July 1963, and particularly on 6 June 1963, this road existed as an unimproved farm road. That said road as relocated and reconstructed by the State Highway Commission will serve at least five different property owners and four dwellings, and is on the State highway system, and when completed will be open to the general public.

Defendants' evidence shows these facts: Their land is between W. M. Batts' land and Secondary Road 1717. An old farm road leads from Secondary Road 1717 across the lands of Lovie Anne Joyner to the lands of W. M. Batts and J. M. Batts, now occupied by Charlie Batts. This old farm road has never been closed due to weather conditions and has provided free access to the highway from W. M. Batts' and J. M. Batts' lands for over 60 years. The only people using this farm road are the people living back of J. B. Batts and Lovie Anne Joyner and people who go back there to call on them. The State Highway Commission seeks to condemn their land for the purpose of constructing a dead-end road over it for the sole use and private benefit of Mr. and Mrs. W. M. Batts and a few of their relatives. The action of

the State Highway Commission was initiated by a letter of Mr. and Mrs. W. M. Batts. Mr. and Mrs. W. M. Batts were notified by the State Highway Commission that if they wanted the road they requested, they would be required to give the Commission a bond indemnifying them for whatever damages defendants and Lovie Anne Joyner might prove as a result of the condemnation, and that Mr. and Mrs. Batts did give the Commission such an indemnifying bond. That the State Highway Commission advised Mrs. W. M. Batts of the policy of the Commission requiring four dwellings fronting on the proposed road. At that time there were three dwellings fronting on the proposed road, to wit, Charles Batts, nephew of W. M. Batts, and his mother-in-law in one dwelling; C. O. Vick, Mrs. Batts' brother, in another dwelling; and Mr. and Mrs. W. M. Batts in the other dwelling. Thereafter, Charlie Batts built a shell house on the proposed road, and Mrs. W. M. Batts' daughter, Mrs. Phil Ellis, moved in with her family. Mrs. W. M. Batts sought the help of the Nash County Board of Commissioners, and on 8 June 1962 presented a written request for a proposed new road to said Board, purporting to be signed by all the property owners on the said road. However, two of the adjoining property owners, J. B. Batts and Lovie Anne Joyner had not signed it, and had not even been apprised of said written request. As a consequence of the written request, the Nash County Board of Commissioners on 8 June 1962 passed a resolution requesting the State Highway Commission to take the proposed road into the State secondary road system. This resolution was forwarded to the Commission. However, on 3 September 1963, when the Nash County Board of Commissioners discovered that all the property owners had not in fact signed the request, the Board passed another resolution rescinding their prior resolution of request, and so notified the State Highway Commission. The proposed road is only 3,316 feet long, and dead-ends at or near Charlie Batts' house. Back of Charlie Batts' property is Tar River. The only persons who would use the proposed road, other than Mr. and Mrs. W. M. Batts and their relatives, would be persons having business or social relations with them. That the following sketch marked Exhibit "X" shows the proposed road, the farm road through the property of Lovie Ann Joyner, and the lands of the various parties adjacent to the proposed road and the farm road.


310
118.7
118.7
HWY. # 1717
831
J.B. BATTS
10.9 ACRES
1221
LOVIE ANNE JOYNER
30.9 ACRES
1340
N.
14 ACRES
929
ROAD
EXISTING
W.M. BATTS
1435
C.O. VICK
CHARLIE BATTS
1385
14 ACRES
EXHIBIT "X"
S.H.C. v BATTS #254
TO TAR RIVER 650 FT.

Judge Bone was empowered by the provisions of G.S. 136-108 to hear and determine the question specified in his judgment.

The basic question for decision is this: Whether the taking and condemnation of defendants' property as set forth in the complaint and declaration of taking filed by the State Highway Commission is for a public use for a State and county public highway, as contended by the Commission, or is for the sole use and benefit of W. M. Batts and wife and a few of their relatives, as contended by defendants.

In the exercise of the sovereign power of eminent domain, private property can be taken only for a public use and upon the payment of just compensation. *Charlotte v. Heath,* 226 N.C. 750, 40 S.E. 2d 600; Strong's N. C. Index, Vol. 2, Eminent Domain, § 3. In any proceeding for condemnation under the sovereign power of eminent domain, it is settled by our decisions that what is a public use is a judicial question for ultimate decision by the court as a matter of law, reviewable upon appeal. *Redevelopment Commission v. Hagins,* 258 N.C. 220, 128 S.E. 2d 391; *Charlotte v. Heath, supra; Highway Commission v. Young,* 200 N.C. 603, 158 S.E. 91; *Yarborough v. Park Commission,* 196 N.C. 284, 145 S.E. 563. To the same effect, *Rindge Co. v. Los Angeles County,* 262 U.S. 700, 67 L. Ed. 1186, in which it is said: "The nature of a use, whether public or private, is ultimately a judicial question."

The State Highway Commission was created by the General Assembly, G.S. 136-1, as an unincorporated State agency or instrumentality, and is charged with the duty of exercising certain administrative and governmental functions for the purpose of constructing and maintaining State and county public roads. *Smith v. Highway Commission,* 257 N.C. 410, 126 S.E. 2d 87; *Equipment Co. v. Hertz Corp.,* 256 N.C. 277, 123 S.E. 2d 802. "The general purpose of the laws creating the State Highway Commission is that said Commission shall take over, establish, construct, and maintain a State-wide system of hard-surfaced and other dependable highways running to all county seats, and to all principal towns, State parks, and principal State institutions, and linking up with state highways of adjoining states and with national highways into national forest reserves by the most practical routes, with special view of development of agriculture, commercial and natural resources of the State * * *." G.S. 136-45. The Commission is vested with the power of "general supervision over all matters relating to the construction of the State highways * * *." G.S. 136-18(1). "All the other powers it possesses are incidental to the purpose for which it was created." *DeBruhl v. Highway Commission,* 245 N.C. 139, 95 S.E. 2d 553.

The State Highway Commission as a State agency or instrumentality possesses the sovereign power of eminent domain, and by reason thereof

can take private property for public use for highway purposes upon payment of just compensation. G.S. 136-19, 136-103; *Moore v. Clark,* 235 N.C. 364, 70 S.E. 2d 182; *Highway Commission v. Basket,* 212 N.C. 221, 193 S.E. 16.

G.S. 136-18(2) and 136-45 vest in the State Highway Commission broad discretionary powers in establishing, constructing, and maintaining highways as part of a State-wide system of hard-surfaced and other dependable highways, but the State Highway Commission has no power to condemn private property to construct a road for the private use of any person or group of persons, and if it does so, it is an arbitrary act and an abuse of the discretion vested in it.

The State Highway Commission designates the road it proposes to construct in this case across the lands of defendants and Lovie Anne Joyner as Project 5.322, Nash County. In its declaration of taking, it thus describes Project 5.322, Nash County:

> "Beginning on the point of intersection of the common property line of Lovie Anne Joyner and J. B. Batts *et ux* with the southern right of way boundary of Secondary Road 1717, and running thence in a southeasterly direction, approximately 3,316 ft. to a point in the property of J. M. Batts, end of project."

It is therefore indubitable that the road will end in a *cul de sac* on the property of J. M. Batts about 3,316 feet from Secondary Road 1717. A *cul de sac* is defined as a way, street or alley open at one end only. Black's Law Dictionary, 4th Ed., p. 453; Ballentine's Law Dictionary, 2d Ed., p. 317; 25 C.J.S., p. 20.

This is said in 39 C.J.S., Highways, § 27, pp. 948-49:

> "The character of the place of beginning and ending of a proposed highway has a bearing on the question of its public necessity, utility, or convenience. If the proposed road neither begins nor ends at a pre-existing highway or other public place, it cannot as a rule be established as a highway, since in the nature of the case no public necessity exists for it, and if formally laid out it would not be of public utility or convenience; one terminus at least must be at a pre-existing highway or other public place. However, except where it is otherwise provided by statute, it is not requisite, in order to justify the establishment of a highway, that it should both begin and end at pre-existing highways or other public places, provided it is a public necessity, and, if laid out, will be of public utility and convenience; it is sufficient if one terminus is at an existing highway or other public place. Accordingly a *cul de sac* may be established as a highway, if public

necessity, utility, or convenience requires, provided, in at least one jurisdiction, the terminus is at a place of necessary public resort.

"It has been held sufficient for the terminus of a public road to be located at a river, a creek, a lake, a church, a cemetery, a public school, a railroad station, a large manufacturing establishment, and intersecting points on two public roads. A road may properly terminate at the state line, although there is no highway connecting with it in the adjoining state, or at a county line, or at a town line, notwithstanding the persons in the adjoining town only will utilize it."

To the same effect, see Lewis on Eminent Domain, 3d Ed., Vol. I, pp. 512-13. See also Nichols on Eminent Domain, 3d Ed., p. 705, and 25 Am. Jur., Highways, § 5.

In 39 C.J.S., Highways, § 1, p. 916, it is said:

"According to the weight of authority, however, it is not essential that both termini of a highway connect with a public highway or a place of public resort, and it is held that a *cul de sac* may be a public highway, although, of course, it is not necessarily one."

In *S. v. McDaniel*, 53 N.C. 284, defendant was placed on trial on an indictment for obstructing a public highway. The jury found a special verdict. The trial court being of opinion defendant was not guilty upon the facts found in the special verdict gave judgment accordingly, and the State appealed. The Court, after discussing the facts found in the special verdict, citing authority, and stating "* * * we concur with the Superior Court in the judgment that the obstruction of it is not indictable," went on to use this language, which is *obiter dictum:* "From the finding of the jury, we suppose the road terminated at the church, and was, therefore, what is called in French phrase, a *cul de sac*. It is difficult to conceive of a highway a mile long and closed up at one end, for the public at large cannot be in use of it * * *." No authority is cited to sustain the *obiter dictum*. If it be construed to mean, which it apparently does, that a highway connecting at one end with a public highway and ending in a *cul de sac* cannot as a matter of law be a highway, we disapprove of it as being against the great weight of modern authority.

"Public use," as applied in the exercise of the power of eminent domain, is not capable of a precise definition applicable to all situations. The term is elastic, and keeps pace with changing conditions, since the progressive demands of society and changing concepts of governmental duties and functions are constantly bringing new subjects

forward as being for "public use." *Charlotte v. Heath, supra;* 18 Am. Jur., Eminent Domain, § 36.

This is said in 18 Am. Jur., Eminent Domain, § 38:

> "Use by the general public as a universal test is recognized as inadequate. If public use is use by the public, eminent domain might be employed to secure sites for hotels and theaters, to which places in many states the public has by custom or statute [now perhaps in all states by reason of the recent federal Civil Rights Act] the right of access without discrimination. If public use is synonymous with public advantage, or rather what the legislature might reasonably conceive to be the public advantage, not only might eminent domain be employed in behalf of all large industrial enterprises, but the size of farm holdings might be regulated to suit the prevailing economic theory of the time. Public use, as nearly as can be deduced from the generally accepted doctrines and decisions, may be defined as to include the following classes of takings:
>
> "(1) Takings to enable the Government of the United States or of a state or subdivision thereof to carry on its public functions and to conserve the safety and health of the public whether or not the individual members of the public may make use of the property so taken. Public necessity alone justifies governmental taking of private property."

In *Charlotte v. Heath, supra,* the Court said:

> "The use which will justify the taking of private property under the exercise of the right of eminent domain is the use by or for the government, the general public, or some portion thereof as such, and not the use by or for particular individuals or for the benefit of particular estates. The use, however, may be limited to the inhabitants of a small locality, but the benefit must be in common."

In *Reed v. Highway Commission,* 209 N.C. 648, 184 S.E. 513, the Court held that in taking over a road as a part of the highway system, the scenic value of such road and its necessity as a part of the system of scenic highways for the public may be considered in determining whether taking over the road is for a public or private purpose.

In the case of *Stratford v. City of Greensboro,* 124 N.C. 127, 32 S.E. 394, a taxpayer, resident of Greensboro, brought an action to restrain the city from borrowing money from Caesar Cone with which to open and make a new street, alleging that such activities by the city are not necessary and required for the public use of the city, but on the

contrary they were to be made for the private use and benefit of Caesar Cone; that such benefits as might accrue to the city were only incidental. Caesar Cone was the owner of a large tract of land situate on the north and northeast of the city of Greensboro and lying partly within the corporate limits of the city. The plaintiff also sought to restrain the city from holding an election for authorization to borrow the money from Cone. The first issue submitted to the jury was framed on the view that in all cases where municipal authorities proceed to open and build new streets, having authority so to do in their charter or general law, such proceedings cannot be made the subject of judicial investigation except in cases of actual fraud. There was a verdict in favor of the defendants. The Supreme Court awarded a new trial. In its opinion the Court said: "In the case before us, the main question raised by the pleadings was whether the use, to which the new street and improvements were to be devoted, was a public use. It was not necessary on the part of the plaintiff to allege or prove actual fraud in the transaction. If the substantial benefit was for the defendant Cone as an individual, and the benefit to the city only incidental and purely prospective, then the proceedings of the board were *ultra vires* and void."

Judge Bone's 5th finding of fact in part is "that upon completion, said road will abut upon at least five different properties and will serve four dwellings." The uncontradicted evidence is that at the time Mr. and Mrs. W. M. Batts wrote their letter which initiated plaintiff's action here, 3 April 1961, there were three buildings fronting on the proposed road, to wit, Charlie Batts, nephew of W. M. Batts, and his mother-in-law in one dwelling, C. O. Vick, Mrs. Batts' brother, in another dwelling; and Mr. and Mrs. W. M. Batts in the other dwelling; and thereafter Charlie Batts built a shell house on the proposed road, and Mrs. W. M. Batts' daughter, Mrs. Phil Ellis, moved in with her family. The uncontradicted evidence is that farming is done on the property of W. M. Batts, J. M. Batts, and Lovie Anne Joyner, and that no other business is done there by the present occupants.

Plaintiff's declaration of taking shows conclusively that the road it proposes to construct by condemning lands of defendants here and of Lovie Anne Joyner will begin with the southern right of way boundary of Secondary Road 1717, will run thence in a southeasterly direction about 3,316 feet, and end in a *cul de sac* at a point in the property of J. M. Batts. There is nothing in the record before us to show the proposed road will have any scenic value, or that it will end at any place used by the public. There is nothing in the record before us to show that the construction and maintenance of the proposed road ending in a *cul de sac* on the property of J. M. Batts is required by public necessity,

convenience, or utility. Judge Bone found as a fact "that on August 1, 1963, the State Highway Commission duly passed a resolution placing said proposed Secondary Road 1768 upon the North Carolina Secondary Roads System." The State Highway Commission's resolution does not state it was for a public use, but we will assume that that may be implied from the wording of the resolution. That declaration by the State Highway Commission is entitled to great weight, but the State Highway Commission cannot by its mere *fiat* make a private use a public use. The existence of a public use is a prerequisite to the right of the State Highway Commission to exercise the power of eminent domain to condemn private property, and final determination as to whether the proposed condemnation and taking of defendants' land by condemnation is for a public use is for judicial determination. The State Highway Commission's declaration of taking and all the evidence in the record clearly show that the construction of Project 5.322, Nash County, ends in a *cul de sac* at a point in the land of J. M. Batts and that when constructed Project 5.322, Nash County, would be for the substantial and dominant use and benefit of Mr. and Mrs. W. M. Batts and a few of their relatives; and that any use by, or any benefit for, the general public will be only incidental and purely conjectural; that it is not for a public use, and that no public necessity, convenience, or utility exists for the State Highway Commission to condemn defendants' and Lovie Anne Joyner's land, and that the building of the proposed road by plaintiff will be an abuse of the discretion vested in it to establish, construct, and maintain highways for public use, as part of a State-wide system of hard-surfaced and other dependable highways. Under such circumstances, the State Highway Commission cannot exercise its sovereign power of eminent domain. *Stratford v. City of Greensboro, supra; Brown v. Gerald,* 100 Me. 351, 70 L.R.A. 472, 109 Am. St. Rep. 526, 61 A. 785; *Minnesota Canal and Power Co. v. Koochiching Co.,* 97 Minn. 429, 5 L.R.A. (N.S.) 638, 107 N.W. 405, 7 Ann. Cas. 1182; 18 Am. Jur., Eminent Domain, p. 671; Annot. 44 A.L.R., p. 737. To sustain the proposed condemnation and appropriation of defendants' lands under the facts and circumstances here would set a dangerous precedent for the expenditure of public funds by the State Highway Commission to condemn private property for the construction and maintenance of a road for private use.

Defendants have assigned as error this part of Judge Bone's 5th finding of fact: "That the appropriation of defendants' property is for the purpose of constructing a State-maintained public road." This exception is sustained. There is no evidence in the record to support this challenged finding of fact, in that all the evidence in the record shows

that the taking by plaintiff of defendants' lands here was without their consent and against their will and not for a public purpose.

Judge Bone erred in finding and concluding as a matter of law that the condemnation and appropriation of a right of way by plaintiff as alleged in the complaint and the declaration of taking across lands of defendants here and of Lovie Anne Joyner is for a public use, and that plaintiff is entitled to maintain this action. Based upon plaintiff's complaint and its declaration of taking, and all the evidence, he should have found as facts and concluded as a matter of law and adjudged that the condemnation and appropriation of a right of way across lands of defendants and Lovie Anne Joyner to construct Project 5.322, Nash County, ending in a *cul de sac* on the lands of J. M. Batts, was not for a public use, but was for the substantial and dominant use and benefit of W. M. Batts and wife, and a few of their relatives, and that any use by, or benefit to, the public would be merely incidental and entirely conjectural, and that the building of the proposed road by plaintiff will be an abuse of the discretion vested in it to establish, construct, and maintain highways, as part of a State-wide system of hard-surfaced and other dependable highways, and he should have issued an injunction permanently restraining plaintiff from proceeding with the condemnation and appropriation of their lands.

Plaintiff filed in this Court a demurrer *ore tenus* to the further answer and cross-action of the defendants, upon the ground that the same fails to state a cause of action as an affirmative defense. The further answer alleges as a defense that the condemnation and appropriation of their land by the plaintiff was not for a public use but was for the sole use of Mr. and Mrs. W. M. Batts and a few of their relatives, which, if established, is a legal defense to plaintiff's action. The demurrer *ore tenus* is overruled.

The judgment entered below is reversed, and a judgment will be entered in the superior court of Nash County in accordance with this opinion, and in this judgment it will be adjudged and decreed that defendants' cross-action to recover $75 for plaintiff's cutting of growing trees upon their lands be dismissed. Defendants allege that the construction of such highway is beyond the scope of the authority vested in the Commission and inferentially that acts done in furtherance thereof are also unauthorized. We have agreed. Therefore, the cutting of the trees was not a taking of private property for public use. It was merely an unauthorized trespass by employees of the Commission, for which no cause of action exists against the Commission in favor of defendants. It is *damnum absque injuria*. An agency of the State is powerless to exceed the authority conferred upon it, and therefore cannot commit an actionable wrong. *Schloss v. Highway Commission*, 230 N.C.

489, 53 S.E. 2d 517; *Carpenter v. R. R.,* 184 N.C. 400, 114 S.E. 693; *Teer v. Jordan,* 232 N.C. 48, 59 S.E. 2d 359; *Moore v. Clark,* 235 N.C. 364, 70 S.E. 2d 182; *Pharr v. Garibaldi,* 252 N.C. 803, 115 S.E. 2d 18; *Shingleton v. State,* 260 N.C. 451, 133 S.E. 2d 183. The defendants should not be heard to say that the taking of their land is not for a public purpose, but the taking of their trees was.

Reversed.

HIGGINS, J., dissenting: The parties stipulated that Judge Bone should try the case without a jury. Pursuant to the stipulation, he found:

"5. That upon completion, said road will abut upon at least five different properties and will serve four dwellings; that said road will be open to the general public when completed and the public will have a legal right to use said road. That the appropriation of Defendants' property is for the purpose of constructing a State maintained public road."

Upon the foregoing finding, he concluded:

"1. That the appropriation of right of way by the Plaintiff as alleged in the Complaint across property of Defendants herein is for a public use, and the plaintiff is entitled to maintain this action."

The finding of fact is supported by affidavits. It sustains the conclusion. Both support the order entered by Judge Bone. I vote to affirm.

DENNY, C.J. & SHARP, J., join in this dissent.

PAUL DOUGLAS v. W. C. MALLISON AND SON, A PARTNERSHIP CONSISTING OF S. M. MALLISON, JR., FRED M. MALLISON, MRS. S. M. MALLISON, SR., AND MARY MALLISON BAKER.

(Filed 29 September, 1965.)

1. Appeal and Error § 23—

An assignment of error to the exclusion of testimony should set forth the question asked, the objection, the ruling on the objection, and what the witness would have answered, so as to disclose the questions sought to be presented for review within the assignment of error itself.

2. Appeal and Error § 21a—

An assignment of error to judgment of nonsuit is sufficient if it merely states that it is to such judgment and refers to the page of the record where the supporting exception is noted.

3. Appeal and Error § 41—

Where plaintiff's witness is permitted to state clearly plaintiff's view of the fact in question, an exception to the exclusion of statement of plaintiff's counsel as to what the answer alleged in this regard cannot be prejudicial.

4. Same—

Where the record does not show what the answer of the witness would have been had the witness been permitted to testify, it cannot be ascertained that the exclusion of the testimony was prejudicial.

5. Same—

The exclusion of testimony offered for the purpose of showing that the witness made a representation amounting to a warranty cannot be prejudicial when the buyer shows no authorization on the part of the witness to bind the seller.

6. Sales § 6—

There can be no implied warranty of the quality or fitness of a second-hand machine for the intended use when the purchaser testifies that he, himself, had formerly used the machine and his evidence discloses that he thoroughly inspected it at the time of sale.

7. Sales § 5—

Any affirmation of fact or promise by the seller relating to the article sold is an express warranty if the natural tendency of the statement is to induce the buyer to purchase the article, and the buyer does purchase it in reliance upon the statement.

8. Sales § 14g—

Independent of negligence, the purchaser may recover for a personal injury which results from a breach of warranty if such injury might have been foreseen as a natural consequence of such breach.

9. Sales § 14b—

The buyer is not entitled to recover for personal injuries resulting from breach of warranty unless he carries the burden of proving the warranty, its breach, and his injury which could have been foreseen by the parties as a natural consequence of the breach.

10. Negligence § 26—

Nonsuit on the ground of contributory negligence alleged in the answer is properly entered when plaintiff's own evidence, considered in the light most favorable to plaintiff, so clearly establishes this defense that no other reasonable inference can be drawn therefrom.

11. Negligence § 20—

Contributory negligence must be pleaded.

12. Same—

In this action to recover for injuries resulting when the "A-frame" of the machine plaintiff had purchased from defendants fell back on plaintiff while he was operating the machine, allegations in the answer to the effect that plaintiff knew that the "A-frame" of the machine folded back toward

the chassis for the purpose of transportation, and that in preparing the machine for use plaintiff failed to take precautions to prevent the frame from folding back toward him, *held* sufficient to allege contributory negligence of plaintiff in failing to take the necessary precautions.

13. Sales § 16— Evidence held to show contributory negligence as a matter of law in using machine with obvious defect.

Plaintiff's evidence, considered in the light most favorable to him, tended to show that he and his employees had used the machine in question previously when it had a chain on each side of the "A-frame", that they took the machine to the woods for use with the "A-frame" folded back on the chassis, that they raised the frame and fastened the chain on the left side, that he and his employees understood the purpose of the chain was to brace the "A-frame" so as to prevent it from falling back when the machine was used, that the right side of the "A-frame" had a broken remnant of the steel arm similar to that to which the chain on the left side was attached, and that in using the machine the "A-frame" fell back on the chassis where plaintiff was sitting, resulting in the injury in suit. *Held:* Plaintiff's own evidence discloses contributory negligence as a matter of law.

14. Pleadings § 20—

A pleading will be liberally construed with a view to substantial justice between the parties.

APPEAL by plaintiff from *Fountain, J.*, February 15, 1965 Civil Session of BEAUFORT.

This is an action to recover damages for personal injuries sustained by the plaintiff when a portion of a pulpwood loading machine, purchased by him from the defendants, collapsed and fell upon him. From a judgment of involuntary nonsuit entered at the close of his evidence, the plaintiff appeals. He also assigns as error the exclusion of proposed testimony.

Summarizing the complaint, it alleges: The plaintiff purchased from the defendants a pulpwood loading machine for use in the woods in moving pulpwood from a loading deck onto a pallet for subsequent loading onto a truck, which purpose he explained to the defendants. They advised him that the machine was in good condition and was suitable and fit for such purpose. Relying upon these statements, he purchased the machine, set it up in the woods and undertook to use it for such purpose. On the first attempt to use it, a portion of the machine, referred to as the "A-frame," suddenly collapsed and fell upon the plaintiff, inflicting severe and permanent injuries. The collapse of the A-frame was due solely to its defective condition in that it was not properly braced and was, therefore, unable to resist the strain placed upon it by the loading of pulpwood in the contemplated operation. This defect was, or should have been, known to the defendants in the exercise of ordinary care in the inspection of the machine. The representation

made by the defendants to the plaintiff as to its suitability for the intended use was negligently and wantonly made, which negligence was the sole cause of the injuries sustained by the plaintiff. Plaintiff is not a mechanic and had no way of knowing of the defect in the machine.

The defendants, in their answer, admit they sold the machine to the plaintiff but deny the remaining allegations of the complaint, and further allege in summary: The machine was of simple design and construction, all parts of it being open and visible. It was originally constructed by them for use in limited pulpwood operations and the plaintiff knew, or by the exercise of due care and observation should have known, the mechanics involved in the operation of the loader and its limitations, there being no hidden dangers or latent defects in it. The plaintiff was guilty of contributory negligence, which was one of the proximate causes of his injury, in that, knowing the A-frame was designed to fold back toward the chassis of the machine, for convenience in moving the machine from place to place, and also knowing that, when the machine was in use, the A-frame should be in a position slightly forward of vertical, he nevertheless used the loader in a manner which caused the A-frame to be pulled backward and negligently failed to see and observe what he should have seen concerning the requirements of the safe operation of the loader and the mechanics involved in its use.

The evidence, interpreted most favorably to the plaintiff, tends to show:

Plaintiff is a high school graduate but is not a trained mechanic and has no particular mechanical ability. Before purchasing the loader he had been employed in the pulpwood operations of a Mr. Woolard, who then owned the identical machine. During his employment by Mr. Woolard, the plaintiff observed the use and operation of this machine and operated it occasionally himself.

The machine consists of a chassis mounted on automobile wheels. The A-frame rises above the chassis at the front thereof and consists of two steel beams with a cross bar so that it is in the shape of a capital A. A swinging boom is mounted at the top of the A-frame. A cable runs from a drum or winch on the chassis at the foot of the A-frame, up the A-frame and then, through pulleys, out over the boom and down to the ground, a "grab hook" being attached to the ground end of the cable for the lifting of pulpwood logs. When this hook is attached to a log, the cable is wound on the winch with power supplied by a farm tractor, which is independent of the machine itself, and thus the log of pulpwood is dragged or lifted. The operator of the machine sits on a seat upon the chassis and applies the power to the winch by use of a lever.

The A-frame was not designed to move from side to side, but the boom at the top of the A-frame was designed to swing from side to side through a total angle of 180 degrees in front of the A-frame. The swinging boom enabled the operating crew to attach the cable to logs straight in front or to either side of the machine and, through the application of power by winding the cable on the winch, to pull the log toward the machine and lift it.

A chain, running from the top of the A-frame to a point on the chassis behind the operator's seat, was designed to keep the A-frame from falling forward out of its working position, which was slightly forward of vertical. To facilitate the transportation of the machine from place to place, the A-frame was designed so that it could be folded back upon the chassis. To prevent the A-frame from so folding backward, when the machine was in operation and power was applied through the cable for the lifting or pulling of logs, there were, originally and while this machine was operated by the plaintiff as an employee of Mr. Woolard, two chains, one attached to the outside of each side beam of the A-frame and running thence to a steel arm projecting forward from the corresponding side of the chassis. To permit the A-frame to be lowered backward when desired for the movement of the machine from place to place, these chains were capable of being disconnected from the A-frame, being fastened to it by bolts at other times.

During the period when the machine was owned by Mr. Woolard and operated, as his employee, by the plaintiff there was no accident in connection with the use of the machine and the plaintiff observed it only casually. It was then used to pick up logs off to one side as well as in front of the machine.

Having decided to go into the pulpwood operation for himself, the plaintiff went to the defendants' place of business to purchase a pulpwood loader. He found on their yard the machine in question and, believing it to be the machine which he had formerly observed and used in the Woolard operation, he asked the defendants' agent if they had the Woolard loader. Finding that the machine on the yard was, indeed, the same machine which he had used in the Woolard operation, he negotiated for its purchase and bought it.

The plaintiff could then tell from looking at the machine that it needed work done on it and certain parts were missing. He testified: "I did not ask him [the salesman] if the machine was in operating condition for it did not appear to be in operating condition. I looked at it and reached the conclusion that it needed work done to it." He then testified that he and the defendants' salesman discussed the machine and what needed to be done to it. The salesman stated that the defendants would get it "in working order." He instructed the plaintiff to

get a cable and clamps with which to fasten it to the winch and pulleys over which the cable would operate. These things the plaintiff was to install on the machine himself, which he did after accepting delivery of the machine from the defendants. The salesman stated, at the time the plaintiff purchased the machine, "I will get it ready for you to go." The plaintiff then left to get the cable, clamps and pulleys, which he was to install. Approximately an hour and a half later he returned for the machine and took delivery of it at the defendants' shop after a conversation with one of the mechanics employed there.

Thereupon, the plaintiff moved the machine to the site of his pulpwood operations and set it up on Saturday, attaching the cable and pulleys supplied by himself. In setting up the machine, the plaintiff and his employees raised the A-frame themselves. He did not notice what, if anything, was done to secure the A-frame in its working position.

The following Monday morning, the plaintiff and his employees returned to the site and the plaintiff took his seat on the machine to operate it for the first time. His employees attached the cable hook to a piece of pulpwood lying off to the right side of the machine at an angle of about 90 degrees. At the appropriate signal, the plaintiff, by use of the lever, applied the power for the purpose of raising the log, which weighed approximately 125 pounds. Immediately upon application of the power, the A-frame fell backward and struck the plaintiff, breaking his back and causing him to be paralyzed from the waist down.

Examination of the machine, after the accident, disclosed that the chain running from the left side of the A-frame was still attached to the steel arm projecting from the left side of the chassis but the steel arm was bent around to the inside; that is, to the right. As the A-frame fell, it pulled this arm around. There was no chain on the right side of the A-frame and the steel arm, which originally projected from the right side of the chassis and to which the chain on the right side was originally to be attached, was broken off, leaving a stub. This was an old break, as disclosed by its rusty condition. Thus, at the time the machine was set up by the plaintiff and his employees, there was no steel arm and no chain on the right side of the A-frame. The absence of the chain and steel arm on the right side would have been clearly observable to anyone who looked at that side of the A-frame prior to the accident.

John A. Wilkinson and LeRoy Scott for plaintiff.

James & Speight; William C. Brewer, Jr., W. W. Speight and Hallett S. Ward for defendants.

LAKE, J. The appellant's first three assignments of error do not comply with this Court's Rule 19(3) in that they are not sufficient, within themselves, to present the errors relied upon. For example, Assignment #1 simply states:

"1. The ruling of his Honor on that portion of the direct examination of Paul Douglas, an objection to which was sustained. (R. p. 18). This is PLAINTIFF APPELLANT'S EXCEPTION #1."

The rule requires that the assignment of error show what question is intended to be presented for consideration without the necessity of paging through the record to find the asserted error. A mere reference in the assignment of error to the record page where the asserted error may be discovered is not sufficient. *Hunt v. Davis*, 248 N.C. 69, 102 S.E. 2d 405. The assignment of error should have set forth, within itself, the question asked, the objection, the ruling on the objection, and what the witness would have answered if he had been permitted to testify.

Had these three been the only assignments of error, the appeal might properly have been dismissed on this ground alone, but since the appeal is from a judgment of nonsuit, which is Assignment #4, it is not subject to dismissal under this rule.

Having gone upon the voyage of discovery, to which we are directed by the references to the record in the first three assignments of error, we find that they are without merit. Assignment #1 relates to no question propounded to the witness, but to plaintiff's counsel's statement as to what the answer alleges. The witness stated clearly the plaintiff's view of the fact in question, so, in any event, the plaintiff was not prejudiced by the sustaining of this objection. As to Assignment #3, the record shows only the question to which objection was sustained. It does not show what the witness would have said if he had been permitted to answer. Thus, again, there is no showing of prejudice to the plaintiff by this ruling.

Assignment #2 relates to the sustaining of an objection to a conversation between the plaintiff and one, Henry Hamilton, identified only as a mechanic employed by the defendants. Had the plaintiff been permitted to answer, he would have testified that Hamilton told him, when he went back to get the machine from the defendants' shop, "It was ready." Even if the statement by an authorized agent of the seller of a machine that it is "ready" could be deemed a warranty or representation of fitness for a particular use and purpose, there is nothing in the record to indicate that Hamilton was authorized by the defendants to make any statement as to the condition of this machine or that he knew what use of it was contemplated, or that he had done any work on it. There was no error in sustaining this objection.

The appellant must, therefore, stand or fall on his contention that it was error to allow the defendants' motion for judgment as of nonsuit in view of the evidence offered by him and admitted.

The complaint, liberally construed, proceeds upon two theories of recovery: (1) That the defendants, at the time of the sale, warranted that this particular loader was in good condition and could be operated with safety; and (2) that the defendants negligently sold and delivered the machine when they knew, or should have known, that it was not properly braced and, therefore, was not safe for use.

The plaintiff's testimony shows that he purchased this specific, designated, second-hand machine, selecting it himself as the machine he wanted because he recognized it and had formerly used it. He thoroughly inspected it at the time of the sale. Under those circumstances, no warranty as to its quality or fitness for the intended use can be implied. *Driver v. Snow,* 245 N.C. 223, 95 S.E. 2d 519; 46 Am. Jur., Sales § 360; 77 C.J.S., Sales, § 315; Anno. 78 A.L.R. 2d 594, 616.

There may, however, be an express warranty as to the quality and safety of an article sold as second-hand and there is authority to the effect that an agreement to overhaul a second-hand machine and put it in first class shape may constitute a warranty that the machine delivered pursuant to that agreement is free from structural defects. 46 Am. Jur., Sales, § 327. Any affirmation of fact or promise by the seller relating to the article sold is an express warranty if the natural tendency of the statement is to induce the buyer to purchase the article and the buyer does purchase it in reliance upon such statement. *Potter v. Supply Co.,* 230 N.C. 1, 51 S.E. 2d 908. If such a warranty is given, the seller's liability for its breach does not depend upon proof of his negligence but arises out of his contract. *Wyatt v. Equipment Co.,* 253 N.C. 355, 117 S.E. 2d 21; Williston on Sales, Revised Edition, § 327.

"The liability of the seller of an article in damages for breach of warranty includes all damages which the buyer incurred as a result of a breach of the warranty which may fairly be supposed to have been in the contemplation of the parties at the time of the sale, that is, which might naturally be expected to follow the breach of warranty, and the buyer may, in an action for breach of warranty, recover damages for personal injuries sustained in consequence of the breach complained of, if such injuries were in the contemplation of the parties at the time of the sale, or if they are such as might, in the natural or usual course of things, result from a breach of the warranty." 46 Am. Jur., Sales, § 801. See also: *Price v. Goodman,* 226 N.C. 223, 37 S.E. 2d 592; *Hodges v. Smith,* 159 N.C. 525, 75 S.E. 726.

The burden is upon the plaintiff to prove the giving of the warranty as alleged in his complaint, its breach and his injury as a natural con-

sequence of the breach and one which was contemplated by the parties at the time of the sale as likely to result therefrom. *Furst v. Taylor,* 204 N.C. 603, 169 S.E. 185; Strong, N. C. Index, Sales, § 14.

In the absence of a warranty, the liability of the seller of a machine for injuries sustained by the user thereof due to a defective condition must rest upon the theory that the seller was negligent in selling the machine for the contemplated use. The care required of a seller is certainly no greater than that required of a manufacturer. In this instance, the defendants were the manufacturers of the machine but had sold it and had reacquired it after it had been used for a long period of time. The plaintiff does not contend that the machine, as originally designed and constructed, was defective. His complaint is that at some later time a part was broken off and disappeared. He contends that the defendants, who were the original designer-manufacturers, should have observed the loss of this part when the machine came back into their hands. The difficulty confronting the plaintiff, upon this theory of his case, is that the absence of this part was equally observable to him and he had used this machine when it was in its original condition and the part in question had not been broken off.

It is true that a manufacturer, who produces and sells a new article, which, in the exercise of reasonable care, he should know is likely to cause injury in its ordinary use because of some latent defect or because it is inherently dangerous for such use, is liable to the buyer who, without any negligence of his own, so uses it and is injured by such defect or dangerous nature. *Wyatt v. Equipment Co., supra; Gwyn v. Motors, Inc.,* 252 N.C. 123, 113 S.E. 2d 302; *Lemon v. Lumber Co.,* 251 N.C. 675, 111 S.E. 2d 868; *Tyson v. Manufacturing Co.,* 249 N.C. 557, 107 S.E. 2d 170. However, in the absence of a warranty, the manufacturer-seller of even a new article is not liable for injury to the buyer-user by reason of a condition which is plainly observable.

The plaintiff's own testimony, interpreted in the light most favorable to him, shows that the defect, which he says was the cause of his injury, was not latent but was observable by anyone who inspected the machine. He, himself, had used this machine in the pulpwood operations of its former owner. There was then a chain running from each side of the A-frame to a steel arm projecting from the corresponding side of the chassis. When he and his employees set up the machine for his own operation of it, they knew the nature and purpose of the chain on the left side and they attached it to the A-frame. There was at that time, on the right side of the chassis, the broken stub of what had been the projecting arm from which a chain was originally intended to run to the right side of the A-frame. This condition was readily observable by anyone raising the A-frame into its working position. We

think the plaintiff's evidence fails to show negligence on the part of the defendants in not calling the absence of this chain to the plaintiff's attention.

We do not think the evidence offered by the plaintiff is sufficient to prove a warranty by the defendants that the machine, at the time it was sold and delivered to the plaintiff, was in a safe working condition and ready for use. Other parts were to be attached by the plaintiff and, after the A-frame was raised into the working position, it had to be braced in that position by the plaintiff. The statements that the salesman would get it "in working order" and "get it ready to go" would seem to mean only that the repairs he and the plaintiff had discussed would be made.

Even though the seller of a machine has expressly warranted it to be in good condition and safe for the contemplated use, or has been negligent in selling the machine in an unsafe condition, the buyer-user may not recover damages for injuries resulting from its use if he used it when he knew, or in the exercise of reasonable care should have known, that the machine was not in a safe condition and so contributed to his own injury. *Insurance Co. v. Chevrolet Co.*, 253 N.C. 243, 116 S.E. 2d 780; Williston on Sales, Revised Edition, § 614b; 46 Am. Jur., Sales, §§ 801, 808.

A judgment of nonsuit on the ground of contributory negligence may be entered only when the plaintiff's evidence, considered alone and taken in the light most favorable to him, so clearly establishes the defense that no other reasonable inference or conclusion can be drawn therefrom. *Cowan v. Transfer Co.,* 262 N.C. 550, 138 S.E. 2d 228; *Waters v. Harris,* 250 N.C. 701, 110 S.E. 2d 283; Strong, N. C. Index, Negligence, § 26. For such a ruling to be proper, it is also necessary that the answer has alleged the negligent act or omission on the part of the plaintiff which is so shown by the evidence. *Maynor v. Pressley,* 256 N.C. 483, 124 S.E. 2d 162; *Rodgers v. Thompson,* 256 N.C. 265, 123 S.E. 2d 785; *Messick v. Turnage,* 240 N.C. 625, 83 S.E. 2d 654; *Hunt v. Wooten,* 238 N.C. 42, 76 S.E. 2d 326; G.S. 1-139.

The plaintiff contends in his brief that the answer alleges contributory negligence only in that the plaintiff used the pulpwood loader in a manner and for a purpose other than that for which it was designed. He contends that the defendants have not alleged contributory negligence consisting of the plaintiff's use of the machine when he knew, or ought to have known, that it was unsafe due to the absence of the chain brace on the right side of the A-frame.

The answer alleges as one of the ways in which the plaintiff was negligent: "(e) Plaintiff knew or should have known by the exercise of reasonable care, observation and prudence, that the A-frame folded

back towards where he was seated for the purpose of transportation * * * and plaintiff failed and neglected to take precautions to prevent said frame from falling back towards him * * *."

G.S. 1-151 provides: "In the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed with a view to substantial justice between the parties." We believe that the answer, so construed, alleges contributory negligence in the respect in question.

The record shows that the plaintiff filed a motion to make the answer more definite and certain as to the acts or omissions constituting contributory negligence. Thereupon, the defendants amended one sub-paragraph of the answer, dealing with a different specification of contributory negligence, but did not amend the allegation above quoted. The record does not show any order with reference to the motion to make the answer more definite and certain, so we conclude that the plaintiff elected to go to trial without seeking a more definite statement of the contention made by the above quoted allegation. He evidently understood the allegation as we now interpret it, for he offered evidence designed to justify his use of the machine in the condition in which it was. It is his evidence, and his alone, which is now under consideration.

The plaintiff's evidence shows clearly: He, and at least one of his employees, had used this identical machine before and, at that time, it had a chain on each side of the A-frame. He and his employees took the machine into the woods with the A-frame folded back upon the chassis. There they raised the A-frame and fastened the chain on the left side. He and his employees understood that the purpose of this chain was to brace the A-frame so as to prevent it from falling backward when power was applied to the cable. They saw, or could have seen, on the right side of the A-frame a broken remnant of the steel arm similar to that to which the chain on the left side was attached. This should have been a sufficient reminder or notice to them that the machine originally had, and needed, a chain on each side of the A-frame to prevent the A-frame from falling backward when strain was applied. This evidence, offered by the plaintiff, leads to the single conclusion that, if the defendants were negligent in selling and delivering the machine to the plaintiff without a chain and projecting arm on the right side of the A-frame, as the plaintiff contends, the plaintiff was also negligent in attempting to use the machine when he knew, or should have known, it to be in that condition, and his own negligence was one of the proximate causes of his injury.

The judgment of nonsuit is
Affirmed.

JETHRO MIDGETT, JR. v. NORTH CAROLINA STATE HIGHWAY COMMISSION.

AND

MATTIE MIDGETT v. NORTH CAROLINA STATE HIGHWAY COMMISSION.

(Filed 29 September, 1965.)

1. **Water and Water Courses § 1; Eminent Domain § 2— Evidence held to show that storm of intensity causing damage could have been anticipated.**

Plaintiffs contended that the construction of a bypass highway parallel to the ocean at an elevation above that of the surrounding land impeded the waters of the ocean flowing over the dunes during a storm and caused them to flood plaintiffs' lands lying to the east of the highway, and that the construction of the highway at such elevation constituted a permanent nuisance amounting to a "taking". Plaintiff's evidence tending to show that storms similar in suddenness, force and quantity and flow of water to the storm causing the damage occurred at irregular intervals in the area over a period of years, *is held* to make out a *prima facie* showing that the storm in question could be reasonably anticipated, and therefore that the damage was not the result of an "Act of God" for which no action would lie.

2. **Eminent Domain § 6—**

Plaintiff contended that the construction of a bypass highway parallel to the ocean at an elevation above that of the surroundings caused the waters of the ocean flowing over the dunes during a storm to flood plaintiffs' lands lying to the east of the highway, and that the construction of the highway at such elevation constituted a permanent nuisance amounting to a "taking". *Held:* The cause of action, if any, accrued only when damages were inflicted, and therefore evidence of depreciation in value of the land immediately after construction of the highway and prior to the storm causing the damage giving rise to the suit, is irrelevant and of no probative value.

3. **Damages § 1; Nuisance § 1; Eminent Domain § 2—**

One who seeks damages for the taking of property by the sovereign by reason of the alleged creation and maintenance by the sovereign of a permanent and continuing nuisance must make a *prima facie* showing of substantial and measurable damages, and in the absence of competent evidence of material damage resulting directly from the creation of a permanent structure or obstruction, nonsuit is proper.

4. **Damages § 14—**

The burden is upon the complaining party to establish by evidence such facts as will furnish a basis for assessment of substantial damages according to some definite and legal rule.

5. **Eminent Domain § 2; Nuisance § 1— If structure causes damages solely because of omissions in maintenance, damage is not result of a "taking".**

Plaintiff contended that the construction of a bypass highway parallel to the ocean at an elevation above that of the surroundings caused the waters

of the ocean flowing over the dunes during a storm to flood plaintiffs' lands lying to the east of the highway, and that the construction of the highway at such elevation constituted a permanent nuisance amounting to a "taking". There was evidence that the Commission constructed drains under the bypass highway and that the drains had become obstructed prior to the storm. *Held:* Plaintiffs' cause of action subsists only if the drains as constructed are insufficient to carry off the waters incident to the storm, since if the damages resulted solely because the drains had not been kept open, there would be no permanent nuisance but only a mere injury from negligent omission to keep the drains open on the occasion in question.

6. **Negligence § 2; Nuisance § 1—**

Negligence and nuisance are separate torts, but a structure or condition which may be lawful may become a nuisance by reason of the manner of its maintenance and management.

7. **Highways § 9—**

The State Highway Commission is an agency of the State and is not liable for the negligent omission of its employees, even under the provisions of the Tort Claims Act.

APPEAL by plaintiffs from *Parker, J.*, January 1965 Session of DARE.

Frank B. Aycock, Jr., and Robert B. Lowery for the plaintiffs.

Attorney General Bruton, Deputy Attorney General Lewis, Staff Attorney Costen, Assistant Attorney General McDaniel and Gerald White for defendant.

MOORE, J. The two cases, above entitled, were consolidated for trial. Plaintiffs allege that defendant, State Highway Commission, in the manner in which it constructed a highway, created a continuing nuisance which has caused permanent damage to their real estate, and by means thereof defendant has appropriated their property for a public purpose, for which they are entitled to compensation.

The *Jethro Midgett, Jr.*, case was here at the Fall Term 1963. We held that the allegations of the complaint state a good cause of action and are sufficient to survive demurrer. *Midgett v. Highway Commission,* 260 N.C. 241, 132 S.E. 2d 599. The facts alleged are fully summarized in that opinion and will not be repeated here. The two cases are in all material aspects identical except the parties plaintiff and their lands.

The cases came on for trial at the January 1965 Session of Dare County Superior Court. At the close of plaintiffs' evidence the court sustained defendant's motion for nonsuit and entered judgment dismissing the action. Plaintiffs contend this was error.

Plaintiffs offered evidence tending to establish these facts:

Old Highway 158 runs along the east side of the Outer Banks in Nags Head Township, Dare County, near and parallel to the ocean front. It is about natural grade level. In 1959 the Highway Commission completed the construction of 158 Bypass, which is about 15 miles long. For the greater part of this distance it is about 500 feet west of old 158 and toward the Sound side of the Outer Banks. The Bypass is generally above natural grade level, ranging from slightly above grade to five feet above. At all points it is at a somewhat higher level than old 158. Plaintiffs own adjoining lots, fronting old 158 and lying between it and the Bypass. They have a number of buildings on the lots and reside there. Their property is in a slight natural depression. There are no dunes between it and the ocean. Where their property is located the terrain is practically level from old 158 to the Bypass; to the west of the Bypass it slopes gradually to the Sound. At or near plaintiffs' property the old Nags Head Road intersects old 158, and runs thence westwardly to the Sound. It ran at natural grade level all the way to the Sound, prior to the construction of the Bypass. And when storms brought water over the dune line, the water followed generally the course of the Nags Head Road, spread out over the depressed area, which served as a wide natural channel, and flowed into the Sound. The Highway Commission constructed the Bypass across the depression at a height of five feet above natural grade. At its intersection with the Bypass the Nags Head Road was raised to the level of the Bypass. Prior to and during the course of construction of the Bypass Jethro Midgett, Jr., and Jethro Midgett, Sr. (husband of plaintiff Mattie Midgett) protested the construction of the Bypass at such level. Jethro, Sr., wrote letters to the governor and the Commission's division engineer. The latter promised to fully investigate and consider the matter. However, the plans were not changed. On 7 March 1962 came the "Ash Wednesday storm." It came up suddenly and without warning — it was not a hurricane. Between 4:00 and 5:00 A.M. water began to come over the dune line at the ocean; it came in waves and swells. The water continued coming over until after 7:30 A.M. Water was impounded by the Bypass, and rose until it reached the top and began to run over in places. The water was five feet deep in plaintiffs' yards and on their land, and rose to a height of three feet in their buildings, which were on pilings "right good way up." About 8:00 A.M. or shortly thereafter the water cut through the Bypass at two places west of plaintiffs' property and in the vicinity of the old Nags Head Road. At one of these places the entire road surface and fill were washed out, leaving a gap of 30 to 40 feet. When the Bypass gave way the water, flowing to the gaps both from the north and south, began to fall. In the meantime the storm had subsided. The water soon

flowed into the Sound. Water in as great or greater quantities had come over the dune line during storms which occurred before the Bypass was constructed. This was true of the hurricanes and "northeasters" of the following dates: 1929, August 1933, September 1936, 1944, and 1956. During some of these storms the water came "across from the ocean higher than it did at this time." The Ash Wednesday storm of March 1962 was no more sudden than some of the others. Prior to the construction of the Bypass, water was never more than 18 to 20 inches deep on plaintiffs' lands as a result of any storm.

The question most seriously debated by counsel is whether the evidence shows *prima facie* that the storm of 7 March 1962 was similar in nature and intensity to the storms of prior years in the Nags Head area and could have been reasonably anticipated by defendant, and was not so extraordinary and unusual as to constitute an "Act of God." Pertinent legal principles are set out in *Midgett v. Highway Commission, supra* (p. 247), as follows:

> "An Act of God is not a sufficient predicate for an action for damages. The term 'Act of God,' in its legal sense, applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them. (Citing authority). The builder of an obstruction of surface waters is not bound to anticipate unprecedented storms or rainfalls, and is not liable for damages resulting from extraordinary storms and floods. (Citing cases). The owner of a barrier to surface water is not bound to provide against floods of which the usual course of nature affords no premonition. An extraordinary flood is one the coming of which is not to be anticipated from the natural course of nature. An ordinary flood is one, the repetition of which, although at uncertain intervals, can be anticipated. The fact that similar floods had occurred has been held to tend strongly to show that they are not so extraordinary and unusual that they might not have been reasonably expected to occur. (Citing authority). . . . it is ordinarily a question for the jury and the burden is on plaintiff to show that the storm or flood was such as might reasonably have been anticipated and not an Act of God."

The evidence tends to show that storms, similar in suddenness, force and quantity and flow of water to the Ash Wednesday storm of 1962, occurred at irregular intervals in the Nags Head area prior to 1959. In our opinion this makes out a *prima facie* showing that the 1962 storm could have been reasonably anticipated.

We find, however, plaintiffs' evidence insufficient in two material aspects:

(1). There is no evidence, of any probative value, tending to show any substantial damages. Plaintiffs introduced evidence of the difference in value of their property before the construction of the Bypass and the value after the construction, in the light of witnesses' "experiences with water coming over the dune line in past years." The Bypass was constructed in 1959. If there were damages amounting to a taking, they did not occur until 7 March 1962, the date of the Ash Wednesday storm. The cause of action, if any, accrued only when damage had been inflicted. There can be no recovery of damages before they occur. *Midgett v. Highway Commission, supra* (p. 249); *Raleigh v. Edwards,* 235 N.C. 671, 71 S.E. 2d 396; *McDaniel v. Greenville-Carolina Power Co.,* 78 S.E. 980, 6 A.L.R. 1321. There was not, in contemplation of law, any damage to plaintiffs' property prior to 7 March 1962. The evidence referred to above is wholly irrelevant, entirely prospective and speculative, and of no probative value. The evidence of damage, if any there was, should have been directed to the values immediately before and after the storm.

Plaintiffs contend that there is evidence of nominal damages at least and, therefore, the failure to show monetary loss does not justify nonsuit. They cite *Johnson v. Sanders,* 260 N.C. 291, 132 S.E. 2d 582, and *Edwards v. Erwin,* 148 N.C. 429, 62 S.E. 545. These cases involved breaches of contract. "When plaintiff proves breach of contract he is entitled at least to nominal damages." *Sineath v. Katzis,* 218 N.C. 740, 12 S.E. 2d 671. Proof of injury resulting from negligence also entitles plaintiff to nominal damages. *Clark v. Emerson,* 245 N.C. 387, 95 S.E. 2d 880. However, in the instant case, if plaintiffs are to recover at all, they must recover on the theory of continuing nuisance, an actual permanent invasion of their land amounting to an appropriation of, and not merely an injury to, property. *Midgett v. Highway Commission, supra* (p. 248); *Sanquinetti v. United States,* 264 U.S. 146. In an action for damages based on an alleged nuisance, the injury suffered by plaintiff must be *substantial. Watts v. Manufacturing Co.,* 256 N.C. 611, 124 S.E. 2d 809; *Raleigh v. Edwards, supra; Pake v. Morris,* 230 N.C. 424, 53 S.E. 2d 300; *Holton v. Oil Co.,* 201 N.C. 744, 161 S.E. 391; *Hazen v. Perkins,* 105 A. 249, 23 A.L.R. 748; *Nelson v. Swedish Evangelical Lutheran Cemetery Ass'n.,* 126 N.W. 723; *Lewis v. Pingree Nat. Bank,* 151 P. 558. "Each individual in a community must put up with a certain amount of annoyance, inconvenience or interference, and must take a certain amount of risk in order that all may get on together." *Watts v. Manufacturing Co., supra.* One who seeks damages for the taking of property by the sovereign by reason of the alleged

creation and maintenance by it of a permanent and continuing nuisance must make a *prima facie* showing of substantial and measurable damages.

There is evidence that Mattie Midgett kept a garden, the garden was destroyed by flood waters from the 1962 storm, but it had never been destroyed by prior storms. During the 1962 storm the water rose to a depth of three feet in plaintiffs' buildings. These bits of evidence, without more, are insufficient to support a verdict of substantial monetary damage to real estate. No substantial recovery may be had on mere guesswork and inference. The burden is always upon the complaining party to establish by evidence such facts as will furnish a basis for assessment of substantial damages, according to some *definite* and *legal rule*. When compensatory damages are susceptible of proof with approximate accuracy and may be measured by some degree of certainty, they must be so proved. Evidence wanting in such proof will not justify a verdict of substantial damages. *Lieb v. Mayer*, 244 N.C. 613, 94 S.E. 2d 658.

(2). The evidence leaves in the realm of speculation and conjecture the answer to the question whether the Bypass, as constructed, caused the excessive inundation and alleged damages.

On 3 January 1958, in answer to a letter from Jethro Midgett, Sr., W. N. Spruill, Division Engineer of the Highway Commission, wrote: "I am glad the contractor has completed the installation of the drainage structures under the new project. We believe they provide sufficient opening to take care of flooded conditions when and if such conditions develop in the future." There is evidence to the following effect: When the Bypass was constructed drains were put under the road. The Highway Commission's employees cleaned the drains at times. Jethro Midgett, Sr., on occasions requested said employees to clean them. He, Jethro, Jr., and others removed sand and debris from the drains a number of times. Boards, debris and sand would get caught in the drains and close them. They were obstructed on the morning of the storm — the water could not get through. There was no water on the west side of the Bypass on the morning of the storm (except such as spilled over it) until the water broke through the embankment.

This material question arises: Were the drains under the Bypass sufficient in size, design and manner of construction to accommodate water coming over the dune line by reason of storms, which could be reasonably anticipated, so as to prevent it from rising on the land to a substantially greater height than it would had the Bypass not been constructed? If *not*, the Bypass, permanent in nature, created and maintained a continuing nuisance, imposing liability upon the Highway Commission for substantial damages to land caused by the excessive

depth of impounded water. *Sherrill v. Highway Commission,* 264 N.C. 643, 142 S.E. 2d 653. If the drains, as constructed, were sufficient to accommodate the water, and if the damages complained of were caused by the negligence of the State Highway Commission employees in failing to keep the drains clear of sand and debris, it is a different matter. In such event, it is appropriate to repeat here what was said in *Butler v. Light Co.,* 218 N.C. 116, 121, 10 S.E. 2d 603: ". . . the nuisance, if it may be called such, was negligence-born, and must, in legal sense, make obeisance to its parentage." See also *Powers v. Trust Co.,* 219 N.C. 254, 13 S.E. 2d 431. The Highway Commission is an agency of the State and is not liable for the negligent omissions of its employees even under the provisions of the Tort Claims Act. G.S. 143-291; *Flynn v. Highway Commission,* 244 N.C. 617, 94 S.E. 2d 571. Negligence and nuisance are separate torts, but the line of demarcation between them is often indistinct and difficult to define. Primarily a nuisance is a condition, not an act or omission, but a structure or condition which is lawful may be a nuisance by reason of the manner of its maintenance or management. *Andrews v. Andrews,* 242 N.C. 382, 88 S.E. 2d 88; *Morgan v. Oil Co.,* 238 N.C. 185, 77 S.E. 2d 682; *Swinson v. Realty Co.,* 200 N.C. 276, 156 S.E. 545. Where circumstances are such that the damage flows from a cause, temporary in nature, that may be readily removed, the measure of damages is not the difference in the market value of the land before and after the injury. *Oates v. Manufacturing Co.,* 217 N.C. 488, 8 S.E. 2d 605. In such case there is a mere injury, not a taking. "In order to create an enforceable liability against the government it is, at least, necessary that the overflow of water . . . be the direct result of the structure established and maintained by the government, and constitute an actual permanent invasion of the land, or a right appurtenant thereto, amounting to an appropriation of and not merely an injury to the property." *Midgett v. Highway Commission, supra* (p. 248).

Plaintiffs' proof must be of such character as to show with at least some degree of certainty that the alleged wrong produced the damage complained of. *Parris v. Fischer & Co.,* 221 N.C. 110, 19 S.E. 2d 128; *Lee v. Stevens,* 251 N.C. 429, 111 S.E. 2d 623. The cause of plaintiffs' alleged damages is left to conjecture by the evidence introduced.

Affirmed.

STATE v. JOSEPH McKOY.

(Filed 29 September, 1965.)

1. **Larceny § 10—**

Under the 1959 amendment to G.S. 14-72, larceny by breaking and entering a building is a felony without regard to the value of the property stolen.

2. **Larceny § 4—**

An indictment for larceny must allege the owner or the person in possession of the goods stolen.

3. **Indictment and Warrant § 9—**

Each count in an indictment should be complete in itself.

4. **Criminal Law §§ 121, 139—**

A fatally defective indictment is insufficient to confer jurisdiction, and the Supreme Court will take notice thereof and arrest the judgment *ex mero motu.*

APPEAL by defendant from *Burgwyn, E. J.,* March 1965 Session of NEW HANOVER.

Defendant was indicted in a bill containing three counts, to wit: First, feloniously breaking and entering a certain building occupied by Raney Chevrolet Company, Inc.; second, larceny of "$60.00 in money"; third, knowingly and feloniously receiving stolen property, to wit, "$60.00 in money."

At trial, and prior thereto, defendant was represented by court-appointed counsel.

The jury returned a verdict of "Guilty as charged."

The record discloses the following with reference to the judgment pronounced and the court's statement preceding the pronouncement thereof, *viz.:*

"The Court finds as a fact that the Bill of Indictment does not charge the Defendant with the felonious Breaking and Entering with the Intent to Steal Goods and Merchandise in excess of $200.00. Therefore the Court will not sentence this Defd't. for the felonious Intent of Breaking and Entering, but will sentence him for the crime of Non-Burglarious Breaking and Entering.

"The Judgment of the Court is that the Defd't. be confined in the common jail of New Hanover County for a term of Two (2) years to be assigned to work under the supervision of the State Prison Department. And for the Larceny of money from the place he is charged with breaking and entering, of the value of less than $100.00: The Judgment of the Court is that the Defd't be confined in the common jail of New Hanover County for a term of Two (2) years to be assigned to work

under the supervision of the State Prison Department. This sentence to run consecutively with the 2 years imposed for non-burglarious breaking and entering."

Defendant excepted and appealed.

Attorney General Bruton, Deputy Attorney General Lewis and Staff Attorney Hensey for the State.

William L. Hill, II, for defendant appellant.

PER CURIAM. There was plenary evidence to support the verdict of guilty as to the first count in the bill of indictment. Moreover, defendant's assignments do not disclose error deemed sufficiently prejudicial to warrant a new trial as to the first count. Hence, the verdict and judgment with reference to said first count are upheld.

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. The comment made before pronouncing judgment indicates the court may have overlooked said 1959 amendment. If so, it would seem defendant was a beneficiary of such oversight.

The second (larceny) count in the bill of indictment is fatally defective. While it alleges the larceny of "$60.00 in money," it fails to designate in any manner the owner thereof or the person in possession thereof at the time of the alleged unlawful taking. The space in the printed form for the name of the owner is blank. Moreover, the second (larceny) count contains no reference to the first (breaking and entering) count. In an indictment containing several counts, each count should be complete in itself. *S. v. McCollum*, 181 N.C. 584, 107 S.E. 309. As to the insufficiency of the second (larceny) count, see *S. v. Biller*, 252 N.C. 783, 114 S.E. 2d 659; also, *S. v. Thornton*, 251 N.C. 658, 111 S.E. 2d 901, and cases cited therein.

Since the second (larceny) count is fatally defective and insufficient to confer jurisdiction, this Court *ex mero motu* arrests the judgment pronounced with reference thereto. However, the solicitor, if so advised, may submit to another grand jury a new bill with reference to the alleged larceny and proceed against the defendant upon a sufficient indictment.

As to first (breaking and entering) count: No error.

As to second (larceny) count: Judgment arrested.

STATE v. JOHN I. HUDLER.

(Filed 29 September, 1965.)

Criminal Law § 154—

At the time of arresting defendant, the officer found a partially filled bottle of whiskey on the seat of defendant's car, which bottle the officer kept in his home until the trial. Defendant contended that the failure of the officer to turn the whiskey over to the sheriff's office deprived his counsel of foreknowledge of its existence, and that the introduction of the bottle in evidence took his counsel by surprise, denying defendant a fair trial. *Held:* The contention is untenable, it being manifest that defendant knew the bottle was in his automobile and could have advised his attorney about it.

APPEAL by defendant from *Morris, J.*, March 1965 Session of JONES.

Criminal prosecution upon a warrant charging defendant with unlawfully and wilfully operating an automobile upon a public highway within the State while under the influence of intoxicating liquor, heard *de novo* in the superior court upon appeal by defendant from a judgment of conviction and sentence in the Jones County recorder's court.

Plea: Not guilty. Verdict: Guilty.

From a judgment of imprisonment for a term of not less than eight months nor more than twelve months, defendant appeals.

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

Charles L. Abernethy, Jr., for defendant appellant.

PER CURIAM. The State's evidence shows the following facts: About 10:15 p.m. on 14 November 1964 a State highway patrolman, who was driving a patrol automobile north on Highway #17, saw ahead of him an automobile parked half on the shoulder and half on the pavement of the highway. As he approached, this automobile pulled up on the highway and proceeded toward the town of Pollocksville weaving back and forth across the center of the highway. He pulled up beside this automobile and turned on his red light and siren, but its driver did not stop until the automobile had gone about a quarter of a mile. When this automobile stopped, the patrolman got out of his automobile and went to it. Defendant got out of this automobile, came down the side of this automobile holding to it, and fell backwards on the boot of this automobile. Defendant had a strong odor of intoxicating liquor on his breath and told the patrolman he had run up with three friends in Jacksonville, and during the afternoon and evening they had drunk three pints of liquor. The patrolman looked in his automobile and saw

on the front seat a pint bottle of Kentucky Gentleman half full. In the opinion of the patrolman, defendant was drunk. The patrolman carried defendant to the county jail. In going up the steps to the jail, defendant had to hold to the railing, and when he came down to go in the jail he fell down on the steps, hit the patrolman, and knocked him down the steps.

Defendant, testifying in his own behalf, said he had been drinking but was not under the influence of intoxicants. He admitted on cross-examination he had been convicted three times previously for driving an automobile while under the influence of intoxicating liquor, and twice previously for driving an automobile while his operator's license was revoked.

None of defendant's assignments of error are supported by an exception duly taken in apt time. We have consistently held that an assignment of error not supported by an exception is ineffectual. *S. v. Strickland,* 254 N.C. 658, 119 S.E. 2d 781; *Barnette v. Woody,* 242 N.C. 424, 88 S.E. 2d 223, and cases cited.

Defendant's contention, as set forth in his assignments of error, is as follows: The patrolman testified he kept in his home the half-filled bottle of whisky he found in the front seat of defendant's automobile when he arrested him, and did not turn it over to the sheriff's office or to the clerk of the court, because he "had some to disappear on a number of occasions." The court permitted this bottle of whisky to be exhibited to the jury and introduced in evidence over his objection. (The record shows no exception by defendant to the court's ruling.) Defendant contends that the patrolman's keeping this whisky in his home denied his counsel any foreknowledge of its existence, because such whisky is usually stored in the sheriff's office, took his counsel by surprise, and denied him a fair trial.

It seems manifest defendant knew this bottle of whisky was in his automobile and could have told his attorney about it. The court properly admitted the bottle of whisky in evidence. *S. v. Mostella,* 159 N.C. 459, 74 S.E. 578; *S. v. Speller,* 230 N.C. 345, 53 S.E. 2d 294; *S. v. Bass,* 249 N.C. 209, 105 S.E. 2d 645; *Baker v. State,* Texas Crim. App., 225 S.W. 2d 828. The contention of defendant's counsel in ingenious, but not convincing, and is overruled.

Defendant makes no contention that the State's evidence is insufficient to carry the case to the jury and to support the verdict. He does not challenge the charge in any respect.

Defendant's appeal itself is an exception to the judgment, presenting the face of the record proper for review. *S. v. Ayscue,* 240 N.C. 196, 81 S.E. 2d 403; Strong's N. C. Index, Vol. 1, Appeal and Error, § 21. The judgment is regular on its face and is supported by the verdict.

Defendant has had a fair trial free from error, and must abide the consequences of his acts.

No error.

MARVIN CAMPBELL, EMPLOYEE v. SUPERIOR YARN MILLS, INC., EMPLOYER, AND LUMBERMENS MUTUAL CASUALTY COMPANY, CARRIER.

(Filed 29 September, 1965.)

Master and Servant § 92—

Where, after an award, additional hearings are had from which appeal is taken, the Industrial Commission should certify the entire record, and when the record does not contain the proceedings upon the original hearing, making it impossible to ascertain judicially what matters had been adjudicated and precluded in the original hearing, the Superior Court should direct the Industrial Commission to certify the entire transcript of its proceedings in the matter, and consider defendant's appeal in the light of the entire record.

APPEAL by claimant from *Brock, S. J.*, July 1965 Civil Session of GASTON.

Proceeding under the Workmen's Compensation Act.

The incomplete record reveals: On January 25, 1959, claimant received compensable injuries to his back and elbow while at work for defendant Superior Yarn Mills, Inc. On March 16, 1960, after hearings on July 23, 1959 and February 25, 1960, a deputy commissioner made an award allowing plaintiff compensation. Other orders were made January 16, 1961, January 19, 1961, and July 24, 1961, the last order being one by the full Commission. None of these orders, nor the evidence upon which they were made, are in the record before us. The Superior Court of Gaston County, on September 24, 1962, after hearing arguments of counsel with reference to these four orders, entered a judgment overruling plaintiff's assignments of error to them. From this order claimant gave notice of appeal to the Supreme Court. The appeal was not perfected, and, on February 11, 1963, the Superior Court dismissed it.

The next disclosure in the record is that on July 16, 1963, and on October 1, 1963, additional hearings were held by a deputy commissioner. The evidence taken at these hearings is in the record. It tends to show that there has been no substantial change in plaintiff's condition since May 1960, but that he has a 20% permanent partial disability

of the back. The deputy commissioner, in an opinion filed on October 31, 1963, found that claimant had not "sustained a change of condition" since the opinion filed March 16, 1960, and denied plaintiff "additional compensation due to a change of condition." From this order plaintiff appealed to the full Commission which, on March 18, 1964, adopted the deputy commissioner's finding of fact but made the additional finding "that the plaintiff has a 20% permanent partial disability to his back as a result of the injury sustained on January 25, 1959 for which the plaintiff has received no compensation." Upon this finding it ordered, *inter alia*, that defendants pay plaintiff compensation for 20% permanent partial disability to the back for a period of 60 weeks at the compensation rate of $35.00 per week, as well as all approved medical expenses incurred. From this order defendants appealed to the Superior Court.

Plaintiff filed a written motion in the Superior Court on July 15, 1965. It "shows unto the court" that the entire transcript of the proceedings relating to plaintiff's claim have not been certified to the court by the Industrial Commission, and avers that the complete record is necessary to a proper adjudication of his claim. Claimant moved the court that it order the Industrial Commission to certify to it the entire transcript. Judge Brock denied this motion and heard defendants' appeal on that portion of the record which was before him. He vacated the order of the full Commission from which defendants had appealed. His judgment, entered on July 16, 1965, recites "that there is no competent evidence of record to support the findings of fact and conclusion of law contained in the Opinion and Award by the North Carolina Industrial Commission filed March 18, 1964, that there has been a change of condition in plaintiff pursuant to G.S. 97-47, and that plaintiff has a 20 percent permanent partial disability to his back as a result of the injuries sustained on January 25, 1959. . . ." From this judgment plaintiff appeals.

Childers and Fowler for plaintiff appellant.
Hollowell & Stott for defendant appellees.

PER CURIAM. Claimant's assignment of error No. 1, based upon his exception to the refusal of the judge to order the Industrial Commission to certify to the court the complete record in this proceeding, must be sustained. Neither the hearing commissioner nor the full Commission has found that there has been any change in the claimant's condition within the meaning of the Workmen's Compensation Act. The full Commission has, however, found that plaintiff has a partial permanent disability resulting from the accident on January 25, 1959 for

which he has received no compensation. It was for this uncompensated disability that the full Commission purported to make an award. These questions arise: Has there heretofore been a full and final award of all compensation to which plaintiff is entitled? If not, has claimant's action been pending for a final award? What was the effect of the judgment of the Superior Court entered on September 24, 1962? By failing to appeal from it, or otherwise, has claimant waived his right to a final award? See *Hall v. Chevrolet Co.*, 263 N.C. 569, 139 S.E. 2d 857; *Pratt v. Upholstery Co.*, 252 N.C. 716, 115 S.E. 2d 27. The answer to these questions is not in the incomplete record before the Court.

The judgment from which plaintiff appeals is vacated, and this cause is remanded to the court below with instructions that it direct the Industrial Commission to certify to the Superior Court of Gaston County the entire transcript of its proceedings in this matter, including all evidence taken. Upon receipt of this transcript the Superior Court will consider defendant's appeal *de novo* and enter such judgment as then appears proper.

Error and remanded.

WILLIAM SCOTT ROGERS v. WALTER SCOTT ROGERS, B. K. MEADOWS, AND JONES DAVIS.

(Filed 29 September, 1965.)

1. Automobiles § 41h—

Evidence favorable to plaintiff tending to show that the driver of the car in which plaintiff was riding turned left to enter a motor court at the time when appealling defendant's vehicle was some 300 feet away, and that this vehicle was traveling some 60 miles per hour and crashed into the vehicle in which plaintiff was riding after its front wheels were into the motel driveway, *held* sufficient to be submitted to the jury on the issue of negligence.

2. Appeal and Error § 35—

The Supreme Court is bound by the record as certified.

APPEAL by defendant Jones Davis from *Nettles, Emergency Judge*, Regular February 1965 Session of BUNCOMBE.

This is a civil action instituted by the plaintiff to recover damages for personal injuries resulting from a two-car collision on 4 May 1962.

The collision occurred on U. S. Highway 70, a three-lane paved highway, approximately 6½ miles east of Asheville, North Carolina. Plain-

tiff was a passenger in a 1957 Chevrolet automobile owned and operated by Walter Scott Rogers in an easterly direction on U. S. Highway 70. A 1959 Ford automobile, owner by defendant B. K. Meadows, was being operated by Jones Davis in a westerly direction on said highway. Defendant Rogers was completing a left turn from the center lane of said highway into the driveway of the Swan Motor Court located on the north side of said highway. About 100 to 125 feet before reaching "the center of the Swan Court," defendant Rogers gave a left turn signal, drove into the center lane and stopped. Defendant Rogers allowed one of two westbound cars to pass, the second car being some 600 or 650 feet to the east; he hesitated "a couple of seconds and then slowly pulled across the road," at an angle of about 45 degrees.

There is evidence tending to show that defendant Davis was traveling at a speed of between 60 to 70 miles per hour and that the car operated by Davis was 300 to 340 feet away when the Rogers car pulled across the westbound lane of said highway. According to plaintiff's evidence, the front wheels of the Rogers car were off the pavement and into the motel driveway at the time of the collision.

Defendant Davis testified that he was within 75 to 100 feet of the Rogers car when he first saw it; that he applied his brakes and skidded into it. Plaintiff was seriously injured.

The jury found that defendant Davis was not the agent of B. K. Meadows and further found that defendants Rogers and Davis were negligent.

From the judgment entered on the verdict, defendant Davis appeals, assigning error.

Uzzell & DuMont for plaintiff appellee.
Williams, Williams & Morris for defendant appellant.

PER CURIAM. The appellant assigns as error the failure of the court below to sustain his motion for judgment as of nonsuit, interposed at the close of plaintiff's evidence and renewed at the close of all the evidence.

A careful consideration of the evidence adduced in the trial below leads us to the conclusion that it was sufficient to carry the case to the jury against the defendant Davis, and we so hold.

The appellant also assigns as error numerous excerpts from the court's charge to the jury bearing on negligence, proximate cause and damages. Many of these portions of the charge are simply unintelligible. We do not believe the able judge who tried this case charged the jury in the manner in which the charge is set out in the record.

Even so, counsel for the respective parties agreed to the case on appeal and we are bound by it. *Respass v. Bonner,* 237 N.C. 310, 74 S.E. 2d 721.

The appellant is awarded a new trial.

New trial.

STATE v. ELVIN GRAY SQUIRES.

(Filed 29 September, 1965.)

1. Indictment and Warrant § 4—

That some of the evidence before the grand jury was hearsay and incompetent is not ground for quashal of the indictment.

2. Witnesses § 2—

The trial court's finding that a witness was mentally competent to testify is conclusive.

APPEAL by defendant from *Morris, J.,* January 18, 1965 Criminal Session, DUPLIN Superior Court.

Criminal prosecution upon an indictment charging that Elvin G. Squires "beginning about January 1, 1963 and continuing on occasions through April 18, 1964, . . . feloniously and incestuously did have carnal intercourse with his minor daughter (naming her)." The evidence, including the testimony of the daughter, her mother, brother, Dr. Quinn, the sheriff, and the welfare officer of Duplin County, was ample to support the charge contained in the indictment. The defendant testified in his own behalf and denied the charge. From a verdict of guilty and judgment thereon, the defendant appealed.

T. W. Bruton, Attorney General; Charles D. Barham, Jr., Assistant Attorney General; Wilson B. Partin, Jr., Staff Attorney for the State.

Charles L. Abernethy, Jr., for defendant appellant.

PER CURIAM. Upon arraignment, counsel questioned the mental capacity of the defendant to plead to the indictment and to conduct his defense. Pursuant to court order he was committed to Dorothea Dix Hospital for observation. At the end of the examination period the authorities certified the defendant was mentally competent to stand trial.

The record discloses: "On calling the case for trial the defendant, through counsel, Charles L. Abernethy, Jr., enters a plea of not guilty

and moves to quash the bill of indictment." Disregarding the question whether the motion to quash was timely made (after plea) the reason assigned (hearsay testimony before the grand jury) was insufficient to invalidate the indictment. *Costello v. U. S.*, 350 U.S. 359, 100 L. Ed. 397. The court, after inquiry, overruled defendant's challenge to the competency of the prosecuting witness to testify. The court's finding of competency was warranted by the showing made and hence is conclusive. *State v. Levy,* 200 N.C. 586, 158 S.E. 94.

The questions presented and argued here, as well as the face of the record, disclose that in the trial there was

No error.

WILLIAM OSCAR MONTFORD, TEACHEY, NORTH CAROLINA v. WILLIAM HERMAN GILBHAAR, WATHA, NORTH CAROLINA, AND BOSTIC-HAWES MOTORS, INC., WALLACE, NORTH CAROLINA.

(Filed 29 September, 1965.)

1. **Automobiles § 41t—**

Evidence that defendant's wrecker was standing unattended in plaintiff's lane of travel, with a cable extending across the highway to a mired car, that the mired vehicle was hidden by a house from northbound traffic, that plaintiff, driving north, attempted to go around the parked wrecker and struck the cable, while traveling less than 20 miles per hour, together with evidence of circumstances under which the cable was difficult to see, *held* sufficient to be submitted to the jury on the issue of negligence.

2. **Automobiles § 42a—**

Evidence that plaintiff drove into a cable extending across the highway from a wrecker, which cable was difficult to see because of light and color, *held* not to show contributory negligence as a matter of law on the part of plaintiff in traveling at a speed greater than was reasonable and prudent under the circumstances or in failing to keep his vehicle under proper control.

3. **Negligence § 26—**

Nonsuit for contributory negligence should be denied when opposing inferences are permissible from plaintiff's proof.

APPEAL by plaintiff from *Stevens, E. J.*, March 1965 Session of DUPLIN.

Graham A. Phillips, Jr., for plaintiff.
Hogue, Hill and Rowe and Rivers D. Johnson for defendants.

PER CURIAM. This is an action to recover damages for personal injuries. On motion of defendants, judgment of involuntary nonsuit was entered at the close of plaintiff's evidence.

The evidence, taken in the light most favorable to plaintiff, is summarized as follows: About 5:35 P.M. on 28 February 1964 individual defendant was operating and in control of a Ford truck, equipped as a "wrecker," owned by corporate defendant. The wrecker was being operated in an attempt to pull another vehicle which was mired in a field on the west side of rural paved highway No. 1149 in Duplin County. The wrecker was left standing on the highway, diagonally across the east lane — the lane for northbound traffic. A cable, about the size of a man's little finger, was attached to the wrecker and extended westwardly across the highway and to the vehicle mired in the field. The cable was slack and was about 21 inches above the surface of the highway; it was about the same color as the pavement. The sky was overcast; it was "drizzling rain"; the highway was wet. The mired vehicle was not visible to northbound traffic; it was hidden from view by a house located near the highway. The only lights on the wrecker were two "little red lights" on the rear; the large rotating red light on the top was not in operation. Plaintiff was driving north in his Volkswagen automobile. His parking lights were on and his windshield wiper was in operation. It was not dark enough for headlights. When about one-tenth of a mile away, he saw indistinctly defendant's vehicle in his lane of travel. When about 500 feet away, he saw the rear lights of the vehicle and observed that it was a truck and had a boom or crane mounted on it. He shifted to third gear and reduced speed below 30 miles per hour. He saw no person at or about the wrecker. He pulled to his left, attempted to pass and ran into the cable. He had not seen the cable, though he had looked continuously in his direction of travel. At the time he struck the cable his speed "was somewhere below 20 miles per hour." He suffered personal injuries as a result of the collision.

Plaintiff's exception to the judgment of nonsuit was well taken. In our opinion the evidence that defendants left the wrecker standing on the highway in such manner that the wrecker and the cable attached blocked the entire highway, the existing circumstances affected visibility of the cable, and no meaningful warning was given that the highway was completely obstructed and traffic, to avoid collision, would have to come to a complete stop, makes out a *prima facie* case of actionable negligence on the part of defendants. G.S. 20-161. It is a jury question whether plaintiff operated his automobile at a speed greater than was reasonable and prudent under the circumstances, failed to keep his vehicle under proper control, or failed to maintain a reasonable lookout and should have seen the cable under prevailing weather

conditions and the similarity of the color of the cable and the road. Nonsuit on the issue of contributory negligence should be denied when opposing inferences are permissible from plaintiff's proof. 3 Strong: N. C. Index, Negligence, § 26.

The judgment below is

Reversed.

BEATRICE A. REED v. COLLINS DEPARTMENT STORE, INC.

(Filed 29 September, 1965.)

APPEAL by plaintiff from *Hubbard, J.,* March 1965 Session of ONSLOW.

Action to recover for personal injuries.

Plaintiff alleges in substance these facts: In the afternoon of 17 June 1963 she entered defendant's department store for the purpose of purchasing lamps. As she was walking along the center customer aisle of the store she stepped on a glob of wax, about the "size of a nickel," slipped, fell to the floor, and suffered injuries to her person. About 45 minutes before, an employee of defendant had waxed the floor. He had negligently failed to properly spread this spot of wax, and defendant negligently permitted it to remain on the floor without giving warning of its presence.

Plaintiff introduced evidence tending to support most of the allegations of the complaint. Two issues, relating to defendant's negligence and damages, were submitted to the jury. The jury answered the negligence issue "no." Judgment in favor of defendant was entered.

Ellis, Hopper, Warlick & Waters for plaintiff.
E. W. Summersill and Strickland & Warlick for defendant.

PER CURIAM. Plaintiff brings forward and discusses in her brief eight assignments of error. All relate to the judge's charge. Plaintiff stresses her exception to the failure of the judge to instruct the jury with respect to defendant's duty "to give an invitee notice of any hidden danger or unsafe conditions." *Revis v. Orr,* 234 N.C. 158, 66 S.E. 2d 652. This principle of law does not arise upon the evidence. The only evidence in the record which even remotely refers to any warning or failure to warn is the statement of a witness that "at the time Mrs. Reed fell, there were no signs in the store concerning work

being done on the floor." There is no evidence that any work was then being done on the floor; the evidence is to the contrary. Furthermore, the exception is not valid for other reasons. We have carefully considered all assignments of error and we find in them no merit.

No error.

JAMES EDWARD BURTON, ADMINISTRATOR OF THE ESTATE OF LYDA ANN BURTON v. EDWARD JAMES CROGHAN AND BERNARD AUSTIN.

(Filed 29 September, 1965.)

APPEAL by plaintiff from *Bundy, J.*, March 1965 Session of ONSLOW.

Action for the wrongful death of a 6-year-old girl.

Upon the trial the jury found that plaintiff's intestate was killed by the negligence of defendants and assessed damages in the sum of $2,-500.00. Contending that the amount awarded was inadequate, plaintiff moved to set aside the verdict on the second issue. The motion was denied. Plaintiff appeals assigning error in the judge's charge on the measure of damages.

Charles L. Abernethy, Jr., for plaintiff appellant.

E. W. Summersill; Ellis, Hooper, Warlick & Waters for defendant appellees.

PER CURIAM. A careful examination of the judge's charge reveals no error prejudicial to plaintiff. Indeed, the charge was more favorable to appellant than the law allows. The judge instructed the jury that the funeral bill of $895.00 was "an item to be taken into consideration" if it reached the issue of damages. G.S. 28-173 permits the amount recovered in an action for wrongful death to be applied to the payment of the burial expenses of the deceased, but the funeral bill itself is not an item of damages. G.S. 28-174; *Davenport v. Patrick*, 227 N.C. 686, 691, 44 S.E. 2d 203, 206. This error in the charge was, no doubt, prejudicial to defendants. They, however, have not complained, and plaintiff may not.

Except for the inclusion of the funeral bill, the judge instructed the jury, with reference to the measure of damages, in conformity with the well established rule applicable in wrongful-death actions. *Bryant v. Woodlief*, 252 N.C. 488, 114 S.E. 2d 241; *Caudle v. R. R.*, 242 N.C. 466, 88 S.E. 2d 138. The measure of damages for the death of a child is the

same as for an adult, notwithstanding the difficulty of applying the rule "is greatly increased in the case of an infant." *Rea v. Simowitz,* 226 N.C. 379, 382, 38 S.E. 2d 194, 196; *Russell v. Steamboat Co.,* 126 N.C. 961, 967, 36 S.E. 191, 192.

No error.

CAROLINA EQUIPMENT AND PARTS COMPANY, A CORPORATION v. WOODROW ANDERS.

(Filed 13 October, 1965.)

1. Principal and Agent § 6—

Even though the testimony of an agent in regard to modification of the contract is incompetent to establish the agent's authority to modify it, his testimony may be competent to establish the terms of the modification when there is other evidence tending to show the principal authorized the modification or ratified it.

2. Contracts § 19—

A novation is a substitution of a new contract for an old one which is thereby extinguished.

3. Same—

In the case of a novation of an executory contract, the substitution of the newer obligations of the parties, respectively, constitutes consideration for the release of the original obligations; if the contract has been executed by one of the parties, a valid novation requires a consideration *dehors* the original agreement.

4. Same—

The return of one of the items purchased under a contract of sale is sufficient consideration on the part of the purchaser to support a novation of the contract.

5. Principal and Agent § 6—

In order to constitute a ratification of an unauthorized act of an agent, the principal must have knowledge of all of the facts relative to the unauthorized transaction and must signify his intent to ratify by word or by conduct which is inconsistent with an intent not to ratify. However, the principal will be bound by a course of conduct reasonably tending to show an intention to ratify even though he may not so actually intend, since the law will presume that a person intends the legal consequences of what he does.

6. Same—

While a principal must have actual knowledge of all the facts relative to an unauthorized act of his agent in order to ratify the unauthorized act,

and is not chargeable with what would be discovered by reasonable inquiry, nevertheless knowledge of the principal may be inferred, and when the evidence discloses that a person of ordinary intelligence would infer the facts, the jury may find from it that the principal had knowledge.

7. Same—

A principal may not ratify the act of his agent in part and repudiate such act in part.

8. Same; Contracts § 19— Evidence held to raise jury question whether principal ratified agent's act in negotiating a novation of the contract.

This action was instituted to recover the balance of the purchase price of three pieces of heavy equipment. Defendant contended that the parties entered into a novation under which defendant returned one piece of equipment with agreement that he should be liable for the balance of the purchase price on the other two pieces only. Defendant's evidence tended to show that the novation was agreed to by plaintiff's agent, that he gave the agent a check marked on its face for three payments to be applied on the purchase price of the equipment retained, that the check was in an amount equal to three payments on the equipment retained with a discrepancy of some cents between its amount and the sum necessary to constitute one payment under the original contract, and that the next day the seller's agent took one of the pieces of equipment in accordance with the new agreement but returned this piece to the buyer without explanation the next day. The evidence further tended to show that the seller x-ed out the "3" on the check and cashed same. *Held:* Even though the agent lacked authority to agree to the novation, the evidence is sufficient to be submitted to the jury as to the ratification of the novation by the seller.

9. Pleadings § 4—

The fact that a party prays for damages to which he is not entitled does not preclude recovery by him on a theory supported by allegation and proof.

10. Appeal and Error § 41—

Asserted error in limiting the admission of certain evidence to the purpose of corroboration will not justify a new trial when appellant fails to show a reasonable probability that the asserted error affected the result of the trial.

11. Trial § 41—

Where the issues submitted are sufficient to embrace all questions in dispute between the parties, assignment of error to the failure of the court to submit issues tendered will not be sustained.

APPEAL by plaintiff from *Martin, S. J.*, March 1965 Civil "A" Session of BUNCOMBE.

Action by plaintiff to recover from defendant $17,354.00, plus interest, the balance allegedly due on the purchase price of three pieces of heavy equipment.

The allegations of the complaint, admitted by the answer, establish these facts: In June 1963, for the price of $26,650.00, defendant purchased from plaintiff an Eimco crawler bulldozer (Eimco) and a Birmingham trailer and an International tractor (tractor-trailer). As defendant's down payment of $8,800.00, plaintiff accepted from defendant a backhoe digger. For the balance of $17,850.00 defendant executed his promissory note to be paid in 35 monthly installments of $496.00 each, with a final payment of $490.00. The first payment was due July 21, 1963, and the note was secured by the usual conditional sales agreement. Defendant made no payment of $496.00.

Plaintiff instituted this action on January 7, 1964 and, at the same time, resorted to claim and delivery proceedings to repossess the equipment which it valued at $12,500.00. In due course the sheriff delivered the property to plaintiff. By consent, it was sold at auction on July 10, 1964. Eagle Construction Company purchased the property for $8,500.00.

Answering the complaint, defendant alleges: The backhoe digger which defendant gave in trade was worth $8,500.00. The Eimco which plaintiff had warranted to be "reasonably fit and suitable for the purposes for which it was manufactured and sold" was "completely unfit and unsuitable," and plaintiff was unable to put it in proper working condition. On September 19, 1963 plaintiff, by its authorized agents, agreed that it "would take back" the Eimco, permit defendant to keep the tractor-trailer at an agreed price of $5,288.40, plus $663.84 accumulated interest, a total of $5,952.24. Defendant then gave his check for $496.02 representing three monthly payments of $165.34 each *on the tractor-trailer*, leaving a balance due of $5,456.22. In accordance with this agreement, plaintiff removed the Eimco from defendant's lot but returned it the next day. In breach of the agreement, plaintiff refused to credit the $496.02 payment toward the purchase price of the tractor-trailer and demanded payment of $17,354.00, the original indebtedness less $496.00. Defendant further averred that even if plaintiff's agent lacked authority to enter into the alleged novation, by accepting and cashing the check for $496.02, representing three payments on the tractor-trailer, plaintiff ratified the agreement between its agent and defendant. Defendant prayed that he recover $10,000.00 for the breach of the warranty on the Eimco and $8,500.00 for the wrongful repossession of the tractor-trailer "arising out of the loss by him of the Backhoe Digger traded to the plaintiff by the defendant at the time of the original purchase."

By reply, plaintiff denied the allegations of defendant's further answer, defense, and counterclaim, and alleged that if plaintiff and defendant had entered into a new contract as defendant alleged, it pre-

cluded any recovery by defendant for a breach of warranty as to the Eimco; that defendant had breached the new contract and was liable to plaintiff for the sum of $4,456.22, the alleged contract price of the tractor-trailer as reduced by the payment of $496.02.

Defendant's evidence tends to show: Defendant tried out the Eimco for a month before he bought it. It was completely unsatisfactory from the beginning, but he relied upon plaintiff's promise to repair it. The Eimco continued to break down on every job although plaintiff made six attempts at repairs. As a result, defendant was unable to make any payments on the equipment. On September 19, 1963, in response to defendant's final complaint to plaintiff's Raleigh office, Mr. H. P. Manuel, the salesman who had negotiated the original contract with defendant, came to see defendant at Old Fort where he was working. Defendant told Manuel that he could not use the Eimco, but he wanted to retain the tractor-trailer if, in the contract of purchase, this equipment could be separated from the Eimco. Manuel then went into a telephone booth "to call his office" in Raleigh. Twenty minutes later he emerged to report that "he had talked to the boss"; that if defendant would catch up the back payments on the truck and trailer it was "fixed up" so that defendant could keep the truck and trailer and plaintiff would take the "Eimco dozer" back. Defendant and Manuel then went to the Friendly Tavern, a place operated by defendant's wife in Black Mountain. There, in defendant's checkbook, on the back of a stub sheet (defendant's Exhibit 3), Manuel figured the purchase price of the tractor-trailer at $5,288.40, and accumulated interest at $663.84, a total of $5,952.24. Above these figures he multiplied $165.34 (the amount of each monthly installment) by 3 to get the sum of $496.02, the amount due on the tractor-trailer. He then wrote check No. 332 (defendant's Exhibit 1) to plaintiff for $496.02, noting thereon that it was "for (3) payments on truck & trailer." Thereafter, someone other than defendant blotted out the figure "(3)" on the check. At the time he wrote the check Manuel also filled out its stub in defendant's book (defendant's Exhibit 2) showing the check to be "for (3) payments on truck & trailer." Defendant then signed the check. Before delivering it to Manuel, defendant took the check over to a booth where two ladies, customers and friends of his wife, were sitting and asked them "to be a witness that the check was on a truck and trailer." From the beginning, defendant had not wanted the tractor-trailer in the same contract with the bulldozer.

Manuel told defendant he thought he had the bulldozer sold at Kings Mountain, and, the next day, September 20th, one of plaintiff's employees "hauled it off." The following day, without explanation, it was returned to defendant's parking lot where it remained until the

sheriff took it under claim and delivery. Plaintiff cashed defendant's check for $496.02, but applied it to the original contract. Defendant made no further payments.

The backhoe which defendant gave plaintiff in trade for the equipment in question was worth $8,500.00. The value of the tractor-trailer at the time plaintiff repossessed it was $5,900.00.

Plaintiff's evidence tends to show: Plaintiff sold the secondhand Eimco to defendant without warranty. It was then in excellent condition but thereafter broke down and gave a lot of trouble. Defendant made complaints to the Raleigh office. Plaintiff replaced some parts and repaired it on at least six different occasions. The conditional sales contract in suit was signed in June 1963 by defendant and Mr. H. P. Stephenson, the president of the plaintiff corporation. Thereafter, Manuel, plaintiff's sales representative for Western North Carolina, called on defendant frequently trying to collect past-due payments. Defendant's excuse for nonpayment was lack of work and inability to keep operators. On September 19, 1963, defendant informed Manuel that his operators preferred a Caterpillar bulldozer to an Eimco and inquired about the possibility of trading the Eimco for a Caterpillar. Manuel telephoned Mr. Edward Dougher, plaintiff's vice-president and general manager, in Raleigh. After that call Manuel reported to defendant that plaintiff would consider a trade if defendant would give him some money. Although Manuel, at defendant's request, went "over a breakdown of the contract," there was no talk whatever about taking the bulldozer back and no discussion of any separation of equipment in the contract. At that time Manuel did not mention such a possibility to Dougher nor did he tell him that defendant was not satisfied with the Eimco. According to Manuel, after he went over the figures with defendant, he figured the cost of financing the tractor-trailer over a period of 36 months on the back of a stub page in defendant's checkbook. At defendant's request, he wrote a check for him "on the truck and trailer," and "accepted the check for approval by (my) company but not just on the truck and trailer." On cross-examination, Manuel admitted that he wrote the check "for (3) payments on truck & trailer" and later "scratched over" the figure *3*.

Manuel, according to plaintiff's evidence, had no authority to modify defendant's old contract or to make a new one. His authority was to find a prospect, get an offer, and submit it through the Raleigh office to Stephenson if the sale involved a trade-in or financing. The only purpose of Manuel's visit to defendant on September 19, 1963, was to collect some money. The following day, with the permission of Mr. Dougher, Manuel took the Eimco to Kings Mountain to demonstrate it to a prospect for the sole purpose of helping defendant dispose of it

so that he might get the Caterpillar he preferred. The prospect, however, would not buy it, and, in accordance with Mr. Dougher's instructions, Manuel returned the bulldozer to defendant immediately. This effort to help defendant cost plaintiff about $100.00.

The next day, or the day after, according to Manuel, he delivered defendant's check to Stephenson "for the approval of the finance company" and told him defendant wanted a separation of the contract. He also told him that this was the only money he could get from defendant who had requested him "to write the check on that basis to be presented to the finance company." The following is Mr. Stephenson's version of what Manuel told him when he delivered defendant's check:

> "Mr. Anders requested that he would like to have a separation of the truck and trailer and the Eimco tractor. He said that he told Mr. Anders he would present that request to me; that it would be up to me as to whether or not we could do this and he further told Mr. Anders that his instructions were from me to deliver a message to Mr. Anders at that time, either he paid us money or we turned it over to the attorneys immediately to repossess the three pieces of equipment involved. And he explained to Mr. Anders that in any event he must come away from his place with money or we were through messing with him, that our attorneys would proceed to repossess the equipment which was badly in default." (The judge limited this evidence to the corroboration of Manuel, and it is the subject of assignment of error No. 12).

Stephenson's reaction to this proposition, according to his testimony:

> "As to what statement Mr. Manuel made regarding any alleged new contract, Mr. Manuel delivered to me Mr. Anders' request that they be separated. I emphatically told Mr. Manuel that this was ridiculous; we wouldn't consider it. I further asked Mr. Manuel if he emphatically told Mr. Anders that we must use the check that we had collected against the obligations. I then had the check endorsed and forwarded." (This evidence went in unrestricted).

On November 4, 1963, Manuel met defendant in Columbia, South Carolina, and showed him "a real good 933 Cat motor." There, they discussed with Mr. Stephenson a separation of the contract with a trade-in of the Eimco on the Caterpillar. *According to Manuel:* Stephenson told defendant such a separation would require the approval of the finance company which held his note. *According to Stephenson:* He flatly refused to consider a separation, declined to

take the Eimco back, and told defendant it was his property and must be traded as such. Defendant then promised to catch up the payments on the original contract and about the middle of November he again promised to do so. *According to defendant:* Neither the Eimco tractor nor the old contract was mentioned on his trip to Columbia. He went to Columbia just to see the "933 Cat."

When the case went to the jury, plaintiff contended it was entitled to recover $5,227.00. This figure represented the amount sued for ($17,-354.00), plus the expense of the claim and delivery ($373.00), less the value ($12,500.00), which plaintiff had placed upon the equipment in the affidavit for claim and delivery. During the trial, defendant abandoned any claim for breach of warranty and, instead of the $18,500.00 for which he prayed in his answer, defendant asked to recover only $612.00, the difference between his valuation of the tractor-trailer on September 19, 1963 ($5,900.00), and the alleged new contract price ($5,288.00). The jury, in answer to issues submitted, found that (1) plaintiff and defendant entered into a new contract on September 19, 1963, as alleged in the answer; (2) plaintiff breached the new contract; (3) defendant was entitled to recover $300.00 from plaintiff; and (4) plaintiff was entitled to recover nothing from defendant.

Plaintiff appeals from the judgment entered upon this verdict.

Van Winkle, Walton, Buck and Wall by Roy W. Davis, Jr., for plaintiff appellant.

Harold K. Bennett and E. Glenn Kelly for defendant appellee.

SHARP, J. Plaintiff assigns as error the failure of the trial court to allow its motion to dismiss defendant's counterclaim. Defendant, having admitted the execution and delivery of the conditional sales contract in suit, must establish the novation he has alleged if plaintiff is not to recover the amount it claims.

To establish the terms of the novation he alleges, defendant relies upon his conversations with Manuel, plaintiff's sales agent for Western North Carolina. The evidence discloses, however, that Manuel himself had no authority to modify the contractual relations existing between plaintiff and defendant, and that defendant knew this. 2 C.J.S., Agency § 114, p. 1324. Manuel's declarations to defendant on September 19, 1963, which tended to show his authority to take back the Eimco and to modify the contract by a "separation" were not, as the trial judge held, competent to establish the nature and extent of Manuel's agency. *Commercial Solvents v. Johnson,* 235 N.C. 237, 69 S.E. 2d 716. They were, however, competent to establish the terms of the alleged new con-

tract which, defendant contends, Manuel purported to make on behalf of plaintiff, and which plaintiff thereafter ratified.

A novation is the substitution of a new contract for an old one which is thereby extinguished. *Tomberlin v. Long,* 250 N.C. 640, 109 S.E. 2d 365. One of the several methods by which a contract may be discharged is the substitution of a new contract, the terms of which differ from the original. *Bixler v. Britton,* 192 N.C. 199, 134 S.E. 488; *Public Utilities Co. v. Bessemer City,* 173 N.C. 482, 92 S.E. 331; *Redding v. Vogt,* 140 N.C. 562, 53 S.E. 337. "In such cases the release of the obligations of the old and the substitution of new obligations constitute valuable considerations." *Lipschutz v. Weatherly,* 140 N.C. 365, 369, 53 S.E. 132, 133; 66 C.J.S., Novation § 12. While a contract is wholly executory the mutual consent of the parties to discharge each other from its obligations is sufficient consideration for a rescission. When, however, as here, the contract has been executed by one of the parties, a valid novation requires a consideration. *Palmer v. Lowder,* 167 N.C. 331, 83 S.E. 464; *McKinney v. Matthews,* 166 N.C. 576, 82 S.E. 1036. The return of the Eimco to plaintiff would be sufficient consideration for the alleged novation, which released defendant from his obligation to pay for the Eimco and set up a new schedule of payments for the tractor-trailer only.

The determinative question here is whether plaintiff's acceptance of the check for $496.02 for "payment on truck & trailer," coupled with the other circumstances disclosed, was "evidence of ratification fit to be considered by a jury." *Mfg. Co. v. McPhail,* 181 N.C. 205, 209, 106 S.E. 672, 674.

> " 'If certain acts have been performed or contracts made on behalf of another without his authority, he has, when he obtains knowledge thereof, an election either to accept or repudiate such acts or contracts. If he accept them, his acceptance is a ratification of the previously unauthorized acts or contracts, and makes them as binding upon him from the time they were performed as if they had been authorized in the first place.' *Gallup v. Liberty County,* 57 Tex. Civ. App., 175, 122 S.W. 291." *McNeely v. Walters,* 211 N.C. 112, 113, 189 S.E. 114, 115.

In order to establish the act of a principal as a ratification of the unauthorized transactions of an agent, the party claiming ratification must prove (1) that at the time of the act relied upon, the principal had full knowledge of all material facts relative to the unauthorized transaction, *Wilkins v. Welch,* 179 N.C. 266, 102 S.E. 316; *Wise v. Texas Co.,* 166 N.C. 610, 82 S.E. 974, and (2) that the principal had signified his assent or his intent to ratify by word or by conduct which

was inconsistent with an intent not to ratify. The jury may find ratification from any course of conduct on the part of the principal which reasonably tends to show an intention on his part to ratify the agent's unauthorized acts. 3 Am. Jur. 2d, Agency § 162. "It is what a party does, and not what he may actually intend, that fixes or ascertains his rights under the law. He cannot do one thing and intend another and very different and inconsistent thing. The law will presume that he intended the legal consequences of what he does, or, in other words, that his intention accords in all respects with the nature of his act." *Norwood v. Lassiter*, 132 N.C. 52, 56-57, 43 S.E. 509, 510.

A principal who acted without actual knowledge of the material facts will not be held to have ratified an unauthorized act of his agent even though he failed to exercise due diligence which would have revealed the truth. "This general rule pertains whether the want of knowledge arises from the intentional or the unintentional concealment or misrepresentation of the agent, or from his mere innocent inadvertence; and, of course, if the material facts are suppressed or unknown, the ratification is invalid, because founded on mistake or fraud." 3 Am. Jur. 2d, Agency § 173. However, as stated by the American Law Institute, "knowledge by the purported principal can be inferred as in other cases; when he has such information that a person of ordinary intelligence would infer the existence of the facts in question, the triers of fact ordinarily would find that he had knowledge of such fact." Restatement (Second), Agency § 91; 1 Mechem, Law of Agency § 406 (2d Ed. 1914). See *Fisher v. Lumber Co.*, 183 N.C. 485, 111 S.E. 857 and *Hall v. Giessell*, 179 N.C. 657, 103 S.E. 392, cases in which the court, in sustaining judgments based on the jurys' findings of ratification, commented that the facts were sufficient to show that the principals knew or should have known the terms of their agents' contracts and that the jurys had the right to consider this and other evidence as bearing upon the question of ratification. See also Breckenridge, *Ratification in North Carolina*, 18 N.C. L. Rev. 308, 327-334 (1940).

A principal is not permitted to repudiate the act of its agent as being beyond the scope of his authority while accepting the benefits of what he has done. *Jones v. Bank*, 214 N.C. 794, 1 S.E. 2d 135. "It is also a settled principle of ratification that the principal must ratify the whole of his agent's unauthorized act or not at all. He cannot accept its benefits and repudiate its burdens." *Parks v. Trust Co.*, 195 N.C. 453, 456, 142 S.E. 473, 474. *Accord*, *Maxwell v. Distributing Co.*, 204 N.C. 309, 168 S.E. 403.

Clearly, if plaintiff's president, Stephenson, knew that defendant had attached conditions to the acceptance of his check he could not endorse

it, collect the proceeds for plaintiff, and then repudiate the conditions attached to it notwithstanding he may have intended to do so. *DeLoache v. DeLoache,* 189 N.C. 394, 127 S.E. 419; *Mfg. Co. v. McPhail, supra; Wilkins v. Welch, supra; Moore v. Accident Assurance Corp.,* 173 N.C. 532, 92 S.E. 362; *Bank v. Justice,* 157 N.C. 373, 72 S.E. 1016; *Norwood v. Lassiter, supra.* Such knowledge and conduct would have made Stephenson's position equivalent to that of the man who cashes a check which purports to be in full payment of a disputed account. Speaking to this situation in *Petit v. Woodlief,* 115 N.C. 120, 20 S.E. 208, the Court said, "When the plaintiff endorsed this draft and collected the money, with the proposal staring him in the face that it should, if received, operate to discharge the whole debt, instead of returning it to the drawer and declining the offer, we think that his conduct amounted to an acceptance of it. . . ." 115 N.C. at 125, 20 S.E. at 209. *Accord, Supply Co. v. Watt,* 181 N.C. 432, 107 S.E. 451; *Aydlett v. Brown,* 153 N.C. 334, 69 S.E. 243; *Armstrong v. Lonon,* 149 N.C. 434, 63 S.E. 101; *Kerr v. Sanders,* 122 N.C. 635, 29 S.E. 943.

In *Lipschutz v. Weatherly, supra,* plaintiff agreed with defendants that they should have an exclusive contract for the sale of plaintiff's cigars (which they were authorized to purchase at a special price) in a specific area so long as they complied with certain conditions. Plaintiff, contending that defendants had violated the conditions, notified them that in the future defendants could order only upon the same terms and conditions as any other person. Thereafter plaintiff declined to fill defendants' orders until they agreed to the cancellation of the previous contract. This defendants did and ordered cigars upon the new terms. When defendants refused to pay for these cigars, plaintiff sued for the purchase price and defendants set up a counterclaim for damages for breach of contract. In affirming the trial judge's peremptory instruction in favor of plaintiff, the Court said that, assuming plaintiff had breached the original contract, defendants could have sued for damages; instead, they assented to plaintiff's terms for further sales and made a new contract which discharged the old, thereby eliminating any claim for damages resulting from its breach. See also *Mfg. Co. v. McPhail, supra.*

The evidence here strongly suggests that if Manuel's prospect in Kings Mountain had purchased the Eimco, this lawsuit would have been averted; that Manuel, thinking he had the Eimco sold elsewhere, talked one way to defendant Anders, and thereafter, when the sale was not made, another way to his employer Stephenson. It was then, no doubt, that he blotted out the figure *3* within the parentheses on the check. But, be that as it may, Stephenson knew that defendant had requested "a separation of the truck and trailer and the Eimco trac-

tor," and that at the time defendant made the request he had issued a check for $496.02 which stated that it was "for (3) payments on truck & trailer." Each monthly payment under the original contract was to have been an even $496.00. The notation of plural payments totalling $496.02 negated a payment on the original indebtedness. Obviously defendant was not making a payment on the original contract. Stephenson said that, after telling Manuel defendant's proposition was ridiculous and not to be considered, he asked him "if he had emphatically told Mr. Anders that we must use the check that we had collected against the obligations." Curiously enough, Stephenson did not testify what reply, if any, he got to this inquiry. He merely said that after asking this question he "then had the check endorsed and forwarded."

We think there was "evidence of ratification fit to be considered by the jury." The court instructed the jury, in effect, that in order for it to find that plaintiff and defendant entered into a new contract on September 19, 1963, defendant must satisfy the jury (1) that defendant and Manuel made the agreement defendant alleged; (2) that defendant's payment of three installments on the tractor-trailer under the new contract was received by the plaintiff with knowledge of the new contract and with "intent on the part of the plaintiff corporation to ratify and confirm the transaction and substitute this contract for the contract of June 1963," and that if defendant failed to satisfy the jury of these facts it would answer the first issue (novation) against defendant. Plaintiff has no cause to complain of this instruction. The verdict that there had been a novation was supported by competent evidence, the credibility of which was for the jury. Plaintiff's motion to nonsuit defendant's counterclaim was properly overruled. The fact that defendant prayed damages to which he is not entitled does not preclude recovery on a theory supported by the allegations and proof. *Board of Education v. Board of Education,* 259 N.C. 280, 130 S.E. 2d 408; Strong, N. C. Index, Pleadings § 4.

Plaintiff's assignment of error No. 12 relates to the limitation which the court placed upon that testimony of Mr. Stephenson as noted in the statement of facts. Conceding the error in limiting this evidence to the corroboration of Manuel, we regard the probable effect of this limitation upon the jury as entirely too tenuous to justify a new trial. Technical error alone will not upset a judgment. Appellant must show a reasonable probability that the error affected the result of the trial. *Johnson v. Heath,* 240 N.C. 255, 81 S.E. 2d 657. As heretofore pointed out, the crucial question of fact is what knowledge did Stephenson have when he accepted the defendant's check for $496.02. Unrestricted evidence establishes that he knew of defendant's request "for a separa-

tion in the contract" of the Eimco from the tractor-trailer and that with this knowledge he accepted a check "for [illegible] payments on truck & trailer."

The issues submitted were sufficient to embrace the questions in dispute between the parties, and plaintiff's assignment of error based on the failure of the judge to submit the issues it tendered is not sustained. *Hall v. Giessell, supra.* Each of plaintiff's other assignments of error has been considered; no prejudicial error appears.

No error.

MARCUS LEROY COLEMAN v. SAMUEL L. BURRIS AND SAM HATTEN.

(Filed 13 October, 1965.)

1. Automobiles §§ 6, 10—

Where there is neither allegation nor proof that the city street upon which the accident occurred was a part of a State highway, G.S. 136-66.1, plaintiff may not contend that defendant was negligent in violating G.S. 20-134 and G.S. 20-129(d), in parking a vehicle on the hard-surface at night without lights.

2. Same—

The violation of a municipal ordinance relating to parking and parking lights is negligence *per se.*

3. Automobiles § 41e— Evidence of negligence in parking vehicle without lights so that rear extended into lane of travel held to raise jury question.

Evidence tending to show that defendant parked his truck with the left rear of the bed of the truck about four or five feet on the street in plaintiff's lane of travel, with no reflectors or lights on the rear of the truck, and that plaintiff, blinded by the lights of an on-coming vehicle, did not see the parked vehicle until too late to avoid collision, together with the introduction in evidence of the ordinance of the municipality in which the accident occurred and evidence sufficient to permit the jury to find that the parking of the vehicle was in violation of the ordinance, *held* sufficient to be submitted to the jury on the issue of defendant's negligence in violating the ordinance and also under the common law.

4. Trial § 22—

Discrepancies and contradictions, even in plaintiff's evidence, are for the jury to resolve.

5. Automobiles § 42d—

Evidence tending to show that defendant parked his truck with the left rear of the bed of the truck some four or five feet on the street in plaintiff's lane of travel, with no reflectors or lights on the rear of the truck, and that plaintiff, blinded by the lights of an on-coming vehicle, did not see the parked vehicle until too late to avoid the collision, *held* not to disclose contributory negligence as a matter of law. G.S. 20-141(e).

APPEAL by plaintiff from *Farthing, J.*, May 1965 Civil Session of GASTON.

Civil action to recover damages for personal injuries and damage to an automobile growing out of a collision about 11 p.m. on 29 January 1964 between a Volkswagen Karmann-Ghia owned and operated by plaintiff and a flat-bottom two-ton truck allegedly owned by defendants and allegedly negligently parked with its left rear portion on the east side of North Broad Street in the city of Gastonia, without any reflectors or red lights on the rear portion of the truck.

Defendants filed a joint answer in which it is admitted that defendants were the owners of the truck, and that while Sam Hatten was driving it along North Broad Street, the truck ran out of gas and he got out of it and pushed it off the paved portion of the street. The answer denies that defendants were negligent, and further alleges conditionally contributory negligence on plaintiff's part as a bar to recovery.

From a judgment of compulsory nonsuit entered at the close of plaintiff's evidence, he appeals.

Frank P. Cooke; Childers and Fowler by H. L. Fowler, Jr., for plaintiff appellant.

Hollowell & Stott by L. B. Hollowell, Jr., for defendant appellees.

PARKER, J. Plaintiff's evidence tends to show these facts: About 11 p.m. on 29 January 1964 he was driving his 1963 Volkswagen Karmann Ghia, which is about six and a half feet wide, north on North Broad Street in the city of Gastonia at a speed of 25 or 30 miles an hour. He was alone in the car. North Broad Street is an asphalt paved street 20 or 21 or 22 feet wide. On the eastern side of the pavement of North Broad Street in the area where the collision hereafter set forth occurred is a dirt shoulder about four feet wide and beyond the shoulder is a ditch about eighteen inches to two feet deep. The weather was cold and clear, and it was a dark night. North Broad Street is used for two-way traffic. North Broad Street runs north and south and Harris Street makes a "T" intersection with it from the east. At this intersection hanging over the middle of it is a street light. The collision here occurred about 100 to 125 feet north of this intersection.

Where the collision occurred, North Broad Street is straight and level for about three hundred yards to the south.

Plaintiff testified as follows on direct examination:

> "I came straight out Broad Street and crossed Franklin on my way home, and I got in the vicinity of Harris St. there and I was meeting a car. The car that I was meeting was traveling south. The other car had his lights on bright. I blinked mine, blinked them back dim. He kept on going, I pulled over a little past the center of the road, continued on. I guess I was probably doing 25 or 30 miles an hour. The car passed and the next thing I knew I was on the truck. In response to your question as to why I did not see the truck, well, to begin with, the other car's lights were on bright and, of course, I didn't see the truck until I was right on it. I was meeting the car. He had his lights on bright. I flicked mine on bright, back on dim. He did not dim his lights. My lights were on dim all the way. The car passed. The next thing I knew I was right on the truck. In my opinion, my car traveled roughly 20 or 25 feet after the other vehicle passed me before my vehicle collided with the truck. I did not apply the brakes. In my opinion, my car traveled 25 to 30 feet after striking the truck until it came to a stop."

He testified on cross-examination:

> "I was 25 feet away from Mr. Hatten's truck when I first saw it after this other car passed me. When I first saw it when I was 25 feet away, the first thing I did was to swing to the left as hard as I could. I tried to apply the brakes, but I never did apply them. * * * I saw him when he was 150 feet from my automobile and at that time he had his lights on bright. He blinded me when I first saw him. I just flicked my lights from bright to dim and then back on to bright and during that time I was, of course, blinded. * * * I was going about 30 miles an hour prior to the time that the accident happened. I was going about 30 miles an hour when the lights blinded me. I was going about 30 miles an hour when I passed the automobile whose lights blinded me. I probably had slowed down a little when I had an impact with Mr. Hatten's truck because I only had to take my foot off the accelerator pedal. I hadn't hit my brakes. I would say I was probably going around 25 miles an hour. * * * In response to your question as to why I didn't stop right then and decrease my speed when I was blinded by the lights of this oncoming car, I wasn't doing a dangerous rate of speed to start with, and, of course, I pulled over to my right. I was still in my lane of travel. I didn't pull off onto the

shoulder of the road; I stayed on the paved portion. I didn't stop when I was blinded because I don't recall anybody ever stopping for a car that won't dim his lights, as far as coming to a dead stop. I testified I didn't even hit my brakes. I kept on going at the same speed. I believe the speed limit there would be 35. And I was going roughly 30 miles an hour."

The truck plaintiff's car collided with was "a dual-wheel truck, bed truck, loaded with bricks," and it was standing still with its left rear dual wheels on the pavement of North Broad Street, and with the left rear of the bed of the truck about four or five feet on North Broad Street in plaintiff's lane of traffic. Plaintiff testified on cross-examination: "The truck was angled in, yes sir. It wasn't pulled parallel to the road, it was angled. The right front wheels were not in the ditch. There was no actual ditch there. There was a bank. This area was 18 inches to two feet beneath the surface. That's where the front wheels were when I saw it. (Ditch labeled 'Ditch, four feet from pavement.')" After the collision a board an inch and a half thick and about three feet long extended out of plaintiff's automobile. The right side of plaintiff's car struck the left rear of the bed truck. Plaintiff examined the truck after the collision, and it had no reflectors. When his lights were on low beam plaintiff thinks he could see 30 feet ahead of him, and when his lights were on high beam roughly 55 or 60 feet.

Harold Cletus Truelove, a police officer in Gastonia, arrived at the scene of the collision about ten minutes after it occurred. He testified in effect that upon arrival he saw a dual-wheel truck, bed truck, loaded with bricks, and the left rear wheels were sitting out in the road and the left rear corner of the bed was sticking out into the road about four to five feet. He does not remember seeing any reflectors or any lights on the rear end of the truck. Jacob Howard Prather, Jr., a police officer of the city of Gastonia, arrived at the scene of the collision with officer Truelove. He testified in effect that when he arrived at the scene he did not observe any lights on the rear of the truck.

In the collision plaintiff received personal injuries and his car was damaged.

The parties stipulated that the collision in the instant case occurred on North Broad Street in the city of Gastonia.

In his original complaint in paragraph seven plaintiff alleges that the defendants were guilty of negligence in parking their truck on North Broad Street in the city of Gastonia in violation of G.S. 20-134, G.S. 20-129(d), and G.S. 20-161, and in having no reflectors or red lights on the rear of the truck, and in paragraph eight of his complaint he alleges that the collision resulting in personal injuries to himself and damage to his car was proximately caused by such negligence of

the defendants. At the February 1965 Session of court, before the trial at the May 1965 Session, plaintiff was permitted by the court in its discretion to amend his complaint by deleting paragraph seven therefrom and inserting in lieu thereof a new paragraph seven in which he alleges that the defendants were guilty of negligence in parking their truck on North Broad Street in the city of Gastonia in violation of G.S. 20-134, G.S. 20-129(d), and in violation of the following sections of the ordinances of the city of Gastonia, to wit, Sec. 23-109(a)(15), Sec. 23-111(a), and Sec. 23-111(c), and in having no reflectors or red lights on the rear of the truck. Defendants filed an answer to the amended complaint denying all of its allegations of negligence.

The following appears in the record:

> "PLAINTIFF OFFERED into evidence the CODE OF ORDINANCES of the city of Gastonia, North Carolina, adopted by the City Council of the City of Gastonia on September 16, 1958, effective October 12, 1958, Section 23-109, entitled 'Prohibited places; no signs required. Article 13, Stopping, Standing, or Parking. Division 1. Prohibited in Specified Places, for Certain Vehicles and Purposes.'
>
> "'(a) No person shall stop, stand, or park a vehicle, except when necessary to avoid conflict with other traffic or in compliance with law or the directions of a police officer or traffic control device, in any of the following places: Section (15), In a traffic lane that is marked or intended for the movement of traffic so that such vehicle obstructs the passage of other vehicles in the lane.'
>
> "Section 23-111: 'Unlawful Parking. No person owning or having control or charge of a vehicle shall: (a) Abandon or leave standing such vehicle on any street of the city for a longer continuous period than forty-eight hours.'
>
> "Section (c): 'Park any vehicle upon a street or alley in such a manner or under such conditions as to leave available less than ten feet of the width of the roadway for free movement of vehicular traffic.'"

In *Smith v. Metal Co.*, 257 N.C. 143, 125 S.E. 2d 377, a case relied upon by defendants, a motor scooter driven by plaintiff collided in the nighttime with a truck parked on the east side of Kornegay Street in the city of Goldsboro. In this case the parties stipulated, "Kornegay Street does not constitute any part of the highway system." In the instant case there is no stipulation by the parties to the effect that North Broad Street in the city of Gastonia does not constitute any part of the highway system.

G.S. 136-66.1 provides in part: "The State highway system inside the corporate limits of municipalities shall consist of a system of major

streets and highways necessary to move volumes of traffic efficiently and effectively from points beyond the corporate limits of the municipalities through the municipalities and to major business, industrial, governmental and institutional destinations located inside the municipalities."

Plaintiff has neither allegation nor proof that North Broad Street in the city of Gastonia is a part of the State highway system as set forth in G.S. 136-66.1. However, his evidence and a stipulation by the parties show that North Broad Street is a public street in the city of Gastonia. Therefore, the provisions of G.S. 20-134 and the provisions of G.S. 20-129(d) are not applicable to defendants' truck parked or stopped on North Broad Street in the city of Gastonia, when plaintiff has neither allegation nor proof to show that North Broad Street in the city of Gastonia forms a part of the State highway system. *Smith v. Metal Co., supra.* However, plaintiff's allegations, and his evidence considered in the light most favorable to him and giving him the benefit of every reasonable inference to be drawn therefrom (*Bridges v. Graham*, 246 N.C. 371, 98 S.E. 2d 492), show that defendants stopped or parked their truck about 11 p.m. on 29 January 1964 on the eastern side of North Broad Street in the city of Gastonia — there are no allegations or evidence showing North Broad Street is a part of the State highway system — with its left rear wheels on the pavement of the street and with the left rear of the bed of the truck about four or five feet out on the street in plaintiff's lane of traffic, with no reflectors and no lights on its rear, in violation of Section 23-109(a) of an ordinance of the city of Gastonia reading in relevant part, "No person shall stop, stand, or park a vehicle [with exceptions not relevant here] in a traffic lane that is marked or intended for the movement of traffic so that such vehicle obstructs the passage of other vehicles in the lane," and that the violation of such ordinance was a proximate cause of the collision between plaintiff's car and defendants' truck resulting in plaintiff's injuries and damage to his car. A violation of this ordinance patently enacted in the interest of public safety and to promote the orderly and safe flow of traffic is negligence *per se*. *Carrigan v. Dover*, 251 N.C. 97, 110 S.E. 2d 825, and authorities there cited. In addition, plaintiff's evidence would permit a jury to find that defendants parked or stopped their truck at night with a part of it on the eastern side of the pavement of North Broad Street in plaintiff's lane of traffic, as above set forth, without any reflectors or lights on its rear; that in doing so defendants failed to do what a reasonably prudent person would do under similar circumstances and charged with a duty to warn approaching traffic at night, by lights or otherwise, of their truck obstructing the street; and that under common law rules defendants were

guilty of negligence which was a proximate cause of plaintiff's injuries and damage to his car. In 2A Blashfield, Cyclopedia of Automobile Law and Practice, Per. Ed., § 1203, it is said: "Irrespective of statute or ordinance, the exercise of ordinary care by a motorist, who parks his car or permits it to stand in the street at night or when vision is obstructed from any cause, to protect himself and others from injury, will frequently require him to place lights on the car. Thus, a failure to take these safety measures is generally negligence under common law rules. * * * The exemption of a disabled vehicle from a statute prohibiting parking on the highway does not absolve the driver of that vehicle from doing what a reasonably prudent person would do under the circumstances to warn approaching traffic at night, by lights or otherwise, of the highway obstruction." See also *Kirby v. Fulbright,* 262 N.C. 144, 136 S.E. 2d 652.

"Discrepancies and contradictions, even in plaintiff's evidence, are for the twelve and not for the court," *Barlow v. Bus Lines,* 229 N.C. 382, 49 S.E. 2d 793, and do not justify a nonsuit, *Keaton v. Taxi Co.,* 241 N.C. 589, 86 S.E. 2d 93.

Plaintiff's allegations and proof make out a case of actionable negligence against defendants.

Defendants contend first that there is insufficient evidence of negligence by defendants, but that "even if it be conceded that the defendants were negligent, the contributory negligence of the plaintiff is manifest from his own testimony and the physical facts of record." To neither contention do we agree.

There are two lines of decisions in our Reports involving highway accidents where the driver of a car collides with the rear of an unlighted vehicle stopped or parked on the highway at night, which turn on the question of contributory negligence. In *Tyson v. Ford,* 228 N.C. 778, 47 S.E. 2d 251, and in *McClamrock v. Packing Co.,* 238 N.C. 648, 78 S.E. 2d 749, will be found a list of cases of this type in which contributory negligence was held as a matter of law to bar recovery, and a second list in which contributory negligence has been held to be an issue for the jury. In *Carrigan v. Dover, supra,* it is said:

> "Without attempting to analyze and distinguish the reasons underlying the decisions in those cases, they illustrate the fact that frequently the point of decision was affected by concurrent circumstances, such as fog, rain, glaring headlights and color of vehicles, etc., and that these conditions must be taken into consideration in determining the question of contributory negligence and proximate cause. 'Practically every case must "stand on its own bottom."' *Cole v. Koonce,* 214 N.C. 188, 198 S.E. 637."

In *Weston v. R. R.*, 194 N.C. 210, 139 S.E. 237 (1927), the Court held a motorist must operate his motor vehicle at night in such manner and at such speed as will enable him to stop within the radius of his lights, or within the range of his vision, and that failure to do so is negligence barring recovery. This principle was subsequently applied in many cases, a list of which is set forth in *Burchette v. Distributing Co.*, 243 N.C. 120, 90 S.E. 2d 232. However, the General Assembly passed an Act, Ch. 1145, Session Laws 1953, amending G.S. 20-141(e) by adding thereto the proviso "that the failure or inability of a motor vehicle operator who is operating such vehicle within the maximum speed limits prescribed by G.S. 20-141(b) to stop such vehicle within the radius of the lights thereof or within the range of his vision shall not be considered negligence *per se* or contributory negligence *per se* in any civil action, but the facts relating thereto may be considered with other facts in such action in determining the negligence or contributory negligence of such operator." As a result of this amendment to the statute, if a motorist is traveling within the legal speed limit, his inability to stop within the range of his headlghts "shall not be considered negligence *per se* or contributory negligence *per se* in any civil action, but the facts relating thereto may be considered with other facts in such action in determining the negligence or contributory negligence of such operator." *Beasley v. Williams*, 260 N.C. 561, 133 S.E. 2d 227; *May v. R. R.*, 259 N.C. 43, 129 S.E. 2d 624.

It is hornbook law that a driver of a motor vehicle on a highway or street either in the daytime or at night must exercise ordinary care for his own protection. *Carrigan v. Dover, supra.* Plaintiff's evidence shows that he was operating his car along North Broad Street in the city of Gastonia at a speed of about 30 miles an hour, within the maximum speed limit prescribed by G.S. 20-141(b). He was meeting a car which had its lights on bright. When he first saw it, it was about 150 feet from him. Plaintiff blinked his lights, and blinked them back dim as a signal to the approaching motorist. The car approaching plaintiff did not dim its lights. Plaintiff was blinded by the bright lights of the approaching car and continued at his same speed. When this car passed plaintiff, he saw 25 feet ahead of him defendants' bed truck, which was loaded with bricks, partially blocking the street. Plaintiff swung his car to the left as hard as he could, but he was unable to avoid striking with the right side of his car the left rear of defendants' truck, which at night without lights or reflectors on its rear was stopped or parked partially on the pavement of the street. There is nothing in the evidence to indicate or suggest that there was anything which gave or should have given plaintiff notice that a truck without lights or reflectors on its rear was stop-

ped or parked partially on the street ahead of him. In *Chaffin v. Brame,* 233 N.C. 377, 64 S.E. 2d 276, Ervin, J., with his customary clarity and accuracy, speaking for the Court said: "The duty of the nocturnal motorist to exercise ordinary care for his own safety does not extend so far as to require that he must be able to bring his automobile to an immediate stop on the sudden arising of a dangerous situation which he could not reasonably have anticipated. * * * It is a well established principle in the law of negligence that a person is not bound to anticipate negligent acts or omissions on the part of others; but in the absence of anything which gives or should give notice to the contrary, he is entitled to assume and to act upon the assumption that every other person will perform his duty and obey the law and that he will not be exposed to danger which can come to him only from the violation of duty or law by such other person." Under the provisions of G.S. 20-141(e) as amended by the 1953 Session of the General Assembly, and our decisions, plaintiff on his own evidence was not guilty of contributory negligence as a matter of law; It was a case for the jury. *Rouse v. Peterson,* 261 N.C. 600, 135 S.E. 2d 549; *Dezern v. Board of Education,* 260 N.C. 535, 133 S.E. 2d 204; *Beasley v. Williams, supra; Melton v. Crotts,* 257 N.C. 121, 125 S.E. 2d 396; *Scarborough v. Ingram,* 256 N.C. 87, 122 S.E. 2d 798; *Privette v. Lewis,* 255 N.C. 612, 122 S.E. 2d 381; *Carrigan v. Dover, supra; Keener v. Beal,* 246 N.C. 247, 98 S.E. 2d 19; *Burchette v. Distributing Co., supra; McClamrock v. Packing Co., supra; Chaffin v. Brame, supra; Clarke v. Martin,* 215 N.C. 405, 2 S.E. 2d 10; *Cole v. Koonce,* 214 N.C. 188, 198 S.E. 637; *Williams v. Express Lines,* 198 N.C. 193, 151 S.E. 197.

Defendants rely on *Morris v. Transport Co.,* 235 N.C. 568, 70 S.E. 2d 845 (1952); *McKinnon v. Motor Lines,* 228 N.C. 132, 44 S.E. 2d 735 (1947); *Beck v. Hooks,* 218 N.C. 105, 10 S.E. 2d 608 (1940), all of which cases were decided before the amendment to G. S. 20-141(e) by the 1953 General Assembly above set forth.

The judgment of compulsory nonsuit entered below is

Reversed.

PAUL J. McARVER v. JAMES GERUKOS.

(*Filed 13 October, 1965.*)

1. Trial § 21—

On motion to nonsuit, plaintiff's evidence must be taken as true and considered in the light most favorable to him.

2. Same—

On motion to nonsuit, only those portions of defendant's evidence which are favorable to plaintiff may be considered.

3. Brokers and Factors § 1; Statutes § 10—

The statute making it unlawful to engage in the business of a real estate broker or salesman without a license must be strictly construed with a view to the evil it was intended to supress. G.S. 93A-1.

4. Same; Contracts § 6—

A person who is not a licensed real estate broker or salesman may not recover compensation, either under contract or upon *quantum meruit*, for activities in regard to the purchase, sale or leasing of land when such activities are restricted by the statute to licensed brokers or salesmen.

5. Same— Person purchasing land for his own account is not required to be licensed even though purchase is for resale.

Allegation and evidence to the effect that plaintiff assisted defendant broker in obtaining options on property in defendant's name, that the options were resold to a developer who erected a building thereon and that defendant negotiated a lease to a store company, and that plaintiff did so under a contract providing for the payment to plaintiff by defendant of a portion of the commissions, profits, and payments received by defendant in connection with the sale of the options and the negotiation of the lease, *held* not to disclose an illegal contract as a matter of law, there being nothing to suggest that either party contemplated that plaintiff would take any part in the negotiation of the lease or would participate in any of the contemplated activities other than the acquisition of the options for the account of the parties themselves. G.S. 93A-2(c).

APPEAL from *Riddle, S.J.*, 10 May 1965, Civil Session of GASTON.

Action for breach of contract. From a judgment of nonsuit the plaintiff appeals.

The complaint alleges that the plaintiff, the defendant and one Daniel agreed that they would obtain options upon certain tracts of land in the City of Gastonia, would resell the same and would share equally all profits, commissions or other benefits received from the transactions; that the plaintiff assisted the defendant in obtaining options on such properties which options the defendant resold; and that the profits received by the defendant from the resale of the options, together with payments to him for services in connection with the negotiation of a lease of the properties amounted to $12,025, one-third of

which sum is due the plaintiff, but the defendant has refused to pay such share to him.

The answer denies all material allegations of the complaint and, by way of further defense, alleges that, if the parties did contract as alleged in the complaint, the contract was illegal and void for the reason that the plaintiff was not a licensed real estate broker or salesman in accordance with the provisions of G.S. 93A-1.

The plaintiff testified, in substance, as follows: Prior to the transactions involved in this action he had had other dealings with the defendant. In the late summer of 1963 the defendant informed him that Colonial Stores wanted a location in Gastonia and the defendant wanted the plaintiff to help him find and acquire one. Their plan was to select a site, obtain options to buy the tracts comprising it, then find a buyer to whom they would transfer the options and who would build thereon a store to be leased by him to Colonial Stores. The profits, including compensation for various aspects of the contemplated transactions, were to be divided in three equal shares by the plaintiff, the defendant and Daniel who was brought into the arrangement by the defendant. The plaintiff made numerous trips and had many conferences with the defendant and with the property owners and the contemplated options were obtained in the name of the defendant. At the time of these agreements and transactions the plaintiff was not licensed by the North Carolina Real Estate Licensing Board, which the defendant knew.

Daniel testified for the plaintiff, in substance, as follows: He is a licensed real estate broker. He and the defendant agreed early in 1963 to work together to obtain a location for a store to be operated by Colonial Stores. They were "to work the investors, obtain suitable locations, make various surveys, house counts, and population counts in dealings with Colonial Stores." They found what they believed a suitable location and Daniel convinced Colonial Stores of its desirability, and it eventually occupied and now occupies a store building constructed thereon. Daniel's part of the transaction also included assisting in finding an investor who would buy the site and erect the store building thereon for leasing to Colonial Stores. Thereafter, the defendant introduced the plaintiff to Daniel as his partner who was assisting him and had been helping him obtain options on the properties comprising the desired location. At the suggestion of the defendant, the agreement between Daniel and the defendant was then amended to provide for a division of the profits equally among the three men, Daniel, the defendant and the plaintiff. These "profits" were to consist of the difference between the purchase price and the sale price of the

options plus any commission received as a result of the making of a lease between the investor-purchaser of the land and Colonial Stores. Such lease was negotiated and executed. The defendant has never paid Daniel his part of the profits from the transaction.

Frank Matthews, called as a witness for the plaintiff, testified, in substance: He is the vice-president of Robinson Investment Company, the investor which bought the options from the defendant, exercised them to acquire the site, built the store building and leased it to Colonial Stores. It paid the defendant $12,075 "for putting together" this entire transaction, including the transfer by the defendant to it of the options and the bringing about of the lease to Colonial Stores.

At the close of the plaintiff's evidence the defendant moved for judgment as of nonsuit which motion the court denied. Thereupon, the defendant testified, in substance, as follows: He received $12,075 from the Robinson Investment Company. for the options in question and for putting the entire deal together. All of the options were in the defendant's own name. He had no agreement with the plaintiff or with Daniel for the sharing of the money so received by him. He has done business with the plaintiff before, and just prior to the matters involved in this action they had made a profit of $9,600 on another real estate transaction. He did not know that the plaintiff had no real estate license at that time.

At the close of all the evidence the defendant renewed his motion for judgment as of nonsuit and the motion was granted. The plaintiff appealed.

W. N. Puett and Berlin H. Carpenter, Jr., for plaintiff.
Hollowell & Stott for defendant.

Lake, J. In passing upon a motion for judgment of nonsuit, the plaintiff's evidence must be taken to be true and must be considered in the light most favorable to him. Only those portions of the defendant's evidence which are favorable to the plaintiff may be considered upon such a motion.

So considered, the evidence is amply sufficient to show that the plaintiff and the defendant contracted as alleged in the complaint, that the defendant broke the contract and the plaintiff has been damaged thereby in the amount of $4,025 (only $4,008.33 being alleged in the complaint). The sole question, therefore, is whether the contract so alleged and shown is unenforceable by the plaintiff for the reason that when it was made and performed he did not have a license as a real estate broker or salesman pursuant to Chapter 93A of the General Statutes, the pertinent provisions of which are:

G.S. 93A-1. *"License required of real estate brokers and real estate salesmen.*— From and after July 1, 1957, it shall be unlawful for any person * * * to act as a real estate broker or real estate salesman, or directly or indirectly to engage or assume to engage in the business of real estate broker or real estate salesman without first obtaining a license issued by the North Carolina Real Estate Licensing Board * * * under the provisions of this chapter."

G.S. 93A-2. *"Definitions and exceptions.*— (a) A real estate broker within the meaning of this chapter is any person, partnership, association, or corporation, who for a compensation or valuable consideration or promise thereof sells or offers to sell, buys or offers to buy, auctions or offers to auction * * * or negotiates the purchase or sale or exchange of real estate, or who leases or offers to lease, or who sells or offers to sell leases of whatever character, or rents, or offers to rent any real estate or the improvement thereon, for others, as a whole or partial vocation.

"(b) The term real estate salesman within the meaning of this chapter shall mean and include any person who, for a compensation or valuable consideration is associated with or engaged by or on behalf of a licensed real estate broker to do, perform or deal in any act, acts or transactions * * * comprehended by the foregoing definition of real estate broker.

"(c) The provisions of this chapter shall not apply to and shall not include any person, partnership, association or corporation, who, as owner or lessor, shall perform any of the acts aforesaid with reference to property owned or leased by them, where such acts are performed in the regular course of or as an incident to the management of such property and the investment therein; * * * and nothing in this chapter shall be so construed as to require a license for the owner, personally, to sell or lease his own property."

G.S. 93A-8. *"Penalty for violation of chapter.*— Any person violating the provisions of this chapter shall upon conviction thereof be deemed guilty of a misdemeanor and shall be punished by a fine or imprisonment, or by both fine and imprisonment, in the discretion of the court."

The act was declared constitutional in *State v. Warren,* 252 N.C. 690, 114 S.E. 2d 660. Its purpose is to protect sellers, purchasers, lessors and lessees of real property from fraudulent or incompetent brokers and salesmen. It must be construed with a regard to the evil which it

is intended to suppress. *State v. Brown,* 221 N.C. 301, 20 S.E. 2d 286. Any violation of its provisions is declared to be a criminal offense. For this reason, and for the further reason that it is a statute restricting to a special class of persons the right to engage in a lawful occupation, the act must be strictly construed so as not to extend it to activities and transactions not intended by the Legislature to be included. *Milk Producers Co-op v. Dairy,* 255 N.C. 1, 20, 120 S.E. 2d 548; *State v. Mitchell,* 217 N.C. 244, 7 S.E. 2d 567; *State v. Harris,* 213 N.C. 758, 197 S.E. 594.

If the statute, so construed, makes the doing of an act a criminal offense, one who has contracted to do the forbidden act may not, after performing his contract, sue in the courts to recover the agreed consideration for such performance. *Cauble v. Trexler,* 227 N.C. 307, 42 S.E. 2d 77; *Courtney v. Parker,* 173 N.C. 479, 92 S.E. 324; *Cansler v. Penland,* 125 N.C. 578, 34 S.E. 683; Restatement of Contract, § 580; Anno., Validity of Contract in Violation of Statute, 55 A.L.R. 2d 481, 483.

In *Courtney v. Parker, supra,* the plaintiff sold building materials to the defendant in the course of a business conducted by the plaintiff under an artificial name without registering the name of the owner, as the statute required, a violation of the statute being a misdemeanor. For this reason it was held that he could not maintain an action for the contract price, nor could he recover on *quantum meruit.* The Court said:

> "It is well established that no recovery can be had on a contract forbidden by the positive law of the State, and the principle prevails as a general rule whether it is forbidden in express terms or by implication arising from the fact that the transaction in question has been made an indictable offense or subjected to the imposition of a penalty."

In *Cauble v. Trexler, supra,* the Court said:

> "Where the law-making power speaks on a particular subject over which it has power to legislate, public policy in such cases is what the law enacts. Hence an agreement which violates a provision of a statute or which cannot be performed without a violation of such provision is illegal and void."

In Restatement of the Law of Contracts, § 580, the rule is stated as follows:

> "(1) Any bargain is illegal if either the formation or the performance thereof is prohibited by constitution or statute. (2)

> Legislative intent to prohibit the formation of a bargain, or an act essential for its performance, may be manifested by * * * (d) requiring a license, inspection, or something similar from persons making such bargains or doing acts essential for their performance * * *."

In Williston on Contracts (Rev. Ed.), § 1765, it is stated:

> "Where a statute requires a broker to obtain a license before sales of the kind in question can be negotiated by him, there is no doubt that if such a sale is made by one acting as a broker without the required license, he can recover no compensation for his services * * *."

Recovery of commissions has been denied an unlicensed real estate broker by the Supreme Courts of Illinois and Michigan, the statutes involved being similar to our own. *Frankel v. Allied Mills, Inc.*, 369 Ill. 578, 17 N.E. 2d 570; *Krause v. Boraks*, 341 Mich. 149, 67 N.W. 2d 202. In the *Krause* case the defendant was a licensed real estate broker who had contracted to pay the unlicensed plaintiff a commission for finding a purchaser for property listed with the broker for sale by the third-party owner. This circumstance distinguishes the *Krause* case from the one at hand.

Thus, if McArver and Gerukos contracted for the doing of an act or the handling of a transaction by McArver, which he was forbidden to do by G.S. 93A-1, McArver cannot maintain this action for the recovery of his agreed share of the proceeds of their activities.

G.S. 93A-2(c) expressly provides that nothing in this act shall be construed so as to require the owner of property to obtain a license before selling or leasing it himself. This Court has held that the act does not apply to a sale by such owner of his own note secured by a deed of trust upon his property. *In Re Dillingham*, 257 N.C. 684, 127 S.E. 2d 584. Although the statute does not expressly exempt from its provisions one who purchases or leases land for his own account, it defines "real estate broker" as a person who does these specified acts "for others." Thus, it is clear that the Legislature did not intend for this act to apply to a person, partnership or association who purchases land for his or its own account, even though such purchase is for resale. Therefore, a contract by one who is not a licensed real estate broker or salesman with another person to buy land, or an option thereon, for their own account and, thereafter, to resell such land, or option, and divide the profits would not be a contract to do an act prohibited by this statute.

It is true that the plaintiff's own evidence shows that the entire plan contemplated by the plaintiff and the defendant included more

than the mere acquisition and resale of options on land. Their venture also contemplated that a lease would be negotiated on behalf of the purchaser of such options from them, as lessor with Colonial Stores as lessee. The negotiation and bringing about of such a lease would be the act of a "real estate broker" within the contemplation of this statute. If their contract was for the doing of such an act by the plaintiff, who was not a licensed broker or salesman, the contract would be illegal and the plaintiff could not enforce it. However, there is nothing to suggest that either party to the contract contemplated that the plaintiff would take any part in the negotiations of such lease or would participate in any of their contemplated activities other than the acquisition of the options. There is nothing in the plaintiff's evidence to suggest that he did take part in the negotiation of any lease or in any act other than the acquisition of the options and the defendant denies that the plaintiff did so.

Thus, there is no evidence whatever that the plaintiff contracted to do or did any act for which a real estate broker's or salesman's license is required by the statute. This statute does not forbid a licensed real estate broker, such as the defendant, to embark with an unlicensed person upon a joint venture in which all of the unlicensed party's activities will be such as are not within the contemplation of this statute, nor does this statute forbid them to agree that they will share all of the receipts from the activities of both of them. Such a contract, when enforced as made, does not violate the policy declared by the Legislature in this statute.

All of the contemplated activities under this contract which the statute forbids to be done by an unlicensed person were to be performed and were performed by the defendant, who is a licensed real estate broker. The statute is not concerned with a licensed broker's sharing of his commissions with an unlicensed associate, unless the reason for such sharing is the performance by the unlicensed associate of acts which violate the statute. See G.S. 93A-6(9). Thus the contract between the plaintiff and the defendant, if it was made, as the plaintiff's evidence tends to show, was not in violation of this statute and public policy does not forbid its enforcement by the courts. Therefore, the granting of the motion for judgment of nonsuit was error.

Reversed.

STATE v. JOSEPH STUBBS.

(Filed 13 October, 1965.)

1. Constitutional Law § 28—

A person may not be tried or convicted for a criminal offense without a formal and sufficient accusation.

2. Criminal Law § 150—

The indictment or warrant is an essential part of the record on appeal in a criminal action. Rule of Practice in the Supreme Court No. 19(1).

3. Criminal Law § 147; Appeal and Error § 29—

It is the duty of appellant to see that the record is properly made up and transmitted to the Supreme Court.

4. Criminal Law § 149—

Where the indictment upon which defendant was tried has been lost subsequent to the trial, defendant properly moves for *certiorari* in order to give him an opportunity to move in the Superior Court for an order that a copy of the indictment as returned by the grand jury be supplied and certified so that he can proceed with his appeal.

5. Criminal Law § 147—

Where the indictment upon which defendant was tried has been lost subsequent to the trial, a substituted copy may not be inserted in the record by stipulation of the solicitor or assistant solicitor and counsel for defendant, but an order determining and providing a true copy of the indictment as returned by the grand jury must be inserted in the record by the trial court, there being disagreement between defendant and the State as to the wording of the indictment.

6. Same—

The trial judge has jurisdiction to settle the case on appeal, notwithstanding that at the time of settlement he has resigned as a judge of the Superior Court. G.S. 1-283.

ON *certiorari* from *Huskins, J.,* 5 October 1964 Regular "A" Criminal Session of MECKLENBURG.

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

A. A. Coutras for defendant appellant.

PARKER, J. We have before us a confused record. As we understand this confused record, the history of this case is as follows:

At the 5 October 1964 Regular "A" Criminal Session of Mecklenburg County Superior Court, the Honorable J. Frank Huskins, Judge Presiding, defendant Stubbs and one Lester Emmett Carter were apparently tried on either separate indictments charging a crime against

nature consolidated for trial, or a joint indictment charging each one of them with committing the crime against nature upon each other, a violation of G.S. 14-177. Each defendant pleaded not guilty. Defendant Stubbs was represented at the trial by court-appointed counsel, A. A. Coutras, a member of the Mecklenburg County Bar. Each defendant was found guilty of the crime. Defendant Stubbs was sentenced upon the verdict to imprisonment for a term of not less than seven years nor more than ten years. In open court defendant Stubbs appealed from the judgment of imprisonment to the Supreme Court (there is nothing in the record before us to indicate that Carter appealed), and the trial court entered an order allowing Stubbs to appeal *in forma pauperis*. Stubbs by order of court was allowed 90 days within which to make up and serve upon the state his statement of case on appeal, and the State was allowed 30 days after service of his statement of case on appeal on it within which to file exceptions or to serve a counter case. Because the court reporter could not deliver a transcript of the evidence in the case and the charge of the court until 7 December 1964, defendant Stubbs by order of the trial judge was allowed an additional 30 days from 16 December 1964 to make up and serve upon the State his statement of case on appeal. On 25 January 1965 defendant Stubbs submitted to the solicitor for the State his statement of case on appeal. On 26 January 1965 the solicitor in writing accepted service of his statement of case on appeal. There is nothing in the record before us to indicate that the solicitor for the State filed exceptions or a counter case.

Defendant Stubbs' statement of case on appeal upon which the solicitor for the State accepted service was filed in the office of the Clerk of this Court on 3 September 1965. There is nothing in the record before us to indicate that the trial judge ever saw defendant Stubbs' statement of case on appeal. Defendant Stubbs' statement of case on appeal contains a statement of the organization of the court, an indictment charging Lester Emmett Carter with the commission of the crime against nature with defendant Stubbs (in this statement of the case on appeal there is no indictment against defendant Stubbs), Stubbs' and Carter's pleas of not guilty, the impanelling of the jury, the verdict that defendant Stubbs and Lester Emmett Carter are guilty of the crime against nature with the recommendation of medical help, the judgment against defendant Stubbs of imprisonment, his appeal entries, a statement of the evidence for the State and for defendants Stubbs and Carter, the charge of the trial court, and assignments of error. The charge of the trial court begins: "Ladies and Gentlemen of the Jury. Joseph Stubbs in Case No. 42-477 and Lester Carter in Case

No. 42-478 are charged with the detestable and abominable crime against nature, the State alleging that such crime was committed by these two defendants upon each other on the first day of August, 1964."

On 10 June 1965 defendant Stubbs filed in the office of the Clerk of this Court a petition for a writ of *certiorari,* in which he alleges in substance, except when quoted: His counsel served his statement of case on appeal on the solicitor for the State on 25 January 1965. His counsel in preparing the case on appeal discovered that no indictment against him was in existence and no indictment against him could be found in the records of Mecklenburg County Superior Court. On 22 January 1965 he filed a petition for a writ of *habeas corpus* before Judge George B. Patton. Judge Patton on 29 January 1965 heard his petition for a writ of *habeas corpus* and after hearing the testimony "found as a fact, based upon oral testimony, transcript of the record of trial and upon affidavit of the Assistant Solicitor, John H. Hasty, that at the time of trial at the October 5th Criminal Term of Superior Court of Mecklenburg County, there was in existence a Bill of Indictment charging the Petitioner, Joseph Stubbs with a Crime Against Nature," and thereupon Judge Patton denied his petition for a writ of *habeas corpus.* "The State of North Carolina made a motion on February 10, 1965, to the Court that the records be made to speak the truth and that the Court ordered a Bill of Indictment in accordance with that which was in existence at the time of trial of the Petitioner. That the Court as of the date of this Petition has not entered an Order allowing the motion of the State of North Carolina." On 17 March 1965 his counsel "moved the court for a new trial based on the premise that the exact and substantial wordage of the original bill of indictment could not be established; however, said Petitioner's motion was denied by the court." That the affidavit of the assistant solicitor, John H. Hasty, before Judge Patton sets forth an indictment, which is marked "Indictment A," and is to the effect that the indictment charged Lester Emmett Carter and defendant Stubbs with committing the crime against nature. That an indictment "for which there is no court order as of the date of this Petition" was "subsequently inserted into the records of the Mecklenburg County Court House"; it is marked "Indictment B," and charges Lester Emmett Carter and Joseph Stubbs with committing the crime against nature upon each other. That the indictments hereinbefore set out are substantially different in language. "That 'Indictment B' is not properly in the record in that no order was issued by the Court allowing the State's motion to amend the record. That the record is incomplete as of the date of this Petition and therefore said Petitioner was unable to proceed with his appeal. The Defendant Pe-

titions for Writ of *Certiorari* and assigns as error the following: 1. Defendant Petitioner was unable to proceed with his appeal in that the original Bill of Indictment was missing from the record. 2. That 'Indictment A' as hereinbefore set forth is fatally defective on its face. 3. That 'Indictment B' is not properly in the record. 4. That 'Indictment A' and 'Indictment B' are substantially different in wordage. Your Petitioner has complied with all requirements known to him in this Petition for Writ of *Certiorari* and respectfully requests that the Writ be granted to the end that the entire record proper be reviewed and that the case on appeal served on the Solicitor of the 14-A Solicitorial District be reviewed and that the defendant Petitioner be granted a new trial."

Defendant's petition for a writ of *certiorari* was allowed by order of this Court in conference on 23 July 1965.

On 10 September 1965 there was filed in the office of the Clerk of this Court a stipulation in the instant case signed on 3 September 1965 by the assistant solicitor, John H. Hasty, and A. A. Coutras, counsel for defendant Stubbs, in which it is stated that to "the best of their recollection, that the attached is a substituted copy of the indictment in the above entitled case." The attached substitute copy of an indictment charges Lester Emmett Carter and defendant Joseph Stubbs with committing the crime against nature upon each other, and purports to have been found a true bill by the grand jury at the 7 September 1964 Criminal Session. This stipulation and attached substituted copy of the indictment are inserted in defendant Stubbs' statement of case on appeal, and this stipulation further states "that the case on appeal, as submitted, is settled and agreed to by the undersigned."

There can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. *S. v. Albarty,* 238 N.C. 130, 76 S.E. 2d 381; 42 C.J.S., Indictments and Informations, § 1.

On appeal in criminal cases, the indictment or warrant and plea on which the case is tried, the verdict and judgment appealed from are essential parts of the transcript record of a criminal action brought to this Court. Rule 19(1) of the Rules of Practice in the Supreme Court, 254 N.C. 795; *S. v. Jenkins,* 234 N.C. 112, 66 S.E. 2d 819.

It is the duty of appellant to see that the record is properly made up and transmitted to the Court. *S. v. Jenkins, supra; S. v. Golden,* 203 N.C. 440, 166 S.E. 311; *S. v. Frizell,* 111 N.C. 722, 16 S.E. 409.

The case of *S. v. McDraughon,* 168 N.C. 131, 83 S.E. 181, had a factual situation in many ways similar to the factual situation in the instant case. In that case the defendant was tried in the superior court

upon an indictment duly found, and upon conviction was sentenced to serve eight months upon the county roads. Since the trial the indictment was lost, without fault, so far as the record discloses, upon the part of the defendant, and therefore is not a part of the transcript. The defendant made no effort to have the indictment supplied in the superior court, nor did he move in the Supreme Court for *certiorari*. The Attorney General made a motion to dismiss the appeal because of the insufficiency of the transcript. The Court in its opinion states the rule applicable to the instant case:

> "In cases of this character the jurisdiction of this Court is not original, but appellate * * *.
>
> "The presumption is that the judgment of the Superior Court is correct, and the burden is on the appellant to show errors. As far back as *S. v. Butts*, 91 N.C. 524, the requisites of the transcript were pointed out, and in *S. v. Frizell*, 111 N.C. 722, the Court said: 'An appellant does not do his duty by simply taking an appeal and leaving it to the clerk to send up what he may deem necessary. It is the appellant's duty to see that the record is properly and sufficiently made up and transmitted. Hereafter the Court will dismiss the appeal or affirm the judgment, as the case may be, when the record is defective in any material particular, in all cases in which the Attorney-General, or the opposite party (in civil cases), sees proper to make such motion, unless sufficient excuse for the apparent laches is shown.' And again, in *S. v. May*, 118 N.C. 1204: 'The transcript fails to show that the court was held by a judge at the time and place required by law; that a grand jury was drawn, sworn, and charged, and presented the indictment; and there are other defects. It is the duty of the appellant to have the record sent up, and when it is in such condition as above stated, usually the Court will dismiss the appeal, unless it is shown that the appellant is guilty of no laches; otherwise, the appellant could always obtain six months delay by simply failing to have a sufficient record sent up.'
>
> "It therefore appears to be well settled that it was the duty of the defendant to see that the indictment was a part of the transcript, and if lost, he ought to have applied to the Superior Court to supply it, or if no court convened in the county of Sampson prior to the time of docketing the transcript here, he ought to have sent to this Court as much of the record as could be procured, and then applied to this Court for a *certiorari*, in order to give him an opportunity to move in the Superior Court. He has done neither, and has offered no excuse for his laches.

"The power of the Court to supply an indictment which has been lost accidentally or otherwise upon motion based upon affidavits is simply the power to make the record speak the truth, which is inherent in courts of common-law jurisdiction. The refusal to exercise this power would encourage negligence in the custodian of papers and criminality in those interested in abstracting the indictment from the files."

The Court dismissed the appeal for insufficiency of the record.

The case of *S. v. Currie,* 206 N.C. 598, 174 S.E. 447, presents a factual situation also quite similar to the factual situation here. The defendants were convicted by a jury in New Hanover County and appealed to this Court from the judgment. The record proper filed in this Court was fatally defective for that no indictment appeared therein. There is a statement in the record, filed by the solicitor for the State and counsel for defendants, to the effect that since the trial of the action the papers in the case have disappeared from the office of the clerk of the superior court, and cannot be found, but that an indictment in due form charging the defendants with conspiracy and robbery was in the record at the time of the trial. The Court in its opinion said: "This statement is not sufficient. It was the duty of the defendants to see that the indictment appeared in the record, or if lost, to apply to the Superior Court for an order that a copy be supplied. See *S. v. McDraughon,* 168 N.C. 131, 83 S.E. 181." The appeal was dismissed.

S. v. Vandiford, 245 N.C. 609, 96 S.E. 2d 835, is in point. Defendant appealed to this Court from a judgment of imprisonment based upon a verdict of guilty of a felonious assault with a deadly weapon with intent to kill, inflicting serious injury. The Attorney General moved to dismiss the appeal on authority of *S. v. Currie, supra,* for that the record on appeal is fatally defective in that it did not contain the indictment. In lieu thereof, by consent of the solicitor and defendant's attorney, the clerk of the superior court certified that there was a true bill of indictment containing the charge of a felonious assault with a deadly weapon with intent to kill, inflicting serious injury, but that during the progress of the trial the indictment was misplaced, and not to be located. In its opinion the Court said:

"*S. v. Currie, supra* [206 N.C. 598, 174 S.E. 447], presented a similar factual situation. In respect thereto this Court held that the statement was not sufficient, — that it was the duty of the defendants to see that the indictment appeared in the record, or, if lost, to apply to the Superior Court for an order that a copy be supplied, citing *S. v. McDraughon,* 168 N.C. 131, 83 S.E. 181, and the appeal was dismissed. To like effect is *S. v. Gosnell,* 208 N.C.

401, 181 S.E. 323; *S. v. Dry,* 224 N.C. 234, 29 S.E. 2d 698; *S. v. Jenkins,* 234 N.C. 112, 66 S.E. 2d 819; *S. v. Dobbs,* 234 N.C. 560, 67 S.E. 2d 751.

"In accordance with ruling in *S. v. Currie, supra,* defendant has now applied to Superior Court of Craven County for an order that a copy of the bill of indictment be supplied, and such an order has been made, and certified to this Court, with copy of a true bill of indictment as returned by grand jury, and on which defendant was tried. Under these circumstances, the appeal will not be dismissed, but, rather, the order and copy of bill of indictment so certified will be attached to and become a part of the record on the appeal."

On 10 June 1965 defendant Stubbs filed in this Court a petition for a writ of *certiorari,* in which he alleges in substance: His counsel served his statement of case on appeal on the solicitor for the State on 25 January 1965. His counsel in preparing the case on appeal discovered that no indictment against him was in existence, and no indictment against him could be found in the records of Mecklenburg County Superior Court, and for that reason he is unable to proceed with his appeal. There is nothing in the petition for a writ of *certiorari* to suggest that the indictment against defendant Stubbs was lost or misplaced by any fault of his, or that he was guilty of laches. It seems apparent from the facts alleged in the petition for a writ of *certiorari* that defendant Stubbs applied to this Court for a *certiorari,* in order to give him an opportunity to move in the superior court for an order that a copy of the indictment as returned by the grand jury, and on which he was tried, be supplied and certified to this Court so that he can proceed with his appeal, though his language is not characterized by clarity. We allowed his petition for a writ of *certiorari* on 23 July 1965.

On 3 September 1965 defendant Stubbs filed in this Court his statement of case on appeal, but it contains no indictment against defendant Stubbs. The substituted copy of an indictment against defendants Stubbs and Lester Emmett Carter, later inserted in the record by stipulation between John H. Hasty, assistant solicitor, and A. A. Coutras, attorney for defendant Stubbs, is not sufficient. *S. v. Vandiford, supra; S. v. Currie, supra.*

The Attorney General has not moved to dismiss the appeal.

It is manifest from the record before us that counsel for the State and defendant Stubbs disagree as to the indictment upon which defendant Stubbs was tried.

This action is remanded to the Superior Court of Mecklenburg County in order that defendant Stubbs can make a motion before the trial judge, J. Frank Huskins, for an order determining and supplying a

true copy of the true bill of indictment as returned by the grand jury, and on which he was tried, and that when such order is made by Judge Huskins that it be ordered to be certified to this Court with a copy of the true bill of indictment as returned by the grand jury, and on which defendant Stubbs was tried, to the end that the order and copy of the indictment so certified can be attached to and become a part of the record on appeal in the instant case. Jurisdiction of this matter pertaining to the settlement of the case on appeal remains in the trial judge, J. Frank Huskins, even though he has resigned as superior court judge. G.S. 1-282, 1-283; *Hoke v. Greyhound Corp.*, 227 N.C. 374, 42 S.E. 2d 407; 4 Am. Jur. 2d, Appeal and Error, § 445; 4A C.J.S., Appeal and Error, § 946(b)(2), p. 914.

Remanded.

THELMA C. CONARD, ADMINISTRATRIX OF THE ESTATE OF ROBERT LEE CONARD, DECEASED v. MILLER MOTOR EXPRESS, INC.

(*Filed 13 October, 1965.*)

1. Courts § 20—

In an action instituted in this State to recover for injuries sustained in a collision occurring in another state, the substantive law of such other state and the procedural law of this State control.

2. Automobiles §§ 26, 41b— Motorist may drive at less than minimum speed when necessary for safe operation of vehicle.

Plaintiff's evidence tended to show that his intestate was killed when he collided with the rear of a truck being operated at less than 40 miles per hour, the minimum posted speed on the highway in South Carolina where the accident occurred, S. C. Code § 46-371. The evidence further tended to show that a tire had blown out on one dual wheel of defendant's vehicle, that the shoulders of the road at the place were too narrow to permit the tire to be changed in safety, and that the driver was proceeding at a speed of 30 to 35 miles per hour to the bottom of the hill where there was space and opportunity to make the necessary repairs. There was expert testimony that if a blowout occurs on a dual-wheel tire it is standard procedure not to travel above 30 miles per hour to obviate heat which might produce another blowout. *Held:* The evidence discloses that the operation of defendant's truck came within the proviso of the South Carolina statute that a motorist should not drive at less than the minimum posted speed "except when reduced speed is necessary for the safe operation of the vehicle", and therefore the evidence tends to show no violation of the statute, and nonsuit was properly entered.

APPEAL by plaintiff from *Farthing, J.*, April, 1965, Civil Session, GASTON Superior Court.

This civil action was instituted by the personal representative of Robert Lee Conard to recover damages for his alleged wrongful death. The pleadings and the evidence disclose that the plaintiff's intestate was an employee of Beaunit Mills, Inc. A few minutes after midnight on December 26, 1961, he was asleep in his employer's 1958 Model Mack trailer-tractor unit which at the time was being driven southwardly on U. S. 85 by his co-employee, James Robert Neely.

U. S. 85 is a four-lane, dual Interstate highway. The two east lanes, each 11 or 12 feet wide, were intended for north-bound traffic. Across a grass median were two lanes of equal width for south-bound traffic. As the Beaunit unit proceeded southwardly down a long hill near Gaffney, South Carolina, it ran into the rear of a partially disabled tractor-trailer owned by Miller Motor Express and being operated at the time by Miller's agent, Elbert Lewis King. King's speed was 30-35 miles per hour. The posted minimum speed at the time and place of the accident was 40 miles per hour. The rear-end collision occurred about half a mile below the crest of a hill. The plaintiff contends that Neely was driving at a lawful rate of speed, ran upon the dimly lighted truck which was violating the minimum speed law, of which violation he did not have notice sufficient to enable him to decrease his speed and prevent running into the rear of the Miller trailer. As a result of the collision, the Beaunit trailer-tractor units separated, plunged over the side of the highway, killing both the driver, Neely, and the plaintiff's intestate.

By answer, the defendant denied all negligent acts which the plaintiff charged against its agent. By way of further defense, it alleged and offered evidence tending to show that just before the collision its driver, King, discovered his vehicle was not operating properly. Immediately he pulled out onto the shoulder of the highway, to his right, where he ascertained the tire on one of the dual wheels had blown. The shoulder was approximately the same width as his trailer and offered insufficient room for removal of the wheel and the repair of the blown tire. Thereupon, he turned the red blinker and all other lights on the tractor-trailer and proceeded cautiously down the highway in the extreme right-hand lane at a speed of about 30-35 miles per hour, intending to stop at the bottom of the hill where there was space and opportunity to make the necessary repairs. His blinkers and other lights were fully visible to all traffic overtaking him. The driver of the Beaunit unit could and should have seen these blinkers and marginal lights on his truck for at least 1,000 feet before crashing into the trailer.

The plaintiff's witness, Bruce Love of the State Highway Patrol, testified that he saw the Miller truck as it pulled onto the highway from the shoulder; that the shoulder was approximately eight feet wide and the truck about the same width. He passed just after King had pulled off the shoulder. "I did not have any trouble getting around it at all. . . . I couldn't say . . . how fast he was going. All the trailer rear lights were on. As far as I could see he was going down the hill all right. I did not stop him or say anything to him. . . . I would say that, as you come down the hill from the crest . . . the point of the accident would be about five-tenths of a mile. There is no physical obstruction to the vision of an on-coming or overtaking motorist for about five-tenths of a mile, that is to the impact. . . . This rest area (at the foot of the hill) is a safe place for a vehicle to pull completely off the road."

Mr. Nichols, transportation manager of Beaunit, a plaintiff's witness, testified on cross-examination that if a blow-out occurs on a dual wheel, "It is preferable not to go above about thirty miles per hour because speed produces heat and heat produces another blow-out, and it has the weight of the one single tire that should be borne by the two. It is standard procedure to go on down the road until you get your truck off the road if there is a safe place available."

At the close of the evidence, the court, on defendant's motion, entered compulsory nonsuit. From the judgment dismissing the action, the plaintiff appealed.

Henry M. Whitesides for plaintiff appellant.
Mullen, Holland & Harrell by James Mullen for defendant appellees.

HIGGINS, J. This cause grew out of a rear-end motor vehicle collision in South Carolina. The substantive law of that State controls. The procedural law of North Carolina controls. *Childress v. Motor Lines*, 235 N.C. 522, 70 S.E. 2d 558.

The plaintiff's counsel argues here that the evidence made out a case of actionable negligence under the South Carolina law in that it shows the defendant's agent, King, was operating its tractor-trailer unit on U. S. Highway 85 in South Carolina at a speed of 30-35 miles per hour at a place where the minimum speed for motor vehicles had been established at 40 miles per hour. The evidence is sufficient to disclose that the South Carolina Highway authorities had posted notice of a 40-mile per hour speed limit at the place where the accident occurred. However, the statute, § 46-372, South Carolina Code, under which the Highway authorities posted the minimum, carries an excep-

tion which makes the minimum inapplicable under the circumstances disclosed on this occasion.

"No person shall drive a motor vehicle at such slow speed as to impede or block the normal and reasonable movement of traffic, *except when reduced speed is necessary for the safe operation or in compliance with law.* (emphasis added.) Whenever the Department determines on the basis of an engineering and traffic investigation that slow speeds on any part of the State Highway consistently impede the normal and reasonable movement of traffic, the Department may determine and declare a minimum speed limit below which no person shall drive a vehicle *except when necessary for safe operation or in compliance with law,* when appropriate signs giving notice thereof are erected along the part of the highway for which a minimum speed is established." (emphasis added.)

The plaintiff's evidence discloses that the blow-out on one of the dual wheels of the defendant's unit occurred at a place where the shoulder space (on a fill) equaled the trailer width of about eight feet. King, the driver, testified he had insufficient room to take off a wheel and make repairs. One of the plaintiff's witnesses, a transportation expert, stated that standard procedure required that the unit be driven to a place of safety (at the foot of the hill) for the repairs and that safety required that speed should not exceed 30-35 miles per hour because the one tire carrying the load intended for two might blow out because of the heat generated by the extra weight it carried. Exactly this situation is taken into account by the provision of the statutory limitation: "Except when reduced speed is necessary for safe operation." The minimum speed, therefore, must give way to the superior necessity for safe driving.

The stated objection of the South Carolina Uniform Act is to prevent such slow speeds as "impedes the normal and reasonable movement of traffic." The purpose is not to require the driver of a partially disabled truck to surrender the road at all events to a following truck driver who is in a hurry. The Supreme Court of South Carolina, in *Bell v. Atlantic Coast Line Railroad,* 202 S.C. 160, 24 S.E. 2d 177, has stated the rule:

> "An action for negligence based upon an alleged violation of a statute or ordinance cannot be maintained where it appears that the statute or ordinance was enacted or ordained for a purpose wholly different from that of preventing the injury of which complaint is made. To afford a right of action for injury from the violation of a statute or ordinance the complainant's injury must have been such as the statute or ordinance was intended to pre-

vent. If none of the consequences which the enactment was designed to guard against have resulted from its breach, such a breach does not constitute an actionable wrong, even though some other injurious consequence has resulted. It is not enough for a plaintiff to show that the defendant neglected a duty imposed by statute and that he would not have been injured if the duty had been performed. He must go further and show that his injury was caused by his exposure to a hazard from which it was the purpose of the statute to protect him."

For the reasons herein discussed, we hold the plaintiff's evidence fails to make out a case of actionable negligence under South Carolina law. The judgment of nonsuit is

Affirmed.

JOHN ANDERSON, JR., EMPLOYEE v. LINCOLN CONSTRUCTION COMPANY, EMPLOYER, AND UNITED STATES CASUALTY COMPANY, CARRIER.

(Filed 13 October, 1965.)

1. Master and Servant § 93—

On appeal from the Industrial Commission, the courts may review the evidence to determine, not what the evidence proves or fails to prove, but only whether there is any competent evidence to sustain the findings, the credibility of the witnesses and the weight to be given their testimony being the exclusive province of the Commission. G.S. 97-86.

2. Master and Servant § 64—

Claimant testified that he had not been sick for some five years prior to the accident and that since the accident he had been totally disabled, and a physician who examined claimant after the accident testified that claimant had a contusion and bruises of the left hip and to a less extent of his right hip and right lateral chest wall. *Held:* The evidence was sufficient to sustain a finding of the Industrial Commission that the accident caused temporary disability, notwithstanding other evidence that claimant was suffering from osteomylitis of some ten years' duration.

APPEAL by plaintiff from *Cowper, J.*, June, 1965 Civil Session, CARTERET Superior Court.

This proceeding originated as a compensation claim before the Industrial Commission. The Hearing Commissioner and the Full Commission, on review, found the plaintiff, claimant, had sustained injury by accident arising out of and in the course of his employment as a crane operator for Lincoln Construction Company. In short summary,

the plaintiff testified: He had worked as a crane operator for his present and former employers for many years. "For the past 5 or 10 years before the accident I haven't been to a doctor, haven't been sick a day, haven't been out of work a day, and I have worked on the average of about 40 or 45 hours a week for the last five years. I haven't been able to do anything since the accident. I can't even dress myself."

On October 3, 1963, he drove his employer's Model 1952 International truck to Cedar Island to pick up certain equipment for his employer. "Somewhere on the Atlantic highway I crossed a bridge and the pickup felt to me like it probably hit a little dip and it started shimmying and I lost control of it and the next thing I knew I saw the water over the headlights. . . . I had gone into the canal. . . . They tell me 337,000 miles on the truck."

The plaintiff was taken to the hospital where he remained under the care of Dr. Gainey until October 11th. He was readmitted to the hospital and again examined by Dr. Gainey on December 6. Dr. Gainey testified the claimant gave a history of having been in an accident on October 3, and complained of pain in both hips and in his chest. "Examinations showed that he had hip joint disease. At that time I did not know of what duration, but he had a contusion and bruises of his left hip and to a less extent of his right hip and of his right lateral chest wall." He was released from the hospital on October 11.

"On December 6, 1963, he was readmitted to Morehead City Hospital and was there until December 7. He was not able to carry on any kind of employment. I do not know whether he is now or not because I haven't seen Mr. Anderson since February 28, 1964. In my opinion at that time his condition had improved, but in my opinion he was not able to perform any type of employment."

The Hearing Commissioner found:

> "13. That the plaintiff sustained an injury by accident arising out of and in the course of his employment with the defendant employer on October 3, 1963, and by reason of said accident was temporarily totally disabled from said date through February 28, 1964; on February 28, 1964, the plaintiff was still temporarily totally disabled and had not reached his point of maximum improvement."

The Hearing Commissioner concluded:

> "3. That by reason of the plaintiff's injury by accident the plaintiff was temporarily totally disabled for the period October 3, 1963, through at least February 28, 1964, and is entitled to com-

pensation for said period and until the point the plaintiff reaches his maximum improvement or sustains a change in condition. G.S. 97-29; G.S. 97-47."

The defendants appealed to the Full Commission for review. The Full Commission adopted as its own the findings and conclusions of the Hearing Commissioner, overruled the exceptions, and affirmed the award. The defendants appealed to the Superior Court of Carteret County. Judge Cowper, after hearing, ordered that the award "be set aside for that there is no evidence to support the finding of fact or conclusion of law that the accident resulted in the plaintiff's disability." The plaintiff excepted and appealed.

Hamilton, Hamilton & Phillips by Luther Hamilton for plaintiff appellant.
Marshall & Williams by Lonnie B. Williams for defendant appellees.

HIGGINS, J. The Commission found the claimant had suffered a total temporary disability by accident arising out of and in the course of his employment and awarded compensation upon the basis of the finding. The employer and its compensation carrier challenged the finding and the award upon the sole ground the evidence is insufficient to show causal relationship between the claimant's accident and his injury. The Superior Court sustained the challenge and reversed the award. The appeal requires this Court to review the evidence and to determine, not what the evidence proves or fails to prove, but to find whether the Commission had before it any competent evidence sufficient to support its findings.

The claimant admitted a history of osteomylitis and an operation therefor about 10 years prior to his accident. Admitting the history, nevertheless, he testified he had worked as a crane operator for at least five years prior to October 3, 1963. "I haven't been to a doctor, haven't been sick a day, haven't been out of work a day and I have worked an average of 40 to 45 hours a week for the last five years. I haven't been able to do anything since the accident." Dr. Gainey, while guarded about what caused the disability, found the claimant entered the hospital the day following the accident, stated he had been in an accident. The doctor found contusions and bruises of the left hip and to less extent of his right hip and of his right lateral chest wall, "and was not able to perform any type of employment." May we say the Commission did not have before it any competent evidence showing causal connection between the accident and the injury?

The Workmen's Compensation Act, G.S. 97-86, vests the Industrial Commission with full authority to find essential facts. The Commis-

sion is the sole judge of the credibility of the witnesses and the weight to be given their testimony. The courts may set aside findings of fact only upon the ground they lack evidentiary support. *Blalock v. Durham,* 244 N.C. 208, 92 S.E. 2d 758; *Creighton v. Snipes,* 227 N.C. 90, 40 S.E. 2d 612. The court does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding. *Brice v. Salvage Co.,* 249 N.C. 74, 105 S.E. 2d 439. Of course, where there is no evidence of causal relationship between the accident and injury the claim must be denied. Or, if the disability is due to pre-existing physical injuries, it must be denied. But where the evidence is conflicting, the Commission's finding of causal connection between the accident and the disability is conclusive. *Tucker v. Lowdermilk,* 233 N.C. 185, 63 S.E. 2d 109.

In this case the evidence was sufficient to support the finding. Hence the Superior Court committed error in vacating the award of temporary disability. The Superior Court will remand the cause to the Industrial Commission for further disposition as the law requires.

Reversed.

HUGH JACKSON BANKS v. MARY KNAPP WOODS.

(Filed 13 October, 1965.)

1. Negligence § 24a—

Plaintiff is entitled to go to the jury in his action and defendant is entitled to go to the jury on his cross-action, respectively, if the evidence considered in the light most favorable to him is sufficient to permit a legitimate inference that the injury and damage were proximately caused by the actionable negligence of the other, unless his own proof establishes contributory negligence as a matter of law.

2. Automobiles § 42h—

Plaintiff's own evidence tended to show that he was traveling east on a four-lane highway approaching an intersection controlled by electric traffic signals, that he gave a left turn signal, stopped to permit two vehicles traveling west to pass through the intersection, and then crossed the westbound lanes, and that before he cleared the intersection he was hit by defendant's vehicle traveling west with the green light. *Held:* Plaintiff's evidence discloses contributory negligence as a matter of law.

3. Same—

Plaintiff contended that defendant was traveling at excessive speed when defendant collided with plaintiff's vehicle, which had made a left turn at

an intersection across defendant's lane of travel. Defendant testified that she was driving 35 miles per hour in a 45 mile per hour zone, and the physical facts disclosed that her vehicle stopped practically at the point of impact. *Held:* Defendant's evidence does not show contributory negligence as a matter of law, and nonsuit of defendant's cross-action was error.

APPEAL by both parties from *Martin, S. J.*, March-April, 1965 Civil Session, BUNCOMBE Superior Court.

This civil action, consisting of the plaintiff's claim and the defendant's counterclaim for damages, grew out of an automobile collision at the intersection of Patton and Louisiana Avenues in the City of Asheville. The accident occurred about 6:55 on the morning of March 31, 1964. Each party, by proper pleading, contended the collision, injury, and damages resulted altogether by reason of the other's actionable negligence. At the close of all the evidence the court entered compulsory nonsuit as to both claims. Each party appealed.

Gudger & Erwin by James P. Erwin, Jr., for plaintiff appellant.

Williams, Williams & Morris by William C. Morris, Jr., J. N. Golding for plaintiff appellee.

Meekins, Packer & Roberts by Landon Roberts for defendant appellant.

HIGGINS, J. According to all the evidence Patton Avenue is a four-lane east-west through highway. The two north lanes are for west-bound traffic and the two south lanes for traffic east-bound. A grass median separated the north from the south lanes. Louisiana Avenue intersects Patton at right angles. Electric stop, go, and caution signals were installed and in operation at the time of the accident. Posted signs gave notice of a maximum speed of 45 miles per hour on Patton.

Immediately prior to the collision, the plaintiff, according to his own evidence, approached the intersection from the west in the inside lane for east-bound traffic, gave a left turn signal, stopped to permit two approaching vehicles to pass through the intersection, going west. After the second vehicle cleared the intersection, he turned left across the west-bound traffic lanes on Patton, intending to enter Louisiana. Before he cleared the intersection his Oldsmobile was hit by the defendant's Ford. The crash occurred in the northeast quadrant of the intersection. The investigating officer testified the two vehicles came to rest 40 feet apart — the Ford within three feet of the debris and the Oldsmobile more than 30 feet away. Neither vehicle left skid marks.

The evidence disclosed the intersection and signal lights could be seen a considerable distance by travelers approaching on Patton ave-

nue from either direction. Plaintiff testified he did not see the defendant's Ford until the impact. The defendant testified the last she remembers she was possibly a little more than two car lengths from the intersection, driving 35 miles per hour, intending to continue through on Patton. The light was green for such movement. She was rendered unconscious as a result of the accident.

This Court, in *Railway v. Woltz,* 264 N.C. 58, 140 S.E. 2d 738, stated the rules of law by which the trial court should determine whether motions for nonsuit should be allowed. Ordinarily, the plaintiff is entitled to go to the jury if the evidence, in the light most favorable to him, ignoring evidence *contra,* is sufficient to permit a legitimate inference that the injury and damage were proximately caused by the defendant's actionable negligence. The defendant is entitled to go to the jury on his counterclaim if the evidence, in the light most favorable to him, ignoring evidence *contra,* is sufficient to permit a legitimate inference his injury and damage were proximately caused by the plaintiff's actionable negligence. "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 negligence as a matter of law." *Railway v. Woltz, supra.*

In the case before us the plaintiff, admitting that although he was in a place of safety at the intersection, nevertheless, he turned left, crossed the intersection in front of the defendant who had the green light, blocked her travel lanes without even seeing her vehicle until the moment of impact, and without ascertaining his movement could be made in safety. Such conduct is negligence as a matter of law. *Greene v. Meredith,* 264 N.C. 178, 141 S.E. 2d 287; *King v. Sloan,* 261 N.C. 562, 135 S.E. 2d 556; *Clontz v. Krimminger,* 253 N.C. 252, 116 S.E. 2d 804. While the plaintiff alleges the defendant was guilty of excessive speed, she testified she was driving 35 miles in a 45-mile zone. The physical facts show her Ford stopped practically at the point of impact as disclosed by the debris. Her evidence does not disclose her negligence as a matter of law.

On the plaintiff's appeal the judgment is affirmed. On the defendant's appeal, the judgment of nonsuit on her counter-claim is reversed. She is entitled to go to the jury on the issues raised by her counterclaim and by the plaintiff's reply.

Plaintiff's appeal — Affirmed.

Defendant's appeal — Reversed.

STATE OF NORTH CAROLINA v. RUFUS GAINEY.

(Filed 13 October, 1965.)

1. Criminal Law § 173—

A post conviction hearing is not a trial nor a substitute for appeal, but is a remedy for determination by the court of the question of law whether defendant was deprived of any constitutional right in his original trial, and it is not necessary that defendant be present at his post conviction hearing. G.S. 15-221.

2. Same—

Upon *habeas corpus* subsequent to a conviction at a new trial held pursuant to order entered at a post conviction hearing, defendant may not object that his petition for a post conviction hearing did not request a new trial.

3. Criminal Law § 26—

A plea of former jeopardy does not pertain at a second trial procured by a defendant upon *habeas corpus* or a post conviction hearing.

4. Same—

A plea of guilty voluntarily entered at a second trial waives a plea of former jeopardy.

APPEAL by defendant from *Bone, E.J.*, Special Criminal Session 12 July 1965 of NASH.

The defendant at the November Session 1960 of the Superior Court of Nash County was tried upon indictments charging him with escape and robbery with firearms. He was convicted on both charges and sentenced to fifteen years for armed robbery and two years on the escape charge.

After serving 4½ years of the fifteen-year sentence, the defendant filed a petition for a post conviction hearing and sought his release pursuant to the provisions of the Post Conviction Hearing Act.

The court below, on 21 January 1965, appointed counsel to represent the defendant at the hearing on his petition for a post conviction hearing. The hearing was held at the March Session 1965 of the Superior Court of Nash County. The defendant was not present at the hearing but was represented by his counsel. It was found as a fact that the defendant was tried at the November Session 1960 of the Superior Court of Nash County on the charge of armed robbery and escape without the benefit of counsel. The court vacated the judgments entered at the November Criminal Session 1960 and ordered that the defendant be tried within a reasonable time on the original bills of indictment for escape and robbery with firearms.

On 4 May 1965, the defendant filed a petition for writ of *habeas corpus*. He demanded his outright release on the grounds (1) that his

constitutional rights were violated at his first trial, and (2) that his court-appointed counsel had obtained a new trial for him without his consent and without his presence in court.

At the May-June Criminal Session 1965 of the Superior Court of Nash County the defendant was heard on his petition for writ of *habeas corpus*. The petitioner made a motion to set aside the order granting him a new trial. However, after the petitioner testified at the hearing below, he then informed the court that he wished to withdraw his motion to set aside the order for a new trial and to permit the same to remain in force without prejudice to his right to challenge the validity of the order granting him a new trial. The court then entered an order to the effect that the order setting aside the original judgments remain undisturbed, with the right of the petitioner to question the same or except thereto as he is advised.

At the July Session 1965 of the Superior Court of Nash County, the two cases having been consolidated for trial, the case came on for trial on the original bills of indictment. The defendant entered a plea of guilty on both charges and signed a statement in open court to the effect that he was voluntarily entering a plea of guilty to said charges; that he knew the seriousness of the charges and understood the punishment that might be imposed; that he was entering the plea of guilty on such charges without being influenced against his will by anyone or without any promise or duress from anyone.

The court imposed a sentence of not less than twelve nor more than fifteen years for the offense of robbery with firearms, and not less than one nor more than two years on the escape charge, this latter sentence to begin at the expiration of the sentence for robbery with firearms.

The defendant appeals.

Attorney General Bruton, Deputy Attorney General Harrison Lewis, Staff Attorney T. Buie Costen for the State.

Frederick E. Turnage for defendant.

DENNY, C.J. The defendant entered no exceptions in the trial below and assigns no error on this appeal. He does, however, attempt to raise two questions in his brief. (1) Did the court below commit error in conducting a post conviction hearing in the absence of the petitioner and by granting relief not requested in the petition? (2) Did the court below err in denying the defendant's motion for dismissal of prosecution on the ground of former jeopardy?

The record does not contain exceptions upon which appellant's alleged errors may be grounded.

A post conviction hearing is not a trial. It is not designed to be a second day in court, nor is it a substitute for appeal. It is a post conviction remedy to determine whether a defendant was deprived of any constitutional right in his original trial. This is a question of law for the court. *S. v. Wheeler,* 249 N.C. 187, 105 S.E. 2d 615, and cited cases. Furthermore, there is no requirement that a defendant be present at a post conviction hearing. In pertinent part, G.S. 15-221 reads as follows: "The court may receive proof by affidavits, depositions, oral testimony, or other evidence, and the court shall pass upon all issues or questions of fact arising in the proceeding without the aid of a jury. In its discretion, the court may order the petitioner brought before the court for the hearing. * * *"

In the instant case, at the post conviction hearing, the petitioner was granted a new trial and thereafter elected to ratify the action of the court in granting such new trial.

On the second question above set out, when a prisoner obtains a new trial by virtue of a *habeas corpus* proceeding or a post conviction hearing, he accepts the hazards as well as the benefits of a new trial. *S. v. Anderson,* 262 N.C. 491, 137 S.E. 2d 823; *S. v. White,* 262 N.C. 52, 136 S.E. 2d 205. The plea of former jeopardy is without merit. Moreover, the appellant herein freely, voluntarily, without being influenced by anyone, without duress, and without promise of leniency, pleaded guilty to both offenses of which he was indicted. A subsequent plea of guilty constitutes a waiver of the plea of former jeopardy. 14 Am. Jur., Criminal Law, § 280, page 958.

In 21 Am. Jur. 2d, Criminal Law, § 209, page 253, *et seq.,* it is said: "A defendant waives his constitutional protection against double jeopardy when a verdict or judgment against him is set aside at his own instance either on motion in the lower court or on a successful appeal. This is also true where he merely asks that a judgment against him be vacated but the court goes beyond what he asks and orders a new trial. In such a case, the defendant may be tried anew on the same indictment for the same offense of which he was convicted, or he may be prosecuted on a new information charging the offense." *Green v. United States,* 355 U.S. 184, 2 L. Ed. 2d 199, 61 A.L.R. 2d 1119; *Murphy v. Massachusetts,* 177 U.S. 155, 44 L. Ed. 711; Anno: 61 A.L.R. 2d 1143.

The judgments imposed in the court below are

Affirmed.

STATE OF NORTH CAROLINA v. WALTER LEE LITTLE.

(Filed 13 October, 1965.)

1. Intoxicating Liquor § 12—

It is competent for an expert in the field to testify that the still in question, examined by the witness, was capable of making whiskey.

2. Same—

It is competent for an expert in the field to testify that mash found by the witness at a still site had fermented and was ready to run, and to testify as to what was needed to put the still in operation.

3. Intoxicating Liquor § 13e—

Evidence in this case *held* sufficient to be submitted to the jury upon an indictment charging defendant with unlawfully and wilfully having in his possession materials and equipment designed and intended for the unlawful manufacture of intoxicating liquor. G.S. 18-4.

APPEAL by defendant from *Bone, E. J.*, July 1965 Special Criminal Session of NASH.

Criminal prosecution on an indictment charging defendant with unlawfully and wilfully having in his possession materials and equipment designed and intended for the unlawful manufacture of intoxicating liquor, to wit, rye mash, still equipment, and glass jars, a violation of G.S. 18-4. Defendant in the Nash County Recorder's Court had demanded a jury trial on a warrant charging him with the identical offense charged in the indictment, and his case was transferred to the superior court for trial. In the superior court defendant pleaded not guilty. The jury returned a verdict of 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.

C. C. Malone, Jr., and W. G. Pearson, II, for defendant appellant.

PER CURIAM. The defendant did not offer any evidence. 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 offered three witnesses: J. B. Herbert, a State ABC officer; Joseph Kopka, an investigator for the Alcohol and Tobacco Tax Unit, United States Treasury Department; and Alfred Joyner, a Nash County ABC officer. A summary of the State's evidence is as follows: About 5 a.m. on 3 May 1965 Deleon Battle, Charles Sidney Langley, and defendant Walter Lee Little were seen at a small shed approximately 1,000 yards from a still site at the back of defendant's home. They loaded something on a pickup truck and the truck was driven by

Langley down through a large cow pasture, across a pond dam, and down to a fence. Battle was sitting in the truck on the right side, and defendant Little was riding on the front fender of the truck. Defendant Little had a valve regulator in his hand. When the truck came to the fence, defendant Little got out and opened the gate. He then walked on down to the still site. The following were at the still site: A distillery consisting of one 1650 gallon metal tank pot type still which was set up but not in operation; 4800 gallons of mash contained in twenty-four 240-gallon fermenter boxes. The still was set up on concrete blocks above the ground so a burner could fit underneath. There were two 55-gallon copper doublers, copper connecting pipes, one one-inch copper pipe branch worm condenser contained in a one-quarter gallon wood and metal cooler tank, one 240-gallon liquor box, 77 cases with 12 jars to the case of empty half-gallon glass fruit jars, one hand forced water pump, one homemade gas burner, eleven 100-lb. propane tanks full, 200 lbs. of sugar, one hoe, one shovel, one axe, five gallons of gasoline contained in one five-gallon gasoline can, two buckets, one tub, two kerosene lamps, two gallons of kerosene contained in one 2-gallon can, 25 feet of one-inch plastic pipe, 50 feet of 1¼ inch plastic pipe, one 50-ft. roll of roofing paper, 2 wrenches, 1 Briggs & Stratton gas motor, Serial No. 01-6401143, with a Rapidayton water pump, 1 Claricon citizen band transceiver, Model #15-020, Serial #11215792, one 1954 model two-tone G.M.C. half-ton pickup truck, Serial #10224-PZ-1846, bearing North Carolina license #3351-SE.

There was a considerable quantity of mash that was ready for distillation at that time. Distillation is a process whereby liquid mash is put into a still, and the heat cooks the mash, and vapors rise from the liquid mash, and run through a process of doublers and into a condenser, and it becomes liquid again, in the form of distilled spirits. The still was not in operation at the time. The mash had fermented and was ready to be run or manufactured into whisky. When the officers went in to the still site, one person there was arrested, and defendant Little ran. Little was caught and brought back to the still site. While the officers and Langley and defendant Little were standing together at the still site, Langley said to defendant Little, "Boy, I thought you could run," and Little replied, "I thought I could, too." A lunch box full of food was found at the still site. Defendant Little stated that it was his lunch box, that he brought it to the still site, and that he came to the still site to work. Officer Herbert compared the valve regulator that defendant Little had on the truck with a gas burner at the still site. The valve regulator had a nut that screws onto a valve the exact size of the gas tank and the exact size of the gas burner. The still site was not on defendant's land. The truck did not belong to him.

J. H. Herbert, a State ABC officer, testified that he had been connected with the ABC law-enforcement work for about three years, during which time he had examined about 250 stills, and he was familiar with the operation of stills. He testified that the still found at the still site was capable of making whisky. Defendant assigns as error the refusal of the court to strike his testimony, that the mash found at the still site had fermented and was ready to run, to be manufactured into whisky. Defendant also assigns as error that the witness Herbert was permitted over his objection to testify that to get the still in operation the mash would have to be pumped into the still, and the burner put under the still; the gas would have to be lighted. Both assignments of error are overruled. It clearly appears that Herbert by reason of his knowledge and experience was competent to testify that the mash found at the still site had fermented and was ready to run, to be manufactured into whisky, and also to testify as to what was needed to put the still in operation. The court properly admitted such testimony in evidence. *S. v. Fields,* 201 N.C. 110, 159 S.E. 11; 48 C.J.S., Intoxicating Liquor, § 348(b), p. 491.

Joseph Kopka testified in detail as to his extensive training and experience with the Alcohol and Tobacco Tax Unit, United States Treasury Department, with which he had been for five and one-half years. He has examined between 400 and 500 stills during that period. He is familiar with the operation of stills and the manner in which distilled spirits are made. He estimated from his experience and training that the still found by the officers in the instant case had a daily producing capacity of 154 gallons of distilled spirits or whisky. Defendant's assignment of error to the admission of this testimony of Kopka is overruled. It is manifest that Kopka had the training and experience to estimate the daily producing capacity of this still, and his testimony as to its daily producing capacity was competent as evidence.

The trial court correctly denied defendant's motion for judgment of compulsory nonsuit. Under our decisions the State's evidence was amply sufficient to carry the case to the jury. *S. v. Perry,* 179 N.C. 718, 102 S.E. 277; *S. v. Jaynes,* 198 N.C. 728, 153 S.E. 410; *S. v. McLamb,* 235 N.C. 251, 69 S.E. 2d 537; *S. v. Edmundson,* 244 N.C. 693, 94 S.E. 2d 844.

Defendant has no assignment of error to the charge. All defendant's assignments of error are overruled. In the trial below, we find

No error.

REBECCA GRIFFIN, B/N/F CHARLEEN GREENE V. HARTFORD ACCIDENT AND INDEMNITY COMPANY.

(Filed 13 October, 1965.)

1. Insurance § 65—

Evidence that insurer had issued its policy of automobile liability insurance covering the operation of the vehicle inflicting the damage, that the accident occurred during the term of the policy, and that plaintiff had obtained a judgment against insured upon which execution had been returned unsatisfied by reason of her insolvency, nothing else appearing, entitles plaintiff to judgment against insurer.

2. Insurance § 61—

Where plaintiff makes out a *prima facie* case against insurer upon its liability policy, insurer's contention that the policy had been cancelled prior to the accident causing the injury is an affirmative defense, and plaintiff's action against insurer may not be nonsuited upon such defense when the defense is not established by plaintiff's own evidence.

3. Trial § 21—

Nonsuit may not be entered upon an affirmative defense unless plaintiff's own evidence establishes such defense so clearly that no other reasonable conclusion can be drawn therefrom, and defendant's evidence tending to establish such defense cannot warrant nonsuit, since its credibility is for the jury.

APPEAL from *May, S.J.*, 7 June 1964 Session of GASTON.

This is an action by a judgment creditor of the insured in a policy of automobile liability insurance against the insurer to compel payment of such judgment. It was before us upon a former appeal in which a new trial was ordered. *Griffin v. Indemnity Co.,* 264 N.C. 212, 141 S.E. 2d 300.

The complaint alleges the issuance of the policy, the injury of the plaintiff within the stated term of the policy through the operation of the insured's automobile, the obtaining of a judgment by the plaintiff against the policyholder, the issuance of execution and the return thereof unsatisfied by reason of the insolvency of the policyholder.

The answer admits the issuance of the policy, denies the other material allegations of the complaint and alleges, in bar of the plaintiff's right to recover, that the policy was cancelled prior to the accident, which is denied in the reply.

It is stipulated that the defendant issued to Mildred Sadler its policy insuring her, from 27 February 1961 to 26 February 1962, against liability for personal injuries sustained by any person by reason of the operation of the automobile specified therein. It is further stipulated that as a result of an automobile accident on 15 July 1961 the plaintiff obtained judgment against Mildred Sadler for $3,500, plus costs,

and that execution issued thereon against the judgment debtor was returned unsatisfied by reason of her insolvency.

At the new trial the plaintiff's evidence consisted of the foregoing stipulations, the insurance policy and the judgment in favor of the plaintiff against the named insured.

Defendant's motion for judgment as of nonsuit at the close of the plaintiff's evidence having been denied, the defendant called Mildred Sadler as its witness. She testified, in substance: She obtained the insurance policy, paid part of the premium and financed the remainder of it. That is, the finance company with which she dealt paid the balance of the premium to the defendant and took from her an undertaking to pay to it, in installments, the amount so advanced. As security, she gave the finance company her power of attorney authorizing it, as her agent, to direct the defendant to cancel the policy and pay to it the unearned portion of the premium if and when she failed to pay any installment of such indebtedness. The automobile involved in the accident was the one specified in the policy. The day before the accident she received from the Department of Motor Vehicles in Raleigh a notice that the insurance policy had been cancelled.

The manager of the finance company, called as a witness by the defendant, testified, in substance, that Mildred Sadler was in default in payment due the finance company and, consequently, he sent to the defendant the above mentioned power of attorney and a request that the policy be cancelled.

The defendant then called as its witness its employee who testified, in substance, that the defendant received from the finance company the request for cancellation of the policy, together with the power of attorney, cancelled the policy and mailed to the policyholder a notice of cancellation, upon which mailing it received from the post office a receipt.

All the documents above referred to were introduced in evidence.

At the close of all the evidence the defendant renewed its motion for judgment as of nonsuit and the motion was allowed. From such judgment the plaintiff appeals.

Horace M. DuBose, III, for plaintiff appellant.

J. Donnell Lassiter and Kennedy, Covington, Lobdell and Hickman for defendant appellee.

PER CURIAM. The evidence offered by the plaintiff, taken to be true and interpreted in the light most favorable to her, as it must be upon a motion for judgment as of nonsuit, shows that the defendant issued to Mildred Sadler its policy of automobile liability insurance, which,

unless properly cancelled, was in effect at the time of the accident out of which the plaintiff's judgment against Mildred Sadler arose. Thereby the defendant company contracted "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury * * * sustained by any person, caused by accident and arising out of the ownership * * * or use of the automobile." It further shows, when so taken, that the plaintiff obtained judgment against Mildred Sadler in the amount of $3,500, plus costs, by reason of such liability, that execution issued thereon and was returned unsatisfied by reason of her insolvency. Nothing else appearing, the plaintiff would be entitled to judgment against the defendant for the amount now due her upon the said judgment. *Crisp v. Insurance Co.*, 256 N.C. 408, 124 S.E. 2d 149; *Hall v. Casualty Co.,* 233 N.C. 339, 64 S.E. 2d 160; Strong, N. C. Index, Insurance, § 65.

Of course, cancellation of the policy at the request of the insured, either directly or through a duly authorized agent, prior to the occurrence of the accident in which the plaintiff was injured, would bar recovery by the plaintiff in this action. However, cancellation of the policy is an affirmative defense and the burden is upon the defendant to prove a valid cancellation effective before the liability of the insured arose. *Crisp v. Insurance Co., supra.*

A judgment of nonsuit may not properly be entered on the ground of a defense, the burden of proving which rests upon the defendant, unless the plaintiff's own evidence establishes it so clearly that no other reasonable conclusion can be drawn therefrom. The defendant's evidence may not be considered in passing upon its motion for such judgment, for its credibility is for the jury. *Barnes v. Trust Co.,* 229 N.C. 409, 50 S.E. 2d 2. The plaintiff's evidence does not show cancellation of the policy. Therefore, the granting of the motion for judgment as of nonsuit was error and the plaintiff is entitled to a new trial.

The remaining assignments of error by the plaintiff are without merit and relate to matters decided on the former appeal. It is unnecessary to discuss them again. The power of attorney expressly authorizes the insurance company to rely upon the finance company's statement as to default by the policyholder in her payments to it.

Reversed.

STATE v. JOHNNIE WILLIAMS.

(Filed 13 October, 1965.)

1. Robbery § 2—

It is not required that an indictment charging the felonious taking of goods from the person of another by the use of force or a deadly weapon aver that the taking was with the intent to convert the personal property to defendant's own use, the question of specific intent being properly submitted to the jury under the charge. G.S. 14-87.

2. Robbery § 6—

Where, in a prosecution for armed robbery, the jury returns a verdict of robbery, the court may not impose a sentence in excess of 10 years.

APPEAL by defendant from *Morris, J.*, January-February 1965 Session of SAMPSON.

This is a criminal action tried upon a bill of indictment charging that the defendant, on 7 January 1965, with the use of a deadly weapon, to wit, a bottle, did threaten and endanger the life of Perry Peterson, the prosecuting witness, and did unlawfully, wilfully, feloniously and violently take from Perry Peterson, and carry away, the goods, chattels and money of the said Perry Peterson, to wit, $35.00 in United States currency, against the form of the statute, *et cetera.*

The defendant and the prosecuting witness had known each other for seven or eight years. The State's evidence tends to show that on 7 January 1965 the prosecuting witness was at his home about 6:00 p.m. when defendant drove his car into the driveway. Defendant was invited inside. The defendant told the prosecuting witness that his car had just run out of gas and requested him to let him have some gas. The prosecuting witness declined to do so and stated that he had only sufficient gas to take him to work the next morning. The defendant then hit the prosecuting witness on the head with an oil bottle, after which the prosecuting witness bent down and picked up some of the broken glass at which time the defendant broke a soft drink bottle over the head of the prosecuting witness. The defendant then picked up a chair and demanded money. The prosecuting witness handed him his bill-fold and the defendant took $35.00 from it. The defendant then ordered the prosecuting witness to drive him to town. In trying to force the prosecuting witness to get in his car and drive him to town, defendant knocked him down, tore his clothing and knocked all of his jaw teeth out.

The defendant's evidence tends to show that he went to the home of the prosecuting witness to get a jar of liquor and that his car ran out of gas in the driveway; that the prosecuting witness told him to get his

car away from there or he would call the police; that when he started to leave, the prosecuting witness attacked him with a knife.

The jury returned a verdict of "Guilty of Robbery," and the defendant was sentenced to a term of not less than fifteen nor more than twenty years in the State's prison, from which judgment the defendant appeals, assigning error.

Attorney General Bruton, Deputy Attorney General Harrison Lewis, Trial Attorney Eugene A. Smith for the State.

John R. Parker for the defendant.

PER CURIAM. The appellant does not contend the State's evidence was insufficient to carry the case to the jury and to support the verdict.

The appellant assigns as error, however, the failure of the court below to arrest judgment for that the bill of indictment was fatally defective in that it failed to allege one of the requisite elements of the crime of robbery, to wit, the taking with felonious intent to convert the personal property allegedly stolen to defendant's own use.

Robbery at common law is defined as the felonious taking of money or goods of any value from the person of another in his presence, against his will, by violence or putting him in fear. *S. v. Stewart,* 255 N.C. 571, 122 S.E. 2d 355; *S. v. Bell,* 228 N.C. 659, 46 S.E. 2d 834; *S. v. Burke,* 73 N.C. 83. The gist of the offense of robbery with firearms is the accomplishment of the robbery by the use of or threatened use of firearms or other dangerous weapon. *S. v. Mull,* 224 N.C. 574, 31 S.E. 2d 764.

The indictment in the instant case is sufficient to meet the requirements of G.S. 14-87, and the allegation that the intent to convert the personal property stolen to the defendant's own use is not required to be alleged in the bill of indictment. *S. v. Brown,* 113 N.C. 645, 18 S.E. 51; *S. v. Stewart, supra; S. v. Rogers,* 246 N.C. 611, 99 S.E. 2d 803.

In the case of *S. v. Lunsford,* 229 N.C. 229, 49 S.E. 2d 410, relied on by the appellant, a new trial was granted because the court in its charge to the jury inadvertently failed to explain to the jury what constitutes felonious intent in the law of robbery. In the instant case, the court fully instructed the jury as to what is meant by a felonious taking. *Cf. S. v. Chase,* 231 N.C. 589, 58 S.E. 2d 364. This assignment of error is overruled.

Appellant's assignment of error challenging the correctness of the judgment entered on the verdict returned by the jury is well taken and must be sustained.

The jury returned a verdict of guilty of robbery and the court below imposed a sentence of not less than fifteen nor more than twenty years in the State's prison. When, on a charge of robbery with firearms or other dangerous weapon, the jury returns a verdict of guilty of robbery, the maximum sentence that may be imposed is ten years. *In re Ferguson,* 235 N.C. 121, 68 S.E. 2d 792. *Cf. S. v. Seymour,* 265 N.C. 216, 143 S.E. 2d 69.

This case is remanded to the Superior Court of Sampson County with directions to vacate the sentence imposed by Judge Morris and to enter in lieu thereof a sentence which in no event may exceed the statutory limit of ten years. The prisoner is entitled to credit thereon for the time served.

The remaining assignments of error present no sufficient prejudicial error to warrant a new trial and they are overruled.

Remanded.

JAMES S. MURPHY AND G. GORDON HACKER v. BARNETT M. HOVIS AND WIFE, MARIE LENA HOVIS, AND BARBARA HOVIS.

(Filed 13 October, 1965.)

Fraudulent Conveyances § 3—

Where there is no evidence that the grantee accepted the deed with intent to delay, hinder or defraud creditors of the grantor, nonsuit is properly entered, notwithstanding evidence that the consideration for the deed was less than the reasonable market value of the land and that the grantor executed the deed with intent to delay, hinder or defraud creditors.

APPEAL by plaintiffs from *Farthing, J.,* May 1965 Session of LINCOLN.

Action by plaintiffs, judgment creditors of Barbara Hovis, to set aside a deed dated March 28, 1963, from Barbara Hovis to Barnett M. Hovis and wife, Marie Lena Hovis, conveying described lands in Lincoln County, North Carolina, on the ground said conveyance was voluntary, without consideration and made with intent to delay, hinder and defraud plaintiffs.

The agreed case on appeal and the documentary evidence disclose the following facts: On July 1, 1963, in the Superior Court of Gaston County, North Carolina, plaintiffs obtained a judgment by default against Barbara Hovis for $5,000.00 plus interest and costs. On December 16, 1963, plaintiffs caused execution to be issued on said judgment to the Sheriff of Lincoln County. The execution was returned by

said Sheriff with the notation: "After a careful check we find that Barbara Hovis has no property in Lincoln County."

Plaintiffs offered evidence tending to show no payment had been made on their said judgment against Barbara Hovis.

Plaintiffs offered in evidence the record of the deed they attack, to wit, the deed of March 28, 1963. This deed recites it is made "in consideration of ONE HUNDRED ($100.00) DOLLARS and other valuables to her paid by PARTIES OF THE SECOND PART." It also provides it is made subject "to a Deed of Trust executed by BARBARA HOVIS, Unmarried, to Sheldon M. Roper, Trustee, for the First Federal Savings and Loan Association of Lincolnton, Dated, 13th January, 1961, . . . securing $5,000.00 which the PARTIES OF THE SECOND PART assumes *(sic)* and agrees *(sic)* to pay off as the same comes due." Plaintiffs also offered in evidence the record of said deed of trust to Sheldon M. Roper, Trustee, securing an indebtedness of $5,000.00 of Barbara Hovis to the First Federal Savings and Loan Association of Lincolnton, N. C.

Plaintiff James S. Murphy was permitted to testify that in his opinion the subject land on March 28, 1963 "was worth in excess of $10,000.00."

At the conclusion of plaintiffs' evidence, the court, upon defendants' motions, entered judgment of involuntary nonsuit. Plaintiffs excepted and appealed.

Childers & Fowler for plaintiff appellants.
Don M. Pendleton and Sheldon M. Roper for defendant appellees.

PER CURIAM. In *Aman v. Walker,* 165 N.C. 224, 81 S.E. 162, it is stated: "If the conveyance is upon a valuable consideration *and made with the actual intent to defraud creditors upon the part of the grantor alone, not participated in by the grantee* and of which intent he had no notice, it is valid." See *Bunn v. Harris,* 216 N.C. 366, 5 S.E. 2d 149.

Whether adequate or inadequate, the evidence discloses the consideration for said deed was "a valuable consideration."

Conceding, without deciding, that the evidence, when considered in the light most favorable to plaintiffs, was sufficient to show a consideration substantially less than the reasonable market value of the subject lands as of March 28, 1963, and that Barbara Hovis executed and delivered the deed with intent to delay, hinder and defraud plaintiffs, her lawful creditors, the record discloses no evidence tending to show Barnett M. Hovis or Marie Lena Hovis accepted said deed with intent to delay, hinder and defraud plaintiffs. Indeed, the record contains no evidence that they or either of them had any knowledge or

notice of the judgment plaintiffs had obtained in Gaston County or of other obligations, if any, of Barbara Hovis. Hence, on the ground indicated, the judgment of nonsuit must be and is affirmed.

Affirmed.

HUGH G. CASEY, JR., ADMINISTRATOR OF THE ESTATE OF JOHNNY RAY HUNSUCKER, PLAINTIFF v. MARY E. POPLIN, ADMINISTRATRIX OF THE ESTATE OF JONAH RICHARD BURLESON; JAMES ARCHIE REVELS; ROBERT EDWARD LEE MARTIN; LAURINBURG MILLING COMPANY; CAROLINA FLEETS, INC., AND W. R. BONSAL, CO., INC., DEFENDANTS.

(Filed 13 October, 1965.)

Automobiles § 43—

Evidence that the driver of the truck in which plaintiff's intestate was a passenger ran off the highway to his right, cut back across the center line and skidded sideways out of control into a tractor-trailer, traveling in the opposite direction, and that a third truck ran into the wreckage before the driver could stop it, *held* to disclose that the negligence of the driver of the vehicle in which plaintiff's intestate was riding was the sole proximate cause of the accident, and the action was properly dismissed as to the drivers and owners of the other vehicles.

APPEAL by plaintiff from *Huskins, J.*, June 14, 1965 Schedule B. Civil Session, MECKLENBURG Superior Court.

In this civil action the plaintiff administrator of Johnny Ray Hunsucker alleged and offered evidence tending to show that on July 24, 1963, his intestate was a passenger in a 1959 Chevrolet pickup truck owned and operated by Jonah Richard Burleson easterly on U. S. Highway 74 near Wadesboro. The pickup truck suddenly left its proper lane of travel, cut across the dividing line in front of and collided with a 1963 Ford tractor-trailer unit owned by Laurinburg Milling Company and driven westerly by its agent James Archie Revels. The plaintiff alleged that Burleson's negligence was a proximate cause of the collision and fatal injuries suffered by the plaintiff's intestate.

The plaintiff also alleged that Revels was negligent in that he was driving too fast and saw or should have seen the Burleson pickup out of control in his lane of traffic in time to have stopped and avoided the collision and resulting injuries. The plaintiff further alleged that a truck owned by W. R. Bonsal Company and operated by its agent, Robert Edward Lee Martin, struck the Burleson pickup after its collision with the Laurinburg vehicle and that Bonsal's driver was following

the Burleson vehicle too closely and negligently failed to stop before running into the wreckage.

The evidence disclosed that both Burleson and Johnny Ray Hunsucker were thrown from the Burleson vehicle by its collision with the Laurinburg tractor-trailer unit; that Burleson was killed and plaintiff's intestate so severely injured that he died four days later.

When the plaintiff rested, all defendants except the administrator of Burleson demurred to the evidence. The court sustained the demurrers and dismissed the actions as to them. The jury answered the issue of negligence and damages against Burleson's personal representative. The plaintiff appealed from the judgment sustaining the demurrers.

Bradley, Gebhardt, DeLaney & Millette by Samuel M. Millette, Reginald S. Hamel for plaintiff appellant.

Richard L. Brown, Jr., for defendants Robert Edward Lee Martin and W. R. Bonsal Company, Inc., appellees.

Craighill, Rendleman & Clarkson for defendants James Archie Revels and Laurinburg Milling Company, appellees.

PER CURIAM. The evidence, when fairly analyzed, disclosed that the Burleson pickup truck ran off the travel portion of the highway to the driver's right, cut back across the center line and skidded sidewise out of control into the Laurinburg tractor-trailer's travel lane where the two vehicles collided. Burleson was killed instantly and plaintiff's intestate received injuries from which he died four days later. The evidence disclosed that both Burleson and plaintiff's intestate were thrown from the pickup as the result of the collision with the Laurinburg tractor-trailer unit and that thereafter the Bonsal truck ran into the wreckage before Martin was able to stop.

The plaintiff's evidence, under fair analysis, fails to disclose actionable negligence on the part of any of the defendants except Burleson. Judge Huskins properly sustained the demurrers and dismissed the action against all other defendants. The judgment entered by Judge Huskins was proper under the evidence and is

Affirmed.

STATE v. LONNIE CORNELIUS.

(Filed 13 October, 1965.)

Criminal Law § 107—

An inadvertence in stating the contentions of the parties or in recapitulating the evidence must be called to the trial court's attention in time for correction.

APPEAL by defendant from *Fountain, J.*, May Criminal Session 1964 of MECKLENBURG.

The defendant was tried and convicted upon a bill of indictment charging that with intent to kill, the defendant did assault one Willie Roy McNeill with a deadly weapon, to wit, a shot gun, inflicting serious injuries not resulting in death.

The defendant entered a plea of not guilty. The jury returned a verdict of guilty of assault with a deadly weapon. The defendant was given a sentence of eighteen months in jail, to be assigned to work under the supervision of the State Prison Department.

Defendant, through his counsel, gave notice of appeal, but his counsel, through no fault of the defendant, failed to perfect the appeal. We allowed *certiorari* on 6 April 1965 and set the case in its regular order for the Fall Term 1965.

Attorney General Bruton, Deputy Attorney General Ralph Moody, Staff Attorney Andrew A. Vanore, Jr., for the State.

Charles V. Bell for defendant.

PER CURIAM. The appellant has only one assignment of error and it purports to be based on a portion of the charge to which no exception was taken as required by the Rules of this Court. Even so, the portion of the charge complained of is set out under the assignment of error and consists in its entirety of a contention of the State.

We have repeatedly held that an inadvertence in stating contentions or in recapitulating the evidence must be called to the attention of the court in time for correction. After verdict, the objection comes too late. *S. v. Case,* 253 N.C. 130, 116 S.E. 2d 429; *S. v. Holder,* 252 N.C. 121, 113 S.E. 2d 15; *S. v. Adams,* 245 N.C. 344, 95 S.E. 2d 902.

There is no contention that the State's evidence was not sufficient to support the verdict.

In our opinion, the defendant has had a fair trial, free from any prejudicial error, and the verdict and judgment entered below will not be disturbed.

No error.

MARVIN C. HULLETT AND WIFE, FRANCES C. HULLETT v. CLIFFORD LEE GRAYSON AND WIFE, BARBARA J. GRAYSON.

(Filed 13 October, 1965.)

1. Deeds § 19—

Restrictive covenants are not favored and are to be strictly construed against limitation on use.

2. Same—

A restrictive covenant against a temporary building, garage, garage apartment or trailer for temporary or permanent use *held* ambiguous, and the courts will not restrain the use by the grantee of a detached garage of permanent-type construction.

APPEAL by plaintiffs from *Huskins, J.*, May 31, 1965, Regular Civil Session of MECKLENBURG.

James B. Ledford and L. Glenn Ledford for plaintiffs.
Hasty, Hasty and Kratt for defendants.

PER CURIAM. Plaintiffs sue for a mandatory injunction to require defendants to remove from their (defendants') property a garage. Plaintiffs allege that the structure violates a restrictive covenant which runs with the land.

Plaintiffs own Lot 9 in Block A, and defendants own Lot 3 in Block A, of a subdivision as shown on a map recorded in Map Book 7, at page 593, Registry of Mecklenburg County. Defendants' residence is located on their lot. Plaintiffs' and defendants' lots are subject to restrictive covenants, among others the following:

> "No temporary building, garage, garage apartment or trailer shall be erected thereon for temporary or permanent use."

Defendants have erected on their lot a building, detached from their dwelling. The building is of permanent, rather than temporary, construction and is for use as a garage.

Plaintiffs contend that the garage violates the above restriction. They say that the adjective "temporary," which immediately precedes the noun "building," modifies "building," but not "garage," "garage apartment" or "trailer," that the phrase "for temporary or permanent use" bears out this construction, and that the restriction prohibits the erection of a separate detached garage, temporary or permanent, on the lot.

On the other hand, defendants insist that the adjective "temporary" preceding the word "building," modifies "building," "garage," "garage apartment" and "trailer," that the phrase relating to use means that any

such temporary structure may not be used either temporarily or permanently, and that the restriction does not prevent the erection of a detached garage of permanent construction.

The facts are not in dispute; the controversy relates solely to the interpretation of the restriction quoted above. The court below, being of the opinion that "the restriction does not prevent the erection upon said property of a detached garage of permanent type construction," denied injunctive relief and dismissed the suit.

The restriction is ambiguous and its language is susceptible of various conflicting interpretations. When it is considered in relation to other restrictions imposed by the deed, its meaning becomes even more doubtful. Restrictive covenants are not favored and are to be strictly construed against limitation on use. In the absence of clear and unequivocal expressions, restrictive covenants are not to be expanded and all doubts are to be resolved in favor of the free use of the property. *Scott v. Board of Missions,* 252 N.C. 443, 114 S.E. 2d 74. The restriction in question is of such doubtful meaning that the court, in the exercise of its equity jurisdiction, could not in good conscience grant the relief sought in this action.

Affirmed.

CATHERINE E. JACOBS v. BAREFOOT OIL COMPANY, INC. AND PERCY V. BAREFOOT.

(Filed 13 October, 1965.)

APPEAL by defendants from *Clark (E.B.), S.J.,* 5 April 1965 Session of SAMPSON.

This is a civil action for personal injuries arising out of a collision between plaintiff's automobile and a truck owned by defendant Barefoot Oil Company, Inc. (hereinafter called Company), and being driven at the time by the individual defendant, Percy V. Barefoot (hereinafter called Barefoot). Barefoot was, admittedly, the agent of defendant Company at the time of the collision, and was acting in the course of his employment.

The collision occurred at approximately 7:30 a.m., 27 September 1963, at a point where Rural Paved Road (R.P.R.) 1338 intersects U. S. Highway 421, a north-south highway, from the west, in Sampson County, North Carolina. According to plaintiff's evidence, she had entered U. S. 421 about one mile south of said intersection from a

service station on the western side of said highway. Plaintiff had seen defendant Company's truck, just prior to entering U. S. 421, some 400 yards to the south, proceeding north. Plaintiff testified that she gave both an arm and electrical signal indicating a left turn onto R.P.R. 1338 some 600 feet south of said intersection. Plaintiff "looked back about 150 feet and the road was clear behind" her. As she negotiated the turn onto R.P.R. 1338 from U. S. 421, the collision with defendant Company's truck occurred, causing injuries for which this action was instituted.

Barefoot's testimony was to the effect that when plaintiff entered U. S. 421 from the service station he had to "brake" his truck "to keep from hitting it (plaintiff's automobile) and almost hit it." Barefoot continued "to gain" on plaintiff's automobile until the automobile approached an intersection with a road to the east, some 150 to 175 feet south of the intersection with R.P.R. 1338 to the west, at which time a right-turn electrical signal was indicated by plaintiff's automobile. Plaintiff's car did not turn, but continued north on U. S. 421 until it reached the intersection with R.P.R. 1338 from the west. Barefoot testified that plaintiff's automobile "stopped in front of me and I locked my brakes and blew my horn, and went to the left of it so I would miss it." As Barefoot "went to the left," the collision with plaintiff's automobile occurred. Barefoot contends he saw no signal indicating a left turn, and that he was some four car lengths behind plaintiff when he "went to the left" to avoid hitting plaintiff's automobile.

Barefoot was driving a 1963 Mack truck and oil tanker which was 50 or 55 feet long. The truck and tanker, including the fuel oil that was being transported, weighed 65,000 pounds. Barefoot's testimony is to the further effect that plaintiff's car was traveling about 25 miles an hour; that Barefoot was driving about 40 miles an hour, and at the time of the accident Barefoot was shifting gears in an effort to gain speed. On cross examination Barefoot testified: "When I saw the car in front of me, * * * I pulled to the left and hit my brakes to miss the auto. I would not have been able to stop in that lane (the right lane) without hitting the car. When I cut to the left, I was about a couple of car lengths behind the car."

It was stipulated that, "On September 27, 1963, there was upon the surface of Highway 421 a solid yellow line four inches wide extending from the point where Rural Paved Road 1338 enters U. S. Highway 421 from the east southwardly 500 feet. This line was in the right-hand lane for traffic proceeding northwardly along Highway 421 * * *." Between the points where R.P.R. 1338 enters U. S. 421 from the east and the point where R.P.R. 1338 enters said highway from the west, there were upon the surface of U. S. 421 three painted lines; in the

middle of said highway there was a broken white line four inches in width; and on the east and west thereof and four inches therefrom there were solid yellow lines; that all these lines were painted and maintained by the State Highway Commission.

Plaintiff's motions for judgment as of nonsuit on defendant Company's counterclaim for damage to its truck, and on Barefoot's counterclaim for personal injuries were allowed.

The jury returned a verdict in favor of the plaintiff and from the judgment entered on the verdict the defendants appeal, assigning error.

John R. Parker and Nelson W. Taylor for plaintiff.
James F. Chestnutt for defendant.

PER CURIAM. The appellants preserved, brought forward and argued numerous assignments of error. However, a careful review of the evidence, stipulations, admissions, and the charge of the court leads us to the conclusion that prejudicial error amounting to the denial of a substantial right has not been shown; and the burden is on the defendants to show that if the alleged errors had not occurred, there is reasonable probability the result of the trial might have been different. *Waddell v. Carson,* 245 N.C. 669, 97 S.E. 2d 222; *Johnson v. Heath,* 240 N.C. 255, 81 S.E. 2d 657.

The testimony of the defendant Barefoot, in our opinion, was sufficient to establish actionable negligence against the defendants.

The verdict and judgment entered below will not be disturbed.

No error.

CHRISTINE T. YOUNG v. DWIGHT M. LOWIE, JR., BY HIS NEXT FRIEND, JOHN L. WHITLEY; DWIGHT M. LOWIE AND LYDIA B. LOWIE.

(Filed 13 October, 1965.)

APPEAL by defendants from *Hubbard, J.,* June 1965 Civil Session of WILSON.

Civil action by plaintiff, Christine T. Young, who was riding as a passenger in an automobile driven by her husband, Albert G. Young, to recover damages for personal injuries allegedly proximately caused by the negligence of defendant Dwight M. Lowie, Jr., minor son of defendants, Dwight M. Lowie and his wife, Lydia B. Lowie, and a resident in the home, in the operation with their permission of an auto-

mobile jointly owned and maintained by Dwight M. Lowie and his wife, Lydia B. Lowie, for the use and convenience of members of their family as a family purpose car. Five specific allegations of negligence by Dwight M. Lowie, Jr., in the operation of the automobile which collided with the automobile in which plaintiff was a passenger proximately causing her injuries are averred.

Plaintiff's husband, Albert G. Young, instituted a civil action against all three defendants to recover damages for personal injuries growing out of the same collision, and his complaint is identical with the complaint filed by his wife, Christine T. Young, in her action, except as to allegations of personal injuries.

Defendants filed a joint answer in the Christine T. Young case in which they admit that the Lowie car was a family purpose car, but aver that Dwight M. Lowie was sole owner, and deny that Dwight M. Lowie, Jr., was negligent in its operation. Defendants filed a somewhat similar answer in the Albert G. Young case.

The case of plaintiff Christine T. Young against defendants and the case of Albert G. Young against defendants were consolidated for trial. All parties offered evidence. The following issues were submitted to the jury, and answered as indicated:

"1. Were the plaintiffs, Christine T. Young and Albert G. Young, injured and damaged by the negligence of Dwight Lowie, Jr., as alleged in the complaints?

"ANSWER: Yes.

"2. On July 20, 1962 was the 1961 Ford driven by Dwight Lowie, Jr., jointly owned, maintained or controlled by Mr. and Mrs. Lowie?

"ANSWER: Yes.

"3. If it was not jointly owned, maintained or controlled by Mr. and Mrs. Lowie, was the 1961 Ford driven by Dwight Lowie, Jr., owned, maintained or controlled by his father, Mr. Lowie, Sr.?

"ANSWER: ....

"4. Was Dwight Lowie, Jr., operating the Ford automobile with the permission of the owner or owners thereof?

"ANSWER: Yes.

"5. What amount, if any, is the plaintiff, Christine T. Young, entitled to recover?

"ANSWER: $15,000.

"6. What amount, if any, is the plaintiff, Albert G. Young, entitled to recover?

"ANSWER: $750.00."

Judgment was entered in accordance with the verdict that plaintiff Christine T. Young recover jointly and severally from the defendants the sum of $15,000 and her costs, including expert witness fees, and that her husband Albert G. Young recover from the defendants jointly and severally the sum of $750 and his costs. Defendants appealed in the Christine T. Young case only. They did not appeal in her husband A. G. Young's case.

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

Narron, Holdford & Holdford by William H. Holdford for plaintiff appellee.

PER CURIAM. Defendants have 31 assignments of error, but they have only brought forward and discussed in their brief assignments of error as to the admission of evidence over their objections and exceptions, and as to the charge. Assignments of error not set out in appellant's brief and in respect to which no reason or argument is stated or authority cited will be deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 810; 1 Strong's N. C. Index, Appeal and Error, § 38.

Plaintiff's evidence was fully sufficient to carry her case to the jury: defendants do not contend otherwise in their brief. While appellants' well-prepared brief presents contentions involving fine distinctions and differentiations, a careful examination of all their assignments of error brought forward and discussed in their brief discloses no new question or feature requiring extended discussion in the light of the very large number of cases written by this Court in automobile collision cases resulting in damage suits. Neither reversible nor prejudicial error has been made to appear. The jury, under application of settled principles of law, resolved the issues of fact against the defendants. All defendants' assignments of error are overruled. The verdict and judgment below will be upheld.

No error.

LAKE, J., took no part in the consideration or decision of this case.

TALMADGE ANDREWS GIBBS v. CAROLINA POWER & LIGHT COMPANY, ORIGINAL DEFENDANT, AND SKY-LINE CONSTRUCTION COMPANY AND ST. PAUL FIRE AND MARINE INSURANCE COMPANY, ADDITIONAL DEFENDANTS.

(Filed 20 October, 1965.)

1. Judgments § 33; Courts § 9—

Procedural rulings of the court entered in the action prior to voluntary nonsuit are not *res judicata* in a second action instituted after the nonsuit. This result is not affected by the fact that the same judge presided over both actions nor by the fact that the action is against a third person tort-feasor for negligent injury to an employee. G.S. 97-10.2.

2. Indemnity § 2—

A contract under which the contractor for construction and maintenance of transmission lines agrees to indemnify the electric company for "all claims and causes of action of any character which any" of the contractor's employees may have against the electric company resulting from the performance of the contract, *held* to include indemnity against injury to the contractor's employees resulting from the electric company's negligence.

3. Master and Servant § 86—

A provision in a contract for construction work that the contractor should indemnify the contractee for any liability to the employees of the contractor resulting from the negligence of the contractee does not violate G.S. 97-9, since the Workmen's Compensation Act recognizes the right of third parties to enforce contracts of indemnity against employers. G.S. 97-10.2(e).

4. Contracts § 10; Indemnity § 1—

There is a distinction between a contract by which one seeks to exempt himself from liability to an injured party for negligent injury, and a contract whereby a party purchases indemnity from a third person against liability for negligent injury, and contracts of indemnity are not contrary to public policy.

5. Same—

The rule that a public utility may not contract against its own negligence relates to negligence in the performance of one of its duties of public service and not to negligence which is in no way connected with its public service.

6. Same—

Contracts exculpating a person from liability for his own negligence are not favored and are to be strictly construed.

7. Same—

A contract under which an employer, contracting for construction and maintenance of transmission lines, agrees to indemnify the electric company for liability to the contractor's employees for injury resulting from the electric company's negligence is not contrary to public policy, and al-

though it will be strictly construed, will be upheld as to injuries coming clearly within its terms.

8. Pleadings § 8—

A cross-action by defendant against a codefendant or third party must be germane to the claim alleged by plaintiff, and ordinarily must be one in which all the parties have a community interest.

9. Master and Servant § 86—

In an action by an employee against the third person tort-feasor, the tort-feasor is entitled to assert the joint and concurring negligence of the employer, G.S. 97-10.2(e), but the third person tort-feasor is not entitled to litigate in the employee's action its rights under an indemnity contract between it and the employer, and therefore cannot be entitled to have the insurer of the employer's indemnity liability made a party. G.S. 97-10.2(d).

10. Master and Servant § 86—

Where there is an agreement by the employer to indemnify the third person tort-feasor against liability for negligent injury to the employer's workmen, the third person tort-feasor may not claim that the employer is estopped from maintaining the action in the employee's name in regard to that part of the recovery which might go to the employer and its insurer in reimbursement of the sums paid out to the injured employee under the Workmen's Compensation Act, the language of the indemnity agreement being sufficiently broad to cover the entire recovery by the employee.

APPEAL by defendant, Carolina Power & Light Company, from *Martin, S. J.*, March 15, 1965, Civil Session of BUNCOMBE.

This action was instituted 4 August 1964 to recover damages for personal injuries.

The complaint, in brief summary, alleges these facts: Sky-Line Construction Company (Sky-Line) contracted with Carolina Power & Light Company (defendant) to install and repair power lines and equipment at the latter's Swannanoa sub-station, and on 8 August 1961 was engaged in the performance of that work. Plaintiff, an employee of Sky-Line, was working on that job and was injured when an employee of defendant negligently caused wires, with which plaintiff was in contact, to become energized.

Defendant, answering, denied negligence and set up the following further defenses:

(1). Contributory negligence of plaintiff.

(2). Intervening and insulating negligence of Sky-Line.

(3). Concurrent and contributory negligence of Sky-Line.

(4). Estoppel. Sky-Line and plaintiff were subject to and bound by the provisions of the Workmen's Compensation Act. Sky-Line and its insurance carrier, St. Paul Fire and Marine Insurance Company (in-

surer), filed with the Industrial Commission, within 12 months of the date of the injury, a written admission of liability to plaintiff for workmen's compensation benefits and made compensation payments. A contract between defendant and Sky-Line, which was in effect at the time of the injury, contains an indemnity provision which obligates Sky-Line "to indemnify and save this defendant harmless for any sums recovered against defendant in this action." Defendant requested Sky-Line to honor the indemnity agreement and defend this action. Insurer (named above) was obligated by contract to insure Sky-Line's liability under the said indemnity agreement. Sky-Line and insurer refuse to defend the action. The indemnity agreement, insurer's obligation to insure Sky-Line's indemnity liability, and the provisions of G.S. 97-10.2(g) "bar and estop the said employer (Sky-Line) and its said insurer from benefitting from a recovery against this defendant by, or in the name of, the plaintiff." Sky-Line and insurer "are necessary, or at least proper, parties to the final determination of the matters of estoppel and set-off."

The answer also sets up a cross-action against Sky-Line and insurer in substance as follows: By reason of the indemnity agreement and insurer's obligation to insure Sky-Line's indemnity liability, "this defendant is entitled to recover over against them in this action (a) such sum as is necessary to fully indemnify it against the recovery, if any, which is had by the plaintiff against this defendant, and (b) such sum as is expended by defendant in conducting the defense to plaintiff's action, all of which are directly connected with and grow out of the plaintiff's action against this defendant." (The contract containing the alleged indemnity agreement is attached to the answer as an exhibit.)

On motion of defendant, the clerk of superior court entered an order making Sky-Line and insurer additional parties defendant.

Sky-Line and insurer, in separate pleadings, moved to strike from defendant's answer all references to the indemnity agreement and to insurer, the entire second and fourth further defenses, and the entire cross-action. They also (pleading separately) filed demurrers and included therein motions to strike their names from the pleadings as additional defendants, dismiss them as parties and dismiss the cross-action. The grounds for demurrer are: (a) the cross-action does not state facts sufficient to constitute a cause of action; (b) the cross-action is based upon matters and things not connected with plaintiff's cause of action; and (c) the cross-action and joinder of additional defendants constitute a misjoinder of parties and causes of action.

Plaintiff moved to strike from the answer all of the matters referred to in additional defendants' motions, and some additional matters not

of importance on this appeal. Plaintiff also moved to dismiss the cross-action and the joinder of the additional defendants, on the ground that (a) the cross-action is based upon matters and things not connected with plaintiff's cause of action, and (b) the cross-action and joinder of additional defendants constitute a misjoinder of parties and causes of action.

The court denied all of the motions of Sky-Line and plaintiff (relating to Sky-Line), overruled Sky-Line's demurrer, and ordered the following:

> "3. That the demurrer filed by the additional defendant St. Paul Fire and Marine Insurance Company is allowed, and said cross action is hereby dismissed as to said defendant, and its name and any reference thereto stricken from the pleadings, and by this ruling on the demurrer the motion to strike of St. Paul Fire and Marine Insurance Company becomes moot;
>
> "4. That the cross action of the defendant Carolina Power & Light Company against the defendant Sky-Line Construction Company is deferred for determination until Judgment is obtained in the action of the plaintiff against the defendant, Carolina Power & Light Company, then immediately thereafter the alleged cross action of the defendant, Carolina Power & Light Company, against the Sky-Line Construction Company shall be called for trial or determination; that in the event of a money Judgment being rendered in favor of the plaintiff, no execution is to be issued on said Judgment upon the posting of adequate supersedeas bond by the defendant, Carolina Power & Light Company."

Defendant appeals.

Riddle & Briggs for plaintiff.
Uzzell & DuMont for Additional Defendants.
Sherwood H. Smith, Jr., A. Y. Arledge, and Van Winkle, Walton, Buck & Wall for defendant.

MOORE, J. Defendant's assignments of error may be discussed under two general questions.

First. Did the court below err in sustaining insurer's demurrer to defendant's cross-action, in dismissing the cross-action as to insurer, and in ordering the name of insurer and all references thereto stricken from the pleadings? Defendant insists that the question should be answered in the affirmative, and presents several propositions in support of its contention.

(a). Defendant says that a prior order in the cause overruled the demurrer and denied the motions of insurer, the prior order is *res judicata* and the law of the case, and the court was without authority to overturn the prior rulings.

The pertinent facts relating to the prior order are these: The present action is the second of two actions instituted by the plaintiff against defendant on the same cause of action. The first action was begun on 20 November 1962, more than a year after the injury, and was terminated by judgment of voluntary nonsuit entered 30 July 1964. This second action was instituted 4 August 1965. The complaint in the second action is identical with the complaint filed in the first action. The answer of defendant to the complaint in the first action contained all of the defenses and further defenses and the cross-action set out in the answer to the complaint in the second action. As in the second action, Sky-Line and insurer were made additional parties defendant in the first action. They filed demurrers and motions raising the identical questions raised by their demurrers and motions in the second action. The court overruled the demurrers and motions in the first action, and the additional defendants did not seek appellate review of those rulings. By coincidence the same judge (Martin, S. J.) ruled on the demurrers and motions in both actions. In the second action the demurrer and motions of insurer were sustained and the cross-action as against Sky-Line was deferred until after judgment in plaintiff's action. Defendant contends that the court, when the demurrers and motions were heard in the second action, was bound by his rulings and order in the first action and was without authority to change or alter them, that the order in the first action became the law of the case and was *res judicata* of the matters therein determined.

Parenthetically, there was one difference between the answer filed by defendant in the two actions. In the answer in the first action (but not the second) defendant set up a plea in abatement "based on the allegations that the first action was brought under the provisions of the Workmen's Compensation Act at a time when the right to sue was in the employer and its insurer, without alleging in the complaint that the action was being prosecuted by the subrogated employer or its insurer in the name of the employee, as was held in *Taylor v. Hunt*, 245 N.C. 212, 95 S.E. 2d 589 (1956), to be necessary." The *Taylor* case holds that if, at the time of the institution of an action against a negligent third party, the right of action is in the employer or his insurance carrier, the action may not "be maintained in the name of the injured employee, unless the complaint discloses that the action was instituted in the name of such injured employee by either the employer or his

carrier." Sky-Line or insurer had the right of action when the first action was filed in the instant cause. G.S. 97-10.2(b), (c). The complaint in the first action did not disclose that the action was instituted in the name of plaintiff (employee) by Sky-Line or insurer. Plaintiff took a voluntary nonsuit. He thereafter instituted the second action within "sixty (60) days before the expiration of the applicable statute of limitations," when the right of action was in him. G.S. 97-10.2(c).

Does the doctrine of *res judicata* apply as contended by defendant? A voluntary nonsuit is not *res judicata* in a subsequent action brought in the same cause of action. *Howle v. Express, Inc.,* 237 N.C. 667, 75 S.E. 2d 732; *Starling v. Cotton Mills,* 168 N.C. 229, 84 S.E. 388. "Judgment of nonsuit, of *non pros,* or *nolle pros,* of dismissal, are exceptions to the general rule that when the pleadings, the court, and the parties are such as to permit of a trial on the merits, the judgment will be considered as final and conclusive of all matters that could have been tried. A dismissal or nonsuit not determining the rights of the parties cannot support the plea of *res judicata.*" *Steele v. Beaty,* 215 N.C. 680, 2 S.E. 2d 854. "A nonsuit 'is but like the blowing out of a candle, which a man at his own pleasure may light again.' " *Grimes v. Andrews,* 170 N.C. 515, 521, 87 S.E. 341. "The general rule is that in the absence of statute, and where the answer seeks no affirmative relief, a dismissal, discontinuance or nonsuit leaves the situation as if the suit had never been filed and carries down with it previous rulings and orders in the case." 11 A.L.R. 2d 1411, where the cases are collected and many of them annotated and discussed. See also 17 Am. Jur., Dismissal etc., § 86, p. 158. "It has been held that where an action or proceeding has been dismissed, rulings preceding the final judgment of dismissal are, as a general proposition, not capable of becoming *res judicata.*" 11 A.L.R. 2d 1420. ". . . the effect of a judgment of voluntary nonsuit is to leave the plaintiff exactly where he was before the action was commenced." 17 Am. Jur., 161.

The foregoing principles have been almost universally adopted and applied. Such exceptions as exist are not based on any "reasoned theoretical viewpoint" in conflict with the usual rule but may be explained "upon the unusual nature of the particular facts and circumstances." 11 A.L.R. 2d 1423-4. In the instant case we find nothing justifying a deviation from the general rule. The cases cited by defendant (*Wall v. England,* 243 N.C. 36, 89 S.E. 2d 785; *Greene v. Laboratories, Inc.,* 254 N.C. 680, 120 S.E. 2d 82) do not come to grips with the question here presented. They do not involve actions instituted after voluntary nonsuits had been taken in prior actions on the same causes of action. They hold that one superior court judge may not

modify, overrule or change the judgment of another superior court judge previously made *in the same action.* 1 Strong: N. C. Index, Courts, § 9. And it is not to be understood that the fact that Judge Martin made the two orders in both actions has any significance in this situation. The results would be the same had the orders been made by different judges.

Defendant calls to its aid the proposition that an action against a third party by an employee or employer to recover for injury to employee caused by the alleged negligence of the third party is governed by the provisions of the Workmen's Compensation Act, G.S. 97-10.2, and not by the Code of Civil Procedure. *Lovette v. Lloyd,* 236 N.C. 663, 73 S.E. 2d 886. The proposition is true in so far as the provisions of G.S. 97-10.2 (formerly G.S. 97-10) are in conflict with or supersede any of the rules of civil procedure. But we find nothing in that statute to sustain defendant's position on the point under consideration. Furthermore, defendant insisted in the first action that plaintiff could not maintain that action at all, upon the pleadings as cast, because of noncompliance with the Workmen's Compensation Act. *Taylor v. Hunt, supra.* If this be true, the action was a nullity and any rulings and orders made therein were incapable of supporting a plea of *res judicata* in the second action.

(b) Defendant attached to the answer a copy of a contract between it and Sky-Line containing an agreement by Sky-Line to indemnify defendant for certain losses and liabilities. The contract is by reference made a part of the answer, and for the purposes of the demurrer its existence and contents are admitted. Defendant alleges in connection therewith that insurer has insured Sky-Line's liability under the indemnity agreement. Defendant contends that the indemnity agreement is valid, applicable to the liability which plaintiff seeks to impose, and its rights thereunder are preserved to it by the Workmen's Compensation Act, G.S. 97-10.2(e). On the other hand, appellees contend that the agreement does not include indemnification for injuries to Sky-Line's employees resulting from defendant's own negligence, and, if it does, it is contrary to public policy and to G.S. 97-9 and therefore void.

The pertinent provisions of the indemnity agreement are:

> "Contractor (Sky-Line) shall indemnify, defend, and save harmless Company (defendant) from all liability, loss, cost, claim, claims, damage, expense judgment *(sic)*, and awards arising or claimed to have arisen: . . . (b) out of injuries sustained . . . by Contractor's employees . . . of such nature and arising under such circumstances as to create liability therefor by Contractor

> or by Company under the Workmen's Compensation Act . . ., including also all claims and causes of action of any character which any such employees, the employers of such employees, and all persons or concerns claiming by, under or through them, or either of them, may have or claim to have against Company resulting from or in any manner growing out of any such injuries sustained. . . ."
>
> ". . . In case Company should later require it, Contractor further agrees to . . . satisfactorily insure, or otherwise satisfactorily secure, the performance of this indemnity agreement in respect to all . . . matters aforesaid which are not secured by Workmen's Compensation insurance."

The language used is broad, comprehensive and without ambiguity. Sky-Line agrees to indemnify defendant with respect to all claims and causes of action of *any character* which Sky-Line's employees, Sky-Line or insurer may have or claim to have growing out of injuries to Sky-Line's employees which create liability therefor by Sky-Line or defendant under the Workmen's Compensation Act. The injuries to plaintiff created liability therefor by Sky-Line under the Act, and Sky-Line admitted liability. The Act permits suit by employee against defendant upon the facts alleged. The contract covers claims and causes of action *of any character* and does not exclude causes of action based on defendant's negligence. In a clause not copied herein, it requires Sky-Line to carry workmen's compensation insurance for the protection of its employees. If the indemnity clause does not provide defendant indemnity against claims of the character of plaintiff's claim, it has no meaning or purpose. The indemnity applies to claims based on defendant's negligence for there is no other class of claims for which defendant would be responsible to Sky-Line's employees, who would at the same time be entitled to compensation under the Workmen's Compensation Act. This reasoning has been advanced by the courts in numerous cases involving indemnity contracts similarly worded. *Louisville & N. R. Co. v. Atlantic Co.*, 19 S.E. 2d 364 (Ga. 1942); *Griffiths v. Broderick*, 182 P. 2d 18 (Wash. 1947); *General Accident Fire & Life Assurance Corp., Ltd. v. Smith & Oby Co.*, 272 F. 2d 581 (6C 1959); *Cacey v. Virginian Ry. Co.*, 85 F. 2d 976 (4C 1936).

This brings us to the question whether the indemnity contract is void as violative of G.S. 97-9 and as against public policy.

When certain specified conditions are complied with, G.S. 97-9 limits the liability of an employer for personal injury or death by accident of his employees as provided in the Workmen's Compensation Act. But the Act recognizes the right of third parties to enforce express con-

tracts of indemnity against employers. G.S. 97-10.2(e). Therefore, the contract in question does not contravene the Act. Furthermore, the statutory recognition of third parties' rights under such contracts is a legislative declaration of public policy.

There is a distinction between contracts whereby one seeks to wholly exempt himself from liability for the consequences of his negligent acts, and contracts of indemnity against liability imposed for the consequences of his negligent acts. The contract in the instant case is of the latter class and is more favored in law.

Freedom of contract is a fundamental basic right. However, the public interest is paramount. A public service corporation or a public utility cannot contract against its negligence in the regular course of its business or in performing one of its duties of public service. *Insurance Association v. Parker*, 234 N.C. 20, 65 S.E. 2d 341; *Hill v. Freight Carriers Corp.*, 235 N.C. 705, 71 S.E. 2d 133. Even a public service corporation is protected by an exculpatory clause when the contract is casual and private and in no way connected with its public service. *Singleton v. R. R.*, 203 N.C. 462, 166 S.E. 305; *Slocumb v. R. R.*, 165 N.C. 338, 81 S.E. 335. However, exculpatory clauses, not involving or relating to duties to the public, are not favored and are to be strictly construed. *Winkler v. Amusement Co.*, 238 N.C. 589, 79 S.E. 2d 185. In evaluating the force and effect of such provisions consideration must be given to the circumstances surrounding the parties and the object in view which induced their inclusion in the contract. *Hill v. Freight Carriers Corp., supra; Slocumb v. R. R., supra.* But when the language of the contract and the intent of the parties are clearly exculpatory, the contract will be upheld. *Hall v. Refining Co.*, 242 N.C. 707, 89 S.E. 2d 396.

Defendant's relationship to Sky-Line was not in the regular course of its business of furnishing electric current to the public and not in the performance of a duty of public service. Furthermore, the agreement was not exculpatory. As observed above, the workmen's compensation law, G.S. 97-10.2(e), recognizes the right of third parties to provide by contract with employers for indemnity against liability to employees for the consequences of their negligence and to enforce the contracts. See also *Hunsucker v. Chair Co.*, 237 N.C. 559, 75 S.E. 2d 768. It is not contrary to public policy for an indemnitee to contract with another to save him harmless from liability to a third party. *Markham v. Improvement Co.*, 201 N.C. 117, 158 S.E. 852; *Louisville & N. R. Co. v. Atlantic Co., supra; Indemnity Insurance Company of North America v. Koontz-Wagner Electric Company*, 233 F. 2d 380 (7C

1956). See also 42 C.J.S., Indemnity, § 7, p. 573; 17 C.J.S., Contracts, § 262, pp. 1167-8.

(c). Defendant contends that it is necessary and proper that insurer be joined as an additional defendant "to litigate its liability as insurer of Sky-Line's indemnity agreement" for the purposes of defendant's cross-action and Fourth Further Defense.

The following pertinent principles are firmly established in our law of procedure. A cross-action by a defendant against a codefendant or third party must be germane to the claim alleged by the plaintiff, *i.e.*, the cross-action must be in reference to plaintiff's claim and based on an adjustment of that claim. Independent and irrelevant causes of action may not be litigated by cross-action. *Gaither Corp. v. Skinner,* 238 N.C. 254, 77 S.E. 2d 659; *Clothing Store v. Ellis Stone & Co.*, 233 N.C. 126, 63 S.E. 2d 118; *Schnepp v. Richardson,* 222 N.C. 228, 22 S.E. 2d 555; *Board of Education v. Deitrick,* 221 N.C. 38, 18 S.E. 2d 704; *Montgomery v. Blades,* 217 N.C. 654, 9 S.E. 2d 397. Ordinarily only those matters germane to the cause of action asserted in the complaint and in which all of the parties have a community of interest may be litigated in the same action. *Wrenn v. Graham,* 236 N.C. 719, 74 S.E. 2d 232; *Horton v. Perry,* 229 N.C. 319, 49 S.E. 2d 734. ". . . a plaintiff may not be required to cool his heels in an anteroom while defendants fight out, by cross-action, a claim, one against the other, which is independent of and irrelevant to the cause he asserts." *Wrenn v. Graham, supra.*

Eledge v. Light Co., 230 N.C. 584, 55 S.E. 2d 179, is in point. It was an action for wrongful death. Plaintiff's intestate suffered fatal injuries while repairing an electric line; he was an employee of one Hayes. Hayes had contracted to construct and repair electric lines for defendant Power Company. Hayes and his insurer agreed to pay compensation. Plaintiff sued defendant Power Company, alleging actionable negligence of defendant. Defendant answered and, among other defenses, pleaded an indemnity agreement with Hayes, wherein Hayes obligated to indemnify and hold defendant harmless for any damages or other liability in connection with the work. Hayes and his insurer were made additional defendants. They moved to strike from the answer all references to the indemnity agreement. The motion was allowed. On appeal this Court held that the allegations of defendant relative to the contract of indemnity were properly stricken. We observe that at a later point in the opinion the Court said that defendant "was not entitled to be indemnified against its own negligence." However, on rehearing it was stated: "Observations in the opinion must be read in the light of the matters appearing in the present record. The

decision is not to be construed to lay down any general rule invalidating contracts for indemnity against consequences of future acts of negligence." The result reached in the original opinion, striking the references to the indemnity agreement from the answer, was not disturbed. *Eledge v. Light Co.*, 231 N.C. 737, 57 S.E. 2d 306.

Defendant has no rights against insurer which are superior to its rights against Sky-Line. Plaintiff is not privy to or bound by the indemnity agreement between defendant and Sky-Line or the insuring agreement between Sky-Line and insurer with respect to the indemnity agreement. The rights and obligations with respect to indemnity as between defendant and Sky-Line, between defendant and insurer, and between Sky-Line and insurer, are not germane to plaintiff's cause of action. There is not that community of interest in these various causes of action which will permit them to be litigated in plaintiff's action.

Unless there is some policy or provision of the workmen's compensation law which requires that defendant's cross-action against insurer be litigated in plaintiff's action, the judgment below must be affirmed. The Workmen's Compensation Act provides that an action against a third party by employee, employer or insurer "shall be brought in the name of the employee . . . and the employer or the insurance carrier *shall not be a necessary or proper party thereto.*" G.S. 97-10.2(d). And where the third party defendant sets up in his answer the joint or concurring negligence of employer, an issue shall be submitted to the jury on this question, and "employer shall have the right to appear, to be represented, to introduce evidence, to cross-examine adverse witnesses and to argue to the jury as to this issue as fully as though he were a party although not named or joined as a party to the proceeding." G.S. 97-10.2(e). Employee "is to have the exclusive privilege to prosecute his action to a final conclusion without the presence of either the employer or the insurance carrier unless extraordinary circumstances require their joinder." *Lovette v. Lloyd, supra.* It is very apparent that it is the policy of the law that an action by an employee against a third party shall not be encumbered by including as parties, plaintiff or defendant, the employer or insurance carrier, nor by bringing in irrelevant causes of action. The Workmen's Compensation Act provides, however, that the third party shall have no right (other than to assert the joint or concurring negligence of the employer, as above set out) "by way of contribution or *otherwise* against the employer, except any right which may exist by reason of an express contract of indemnity between the employer and the third party, which was entered into prior to the injury to the employee." G.S. 97-10.2(e). In our opinion this provision does not require or even contemplate that such right of

indemnity be litigated in plaintiff's action. The statute, before setting out this provision, indicates the manner of the trial of plaintiff's action and the relative position of the issues. The indemnity provision deals with substantive rights and not procedure. There is nothing so "extraordinary" in the instant case as to require that insurer be made a party. Defendant had no right to insist that Sky-Line be a party, and certainly there is no statutory provision for making its insurance carrier a party.

Defendant is in no better position with respect to the Fourth Further Defense than with the cross-action. Such defense seeks to set up the indemnity agreement of Sky-Line and the insuring agreement of insurer as a bar and estoppel of these parties to claim any benefits under plaintiff's recovery. This is a limited and unnecessary application of the indemnity agreement. If the indemnity agreement covers any part of plaintiff's recovery against defendant, it covers it all. The so-called "estoppel" is only a part and parcel of the indemnity liability.

The second and final question raised by the appeal is whether the court below erred in deferring the trial of defendant's cross-action against Sky-Line until after judgment in plaintiff's action.

It seems that the court ordered separate trials of plaintiff's action and defendant's cross-action against Sky-Line pursuant to G.S. 1-179. It is unnecessary for us to discuss the applicability of that statute. As we have seen from the discussion in (c) above, the court, in overruling Sky-Line's demurrer and motions and in ordering the separation, made rulings more favorable to defendant than it was entitled to.

The judgment below will not be disturbed.

Affirmed.

EDNA FOUST HARRIS DIXON, EXECUTRIX OF THE ESTATE OF JOHN DANIEL DIXON, DECEASED v. CHARLIE WEBSTER EDWARDS, JULIA CLARK EDWARDS, AND LARRY JOSH EDWARDS, BY AND THROUGH HIS GUARDIAN AD LITEM JULIA CLARK EDWARDS.

(Filed 20 October, 1965.)

1. Trial § 21—

On motion to nonsuit, plaintiff's evidence, together with those portions of defendant's evidence, if any, which are favorable to plaintiff, must be considered in the light most favorable to plaintiff, and defendant's evidence which tends to establish a different state of facts or to contradict or impeach plaintiff's evidence must be disregarded.

2. Appeal and Error § 51—

On appeal from the denial of motion for judgment of nonsuit, all the relevant evidence admitted by the court, whether competent or not, must be accorded its full probative force in determining the correctness of the court's ruling.

3. Automobiles §§ 38, 41c— Nonsuit is proper when plaintiff fails to introduce evidence to establish negligence of defendant driver and that such negligence was the proximate cause of injury.

The accident in suit occurred when the respective vehicles, traveling in opposite directions, collided. Plaintiff offered testimony of an expert, based on his examination of the vehicles and the scene of the accident after the collision, as to the angle of impact between the vehicles, the parts which first collided, the amount of overlap, and what the angle of impact between the two vehicles would have been and the direction in which each would have rotated following the collision if, immediately prior to the time of impact, the two vehicles had been proceeding as testified to by defendant's witness. The expert did not express any opinion as to the location of the two vehicles on the highway immediately prior to the collision. *Held:* The crucial fact was which vehicle was over the center line of the highway at the time of the collision, and plaintiff having failed to offer any evidence tending to show that defendant's vehicle was to the left of the center, nonsuit should have been entered. Whether the testimony of the expert was competent, *quaere?*

4. Appeal and Error § 40—

Judgment on the verdict will not be disturbed in the absence of error in the trial sufficiently prejudicial to have affected the result.

APPEAL by defendants, Charlie Webster Edwards and Larry Josh Edwards, from *Bone, E.J.*, 12 April 1965 Civil Session of PITT.

This is an action to recover damages for the wrongful death of John Daniel Dixon. The defendant Charlie Webster Edwards counterclaims for damages to his 1960 Chevrolet automobile, and the defendant Larry Josh Edwards counterclaims for damages for personal injuries.

On 3 August 1963, at approximately 4 p.m., the 1960 Chevrolet automobile, owned by the defendant Charlie Webster Edwards as a family purpose vehicle and operated as such by his minor son, Larry Josh Edwards, and the 1963 Chevrolet automobile, owned and operated by John Daniel Dixon, collided near Chocowinity on an unpaved road, known as the old Blount's Creek Road. In the collision John Daniel Dixon sustained injuries from which he died almost instantly. Larry Josh Edwards sustained injuries, and both automobiles were severely damaged. The Edwards automobile was proceeding westwardly. The Dixon automobile was proceeding eastwardly. At the point of collision the road is approximately 18 feet in width, with a ditch of substantial depth on either side.

Mrs. Julia Clark Edwards, wife and mother of the other defendants, respectively, was originally joined as a defendant, it being alleged that she was a co-owner of the automobile and, therefore, liable for negligence, if any, of Larry Josh Edwards. At the trial in the superior court it was stipulated that Charlie Webster Edwards was the sole owner of the vehicle. The plaintiff thereupon took a voluntary nonsuit as to Mrs. Edwards.

The complaint alleges that the minor defendant was negligent in that he drove the Edwards car at a speed which was greater than was reasonable under the circumstances then existing, operated it upon the left of the center of the road, failed to maintain a proper lookout and failed to apply his brakes, which negligence is alleged to have been the proximate cause of the collision and of the death of plaintiff's testator.

Each defendant filed an answer denying these allegations and alleging that if the minor defendant was negligent in the operation of the Edwards car, the deceased was contributorily negligent in that he drove his automobile without keeping a proper lookout, while under the influence of intoxicating liquor and at an excessive speed and was also contributorily negligent in that he failed to drive his automobile upon the right half of the road, and failed to give to the minor defendant one half of the main traveled portion of the road. In their respective counterclaims the defendants allege that these acts and omissions by the deceased were the sole proximate cause of the collision and of the damages sustained by the defendants.

The jury answered the issues of negligence and contributory negligence in favor of the plaintiff and found her damages to be $20,000.

The defendants appeal from a judgment entered in accordance with the verdict. They assign as error the overruling of their motions, renewed at the end of all of the evidence, for nonsuit of the plaintiff's action. They also assign as error the rulings of the court finding William E. Billings, a witness for the plaintiff, to be qualified to testify as an expert mechanical engineer specializing in the field of traffic accident reconstruction and permitting him to state his opinions relative to the point of impact upon each car, the angle between the cars at the moment of impact, what the angle of impact and the subsequent movements of the two cars would have been had the collision occurred as testified to by the defendants' witness, and certain other circumstances of the accident. The defendants also assign as error other rulings of the court, a discussion of which, in detail, is not necessary to the determination of this appeal.

Sixteen days after the accident, Billings came to North Carolina and examined the two automobiles involved. He described the damage sus-

tained by each, using photographs to illustrate his testimony. Over objection, in response to hypothetical questions proper in form, he was permitted to state that, in his opinion, the angle of impact between the left sides of the two cars was between five and ten degrees, with the Edwards automobile traveling into the left side of the Dixon automobile, and that, in his opinion, the portions of the vehicles which first collided were the left fronts of both vehicles, the amount of overlap of one front over the other being approximately eight inches. He then testified, on the basis of measurements by him 16 days after the accident, concerning the width of the road at the scene of the collision, which he found to be 18 feet, the width and depth of the drainage ditch on each side, and the grade of the road from west to east, which was an upgrade of 3.6 per cent.

Following testimony offered by the defendants, set forth below, Billings was recalled by the plaintiff. At that time, over objection, in response to hypothetical questions proper in form, he was permitted to testify that: In his opinion, if a collision occurred in the manner stated by the defendants' witness, the Dixon car would rotate counter-clockwise and the Edwards car would be pushed rearward into the ditch; when he examined the Edwards car he found no damage to its rear bumper but found the metal panel dented at the right corner of the rear bumper and dirt and grass under that corner of the bumper; had the impact occurred as testified to by the witness for the defendants, the angle of impact between the left sides of the vehicles would, in his opinion, have been 20 degrees; and, in his opinion, the damage to the Dixon car is inconsistent with the action as described by the witness for the defendants. In addition to the testimony of the witness Billings and evidence as to the age, health, occupation, earnings and living expenses of the deceased, the plaintiff introduced the mortuary table showing the life expectancy of a person 55 years of age to be 19.46 years, and testimony to the effect that:

The Dixon car was severely damaged on the left front and on the left side back to the rear door; the windshield was knocked out and the top was bent; the Edwards car was damaged extensively at the left front; the cars came to rest with the Edwards car sitting across the road with its right rear bumper against the bank of the north ditch and the front end pointed almost south, and about three feet from the Dixon car; the right side of the Dixon car was flush against the embankment of the south ditch, the width of the ditch being approximately three feet; the car was from three to four feet on the road surface; there were no marks on the dirt road, which was hard and dry, except one pointed in a northwesterly direction, a 45 degree angle from

the left front tire of the Dixon car, and one from the left rear wheel of the Dixon car in a more northerly direction; these marks were traceable approximately 18 inches to two feet, beyond which points footsteps of many people walking about the scene made identification of marks on the road impossible; and there was broken glass all over the road. The odor of alcohol was present about the Dixon car; in the car there was broken glass from a pint bottle of Ancient Age whiskey bearing an ABC store stamp, paper cups, but no paper bag of the type used by the ABC store in which to put purchases by its customers.

The evidence offered by the defendants may be summarized as follows:

The minor defendant, accompanied by his younger brother, was driving west at a speed between 35 and 40 miles per hour as they drove up and over the hill. When they could see over the hill they observed the Dixon car, approximately a quarter of a mile away, traveling east, approaching them at a rate of speed between 70 and 80 miles per hour and being driven in the middle of the road. The minor defendant pulled to his right, reduced his speed and continued on for 254 feet to the point of impact. At the moment of collision he was driving at approximately four miles per hour and was only some six inches from the ditch on his side of the road. At all times before the impact all parts of the Edwards car were on its right side of the center of the road.

The Dixon car continued to travel in the middle of the road until approximately a car length from the Edwards automobile, at which point it appeared that the deceased turned his wheels to the right, applied his brakes and slid sideways into the Edwards automobile, the left front of the Dixon car striking the left front of the Edwards car. At the time of the impact the Dixon car was traveling at a speed of approximately 70 miles per hour.

The minor defendant was injured in the collision. He had a cut on the top of his head, which required eight stitches to close, and four upper teeth and one lower front tooth were broken, requiring their removal.

On the day of the accident, after lunch, the deceased purchased at the ABC store in Grimesland two pint bottles of Ancient Age whiskey, which the clerk in the store put in a bag, the seals of the bottles being then intact. After the accident broken glass from such a bottle was found in the Dixon car. The neck of the bottle was not broken but the seal was broken and no paper bag was observed.

Prior to the accident, and approximately a mile west of the scene of it, the defendants' witness Purser was driving his own automobile upon this road in a westerly direction. He met the Dixon automobile, which

was then being driven partially on its left side of the center of the road so that Purser had to pull over and put two of his wheels in the ditch in order to allow the Dixon car to pass. The Dixon car was then "weaving a little bit." The driver of the Dixon car, a white male, was the only person in it at that time. It was then traveling at a speed of 50 miles per hour.

Over objection, the minor defendant stated on cross-examination that he was convicted of operating an automobile on the wrong side of the road on an occasion after this accident and on another occasion, apparently prior to this accident, he was convicted of having an improper muffler.

Mayo & Mayo, James & Speight, and W. H. Watson for defendant appellants.

Lewis & Rouse for plaintiff appellee.

LAKE, J. As is carefully pointed out in the brief of the plaintiff appellee, the witness Billings did not express any opinion as to the location of the two vehicles on the highway immediately prior to the collision, which is the crucial point upon which liability depends in this case. The opinions stated by him, over objection, related to the angle of impact between the left sides of the two automobiles, the parts of the two automobiles which first collided, the amount of overlap between the left fronts of the two cars at the moment of collision and what the angle of impact between the two vehicles would have been and the direction in which each would have rotated following the collision if, immediately prior to the impact, the two vehicles had been proceeding as testified to by Michael Edwards, brother of the minor defendant, who was riding with him.

There is a sharp conflict between the decisions by courts of other jurisdictions as to the admissibility of the opinion of an expert in traffic accident reconstruction based upon his study, after the occurrence, of the damage to the vehicles, their movements after colliding, and other physical evidence at the scene. In Virginia and California, among other jurisdictions, it has been held that such evidence is not competent to show the point upon the highway at which the collision occurred. *Venable v. Stockner,* 200 Va. 900, 108 S.E. 2d 380; *Francis v. Sauve,* 34 Cal. Rptr. 754, 222 Cal. App. 2d 102. Wisconsin and Oklahoma are among the jurisdictions which have allowed such evidence to be introduced for that purpose. *Henthorn v. M.G.C. Corp.,* 1 Wis. 2d 180, 83 N.W. 2d 759; *Tuck v. Buller* (1957 Okla.), 311 P. 2d 212, 66 A.L.R. 2d 1043. For collections of authorities on both sides of the question, see:

8 Am. Jur. 2d Automobiles and Highway Traffic, § 989; Anno: 66 A.L.R. 2d 1048.

Apparently, this specific question has not been decided by this Court and it is not necessary to decide it now since the witness did not express an opinion as to the point in the highway at which the Edwards and Dixon vehicles collided.

At the close of all of the evidence the defendants renewed their motion for judgment as of nonsuit, such motion having been made and overruled at the conclusion of the plaintiff's evidence. Upon this motion the evidence offered by the plaintiff, together with those portions, if any, of the defendants' evidence which are favorable to the plaintiff, must be considered in the light most favorable to the plaintiff and to the exclusion of all evidence by the defendants which tends to establish a different state of facts or to contradict or impeach the testimony presented by the plaintiff. *Coleman v. Colonial Stores, Inc.,* 259 N.C. 241, 130 S.E. 2d 338; *Ammons v. Britt,* 256 N.C. 248, 123 S.E. 2d 579. All relevant evidence admitted by the trial court, whether competent or not, must be accorded its full probative force in determining the correctness of its ruling upon a motion for judgment as of nonsuit. *Ballard v. Ballard,* 230 N.C. 629, 55 S.E. 2d 316. We have so considered the testimony of the witness Billings. It is not necessary upon this appeal to determine its competency.

Applying these rules, there is no evidence to show that the Edwards car was on its left of the center of the traveled portion of the road at or prior to the time of the collision. No inference may reasonably be drawn from the testimony of the witness Billings that the Edwards car was being driven on its left of the center of the road. There is no evidence of unreasonable speed of the Edwards car or of any failure by the minor defendant to maintain a proper lookout or to apply his brakes or of any failure by him in any other duty owed to plaintiff's testator. Disregarding entirely the testimony offered by the defendants as to the position of the automobiles upon the road before and at the time of the impact, this fact is left to conjecture. Since the burden of proof is upon the plaintiff to show that the minor defendant was negligent in the operation of the Edwards vehicle and that his negligence was the proximate cause of the collision, the motion for judgment as of nonsuit as to the plaintiff's cause of action, made by the defendants at the close of all of the evidence, should have been allowed. *Parker v. Flythe,* 256 N.C. 548, 124 S.E. 2d 530; *Boyd v. Harper,* 250 N.C. 334, 108 S.E. 2d 598; *Williamson v. Randall,* 248 N.C. 20, 102 S.E. 2d 381; *Parker v. Wilson,* 247 N.C. 47, 100 S.E. 2d 258; *Cheek v. Brokerage Co.,* 209 N.C. 569, 183 S.E. 729; *Grimes v. Coach Co.,* 203 N.C. 605, 166 S.E. 599.

We have considered each of the other assignments of error by the defendants. In each instance the ruling of the court below was either correct or was not sufficiently prejudicial to the defendants to entitle them to a new trial upon their respective counterclaims.

Under full and proper instructions the jury found that neither of the defendants was injured or damaged by the negligence of the plaintiff's testator, John Daniel Dixon. So much of the judgment below as provides that the defendants, Larry John Edwards and Charlie Webster Edwards, recover nothing of the plaintiff on their respective counterclaims is, therefore, affirmed. For the reasons above stated, the verdict in favor of the plaintiff upon the first and third issues is set aside, and that portion of the judgment providing that the plaintiff recover damages of the defendants together with the costs of this action is reversed. The cause is remanded to the superior court for the entry of a judgment in accordance with this opinion.

Affirmed in part.

Reversed in part.

STATE v. OTIS BEST.

(Filed 20 October, 1965.)

1. Criminal Law § 97—

Where, immediately upon defendant's objection to a single improper remark of the solicitor in his argument, the court instructs the jury not to consider the statement, the impropriety is ordinarily cured, and the contention made by defendant for the first time on appeal that the court should have gone further and instructed the jury that the statement was unfair and prejudicial to defendant, is not sustained on the facts of this case.

2. Criminal Law § 107—

Where the evidence is simple and direct and without equivocation, and the sole controversy is whether defendant was under the influence of intoxicating liquor at the time he drove upon a public street, an instruction submitting to the jury under correct statements of the applicable law whether defendant was intoxicated at the time and place in question will not be held for error for failure of the court to state the evidence, counsel having answered in the negative whether he wished further instructions. G.S. 1-180.

3. Indictment and Warrant § 8—

A defendant waives duplicity in the warrant when he goes to trial without making a motion to quash.

4. **Automobiles § 70—**

Where every feature of the record discloses that the case was contested solely upon whether defendant was under the influence of intoxicating liquor when he drove his automobile on a public street, and neither the evidence nor the charge refers in any way to drugs, the fact that the warrant, charging defendant with operating an automobile on a public street while under the influence of intoxicating liquor or drugs, failed to characterize the drugs as narcotic drugs, is not fatal. G.S. 20-138.

5. **Criminal Law § 118—**

The verdict of the jury may be given significance and interpreted by reference to the charge, the facts in evidence and the instructions of the court.

6. **Criminal Law § 152—**

The setting forth of all of the evidence in the record in question and answer form is a violation of Rule of Practice in the Supreme Court No. 19(4). This Rule is mandatory and may not be waived by the parties, and its violation warrants dismissal of the appeal when no error appears on the face of the record proper.

APPEAL by defendant from *Hubbard, J.*, August 1965 Criminal Session of WAYNE.

Criminal prosecution on a warrant charging defendant with unlawfully and wilfully operating an automobile upon a street in the city of Goldsboro while under the influence of intoxicating liquor or drugs, heard *de novo* upon appeal from an adverse judgment in the County Court of Wayne County.

Plea: Not guilty. Verdict: Guilty.

From a judgment that he pay a fine of $100 and costs, defendant appeals.

Attorney General T. W. Bruton and Assistant Attorney General James F. Bullock for the State.

Braswell & Strickland by Thomas E. Strickland for defendant appellant.

PARKER, J. The State's evidence shows the following facts: About 9:45 p.m. on 9 January 1965 in the city of Goldsboro defendant drove an automobile out of Slaughter Street and proceeded east on Elm Street at a speed of 50 miles an hour, with his automobile going back and forth across the street. He ran three automobiles meeting him off the street. He ran through a stop sign and a red traffic light. Two police officers of the city of Goldsboro, who were riding in a police car, followed him with their siren blowing, but he did not stop until he reached a service station ten or twelve blocks from where the officers

first sounded the siren. The officers went to his automobile, opened the door, and asked him to get out. He did so, took two or three steps, fell up against the side of his automobile and propped himself up. His eyes were very red, he had a very strong odor of intoxicating liquor on his breath, his speech was "slurry," and he could not walk "under his own power." In the back seat of his car were several empty beer cans. In the opinion of the two officers, he was under the influence of intoxicating liquor. The officers arrested him, helped him to walk to their car, carried him to the city hall, and booked him for driving an automobile on a public street in the city of Goldsboro while under the influence of intoxicating liquor or drugs.

Defendant's evidence is to this effect: He had had two or three beers, but he was not under the influence of anything intoxicating. He was not unsteady on his feet. He was driving his car normally, and not going back and forth across the street.

The State's evidence was amply sufficient to carry its case to the jury. Defendant made no motion for judgment of nonsuit at the close of all the evidence, and makes no contention in his brief that the State's case should have been nonsuited.

The prosecuting officer in his argument to the jury said: "Let's take these drunken drivers off of the streets so we can get home tonight." Defendant objected to this statement, and the trial judge promptly instructed the jury not to consider this statement by the prosecuting officer. Defendant assigns as error that the trial court did not go further and instruct the jury that such statement by the prosecuting officer was unfair and prejudicial to him. In our opinion, the prompt action of the trial judge in instructing the jury not to consider this statement by the prosecuting officer corrected any prejudicial effect of such statement, and was to the effect that such statement was improper. So far as the record discloses, defendant was satisfied with the trial court's instruction to the jury, and did not request the trial judge to instruct the jury further that such statement was unfair and prejudicial to him, but makes that contention for the first time in his assignment of error. This assignment of error is overruled.

Defendant assigns as error that the court "erred when it failed to state any of the evidence and apply the law thereto." G.S. 1-180 reads in relevant part: "He [the judge] shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto * * *." The trial court stated no evidence in its charge, but, immediately after defining "under the influence of intoxicating liquor" within the meaning of G.S. 20-138 in substantially the

same language as used in *S. v. Carroll,* 226 N.C. 237, 37 S.E. 2d 688, did apply the law to the evidence as follows:

> "The Court charges you that if you find from the evidence and beyond a reasonable doubt that on the 9th day of January of this year the defendant Otis Best operated a motor vehicle, automobile, on the streets of Goldsboro, and that at that time and place he had previously taken a sufficient quantity of intoxicating beverage of some kind to cause him then and there to have lost the normal control or use of his bodily or mental faculties, either or both, to an appreciable degree of either or both of those faculties, then upon such finding, beyond a reasonable doubt, it would be your duty to return a verdict of guilty.
>
> "If you fail to so find, or if you have a reasonable doubt about it, it would be your duty to return a verdict of not guilty."

Then, at the end of its charge the record shows the following:

> "The Court inquires of counsel: 'Are there any further instructions desired?' Counsel for defendant and the Solicitor answered: 'No sir.' "

This Court said in *Morris v. Tate,* 230 N.C. 29, 51 S.E. 2d 892:

> "The statute [G.S. 1-180], therefore, sensibly requires, on the part of the judge, a statement of the evidence to which he is attempting to apply the law. It is true that our decisions have rationalized the statute so that the statement of the evidence it requires may be dispensed with when the facts are simple; *Duckworth v. Orr,* 126 N.C. 674, 677, 36 S.E. 150; *S. v. Reynolds,* 87 N.C. 544; *S. v. Grady,* 83 N.C. 643; thus leaving the court another troublesome penumbra to deal with in its line-fixing burdens."

See also *S. v. Thompson,* 226 N.C. 651, 39 S.E. 2d 823; *S. v. Thompson,* 257 N.C. 452, 126 S.E. 2d 58. The evidence was simple and direct and without equivocation and complication. While the charge is not a model to be followed, it is our opinion that under the factual situation here it is a sufficient compliance with the requirements of G.S. 1-180. This assignment of error is overruled.

The warrant charges defendant with unlawfully and wilfully operating an automobile while under the influence of intoxicating liquor or drugs. G.S. 20-138, *inter alia,* prohibits the operation of an automobile on a highway within the State while under the influence of narcotic drugs, not under the influence of drugs. As to the duplicity of charging two of the criminal offenses created and defined in G.S. 20-138, see *S.*

v. Thompson, 257 N.C. 452, 126 S.E. 2d 58. However, by going to trial without making a motion to quash, defendant waived any duplicity in the warrant. *S. v. Merritt,* 244 N.C. 687, 94 S.E. 2d 825; *S. v. Thompson,* 257 N.C. 452, 126 S.E. 2d 58.

There can be no trial, conviction or punishment without a formal and sufficient accusation. *S. v. Stubbs,* 265 N.C. 420, 144 S.E. 2d 262. We have repeatedly said that prosecuting officers should carefully read warrants and indictments before proceeding to trial.

The verdict in the instant case was guilty. Every feature of the trial discloses that both the State and defendant considered this criminal prosecution related solely to whether defendant was operating an automobile on a public street in Goldsboro while under the influence of intoxicating liquor. The evidence and the charge do not refer in any way to drugs. The court, in its charge, treated the warrant as charging only one criminal offense, namely, the operation of an automobile on a public street of the city of Goldsboro while under the influence of intoxicating liquor, and whether defendant was guilty of this criminal offense was the only question submitted to the jury. There can be no doubt as to the identity of the criminal offense of which defendant was convicted. What was said in a similar factual situation in *S. v. Thompson,* 257 N.C. 452, 126 S.E. 2d 58, is controlling here:

> "A verdict, apparently ambiguous, 'may be given significance and correctly interpreted by reference to the allegations, the facts in evidence, and the instructions of the court.' *S. v. Smith,* 226 N.C. 738, 40 S.E. 2d 363; *S. v. Beam, supra* [255 N.C. 347, 121 S.E. 2d 558]. 'The verdict should be taken in connection with the charge of his Honor and the evidence in the case.' *S. v. Gilchrist,* 113 N.C. 673, 676, 18 S.E. 319, and cases cited; *S. v. Gregory,* 153 N.C. 646, 69 S.E. 674; *S. v. Wiggins,* 171 N.C. 813, 89 S.E. 58. When the warrant, the evidence and the charge are considered, it appears clearly the jury, by their verdict, found defendant guilty of operating a motor vehicle on the public street of Graham while under the influence of intoxicating liquor."

The solicitor for the State and counsel for defendant agreed upon the case on appeal. All the evidence in the record is by question and answer, and not in narrative form, and therefore does not comply with Rule 19(4), Rules of Practice in the Supreme Court, 254 N.C. 783, p. 800; *S. v. McNeill,* 239 N.C. 679, 80 S.E. 2d 680. This Rule is mandatory and may not be waived by the parties. *S. v. Powell,* 238 N.C. 550, 78 S.E. 2d 343; *S. v. McNeill, supra.*

While defendant has failed to comply with Rule 19(4), Rules of Practice in the Supreme Court, we have discussed *seriatim* his assign-

ments of error and found them untenable.

According to our decisions, the judgment will be affirmed, and the appeal dismissed, as no error appears in the record proper. *S. v. Powell, supra; S. v. McNeill, supra.*

Judgment affirmed; Appeal dismissed.

STATE OF NORTH CAROLINA AND CITY OF CHARLOTTE v. JAMES R. WALKER (No. 42-311).

(Filed 20 October, 1965.)

1. Constitutional Law § 13—

It is within the police power of the State to prescribe minimum standards for the design and construction of buildings for the safety of the occupants, their neighbors and the public at large. G.S. 143-138.

2. Same; Municipal Corporations § 25—

Municipalities have been delegated the police power to prescribe in the interest of public safety minimum standards for the materials, design and construction of buildings, G.S. 160-182, and, in a prosecution for violating a municipal building ordinance by remodeling and repairing without first obtaining a permit in violation of the ordinance, attack of the ordinance on the ground of lack of authority of the municipality and of the Legislature to promulgate the regulations is untenable.

APPEAL by defendant, James R. Walker, from *McLean, J.*, February 15, 1965 Special "A" Criminal Session, MECKLENBURG Superior Court.

This criminal prosecution originated in the Recorder's Court of the City of Charlotte. The Superintendent of Building Inspection of the City, by affidavit, charged that on June 23, 1964, the defendant, James R. Walker, unlawfully, maliciously, and wilfully did violate Section 5-4(c) of the City Code by remodeling and repairing his residence located at 1447 South Church Street without first applying for and obtaining a written permit from the Building Inspection Department of the City in violation of G.S. 14-4. The defendant was arrested and brought into Recorder's Court under a warrant based on the Superintendent's affidavit.

At the trial, the defendant moved to quash the warrant and dismiss the prosecution upon the ground (1) that Section 5-4(c) is unconstitutional in that it violates the defendant's "inalienable and vested right of use, possession, and maintenance of the residence described in the

warrant . . . and said warrant is in conflict therewith; (2) that the conduct described in the said Code and in the warrant is privileged conduct protected by the North Carolina Constitution . . . and . . . the 14th Amendment to the United States Constitution; (3) that any verdict rendered . . . would be an unconstitutional abridgment . . . of the defendant's rights . . . and immunities as a property owner, . . . (including) defendant's right of renovation and repair of his residence."

The Recorder overruled the motion to quash, heard the evidence offered by the prosecution, consisting of the City Code, testimony as to the dilapidated condition of the defendant's residence, the finding that it was unfit for habitation, beyond reasonable repair, and could be neither altered nor improved so as to meet the minimum requirements of the Charlotte Housing Code. The Superintendent of Building Inspection, upon the findings, ordered the dwelling demolished or removed. The defendant undertook to do repair work himself without applying for or receiving any permit.

The defendant did not testify. However, he offered the City Housing Code (apparently for the purpose of attacking it). The Recorder's Court entered a verdict of guilty. From the judgment imposed, the defendant appealed to the Superior Court.

In the Superior Court the State repeated the evidence and the defendant repeated the motions made and heard before the Recorder's Court. The jury returned a verdict of guilty. Judge McLean imposed a jail sentence of 30 days, suspended on condition that within 30 days the defendant comply with the City Building and Housing Code and pay costs. The defendant excepted and appealed.

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

Mitchell & Murphy, Thomas H. Wyche, James R. Walker, Jr., for defendant appellant.

HIGGINS, J. The defendant bases his appeal on two assignments of error: (1) The failure of the court to quash the warrant. (2) The failure to direct a verdict of not guilty. Both assignments are grounded on his challenge to the constitutionality of Section 5-4(c) of the Charlotte Building Code, and G.S. 14-4 which makes violation of the Code a misdemeanor.

The defendant, in his brief, says: "The facts of this case are simple and not in dispute. . . . All of the repairs to the defendant's dwelling took place after a break-down in negotiations between the City offi-

cials and the defendant over the requirements of the Code. . . . (We) could not reach any agreement as to the rights and duties of the Inspection Division under the City Code and the right of the defendant to the use and benefit of his dwelling. . . . The defendant appellant contends and argues on this appeal that the property owner and not the City of Charlotte has a vested property right to repairs in connection with the use and enjoyment of his dwelling."

This case is unusual in that neither the City's ordinance requiring a permit for repairs nor the State law which authorizes them and makes the violation of the ordinance a misdemeanor is challenged on the ground that the requirements are arbitrary, capricious, discriminatory, or invalid for any other reason except the lack of authority on the part of the City and of the Legislature to ordain and to enact them. The General Assembly, by G.S. 160-182, specifically authorizes any municipality to exercise its police power to repair, close, or demolish buildings if the municipality finds dwellings are unfit for habitation due to dilapidation, defects increasing the hazards of fire . . . rendering such dwellings unsafe or unsanitary, detrimental to health, safety or morals. The City ordinance here involved is fully authorized by State law and is a proper exercise of police power.

> "Municipal corporations may, in the proper exercise of their police power, require that permits or certificates be obtained as a prerequisite to the erection, alteration, improvement or use of buildings or other property in a particular manner or in a particular area; and such provisions will generally be upheld if they are reasonable and within the limitations of the exercise of municipal powers generally." 62 C.J.S., Municipal Corporations, § 227(3), p. 507.
>
> "An ordinance requiring a permit to alter or repair . . . buildings . . . is regarded as a reasonable exercise of the police power." McQuillin, Municipal Corporations, 3d Ed., Vol. 9, p. 529.
>
> "The purpose of requiring a permit is to enable the municipality to make sure that the proposed building conforms to the pertinent ordinances. Provisions for permits are for the benefit and protection of the municipality, not the property owner." *Tremarco Corp. v. Garzio,* 55 N.J. Super 320, rev'd o.g. 32 N.J. 448.

It is within the police power of the General Assembly and of a city, when authorized, to establish minimum standards, materials, designs, and construction of buildings for the safety of the occupants, their neighbors, and the public at large. G.S. 143-138; *Drum v. Bisaner,* 252 N.C. 305, 113 S.E. 2d 560; *Lutz Industries v. Dixie Home Stores,* 242

N.C. 332, 88 S.E. 2d 333. The authority to make and to enforce appropriate safety regulations in the public interest arises under the police power. In case of conflicting interests the public good is and must be paramount.

The Charlotte ordinance and the Legislative enactments involved in this case are not shown to be violative either of the Constitution of North Carolina or of the United States. In the trial and judgment below, we find

No error.

IN THE MATTER OF IMPRISONMENT OF WILLIAM C. PALMER.

(Filed 20 October, 1965.)

1. Contempt of Court § 8; Habeas Corpus § 2—

No appeal lies from the imposition of punishment for direct contempt, and review upon *habeas corpus* is not *de novo* but is limited to a determination of whether the court imposing sentence had jurisdiction and whether its findings of fact set forth on the record support its order, the findings being conclusive.

2. Habeas Corpus § 4—

Habeas corpus is a collateral attack on a judgment of imprisonment for contempt, and no appeal lies from the order entered therein, and whether the order will be reviewed on *certiorari* rests in the sound discretion of the Court and the Court in the exercise of such discretion may decline to issue the writ.

PETITION for writ of *certiorari* to review an order of *Martin, S. J.*, entered September 16, 1965, in Chambers at Morganton, BURKE County.

The challenged order was made in a *habeas corpus* proceeding.

On 20 August 1965 Fate J. Beal, Judge of the Recorder's Court for Caldwell County, made findings of fact in writing and concluded therefrom that William C. Palmer, a licensed and practicing attorney, had, on 17 August 1965, committed contemptuous and insolent behavior in the immediate view and presence of said judge while the said recorder's court was in session, and that said conduct tended to interrupt proceedings and impair the respect due the court's authority. Thereupon judgment was entered imposing a jail sentence of 30 days, to be suspended upon specified conditions. The contemner, being unwilling to accept the conditions, was committed to jail.

Contemner applied to Judge Martin for writ of *habeas corpus*. The writ was issued and, upon its return, Judge Martin heard the matter *de novo* at Morganton. He had before him the findings of fact, conclusions of law and judgment of Judge Beal. He also heard testimony of the clerk of recorder's court of Caldwell County, solicitor of recorder's court of Caldwell County, a probation officer, a deputy sheriff of Caldwell County, and an attorney. Judge Martin found facts, concluded that contemner was illegally and unlawfully imprisoned, and ordered that contemner be discharged.

Application was made in Supreme Court for *certiorari* by W. H. Childs, Jr., District Solicitor of the Sixteenth Solicitorial District, for and on behalf of said recorder's court. (G.S. 5-3).

W. H. Childs, Jr., District Solicitor of the Sixteenth Solicitorial District, for the Recorder's Court of Caldwell County.

Byrd & Byrd for contemner.

PER CURIAM. Direct contempt of court is punishable summarily, and the offended court is only required to "cause the particulars of the offense to be specified on the record." *In re Burton,* 257 N.C. 534, 126 S.E. 2d 581; *Galyon v. Stutts,* 241 N.C. 120, 84 S.E. 2d 822; G.S. 5-5. No appeal shall lie from an order of direct contempt. G.S. 5-2; *Luther v. Luther,* 234 N.C. 429, 67 S.E. 2d 345. A contemner imprisoned in consequence of a judgment of direct contempt may seek relief by *habeas corpus*. However, the only question open to inquiry at the *habeas corpus* hearing is whether, on the record, the court which imposed the sentence had jurisdiction and acted within its lawful authority. *In re Renfrow,* 247 N.C. 55, 100 S.E. 2d 315; *State v. Hooker,* 183 N.C. 763, 111 S.E. 351. The facts found by the committing court are binding on the judge at the *habeas corpus* hearing, the only question being whether the judgment was warranted by law and within the jurisdiction of the court. *In re Adams,* 218 N.C. 379, 11 S.E. 2d 163. In *habeas corpus* proceedings, the court is not permitted to act as one of errors and appeals; to justify relief the judgment of imprisonment must be void as distinguished from erroneous. *State v. Edwards,* 192 N.C. 321, 135 S.E. 37; *In re Burton, supra.* The court hearing the matter on *habeas corpus* may not try the cause *de novo,* hear testimony of witnesses, or find facts in conflict with those found by the judge who imposed the sentence. In the *habeas corpus* proceeding the judge merely reviews the record and determines whether the court which imposed sentence had jurisdiction and whether the facts found and specified on the record are sufficient to support the imposition of sentence.

It is clear that the judge below misconceived the scope of his duty and authority. He was bound by the facts found by Judge Beal (but not the factual conclusions). He could not hear testimony of witnesses or consider evidence *dehors* the record, and therefrom find independent facts. He could only determine whether the facts found by Judge Beal are sufficient to support the judgment. *In re Croom,* 175 N.C. 455, 95 S.E. 903.

A *habeas corpus* proceeding is a collateral attack on a judgment of imprisonment, and an order in the proceeding discharging the prisoner is not equivalent to a verdict of not guilty. No appeal lies from an order made in a *habeas corpus* proceeding (except in cases involving custody of children) but such order may be reviewed on *certiorari. State v. Edwards,* 192 N.C. 321, 135 S.E. 37. Whether *certiorari* will be granted rests in the sound discretion of the Court. *In re McCade,* 183 N.C. 242, 111 S.E. 3; *In re Croom, supra.*

After a careful examination of the record, this Court, in the exercise of its discretion, declines to issue writ of *certiorari.*

Petition denied.

STATE v. JAMES THOMAS GIBSON.

(Filed 20 October, 1965.)

Criminal Law § 131; Escape § 1—

Defendant's contentions that his sentence for escape was excessive for that other prisoners charged with the same offense had received shorter sentences, and for that in addition to the sentence imposed he lost his "good time" credit, are untenable.

APPEAL by defendant from *McLean, J.,* August 1965 Session of CATAWBA.

Defendant was indicted for felonious escape in violation of G.S. 148-45. Upon arraignment, defendant declared he did not want a lawyer, waived (in writing) the appointment of a lawyer and pleaded guilty.

The indictment charged, and the evidence disclosed, that defendant, on May 28, 1964, in Catawba County, wilfully and feloniously escaped from lawful custody while serving a three-year prison sentence imposed in Case No. 3142 at September 1963 Session of Lincoln Superior Court upon defendant's conviction of the felony of breaking and entering and of larceny. It also appeared that defendant, on May 28, 1964, was

under a three-to-five-year sentence imposed in Case No. 39-885 at the September-October 1963 Session of Mecklenburg Superior Court, upon defendant's conviction of the felony of breaking and entering and of larceny, which sentence was to begin upon expiration of said Lincoln County sentence.

Upon defendant's said plea of guilty, the court pronounced judgment imposing a prison sentence of two years, this sentence to commence upon expiration of said three-to-five-year Mecklenburg County sentence.

After pronouncement of said judgment, defendant gave notice of appeal; and, based on defendant's affidavit of indigency, the court appointed counsel to represent defendant on appeal and ordered that defendant be permitted to appeal *in forma pauperis.* The court also ordered that Catawba County provide a transcript of all proceedings in Catawba Superior Court for defendant's use in connection with his said appeal.

Attorney General Bruton and Staff Attorney Brown for the State.
Charles W. Gordon, Jr., for defendant appellant.

PER CURIAM. On appeal, defendant assigns as error (1) that the two-year sentence is excessive in that other prisoners charged with escape had received shorter sentences, and (2) that he is suffering "double punishment" because, in addition to the said two-year sentence, his said escape, under the rules and regulations of the Prison Department, caused him to lose "all the good time" credit he had earned on the sentence he was serving at the time of his escape. Obviously, the simple statement of defendant's contentions discloses they are wholly without merit. Further discussion is unnecessary. Hence, the judgment of the court below is affirmed.

Affirmed.

J. H. EDMISTEN v. MARGARET Q. EDMISTEN.

(Filed 20 October, 1965.)

Divorce and Alimony § 13—

Misconduct of the husband prior to the execution of a valid deed of separation cannot defeat his right of action for divorce brought two years after the execution of the deed of separation. G.S. 50-6.

APPEAL by defendant from *McLean, J.,* June 1965 Civil Session of WATAUGA.

Plaintiff-husband, a longtime resident of this State, on February 13, 1965, instituted this action for divorce under G.S. 50-6. He alleges that he and defendant-wife have lived continuously separate and apart since January 14, 1963, the day on which they executed a deed of separation. Answering, defendant admits the execution of the separation agreement and avers that the parties have actually lived separate and apart since June 1, 1962. In a further answer she alleges, as a defense to plaintiff's action and as grounds for affirmative relief, many acts of misconduct on the part of plaintiff prior to January 14, 1963. Plaintiff's demurrer to the further answer was sustained. At the trial, plaintiff's evidence tended to establish the allegations of his complaint. *Inter alia,* he introduced the duly executed deed of separation which contained the parties' agreement to live apart from and after January 14, 1963, made a property settlement, determined the custody and support of their children, and released each other from all marital obligations. Defendant offered no evidence. The usual three issues were submitted and, under peremptory instructions, answered in favor of the plaintiff. From a judgment divorcing the parties *a vinculo,* defendant appeals.

Louis H. Smith for defendant appellant.
Holshouser & Holshouser for plaintiff appellee.

PER CURIAM. From and after the execution of a valid deed of separation, a husband and wife living apart do so by mutual consent. The prior misconduct of one will not defeat his action for divorce under G.S. 50-6, brought two years thereafter. Plaintiff's demurrer to defendant's further answer was properly sustained. The judgment is affirmed upon the authority of *Jones v. Jones,* 261 N.C. 612, 135 S.E. 2d 554; *Richardson v. Richardson,* 257 N.C. 705, 127 S.E. 2d 525.

Affirmed.

JESSIE P. TIDWELL v. GALMON GARFIELD CRISP AND BENNY GARFIELD CRISP, MINOR, BY HIS GUARDIAN AD LITEM.

(Filed 20 October, 1965.)

APPEAL by defendant, Benny Garfield Crisp, from *Martin, S. J.,* March 1965 Civil Session of GASTON.

Whitener & Mitchum for plaintiff.
Hollowell & Stott for defendants.

PER CURIAM. Plaintiff sues to recover damages for personal injuries suffered by her when the automobile in which she was riding ran off the road (Rural Paved Road 2425 in Gaston County) and collided with trees. She alleges that defendant, Benny Garfield Crisp (Benny), was driving the automobile and the accident and her injury were caused by his negligence, consisting of operating the automobile while under the influence of intoxicating liquor, reckless driving, speeding, failing to keep a proper lookout and failing to keep the vehicle under reasonable control. She also alleges that the automobile was owned by and registered in the name of defendant Galmon Garfield Crisp (Galmon), father of Benny, it was a family purpose car, and Benny is a member of Galmon's household and drove the car as Galmon's agent.

Defendants, answering, deny all material allegations of the complaint including the allegations of agency, and aver that plaintiff was operating the automobile at the time of the accident and, if the jury should find that Benny was the operator, that plaintiff was contributorily negligent in failing to protest to Benny concerning the manner of his operation.

For its verdict the jury found that plaintiff was injured by Benny's negligence, plaintiff was not contributorily negligent, the amount of plaintiff's damages is $10,000, and Benny was not Galmon's agent. Judgment was entered accordingly. Benny appeals, and assigns as error the denial of his motion for nonsuit, and challenges certain aspects of the judge's instructions to the jury.

The evidence, when considered in the light most favorable to plaintiff, discloses these facts: Benny, age 18, and plaintiff, age 39, worked the "night shift" in the same mill. After work on the morning of 9 August 1962 Benny invited plaintiff and another to go for a ride in his new car. They left plaintiff's home about 8:00 A.M., drove to South Carolina, and made three stops at beer taverns. At the first stop Benny drank a bottle of beer and shared with three others two pitchers of beer — plaintiff drank one glass. At the second stop Benny drank two bottles of beer — plaintiff drank one. At the third stop Benny drank one bottle of beer. From there they headed north toward plaintiff's home. Benny "scratched off" and once under way kept increasing speed. He was driving between 60 and 80 miles per hour. The right wheels ran onto the shoulder of the road. Plaintiff said, "Oh, Lord, Benny," and he said, "I'm driving." The car made tire marks a distance of 588 feet on the shoulder; the shoulder was "torn up" — "the dirt was loosened." The automobile ran off the road to the right and struck two trees.

Plaintiff sustained serious and permanent injuries. Among other injuries, her right leg "was severed all except for a large nerve and artery and vein in the back part of the knee." The leg was not amputated but "She has a shortening of the right lower extremity of about an inch and one half and a fusion of the right knee. There is no joint."

Defendants' evidence tends to show that plaintiff was driving at the time of the accident.

The evidence is sufficient to repel defendants' motion for compulsory nonsuit. The charge is free of prejudicial error and the exceptions thereto are not sustained.

No error.

BETTY JANE TWEED AND HUSBAND, CARL TWEED, v. CHARLES TAYLOR, LAWRENCE L. TAYLOR AND WIFE, DORIS TAYLOR.

(Filed 20 October, 1965.)

APPEAL by defendants from *McLean, J.*, March-April, 1965, Regular Civil Session of MADISON.

This is a suit to restrain, and to recover damages for alleged trespasses by defendants on land of plaintiffs.

Plaintiffs allege that defendants have entered upon their land located in No. 3 Township, Madison County, built a stone wall thereon and begun construction of a concrete-block building which is partially on their land, and the wall and foundation of the building are situate in Cody (or Ray) Branch so as to divert the waters of the branch onto land not theretofore in the bed of the stream. Defendants deny all material allegations of the complaint.

Pursuant to an order of the court a survey was made and maps drawn showing the contentions of the parties. It was stipulated that plaintiffs and defendants own adjoining lands, the location of a boundary line is in dispute, and the descriptions of the disputed boundary in the deeds of the respective parties are identical. The parties agreed upon the issues to be submitted to the jury.

The jury answered the issues in substance as follows: (1) The true boundary line is "A to B" (plaintiffs' contention as shown on the court map). (2) Defendants diverted the waters of Cody Branch as alleged. (3) Plaintiffs are entitled to recover $100 damages. Judgment was entered in accordance with the verdict and injunctive relief was granted.

Mashburn & Huff for plaintiffs.
A. E. Leake for defendants.

PER CURIAM. The issues, agreed to by the parties and submitted to the jury, are sufficient to dispose of all material controversies arising on the pleadings and to support a final judgment. We find no error in the admission or exclusion of evidence. The evidence amply supports the verdict. The issues were submitted to the jury upon instructions free of prejudicial error.

No error.

STATE v. PERRY SMITH, JR.

(Filed 20 October, 1965.)

APPEAL by defendant from *Pless, J.*, May, 1965 Session, CALDWELL Superior Court.

In this criminal prosecution the defendant was indicted, tried, convicted, and sentenced for the larceny of a radio and a set of wrenches of a value less than $200.00. The defendant appealed.

T. W. Bruton, Attorney General, James F. Bullock, Assistant Attorney General for the State.
Seila, Wilson and Palmer by W. C. Palmer for defendant appellant.

PER CURIAM. The defendant relies for a new trial upon two assignments of error: (1) That the court erred in permitting the investigating officer to testify that the truck tracks near the scene of the theft indicated the vehicle had been stuck in the mud and in his opinion the driver had attempted to get out without calling a wrecker. (2) The defendant's incriminating admissions to the investigating officer should have been excluded.

If we concede the officer should not have been permitted to express the opinion that the driver had attempted to get the truck out of the mud without calling a wrecker, the admission was rendered harmless by the testimony of the defendant that his truck became stuck in the mud, and failing to get it out, he called a wrecker.

With respect to the incriminating admissions to the investigating officer, the record fails to disclose any reason why they should not be admissible as free and voluntary.

No error.

JOHN McNAMARA v. W. J. OUTLAW.

(Filed 20 October, 1965.)

Appeal by defendant from *Mintz, J.*, February, 1965 Session, Wayne Superior Court.

Robert H. Futrelle for plaintiff appellee.
Dees, Dees & Smith by William W. Smith for defendant appellant.

Per Curiam. When this case was here at the Fall Term, 1964 (262 N.C. 612) this Court reversed a judgment of nonsuit on the ground the evidence was sufficient to require jury trial. The record now before us discloses that the jury trial resulted in a verdict of $300.00 for the plaintiff.

No error.

STATE OF NORTH CAROLINA v. JESSE McCULLEN DAUGHETY.

(Filed 20 October, 1965.)

Appeal by defendant from *Mintz, J.*, 15 March 1965 Session of Lenoir.

This is a criminal action tried in the Recorder's Court of Kinston, North Carolina, upon a warrant charging defendant with driving a motor vehicle upon the highways and streets while under the influence of intoxicating beverages. From a verdict of guilty and the judgment imposed, defendant appealed to the Superior Court of Lenoir County in which there was a trial *de novo* on the original warrant.

The jury returned a verdict of guilty. The court sentenced defendant to three months in jail and assigned him to work under the direction of the State Prison Department. Execution of the sentence was suspended upon condition that defendant pay a fine of $300.00 and costs. Defendant appeals, assigning error.

Attorney General Bruton, Asst. Attorney General Charles D. Barham, Jr., Staff Attorney Wilson B. Partin, Jr., for the State.
Turner & Harrison for defendant.

Per Curiam. The State's evidence was sufficient to be submitted to the jury and defendant does not contend otherwise.

We have examined the assignments of error with respect to the admission of evidence and to the charge of the court, and in our opinion no prejudicial error has been shown.

No error.

EVELYN A. AASER v. THE CITY OF CHARLOTTE, THE AUDITORIUM-COLISEUM AUTHORITY AND CHARLOTTE HOCKEY CLUB, INC.

(Filed 3 November, 1965.)

1. **Municipal Corporations §§ 5, 10—**

In operating or leasing an arena for the holding of exhibitions and athletic events, and in operating refreshment stands in the corridors of the building during such events, a municipality acts in a proprietary capacity, and has the same liability as a private person or corporation for injuries to a patron from unsafe conditions.

2. **Same; Games and Exhibitions § 2—**

Where a city, in leasing an arena for an athletic game, retains the privilege of occupying and using the corridors for the operation of refreshment stands, the lease of the arena itself does not relieve the municipality of liability for an injury to a ticket holder injured in one of the corridors.

3. **Same; Negligence § 37a—**

One who purchases a ticket for an athletic game is an invitee of the operator of the exhibition and, while in a corridor providing access to portions of the building which his ticket entitles him to enter, is an invitee of the owner of the building who had retained the right to control the corridors.

4. **Games and Exhibitions § 2—**

The promoter of an athletic event is not an insurer of the safety of patrons purchasing tickets, but is under duty to exercise reasonable care to guard against creating a hazard and the duty to use reasonable care to discover and remove dangerous conditions of which he has actual or implied knowledge.

5. **Same—**

What constitutes reasonable care on the part of a promoter of an athletic event varies with the circumstances and extends not only to the physical conditions of the premises themselves but also to foreseeable activities of his employees, the contestants, and the spectators.

6. **Same—**

The promoter of an athletic event is charged with notice of dangerous conditions or activities created or engaged in by its employees, but as to

acts of third persons he is liable only for those injuries resulting from a condition or activity of which he had knowledge which had existed for a sufficient length of time for him to have discovered and removed the danger in the exercise of due diligence.

7. Same— Evidence held insufficient to show implied knowledge of dangerous activities of boys in corridors of arena.

Plaintiff, a paying spectator, was injured when her ankle was hit by a puck as she was walking along a corridor in the arena where she was attending a hockey game. Plaintiff's evidence tended to show that immediately after the injury she saw boys with hockey sticks playing in the corridor, and that boys had been seen before playing in the corridor with hockey sticks and pucks, and that on prior occasions some boys had been seen kicking paper cups about in the corridor. *Held:* Nonsuit should have been entered, since the evidence fails to show the boys had been playing with hockey sticks and pucks in the corridor for a sufficient length of time to permit an inference of implied notice of such dangerous activities, and since there was no evidence tending to show that the kicking of paper cups along the corridors was either dangerous or recurring or known to the proprietor.

8. Appeal and Error § 51—

On appeal from the overruling of motion to nonsuit, incompetent evidence admitted over objection must be considered in passing upon the sufficiency of the evidence.

9. Trial § 22—

Conflicting evidence offered by plaintiff must be resolved in plaintiff's favor in determining the sufficiency of evidence to overrule nonsuit.

APPEAL by the defendants, City of Charlotte and the Auditorium-Coliseum Authority, from *Brock, S.J.*, 25 January 1965 Civil Session, Schedule "C" of MECKLENBURG.

The plaintiff alleges that on 6 December 1963 she was a spectator at an ice hockey game played in the Coliseum owned by the city of Charlotte, and administered for it by its agency, the Auditorium-Coliseum Authority, hereinafter called the Authority, having purchased a ticket entitling her to admission thereto. She sues the city, the Authority and the Charlotte Hockey Club, Inc., the promoter of the hockey game, for injuries she sustained when struck by a hockey puck while walking in a corridor of the Coliseum. She alleges that a group of young boys were playing in the corridor, knocking the puck back and forth with hockey sticks and, in their play, struck the puck and drove it against her ankle. She further alleges that the defendants had prior knowledge of such play in the corridors by groups of children and were negligent in failing to use due care to stop it, thus failing to exercise reasonable care to keep the premises in a safe condition for use by their invitees, including the plaintiff.

The defendants in their respective answers deny all allegations of

negligence and deny that they had any knowledge of such acts and conduct by any group of children, including the group alleged to have been so playing at the time of the plaintiff's injury.

At the close of the evidence offered by the plaintiff the court entered judgment of nonsuit as to the defendant Charlotte Hockey Club, Inc., but denied the motions therefor by the city and the Authority. The jury rendered a verdict in favor of the plaintiff, finding her damages to be $2,500 and judgment was rendered thereon.

The plaintiff's own testimony is to the effect that: She and her husband, having purchased tickets entitling them to admission, went to the Coliseum on 6 December 1963 to witness the hockey game being played there that evening. During an intermission she left her seat and went to a hospitality room maintained by the Hockey Club for the entertainment of holders of season tickets, such as the plaintiff. Leaving the hospitality room, she was walking in the corridor toward the ladies' rest room when she was struck upon her right ankle with a hockey puck, resulting in a fracture of the ankle. As soon as she was struck she looked to her right and observed eight or ten young boys about 50 feet from her, running away and carrying hockey sticks. Upon her return to the hospitality room she saw therein Police Officer Zagar and R. H. Gilland, a director of the Hockey Club and told them what had occurred. Gilland replied that "they had been playing in the hallways before with hockey pucks and sticks." He asked Officer Zagar to go out and investigate, which Zagar did. As she walked initially along the corridor to the hospitality room the plaintiff did not observe any children playing with hockey sticks or pucks. She stayed in the hospitality room about five minutes, then went back out into the corridor to go to the rest room. She walked some 25 feet along the corridor on this occasion but did not observe the children until after she was struck. She had never before observed or heard of such playing in the corridors.

R. H. Gilland, called as a witness by the plaintiff, testified: The hospitality room was operated by the Hockey Club. He has frequently attended hockey games at the Coliseum. He has seen boys playing in the corridor but had never seen or heard of any children playing with hockey sticks and hockey pucks in the vicinity of the hospitality room prior to the occasion on which the plaintiff was injured.

Harold Love, a witness for the plaintiff, testified that on prior occasions he had observed boys kicking paper cups about in other corridors while hockey games were in progress, but had not observed any playing with hockey sticks and pucks.

Police Officer Zagar, who was also called as a witness by the plaintiff, testified that on the evening in question he was wearing his uniform but was not on duty as a city policeman. He was employed that evening by the Hockey Club. He was in the hospitality room when the plaintiff told him she had been hit with a hockey puck by boys playing in the corridor. He went out into the corridor. A group of boys, one or two of whom had hockey sticks, were playing there and he stopped them. On previous occasions he had observed boys playing in the hallway, kicking empty cups about, but he was unable to say whether or not on those occasions he had seen any boys in the corridors with hockey sticks.

The lease from the Authority to the Hockey Club granted the latter "the right to use [the Coliseum] * * * together with the usual entrances and exits to the same * * * and such additional space as the Lessor in its discretion shall allocate to the Lessee to be used for the purpose of 36 Hockey Games * * * exclusive of lobbies, general offices and all space in halls, corridors, basements, grounds, and so forth, used by the Lessor for concessions * * * all of which * * * are hereby expressly reserved by Lessor to its own use, with the privilege of occupying and using same at any and all times during the term of this agreement." The agreed rental was a share in the gross box office receipts. Free access at all times to all space occupied by the Lessee was reserved to the Authority and its officers and employees.

Before filing suit, the plaintiff gave due notice of her injury and claim to the city and to the Authority.

Boyle, Alexander and Carmichael for defendant appellants.
Elbert E. Foster and Richard T. Meek for plaintiff appellee.

LAKE, J. The Coliseum is an arena for the holding of exhibitions and athletic events owned by the city of Charlotte and administered for it by the Authority to produce revenue and for the private advantage of the compact community. A city is engaging in a proprietary function when it operates such an arena, or leases it to the promoter of an athletic event, and when it operates refreshment stands in the corridors of the building for the sale of drinks and other items to the patrons of such an event. *Carter v. Greensboro,* 249 N.C. 328, 106 S.E. 2d 564; *Millar v. Wilson,* 222 N.C. 340, 23 S.E. 2d 42. Consequently, the liability of the city and of the Authority to the plaintiff for injury, due to an unsafe condition of the premises, is the same as that of a private person or corporation. *Carter v. Greensboro, supra; Rhodes v. Asheville,* 230 N.C. 134, 52 S.E. 2d

371; *Millar v. Wilson, supra;* McQuillin, Municipal Corporations, 3rd Ed., § 53.91.

Upon this appeal it is not necessary for us to determine the duty owed to a ticket holder by the owner of an arena who has leased it to the promoter of an athletic exhibition so as to divest the owner of all control over the building. Here, by the terms of the lease, the city, through the Authority, retained a substantial measure of use of and control over the corridors of the Coliseum, even while the lessee was using it for its hockey games. The mere execution of such a lease does not free the city and the Authority from liability to a ticket holder injured in the corridor while in the Coliseum to attend a hockey game. *Davis v. Atlanta,* 84 Ga. App. 572, 66 S.E. 2d 188; *Johnson v. Zemel,* 109 N.J.L. 197, 160 A. 356; 4 Am. Jur. 2d, Amusements and Exhibitions, § 63.

One who purchases a ticket and, pursuant thereto, enters such an arena is an invitee of the operator of the exhibition. *Williams v. Strickland,* 251 N.C. 767, 112 S.E. 2d 533; *Hahn v. Perkins,* 228 N.C. 727, 46 S.E. 2d 854; *Anderson v. Amusement Co.,* 213 N.C. 130, 195 S.E. 386; Strong, N. C. Index, Negligence, § 37a. While in a corridor providing access to portions of the building which his ticket entitles him to enter, he is also the invitee of the owner of the building who has retained the right to control the corridors. No appeal having been taken from the judgment of nonsuit as to the Hockey Club, we are not here concerned with the liability of the promoter-lessee to a ticket holder injured in the corridor which the owner has retained the right to use and control. Nor are we concerned here with the right of the ticket holder against the owner of the building for injury received in the portion of the Coliseum in which the hockey game is actually played. The plaintiff was injured in a corridor where she had a right to be as the holder of a ticket to the hockey game. The city and the Authority had the right to control the corridor. As to her use of and injury in this corridor, the relation of the plaintiff to them and their duty to her are the same as if the city were a private corporation both owning the building and promoting the hockey game therein.

One who, expressly or by implication, invites others to come upon his premises to view, for a price, an athletic event being carried on therein has the duty to be reasonably sure that he is not inviting them into danger and must exercise reasonable care for their safety. *Dockery v. Shows,* 264 N.C. 406, 142 S.E. 2d 29. He is not an insurer of their safety and is liable only for injuries proximately caused by his failure to use reasonable care to discover and remove, or otherwise protect against, dangerous conditions, activities or occur-

rences upon his premises. *Dockery v. Shows, supra; Lynn v. Wheeler,* 260 N.C. 658, 133 S.E. 2d 514; *Williams v. Strickland, supra.* See also: *Revis v. Orr,* 234 N.C. 158, 66 S.E. 2d 652 (dance hall); *Anderson v. Amusement Co., supra* (theatre).

Since what constitutes reasonable care varies with the circumstances, the vigilance required of the owner of the arena in discovering a peril to the invitee and the precautions which he must take to guard against injury therefrom will vary with the nature of the exhibition, the portion of the building involved, the probability of injury and the degree of injury reasonably forseeable. The law does not require the owner to take steps for the safety of his invitees such as will unreasonably impair the attractiveness of his establishment for its customary patrons. Thus, a dance hall need not be brightly lighted *(Revis v. Orr, supra)* and the bleachers bordering the more remote areas of a baseball field need not be screened against batted balls. Those who attend athletic contests and similar amusements or exhibitions must anticipate that they will be conducted in the usual manner and surroundings. Thus, the owner of an arena has been held not liable for injury resulting from the normal jostling of a crowd at a hockey game. *Klish v. Alaskan Amusement Co.,* 153 Kan. 93, 109 P. 2d 75.

The duty of the owner extends to the physical condition of the premises, themselves, and to contemplated and foreseeable activities thereon by the owner and his employees, the contestants and the spectators. The amount of care required varies, but the basis of liability for injury to the invitee from any of these sources is the same —the failure of the owner to use reasonable care under the circumstances.

"[I]t is only when the dangerous condition or instrumentality is known to the occupant [owner], or in the exercise of due care should have been known to him * * * that a recovery may be permitted." *Revis v. Orr, supra.* In the place of amusement or exhibition, just as in the store, when the dangerous condition or activity is created or engaged in by the owner or his employee, the owner is charged with immediate knowledge of its existence, but where it arises from the act of third persons, whether themselves invitees or not, the owner is not liable for injury resulting unless he knew of its existence or it had existed long enough for him to have discovered it by the exercise of due diligence and to have removed or warned against it. *Norris v. Department Store,* 259 N.C. 350, 130 S.E. 2d 537. *Hughes v. Enterprises,* 245 N.C. 131, 95 S.E. 2d 577.

"The proprietor is liable for injuries resulting from the horseplay or boisterousness of others, regardless of whether such conduct

is negligent or malicious, if he had sufficient notice to enable him to stop the activity. But in the absence of a showing of timely knowledge of the situation on his part, there is no liability." 4 Am. Jur. 2d, Amusements and Exhibitions, § 59. Thus, in *Whitfield v. Cox,* 189 Va. 219, 52 S.E. 2d 72, the promoter of a wrestling match, not so shown to have been negligent, was held not liable for injury to a lady patron struck by a whiskey bottle suddenly thrown by another patron. On the other hand, in *Hughes v. Baseball Club,* 359 Mo. 993, 224 S.W. 2d 989, 16 A.L.R. 2d 904, the owner of a baseball park was held liable for injury to a lady patron, injured, when leaving the park after a game, by the horseplay of a group of boys whom the owner encouraged to gather at that point in the hope of being employed by the owner to go through the stands and pick up seat cushions after the crowd left and who habitually engaged in rowdy play while so waiting. See also: *Hawkins v. Theatres Co.,* 132 Me. 1, 164 A. 628; *Rawson v. Massachusetts Operating Co.,* 328 Mass. 558, 105 N.E. 2d 220; 29 A.L.R. 2d 907; Anno: 16 A.L.R. 2d 912, 932; Restatement, Torts, § 348 (1934); Prosser, Law of Torts, 3rd Ed. (1964), 405.

The burden rests upon the plaintiff to prove that the city, or the Authority, had knowledge of the fact that the group of boys who injured her was, or probably would be, playing in a dangerous manner in the corridors of the Coliseum, or would have so known had it exercised due care in observing conditions in the corridors on this evening or other occasions. On a motion for judgment of nonsuit her evidence must be taken to be true and considered in the light most favorable to her and all reasonable inferences therefrom which are favorable to her must be drawn. *Jones v. Horton,* 264 N.C. 549, 142 S.E. 2d 351; *Ammons v. Britt,* 256 N.C. 248, 123 S.E. 2d 579.

When so considered, the evidence does not justify such a finding. An inference may reasonably be drawn from the plaintiff's testimony that the hockey puck which struck her was driven along the corridor and against her ankle as the result of its being struck with a hockey stick by one of the boys whom she thereafter observed running in the corridor. Such activity by a group of boys in the corridor made it an unsafe place for use as a corridor by the plaintiff and other invitees of the city and the Authority, but there is no showing of any knowledge of this condition in the corridor by the city or the Authority or that either could have discovered it by the exercise of reasonable care in inspecting the corridors. The plaintiff had passed along this very corridor five minutes earlier and had not observed the boys. Subsequently, she walked from the door of

the hospitality room to the point where she was struck without noticing their play. There is nothing to show that anyone saw these boys or any others playing in the corridor with hockey sticks and pucks or in any other dangerous manner on this evening before the plaintiff was struck.

The plaintiff did testify that Mr. Gilland told her, when she informed him of her injury, that "they had been playing in the hallways before with hockey sticks and pucks." This was admitted in evidence over objection by the city and the Authority. It is not necessary to pass upon the validity of these objections, for, even though incompetent, this evidence was admitted and must be considered as if competent for the purpose of the motion for judgment of nonsuit. *Ballard v. Ballard,* 230 N.C. 629, 55 S.E. 2d 316. It must, for this purpose, be taken as true notwithstanding the testimony by Mr. Gilland, called as a witness by the plaintiff, that he had never seen or been told of children playing with these things in the vicinity of the hospitality room. Conflicts in evidence offered by the plaintiff must be resolved in her favor for the purposes of this motion. *Coleman v. Colonial Stores,* 259 N.C. 241, 130 S.E. 2d 338. Nevertheless, this shows nothing as to when or how long such activities were observed. There is nothing to show that the city and the Authority did not on such occasion, whenever it was, move promptly and effectively to stop the dangerous activity. There is nothing to show that this same group of boys was involved in the former play or that the city or the Authority had any reason to suppose it would recur.

The testimony that on unspecified occasions some boys had been observed kicking paper cups about in a corridor of the Coliseum does not justify an inference that such activity was either dangerour or recurring or known to the city or the Authority.

The evidence offered by the plaintiff is, therefore, not sufficient to justify a finding that a condition precedent to her right to recover from the city or the Authority existed. Therefore, the motions of the city and the Authority for judgment of nonsuit should have been granted.

Reversed.

ELIZABETH L. SHARPE, EXECUTRIX OF THE ESTATE OF WINFORD L. SHARPE, DECEASED, v. W. E. HANLINE AND/OR HANLINE POULTRY COMPANY, AND HARRY LEE GRIER.

(Filed 3 November, 1965.)

1. Automobiles § 41e—

Evidence tending to show that defendant driver parked the corporate defendant's truck on the right shoulder of the highway at an angle so that its left rear protruded eight to ten inches over the hard surface of the highway, without lights or reflectors that could be observed by motorists approaching the vehicle from its rear, that the shoulder of the road was 15 to 18 feet wide, and that plaintiff's testate, driving in the right-hand lane, collided with the rear of the truck, *held* sufficient to be submitted to the jury on the issue of negligence in violating G.S. 20-161.

2. Negligence § 26—

Nonsuit for contributory negligence is proper only when plaintiff's own evidence establishes this defense as the sole reasonable conclusion.

3. Automobiles § 42d—

Evidence tending to show that testate, driving a tractor-trailer along his right lane of a four-lane highway, collided with the rear of a truck which was parked on the right shoulder with its rear extending eight to ten inches over the hard surface, without lights or reflectors, and that at the time a vehicle was passing the tractor-trailer in the left lane for traffic going in that direction, *held* not to disclose contributory negligence as a matter of law on the part of testate.

APPEAL by plaintiff from *Walker, S.J.*, June Civil Session "C" 1965 of MECKLENBURG.

Plaintiff, as executrix of her husband's estate, brings this action for the wrongful death of her husband which resulted from a collision between a Burlington Industries, Inc., tractor-trailer, driven at the time by plaintiff's testate, and a "flat-bed pickup truck of defendant W. C. Hanline and/or Hanline Poultry Company" (Hanline), which had been parked on the shoulder of the southbound lane of Interstate 85 (I-85) about one-half mile south of the intersection of the Sam Wilson Road and I-85, in Mecklenburg County, between Charlotte and Gastonia, by the alleged employee of defendant Hanline, defendant Harry Lee Grier (Grier).

From the defendants' answer and from the evidence it appears that about noon on 4 February 1963 defendant Grier, while operating defendant Hanline's truck on I-85 between Charlotte and Gastonia, experienced mechanical difficulty with said truck and left the truck standing on the north shoulder of I-85. I-85, in the vicinity of where the collision occurred, consists of four traffic lanes: two lanes being provided for traffic traveling in a, generally, westerly or

southwesterly direction, separated by a grass median from two lanes provided for traffic traveling in a, generally, easterly or northeasterly direction. There are "wide paved shoulders" for each of the two outer lanes of traffic.

Plaintiff's evidence tends to show that the Hanline truck was parked on a slight curve and that the road was slightly downhill; that the shoulder of the road was fifteen to eighteen feet wide, part of which was asphalt; that the Hanline truck was "painted a dark color" and was parked at an angle, with the rear left of the flat-bed protruding out "eight to ten inches across the running part of the highway, the cement part." The evidence further tends to show that the parked truck had no lights or reflectors on it that could be observed.

Plaintiff's witness, Morris Roger Shaver, testified that on 5 February 1963, on I-85, he "came up behind this tractor-trailer * * * and I followed behind the truck for some distance * * *. I was proceeding to pass the tractor-trailer and it seemed like it just lifted up in the air and went off to the side of the road. * * * I was following the Burlington Industries unit traveling at approximately 55 to 58 miles per hour * * * my opinion is that it was going about 50 to 55 miles per hour. The Burlington Industries truck * * * was driving in the right-hand lane * * * the lane nearest * * * the shoulder of the road. * * * I did not at any time prior to the accident see or observe this pickup truck that I saw after the accident. * * * (I)t was just coming daylight and I was traveling with my headlights on. * * * I got alongside of the unit and about the edge of the tractor's wheel, I was in the extreme left-hand lane * * * when I saw it rear up."

The collision occurred at approximately 7:00 a.m. on 5 February 1963. "It was not dark, neither was it completely daylight."

Several witnesses testified that they passed the Hanline truck between 2:00 a.m. and the time the collision occurred. The presence of the Hanline truck protruding into the traveled portion of I-85 caused each witness to "swerve to the left," into the other lane, or nearer the broken white line between the lanes. There was no obstruction in the inside lane at the time each of these witnesses had to "swerve to the left" to avoid colliding with the Hanline truck.

At the close of plaintiff's evidence, defendants' motion for judgment as of nonsuit was allowed and the action dismissed. Plaintiff appeals, assigning error.

Hedrick, McKnight & Parham for plaintiff appellant.
Wardlow, Knox, Caudle & Wade for defendant appellees.

DENNY, C.J. The sole assignment of error is based upon the exception to the ruling of the court below in granting defendants' motion for judgment as of nonsuit at the close of plaintiff's evidence.

It is provided in G.S. 20-161 as follows: "(a) No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway: * * *."

The evidence adduced in the trial below is to the effect that defendant Grier parked the flat-bed pickup truck of Hanline on the shoulder of I-85 at an angle, with the rear left corner of the flat-bed truck protruding eight or ten inches into the traveled portion of the northern or outside lane of said highway. The uncontradicted evidence is to the effect that the shoulder of the road where the Hanline truck was parked was fifteen to eighteen feet wide. The evidence further tends to show that the parked vehicle had no lights or reflectors on it that could be observed by a motorist approaching the truck from its rear.

In our opinion, the provisions of G.S. 20-161 require that no part of a parked vehicle be left protruding into the traveled portion of the highway when there is ample room and it is practicable to park the entire vehicle off the traveled portion of the highway.

Ordinarily, when it affirmatively appears from the plaintiff's evidence that at the time of the accident the plaintiff was violating a safety statute or was guilty of conduct which was the proximate cause or one of the proximate causes of the accident, he will be held guilty of contributory negligence as a matter of law. *Weston v. R. R.*, 194 N.C. 210, 139 S.E. 237; *Lee v. R. R.*, 212 N.C. 340, 193 S.E. 395; *Austin v. Overton,* 222 N.C. 89, 21 S.E. 2d 887; *Atkins v. Transportation Co.*, 224 N.C. 688, 32 S.E. 2d 209; *McKinnon v. Motor Lines,* 228 N.C. 132, 44 S.E. 2d 735; *Riggs v. Gulf Oil Corp.,* 228 N.C. 774, 47 S.E. 2d 254.

In the instant case, there is no evidence that plaintiff's testate was violating any safety statute at the time of the accident. There is evidence, however, to the effect that at the time of the collision another vehicle was passing the Burlington Industries truck on its left.

In *Lambert v. Caronna,* 206 N.C. 616, 175 S.E. 303, it is said: "'Evidence tending to show that the plaintiff's automobile collided with defendant's truck parked partly across the highway on a dark night without a tail light in violation of statute, causing personal injury to the plaintiff and damage to his car, is sufficient to sustain an

affirmative answer upon the issue of defendant's actionable negligence.

'Contributory negligence of the plaintiff will not be held to bar recovery as a matter of law when an inference in his favor is permissible from the evidence, and in this case where the defendant had parked its car on a dark night upon the side of the highway without a tail light, and there is a reasonable inference that under the existing conditions the plaintiff could not have seen the truck in time to have avoided the injury, in the exercise of ordinary care, the question of contributory negligence upon the issue is for the determination of the jury.' "

In the case of *Cole v. Koonce*, 214 N.C. 188, 198 S.E. 637, defendants' truck was parked on the side of the highway with the left rear of the truck protruding twenty-eight inches on the concrete. Plaintiff was nonsuited below. Upon appeal, this Court reversed and, among other things, said: "It is a familiar rule that a judgment of involuntary nonsuit on the ground of contributory negligence of the plaintiff cannot be rendered unless the evidence is so clear on that issue that reasonable minds could draw no other inference. * * * Where the factors of decision are numerous and complicated, and especially where the opinions and estimates of witnesses play a prominent part, the court must exercise great care to avoid invading the province of the jury, when passing upon the conduct of the plaintiff and his ability, by the exercise of due care, to avoid the consequences of defendant's negligence. Practically every case must 'stand on its own bottom.' "

In *Williams v. Express Lines*, 198 N.C. 193, 151 S.E. 197, plaintiff collided with defendant's truck parked on a highway without a tail light. Brogden, J., speaking for the Court, in upholding a verdict for the plaintiff, said: "* * * (T)he law imposes upon the driver of a motor vehicle the duty of keeping a reasonably careful lookout, not only for other travelers, who are using the highway, but for dangers incurred along the journey. Huddy on Automobiles, 7th Ed., 950. As to whether a motorist, at a given time, was keeping a reasonably careful lookout to avoid danger is ordinarily an issue of fact, and hence the determination of such fact is for a jury. * * *"

In the case of *Tyson v. Ford*, 228 N.C. 778, 47 S.E. 2d 251, Stacy, C.J., said: "There are two lines of decisions in our Reports involving highway accidents which turn on the question of contributory negligence. *Hayes v. Telegraph Co.*, 211 N.C. 192, 189 S.E. 499. In this, as in other matters where a line must be drawn, there will be cases very near each other on opposite sides. Indeed, the line of demarca-

tion may be difficult to plot in some instances. While simple enough in statement, its application is the place of the rub. *Sibbitt v. Transit Co.,* 220 N.C. 702, 18 S.E. 2d 203. 'A serious and troublesome question is continually arising as to how far a court will declare certain conduct of a defendant negligence, and certain conduct of a plaintiff contributory negligence, and take away the question of negligence and contributory negligence from the jury.' *Moseley v. R. R.,* 197 N.C. 628, 150 S.E. 184."

This Court recently held in the case of *Rouse v. Peterson,* 261 N.C. 600, 135 S.E. 2d 549, that where plaintiff was driving her automobile within the maximum speed limit "she cannot be held contributorily negligent as a matter of law in outrunning her headlights, if she did, which we do not concede, and striking the rear end of the pickup truck stopped on the highway without lights. G.S. 20-141(e) * * *." See also *Chaffin v. Brame,* 233 N.C. 377, 64 S.E. 2d 276; *Melton v. Crotts,* 257 N.C. 121, 125 S.E. 2d 396; *Correll v. Gaskins,* 263 N.C. 212, 139 S.E. 2d 202.

In our opinion, plaintiff's evidence, when considered in the light most favorable to her, is sufficient to entitle her to go to the jury upon proper instructions on the issues of negligence, contributory negligence and damages, and it is so ordered.

The judgment as of nonsuit entered below is

Reversed.

CAROLYN J. VAN EVERY v. PHILIP L. VAN EVERY.

(Filed 3 November, 1965.)

1. **Pleadings § 30—**

Defendant's motion for judgment on the pleadings presents the question of law whether the complaint as modified by the reply alleges facts sufficient to state a cause of action or admits facts which constitute a complete legal bar thereto.

2. **Divorce and Alimony § 16—**

A valid separation agreement executed in conformity with G.S. 52-12 precludes the wife from thereafter maintaining an action for alimony in addition thereto.

3. **Husband and Wife § 12—**

The eminence, experience, and character of counsel who represent the

wife in procuring a property settlement bear directly on her subsequent attempt to set it aside as fraudulent.

4. **Same— *Allegations held insufficient to raise issue of fraud in procuring execution of separation agreement.***

In this action for alimony without divorce, plaintiff admitted in her reply that she had executed the separation agreement attached to and made a part of defendant's answer, but alleged that she was then suffering mental and emotional disability so that she did not understand its force and effect, that its execution was procured by fraud, and that the consideration was so grossly inadequate as to amount to a total failure of consideration. The separation agreement disclosed that it was executed in conformity with G.S. 52-12, that it was prepared by eminent counsel for the respective parties after disclosure of the husband's financial condition in reasonable detail, and that the consideration therefor was a home, its furnishings, automobiles and, at the plaintiff's insistence, a large sum in cash in lieu of periodic payments of alimony. *Held:* Plaintiff's reply asserted mere conclusions and failed to allege facts which, if found to be true, would permit the legitimate inference that plaintiff was induced by fraudulent misrepresentations to execute the separation agreement, and the reply is insufficient to raise the issue of fraud.

5. **Pleadings § 30—**

On motion for judgment on the pleadings, exhibits attached thereto and made a part thereof are properly considered.

APPEAL by plaintiff from *Riddle, S.J.*, March 22, 1965 Schedule D Session, MECKLENBURG Superior Court.

On January 12, 1965, the plaintiff instituted this civil action for alimony without divorce. She filed a 23-page complaint reviewing in minute detail the domestic troubles of the parties since their marriage in June, 1935. She alleged that at the time of the marriage the defendant was working for a salary of $30.00 per week. She alleged, on information and belief, that his present worth is five million dollars and his annual income is $250,000.00. In the reply she alleges the income to be $123,000.00. Of the four children of the parties, all girls, three of them are married and have homes of their own. The youngest daughter, now 20, lives with the plaintiff. The defendant has made such provision for the youngest daughter as well as the other children that neither requires help from the plaintiff.

Among the marital difficulties, the plaintiff alleges the defendant wrongfully accused her of borrowing $6,000.00 from one of the Charlotte banks, whereas in fact she had not borrowed money but had requested and obtained an advance of $6,000.00 from a trust fund the parties had set up for her to be paid at the rate of $1,-500.00 per month for her household and personal expenses.

The plaintiff, in her prayer for relief, demands $3,000.00 per month

temporary, and a like amount of permanent, alimony and suitable counsel fees. She prayed for an attachment of all the defendant's property, including the garnishment of his accounts in four Charlotte banks. She asked that a receiver be appointed to take charge of all defendant's property located in this State.

The defendant filed a verified answer in which he denied substantially all charges of mistreatment specified in the complaint, denied the allegations as to his wealth. However, he admitted the parties had separated at the time alleged because of irreconcilable differences and that the separation was by agreement. As a bar to this action, he alleged that on December 31, 1963, the parties entered into a separation and property settlement agreement, a copy of which was attached to and made a part of the answer.

Between the date of the separation and the date of the agreement, able, experienced, conscientious, and highly successful attorneys represented both parties. After exhaustive inquiry on the part of plaintiff's counsel who obtained from the defendant's counsel an inventory of defendant's assets, the agreement was carefully and painstakingly prepared and all terms made known and agreed to by the parties. We quote here a few of the pertinent provisions:

> "1. It is agreed that from and after the date of this Separation Agreement, the said Philip L. Van Every and Carolyn J. Van Every shall and will continue to live separate and apart, each from the other, as fully, completely and in the same manner and to the same extent as though they had never been married.
>
> "3. Each of the parties hereto is fully and completely informed of the financial and personal status of the other, and the said husband has furnished to the wife and her attorneys a personal financial statement showing his estimated net worth and his current annual income, all in reasonable detail, and each of the parties hereto has given full and mature thought to the making of this Agreement, and all of the obligations contained herein, and each of the parties hereto has been and is represented by counsel, and each of the parties understands that the agreements and obligations assumed by the other are assumed with the express understanding and agreement that they are in full satisfaction of all rights which each of the said parties now has or might hereafter or otherwise have in the property or estate of the other and in full satisfaction of all obligations, which each of said parties now has or might hereafter or otherwise have toward the other."

The settlement provided that the defendant convey to the plain-

tiff the home located on Hastings Drive in Charlotte, all household furnishings located therein, a Cadillac automobile and a station wagon, and to make the following payments in cash: $120,000.00 upon the execution of the settlement; $100,000.00 on April 1, 1964; $100,000.00 on July 1, 1964; and $100,000.00 on September 1, 1964. The plaintiff agreed to accept the payments in lieu of all claims growing out of the marriage, including right to administer on the defendant's estate or share therein, or to dissent from his will.

> "7. Wife acknowledges that she and her counsel have expressly requested a lump sum settlement in lieu of, relinquishment and waiver of all maintenance, support and alimony and claims for maintenance, support and alimony, and Wife fully understands and agrees that Husband has no further obligation to maintain and support Wife and will not be responsible for the further maintenance and support of Wife under any circumstances. . . ."

In fulfillment of all obligations which the defendant assumed under the deed of separation, he conveyed to the plaintiff the residence at 2018 Hastings Drive in Charlotte, together with all household furnishings therein. Likewise, he stipulated that the plaintiff was the owner of the Cadillac automobile and the station wagon. He further alleged that he paid to the plaintiff the sum of $420,000.00 in cash.

The plaintiff, by reply, admitted the execution of the separation agreement, her acknowledgement before the Clerk of Superior Court in the manner provided by law for contracts between husband and wife, and that the Clerk entered this certificate: "I do further certify that it has been made to appear to my satisfaction and I do find as a fact that the same is not unreasonable or injurious to her."

The plaintiff seeks to nullify and set aside the separation agreement upon the basis of these allegations: "(T)hat on December 31, 1963 (a) she was incapable by reason of physical, mental and emotional illness and disability to know and understand the force and effect of her act in signing and acknowledging said paper writing; . . . (b) the plaintiff's signature upon said paper writing and her acknowledgment of the execution of the same (were) procured by the fraudulent misrepresentations communicated by the defendant to the plaintiff; (c) the consideration paid by the defendant to the plaintiff in connection with procuring the plaintiff's signature upon said paper writing was so grossly inadequate as to amount to a total failure of consideration and a constructive fraud practiced by the defendant upon the plaintiff."

The reply further alleged: "(T)he plaintiff was advised that the execution of the paper writing did not constitute any permanent settlement because the defendant would return and resume the marriage relationship within a few weeks, and that the money to be received by the plaintiff under the terms of the paper writing was tantamount to a gift. . . . At the time the plaintiff acknowledged her execution of said paper writing she did not know or understand the legal force and effect of her execution . . . did not realize that the terms and provisions . . . were unreasonable and injurious to her, . . . or . . . that the paper writing constituted any permanent or final settlement between her and the defendant." She asked the court to declare that the separation agreement is neither legally binding nor valid so as to bar the plaintiff from the assertion of all rights which she has by reason of the marriage.

The defendant filed a written motion for judgment on the pleadings, which consisted of the complaint, answer, to which was attached the separation agreement, and the reply, all of which were verified. The court, after argument, concluded the plaintiff had not offered any valid challenge to the deed of separation, the formal execution of which she admitted. The court held that the rights of the parties were fixed by the agreements which constituted a complete bar to the action. The petition for alimony and attorney's fees was denied and the action was dismissed. The plaintiff appealed.

Herbert, James & Williams, and Jordan, Wright, Henson & Nichols for plaintiff appellant.

Warren C. Stack; Kennedy, Covington, Lobdell & Hickman by Frank H. Kennedy for defendant appellee.

HIGGINS, J. The plaintiff has appealed from an adverse judgment on the pleadings. The motion for such judgment is in the nature of a demurrer, allowable against the plaintiff only when the complaint as modified by the reply fails to allege facts sufficient to state a cause of action or admits facts which constitute a complete legal bar thereto. When all facts necessary to establish the plea in bar are either alleged or admitted in the plaintiff's pleadings, it becomes the duty of the court to pass on the plea as a matter of law. *McFarland v. Publishing Co.,* 260 N.C. 397, 132 S.E. 2d 752; *Erickson v. Starling,* 235 N.C. 643, 71 S.E. 2d 384; *Adams v. Cleve,* 218 N.C. 302, 10 S.E. 2d 911; *Mitchell v. Strickland,* 207 N.C. 141, 176 S.E. 468.

Conceding the plaintiff in her complaint states a cause of action for alimony under G.S. 50-16, nevertheless, by her reply, she ad-

mits she executed a separation agreement and property settlement in accordance with the statutory formality required by G.S. 52-12. At the time she executed the agreement and during the negotiations leading up to its preparation, she was represented by Messrs. Carswell & Justice, Attorneys of Charlotte, who participated for weeks in the negotiations which culminated in the settlement. She admits she received the home and all furnishings in Charlotte; a Cadillac automobile and a station wagon; and in lieu of periodic payments of alimony she received, at her own insistence and request, a lump sum payment of $420,000.00 in cash. The record discloses she received (and still receives) $1,500.00 monthly from a trust fund set up for her by the defendant and his mother.

On the argument the plaintiff's present counsel do not deny that the plaintiff's attorneys in the settlement proceedings were highly successful members of the Bar, possessed a high degree of legal learning and business experience. The eminence, experience, and character of counsel who represent the plaintiff in procuring a property settlement bear directly on her subsequent attempt to set it aside as fraudulent. "The presence of able counsel for the wife at the conference 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 arrangements, and was ignorant of its terms and did not know what she was doing, (citing authorities). 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.' " *Joyner v. Joyner,* 264 N.C. 27, 140 S.E. 2d 714.

The plaintiff's pleadings are devoid of any factual allegations which raise an issue of fraud in procuring the separation agreement. The allegation, "(T)he plaintiff was advised (by whom is not disclosed) that the paper did not constitute a permanent settlement because the defendant would return, resume marriage relations, and the money received would be tantamount to a gift," is an insufficient allegation on which to impeach the Clerk's certificate required by G.S. 52-12. The above allegation reflects more on the plaintiff's good faith than upon the defendant's lack of it. Nor are we impressed with the allegation that the provisions made for the wife are so grossly inadequate as to amount to a total failure of consideration for the contract. According to the plaintiff's allegation, the defendant's salary at the time of their marriage was $30.00 per week. Thirty years later a trust fund of $1,500.00 per month, a furnished home,

two automobiles, and $420,000.00 in cash constitute "a total failure of consideration."

In the examination of the pleadings to determine whether a plea in bar is established thereby, we may treat the exhibit to the answer (the property settlement and separation agreement) as a part of the pleadings. The plaintiff's reply admits its execution. *Sale v. Johnson, Com'r.,* 258 N.C. 749, 129 S.E. 2d 465. A separation agreement in which fair and reasonable provision is made for the wife will be upheld when executed by her in the manner provided by G.S. 52-12. *Kiger v. Kiger,* 258 N.C. 126, 128 S.E. 2d 235; *Bolin v. Bolin,* 246 N.C. 666, 99 S.E. 2d 920; *Archbell v. Archbell,* 158 N.C. 408, 74 S.E. 327. A valid separation agreement cannot be set aside or ignored without the consent of both parties. The intent of the parties as expressed in such an agreement is controlling. *Bowles v. Bowles,* 237 N.C. 462, 75 S.E. 2d 413; *Lawson v. Bennett,* 240 N.C. 52, 81 S.E. 2d 162. The statute (G.S. 52-12) provides that the certificate of the probate officer shall be conclusive. However, the contract may be set aside if induced by fraud. The plaintiff, however, must allege *facts* which, if found to be true, permit the legitimate inference that the defendant induced the plaintiff by fraudulent misrepresentations to enter into the contract which but for the misrepresentations she would not have done. If the pleading alleges conclusions rather than facts, it is insufficient to raise an issue of actual fraud. When tested by the applicable rules of construction, the plaintiff's allegations are insufficient to overcome the force and effect of her separation agreement. These deficiencies appear upon the face of the pleadings. Judge Riddle properly sustained the plea in bar, denied relief, and dismissed the action. His judgment is

Affirmed.

STATE v. JAMES HOWARD ALLISON.

(Filed 3 November, 1965.)

1. Burglary and Unlawful Breakings § 4; Larceny § 7—

Evidence tending to show that a store building was broken and entered at nighttime and goods taken therefrom, that some of the goods were found shortly thereafter in a car in which defendant and his companions were riding, together with testimony of an accomplice tending to show that the goods were taken by defendant and his companions after breaking and entering, *held* sufficient to overrule nonsuit.

2. **Burglary and Unlawful Breakings § 4; Larceny § 5—**

When it is established that a store has been broken into and entered and that merchandise has been stolen therefrom, the possession of the stolen merchandise shortly after it had been stolen raises the presumptions of fact that the possessor is guilty of the larceny and of the breaking and entering.

3. **Criminal Law § 101—**

Circumstantial evidence as to the identity of defendant as one of the persons who committed the crimes charged in the bill of indictment *held* sufficient to overrule nonsuit.

APPEAL by defendant from *Farthing, J.*, May 1965 Session of LINCOLN.

Appellant, James Howard Allison, was tried on a bill of indictment, containing two counts, to wit: first, feloniously breaking and entering a certain building "occupied by one Joe Anderson's store"; and second, larceny of described merchandise of the value of more than $200.00 "of the goods and chattels and moneys of one Joe Anderson's store." The indictment alleges said criminal offenses were committed in Lincoln County, North Carolina, on the 23rd day of January 1965.

Earl Edward Steppe and John Max Bradley, in separate bills of indictment, were charged with the same criminal offenses.

John Max Bradley waived his right to counsel, entered a plea of guilty as charged, and testified as a State's witness. Allison (appellant), represented by W. H. Childs, Sr., Esq., court-appointed counsel, and Steppe, represented by Glen B. Ledford, Esq., an attorney from Charlotte, entered pleas of not guilty; and the Allison and Steppe cases were, by consent, consolidated for the purpose of trial.

The jury found both Allison and Steppe "guilty as charged." Thereupon, separate judgments as to Allison and Steppe were pronounced. Steppe did not appeal.

The court, based on Allison's conviction on the first (breaking and entering) count, pronounced judgment imposing a prison sentence of not less than four nor more than nine years, with provisions that such sentence was to commence upon expiration of certain prior sentences; and, based on Allison's conviction on the second (larceny) count, the court, by and with the consent of Allison and his said counsel, continued prayer for judgment for five years from May 13, 1965, "with the leave of the Court to pronounce judgment at any subsequent term during the said 5-year period upon motion of the solicitor."

Allison excepted and appealed.

After appropriate appeal entries for Allison had been made, the

court, "for good cause shown, by and with consent of the defendant given in open Court," permitted Mr. Childs to withdraw as Allison's counsel; and thereupon the court appointed David Clark, Esq., as counsel for Allison, an indigent, to prosecute this appeal in his behalf, and ordered that Lincoln County pay all necessary costs incident to a full and proper appeal.

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

David Clark for defendant appellant.

BOBBITT, J. Appellant assigns as error (1) the denial of his motion for judgment as of nonsuit, and (2) the denial of his motion to set aside the verdict.

The evidence consists of that offered by the State and of the testimony of a witness offered by Steppe, to wit, Steppe's mother. Allison did not testify or offer evidence.

The State's evidence consists of the testimony of Joe Anderson, John Max Bradley, R. L. Sigmon, a State Highway Patrolman, and James Melvin, Davidson County Jailer, and of exhibits. This evidence tends to show the facts narrated below.

Joe Anderson's store is located on N. C. Highway #16 in Lowesville in the eastern portion of Lincoln County. Joe Anderson owns the building and operates a general merchandise store therein. The store has a front door and a back door. About 7:00 p.m. on Friday, January 22, 1965, Joe Anderson in person closed his store, locking the front door and barring the back door. When he returned to the store about 7:00 a.m. the following morning, Saturday, January 23, 1965, he found the front door had been "forced open" and the back door "was just unbarred." Within the store there was "general confusion." The combination to his safe had been knocked off. Numerous articles of merchandise, of a value much in excess of $200.00, were missing. Shoes were among the articles missing.

On Friday, January 22, 1965, at the request of Allison, Allison, John Max Bradley and Donny Lee Bradley drove from Burlington, N. C. to Charlotte, N. C. in Donny Lee Bradley's blue and white 1957 Buick. There they met Steppe. The four "got something to eat" at a Charlotte restaurant. Steppe had some "pills" and, while at the restaurant, the four started taking these pills, "around 7 or 7:30 or 8, on Friday night, the 22nd of January." While the four were together in the restaurant, Donny Lee Bradley, the older brother (25) of John Max Bradley (16), was arrested and locked up for public drunkenness.

Allison, Steppe and John Max Bradley (Bradley) left the restaurant and "went to a man's house in Charlotte." There Allison and Steppe got out, got a blanket with some tools in it and "put them in the front seat on the front floor board." Bradley went to sleep. When he waked up Allison and Steppe "were fixing to turn off the highway." They turned off the highway and parked near a church. Bradley went with Allison and Steppe to the back of a store. Allison and Steppe carried the tools from the car. They instructed Bradley "to tell them if any cars were coming." Bradley did not enter the store. Allison and Steppe went around to the front and thereafter came out the back door, bringing "some stuff out in boxes." (According to Bradley, this store was in Lincoln County or Gaston County, "coming into Lincoln or going out of Lincoln.") Allison, Steppe and Bradley were at the store "after midnight."

Leaving the store, Allison, Steppe and Bradley went to the house of one Bid Blackman in Charlotte. There Allison backed the car up to the garage and Allison and Steppe "unloaded some stuff." Bradley was asleep and did not remember what occurred after the trip to Blackman's house until the car wreck in Davidson County. When the car wreck occurred, John Max Bradley, Donny Lee Bradley, Allison and Steppe were the occupants of the car.

Shortly after 1:30 p.m. on Saturday, January 23, 1965, R. L. Sigmon went to the scene of a one-car wreck on U. S. Highway #29, about a mile south of Lexington, N. C. The car involved, "a two-tone 1957 Buick," had gone off the left side of the lane for north-bound traffic, down a 25-30 foot embankment and was stopped "kind of at an angle into some trees." Allison was under the steering wheel. Steppe was in the front seat beside Allison. Donny Lee Bradley and John Max Bradley were in the back seat.

The trunk of the car contained a wide variety of articles of personal property. Among the articles in the trunk were shoe boxes containing new shoes, also empty shoe boxes. Each of the four occupants of the Buick had on a brand new pair of shoes. A shoe box containing a pair of new shoes (State's Exhibit #1), and another shoe box containing another pair of new shoes (State's Exhibit #2), and a box containing a tie and belt set (State's Exhibit #3), were taken from the trunk of the Buick. These boxes bore notations made thereon by Joe Anderson of the cost price or selling price or both of the merchandise therein. These boxes and contents had been a part of the stock of merchandise in Joe Anderson's store prior to January 23, 1965. Joe Anderson did not know Allison, Steppe or John Max Bradley and had never seen them in his store.

Defendant's counsel contends that judgment as of nonsuit should have been entered because the State's case rests upon what he describes as "the unsupported, confused, indefinite, and self-contradictory testimony of an accomplice." However, defendant's conviction does not rest solely on the testimony of John Max Bradley. Indeed, John Max Bradley did not purport to know what store Allison and Steppe broke into and entered and stole merchandise from except the general location thereof and that entrance was made from the front and that merchandise was removed from the back. However, John Max Bradley's testimony is very significant and strengthens the State's case when considered along with the testimony of Joe Anderson, R. L. Sigmon and James Melvin.

There is ample evidence to support findings that Joe Anderson's store at Lowesville in Lincoln County was broken into and entered during the night of January 22-23 and that merchandise of a value much in excess of $200.00 was stolen therefrom and that a portion of such stolen merchandise was found in the possession of Allison and his associates about 1:30 p.m. on Saturday, January 23rd, near Lexington in Davidson County. These facts are sufficient to invoke the following well-established legal principle: If and when it is established that a store has been broken into and entered and that merchandise has been stolen therefrom, the recent possession of such stolen merchandise raises presumptions of fact that the possessor is guilty of the larceny *and* of the breaking and entering. *S. v. Hullen,* 133 N.C. 656, 45 S.E. 513; *S. v. White,* 196 N.C. 1, 144 S.E. 299; *S. v. Lambert,* 196 N.C. 524, 146 S.E. 139; *S. v. Neill,* 244 N.C. 252, 93 S.E. 2d 155.

The State relied upon circumstantial evidence to identify Allison as one of the 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.

No error.

STATE OF NORTH CAROLINA v. ARTHUR LEWIS PERRY.

(Filed 3 November, 1965.)

1. Criminal Law § 23—

In a prosecution for burglary in the first degree, G.S. 14-51, the acceptance by the court of defendant's plea of guilty of felonious breaking and entering of a house otherwise than burglariously, G.S. 14-54, will not be disturbed when there is nothing in the record tending to show that defendant's plea was not freely, voluntarily, understandingly, and intelligently entered, the plea being to a lesser degree of the offense charged, G.S. 15-170, and carrying a much less severe sentence. The fact that defendant was not represented by counsel when, before indictment, he sought a police officer and made exculpatory statements, does not affect this result.

2. Searches and Seizures § 1—

A plea of guilty properly entered waives defendant's right to protest the legality of a search without a warrant.

3. Criminal Law § 23—

Defendant's plea of guilty is equivalent to a conviction of the offense charged and precludes defendant from questioning the facts charged in the indictment, and his appeal presents only whether such facts constitute a punishable offense under the laws and the Constitution.

4. Criminal Law § 131—

Where a defendant has entered a plea of guilty he has a right to an opportunity to rebut representations in aggravation of punishment and to make representations in mitigation, but upon the hearing on the question of punishment the court is permitted wide latitude and the rules of evidence will not be strictly enforced, and the hearing of incompetent or hearsay evidence is not ground for disturbing the sentence in the absence of a showing of prejudice.

APPEAL by defendant from *McLaughlin, J.*, 31 May 1965 Special Session for the trial of criminal cases of FORSYTH.

Criminal prosecution on an indictment containing two counts: both counts charging defendant with the commission of the felony of burglary in the first degree, a violation of G.S. 14-51.

When the case was called for trial, according to page 20 of the record, defendant, who was represented by Phin Horton, Jr., a member of the Forsyth County Bar, by and through his attorney "entered a plea of guilty to feloniously breaking and entering a dwelling house other than burglariously, which plea was accepted by the solicitor for the State with the permission of the court." A similar plea of guilty appears on page 9 of the record, except that there it is stated defendant was represented by Wes Bailey of the Forsyth County Bar. The statement of case on appeal was agreed to by defendant's

present counsel of record and Thomas W. Moore, Jr., assistant solicitor for the State.

From a judgment of imprisonment of not less than seven years nor more than ten years, defendant appeals.

Attorney General T. W. Bruton, Deputy Attorney General Ralph Moody, and Staff Attorney Andrew A. Vanore, Jr., for the State.

McKissick & Burt by M. C. Burt, Jr., for defendant appellant.

PARKER, J. Both counts in the indictment charge defendant with burglary in the first degree, a violation of G.S. 14-51. G.S. 14-52 provides that any person convicted, according to due course of law, of the crime of burglary in the first degree shall suffer death, with a proviso that if the jury when rendering its verdict in open court shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury.

It is a well-settled rule of practice with us, as provided in G.S. 15-170, that "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."

From the common law concept of burglary a number of statutory crimes associated with burglary have evolved, *e.g.*, G.S. 14-54, breaking into or entering houses otherwise than burglariously. 35 N. C. Law Review 98. The statutory offense set forth in G.S. 14-54 is a less degree of the offense of burglary in the first degree set forth in the indictment and as defined in G.S. 14-51. *S. v. Allen,* 186 N.C. 302, 119 S.E. 504; *S. v. Chambers,* 218 N.C. 442, 11 S.E. 2d 280. Defendant by and through his counsel in open court, as authorized by the well-settled rule of practice in this jurisdiction, entered a plea of guilty to feloniously breaking and entering a dwelling house other than burglariously, a violation of G.S. 14-54, and the sentence of imprisonment imposed was within the statutory limit set forth in G.S. 14-54 for the commission of the felony to which defendant pleaded guilty. See also G.S. 14-72; *S. v. Cooper,* 256 N.C. 372, 124 S.E. 2d 91.

Defendant assigns as error "that the court erred in accepting a plea of guilty in view of the fact that the defendant was not represented by counsel during the interrogation procedure," in violation of his right to due process guaranteed to him by the Constitutions of North Carolina and of the United States. The record discloses the following according to the testimony of Sergeant Rominger of the detective division of the Winston-Salem Police Department: "That

on Monday, April 5th around 10:30 A.M. he [defendant] walked in the Detective's Office and wanted to see him and wanted to know if he was hunting for him and he said 'yes.' That he said 'what do you want to tell me.' He said, 'about the incident at Wake Forest.' That he said, 'Arthur, if you are involved you should call your attorney —you don't have to make any statement to me.' I said, 'there is the telephone you can use it to call anybody you want to,' and he said, 'no, I want to tell you what happened.' " Whereupon, defendant made a statement which tended not to incriminate him, but to exonerate him.

According to defendant's brief, he is "a young adult Negro." When he entered his plea of guilty, he had full knowledge of all circumstances relating to his conduct in this case. There is nothing in the record to indicate that he is not a person of competent intelligence. There is no contention in defendant's brief that his trial lawyer was not able and competent. There is nothing in the record to indicate that defendant's plea of guilty was not freely and voluntarily, and understandingly and intelligently entered. Apparently, defendant's trial counsel and defendant at the time he entered the plea of guilty were of the opinion, in light of the fact that he was charged with capital offenses, that the entry of the plea of guilty of a felonious breaking and entry of a dwelling house otherwise than burglariously, which was a violation of G.S. 14-54 and for which violation the punishment could not exceed imprisonment for more than ten years, was to defendant's advantage, and we cannot say that this was not the wiser course. *S. v. Wilson,* 251 N.C. 174, 110 S.E. 2d 813. Under the facts here it does not appear that defendant's constitutional right to due process was violated by the court's acceptance of his plea of guilty as set forth above.

W. H. Byrd, a special police officer at Wake Forest College, testified that about 3 a.m. on 30 March 1965 police officers examined the glove compartment of a car parked on the Wake Forest College campus and found therein a 1964 automobile registration card. Defendant assigns as error the admission of this testimony, because there is no evidence that the officers had a search warrant, or that the defendant consented to the search. This assignment of error is overruled. By pleading guilty, the defendant waived his right to attack the legality of the search and seizure. 21 Am. Jur. 2d, Criminal Law, § 495, pp. 484-85; 22 C.J.S., Criminal Law, § 424(6).

Defendant assigns as error testimony of police officers as to statements made to them in respect to the offense to which defendant pleaded guilty by Linda Ingram whose money was stolen about

3 a.m. on 30 March 1965 from her room in the girls' dormitory at Wake Forest College, by the housemother of the dormitory, and by other girls who had rooms in the girls' dormitory at the time, all of whom were not present, or did not testify, at the trial, and as to a free and voluntary statement made by defendant to a police officer, which statement by him does not incriminate him, but tends to exonerate him. This assignment of error is overruled. This is said in 21 Am. Jur. 2d, Criminal Law, § 495, p. 484: "By a plea of guilty a defendant waives the right to trial and the incidents thereof, and the constitutional guaranties with respect to the conduct of criminal prosecutions." To the same effect, 22 C.J.S., Criminal Law, § 424(6). In *S. v. Wilson, supra,* it is said: "Defendant's plea of guilty was equivalent to a conviction of the offense charged, and no other proof of guilt was required." *S. v. Smith,* 265 N.C. 173, 143 S.E. 2d 293, quotes *S. v. Warren,* 113 N.C. 683, 684, 18 S.E. 498, 498, as follows: "The defendant having pleaded guilty, his appeal could not call in question the facts charged, nor the regularity and correctness in form of the warrant. * * * The appeal could only bring up for review the question whether the facts charged, and of which the defendant admitted himself to have been guilty, constitute an offense punishable under the laws and constitution." To the same effect, 5 Wharton's Criminal Law and Procedure (Anderson Ed. 1957), § 2247, p. 498.

When a defendant in a criminal case has entered a plea of guilty, the matter of prime importance to him is the nature and severity of his punishment, and he has the right to a fair and just consideration, and to be given full opportunity to rebut representations in aggravation of punishment and to make representations in mitigation. All the evidence here was heard by the judge in the presence of defendant and his counsel. Defendant had full opportunity to offer any evidence in mitigation of the offense to which he pleaded guilty, but he decided to offer no evidence except that of one witness that defendant is a good man so far as he knows, and that of his father that he had not been in trouble before. The State had evidence that defendant previously had paid a fine of $100 and the costs for driving an automobile while intoxicated, and had been in court for assault on a female. This Court said in *S. v. Pope,* 257 N.C. 326, 126 S.E. 2d 126: "In our opinion it would not be in the interest of justice to put a trial judge in a strait jacket of restrictive procedure in sentencing. * * * He should be permitted wide latitude in arriving at the truth and broad discretion in making judgment." While the procedure in the instant case of the court's hearing testimony of officers as to what witnesses said instead of having the witnesses present in court to

testify is not approved, under the facts of this case it cannot be said that the hearing of such testimony by the judge before sentencing the defendant was prejudicial to the defendant, or that it manifested inherent unfairness or injustice, or that it was conduct which offended the public sense of fair play.

Defendant's plea of guilty as above set forth constituted a violation of the felony provisions of G.S. 14-54, which is an offense punishable under the laws and Constitution of this State. All defendant's assignments of error are overruled, and the judgment below is

Affirmed.

DOROTHY LEWIS GRIFFITH v. DAVID GRIFFITH.

(Filed 3 November, 1965.)

1. Divorce and Alimony § 18—

Where the husband does not assert adultery as a bar to the wife's right to alimony *pendente lite*, the court is not required to find the facts, either in denying or in granting subsistence *pendente lite*, and its order denying subsistence and counsel fees *pendente lite* will not be disturbed in the absence of a showing of abuse of discretion or error of law.

2. Same; Trial § 29—

The wife, upon the denial of her motion for subsistence and counsel fees *pendente lite* may take a voluntary nonsuit of her action for alimony without divorce and custody of the children of the marriage, the husband having filed no pleading and not having asserted any claim or demanded any relief against the plaintiff.

APPEAL by plaintiff from *Lupton, J.*, July 19, 1965 Special "C" Session, MECKLENBURG Superior Court.

The plaintiff, Dorothy Lewis Griffith, instituted this civil action against her husband, David Griffith, for temporary and permanent alimony without divorce, for counsel fees, and for the custody of the two children of the parties. The complaint alleged in substance the parties were married in December, 1959. On June 21, 1965, by reason of the cruel, unjust, and unprovoked conduct of the defendant (giving details), the plaintiff, with the two children, was forced to leave the home where the parties had lived, the title to which was held as an estate by the entireties.

The plaintiff instituted this action the day of the separation. On her motion, Judge Campbell issued an order, returnable before Judge Lupton, requiring the defendant to appear and show cause why he

should not be required to pay to the plaintiff for herself and the children suitable support and attorneys' fees pending trial on the merits and be required to surrender possession of the home to the plaintiff for the use of herself and the children.

The defendant did not answer. However, he did appear at the hearing and testified as a witness. In his testimony he admitted some of the plaintiff's allegations, denied a few of them, and explained others. He admitted the plaintiff is of excellent character, a good mother, and a suitable custodian for the children. The plaintiff testified, admitted that she was working as a teacher of piano, and was making a substantial salary.

At the conclusion of the hearing, Judge Lupton found that each parent was a suitable custodian for the children but their best interest required that they be placed in the custody of the plaintiff.

Judge Lupton denied the plaintiff any *pendente* allowance. However, he did require that the defendant pay her $450.00 per month for the support of the children and awarded her attorneys $500.00 as compensation for representing her.

At the conclusion of the hearing the plaintiff requested the court for permission to take a voluntary nonsuit and tendered a judgment to that effect. The court refused to sign the judgment. The plaintiff excepted and appealed.

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

Herbert, James & Williams by Henry James, Jr., for defendant appellee.

HIGGINS, J. The parties agree that only two questions are presented by this appeal: (1) Did the court commit error in refusing to award the plaintiff alimony *pendente lite* and the possession of the home? (2) Did the court commit error in refusing to let the plaintiff take a nonsuit?

The record discloses that the court conducted the hearing during a session of the Superior Court. The evidence disclosed that the plaintiff had left the home with the two children and that the plaintiff had a substantial income as a music teacher. The defendant not only failed to file any answer or make any charge as to the plaintiff's misconduct, but, on the contrary, testified she was of good character, a good mother, and a fit custodian for the children. Under these circumstances the court was not required to make findings of fact as a basis for its denial of the alimony *pendente lite. Creech v. Creech,* 256 N.C. 356, 123 S.E. 2d 793; *Holloway v. Holloway,* 214 N.C. 662, 200 S.E. 436. The rule applies whether alimony is allowed or is de-

nied. *Byerly v. Byerly,* 194 N.C. 532, 140 S.E. 158. Subsistence and counsel fees *pendente lite* are within the discretion of the court. Decision is not reviewable except for abuse of discretion or for error of law. *Deal v. Deal,* 259 N.C. 489, 131 S.E. 2d 24; *Harrell v. Harrell,* 256 N.C. 96, 123 S.E. 2d 220. The foregoing decisions sustain the refusal of the court to award alimony *pendente lite* and to order the home surrendered to the plaintiff.

Left for decision, however, is the question whether the court committed error in refusing to permit the plaintiff to take a voluntary nonsuit. Ordinarily, a plaintiff who appeals to a trial court for relief (other than by a proceeding *in rem)* may withdraw the claim and get out of court by taking a voluntary nonsuit. This he may do as a matter of right unless the defendant has asserted some claim or cross action entitling him to affirmative relief. In such event the defendant is entitled to keep the action before the court until his claim is litigated. For citation of authorities, see Strong's North Carolina Index, Vol. 4, Trial, § 29, p. 325. The rule applies to actions for divorce and alimony as in other cases. *Scott v. Scott,* 259 N.C. 642, 131 S.E. 2d 478.

In this case the defendant has not answered and has not asserted any claim or demanded any relief against the plaintiff.

Apparently defense counsel and the court were led astray on the question of nonsuit by what this Court said in *Briggs v. Briggs,* 234 N.C. 450, 67 S.E. 2d 349. In that case, as in this, the wife brought suit for alimony without divorce. While the case was before the court on a motion for a *pendente* allowance, the court denied the motion but, over plaintiff's objection, entered judgment dismissing her action. This Court held the trial court was without jurisdiction to dismiss the action because the plaintiff, notwithstanding the denial of the *pendente lite* claim, nevertheless had the right to pursue her claim for permanent alimony and have the facts heard and the issues answered by the jury. In *Briggs,* the Court held the plaintiff could not be thrown out of court over her objection at the *pendente* hearing. But the holding does not at all mean the plaintiff in such event may not take a voluntary nonsuit and get out of court of her own volition. The *Briggs* case holds nothing more than that she cannot be thrown out over her objection.

The defendant in this case does not assert any claim and does not demand any affirmative relief. This being so, the plaintiff had the right to take a voluntary nonsuit. The court committed error when it denied her that right. The judgment is

Reversed.

STATE v. RONALD JAMES SPRATT.

(Filed 3 November, 1965.)

1. Criminal Law § 3; Robbery § 1—

An attempt to take money or other personal property from another under the circumstances delineated by G.S. 14-87 constitutes an accomplished offense and is punishable to the same extent as if there was an actual taking.

2. Robbery § 5—

While the felonious intent to take the goods of another and appropriate them to defendant's own use is a necessary element of armed robbery, attempt to commit armed robbery, and common law robbery, and while in every case the court must give in its charge some explanation of felonious intent, the comprehensiveness and specificality of the instructions relating to felonious intent depends upon the facts in the particular case.

3. Same—

In this prosecution for an attempt to commit armed robbery the State's evidence tended to show that defendant threatened the cashier of a store with a pistol and attempted to take money from the drawer. Defendant relied upon an alibi. *Held:* An instruction to the effect that the jury, in order to convict, must find beyond a reasonable doubt that defendant attempted to take the property of another with "intent to rob" and that felonious intent is an essential element of the offense, is a sufficient instruction under the facts of the case upon the question of felonious intent. "To rob" or "robbery" imports an intent to steal.

APPEAL by defendant from *Fountain, J.*, February 1, 1965, "B" Session of MECKLENBURG.

Criminal action in which defendant is charged with an attempt to commit armed robbery. Plea: Not guilty. Verdict: "Guilty of attempted armed robbery." Judgment: Prison sentence of not less than 12 nor more than 15 years.

The State's evidence tends to establish these facts: Between 8:00 and 9:00 P.M. on 23 December 1964, defendant entered Minute Markets, Inc., and selected a few items of merchandise. He went to the "check-out" counter where Dwight Blackmon, store manager, was serving as cashier. Blackmon "rang up" the items on the cash register and reached under the counter for a paper bag. Defendant put his hand in the register drawer (in which there was about $400 in cash) and Blackmon slammed the drawer shut on his hand and took a black jack from beneath the counter. Defendant drew a loaded .32 caliber pistol and told Blackmon "it was a stickup," demanded the money from the drawer and reached for it. Blackmon struck his hand with the black jack. Defendant came around the counter and attempted to strike Blackmon with the pistol; Blackmon

blocked the blow with his arm. Defendant then told Blackmon if he didn't give him the money he would kill him. Blackmon pretended that he saw someone outside and beckoned him to come in. Defendant went out of the store without the money and told Blackmon not to follow. Defendant left the vicinity in a car which had been waiting outside.

Defendant's evidence was to this effect: He was visiting a girl from 5:30 to 9:30 P.M. the same evening on the opposite side of the city, and was with his mother and sister for a short time thereafter. On the same evening he went to get a sweater from one, McDonald, in another part of town. He was not at any time in the vicinity of Minute Markets, Inc.

Attorney General Bruton, Assistant Attorney General Icenhour, and Staff Attorney Ray for the State.

Peter L. Reynolds for defendant.

MOORE, J. Defendant contends there is prejudicial error in that the court failed "to charge and instruct the jury on the element of felonious intent."

The bill of indictment alleges, in pertinent part, that defendant "on the 23rd day of December, 1964, . . . unlawfully, wilfully and feloniously, having in possession and with the use and threatened use of firearms . . ., to wit, a .32 caliber pistol, whereby the life of Dwight Blackmon was endangered and threatened, did then and there unlawfully, wilfully, forcibly, violently and feloniously *attempt* to take, steal and carry away lawful money of the United States . . . from the presence, person, place of business . . . of Dwight Blackmon and Minute Markets, Inc. . . ." (Italics ours).

The case was submitted to the jury on the charge of *attempt,* as alleged in the bill. An attempt to take money or other personal property from another under the circumstances delineated by G.S. 14-87 constitutes, by the terms of that statute, an *accomplished* offense, and is punishable to the same extent as if there was an actual taking. *State v. Parker,* 262 N.C. 679, 138 S.E. 2d 496.

The judge instructed the jury, *inter alia,* as follows:

> ". . . for an attempt to be complete within and of itself as an attempt, there must not only be the intent to do the thing, but also some overt act which, if not warded or stopped, would result in the final completion of the act. So if the defendant merely intended to rob Mr. Blackmon, but did not do any overt act, calculated to complete the robbery, then the attempt would not have occurred, but if he did intend to rob him, and did

> commit an overt act, calculated and designed by him to bring about the robbery, then that would constitute an attempt or to put it another way, ladies and gentlemen, if the defendant armed with a pistol drew it on and pointed it at Mr. Blackmon for the intention and purpose of taking money from his cash register by force and against his will, and if he actually made an overt effort to take money or any part of it, and if in doing so it was by force and against the will of Mr. Blackmon and if his life was in danger or threatened, the crime of attempt to commit robbery under this Statute would have been complete." (Emphasis added.)

Under the factual circumstances of this case, the foregoing excerpt from the charge contains a sufficient statement of all of the elements of the offense charged, including that of intent.

A taking with "felonious intent" is an essential element of the offense of armed robbery, of attempt to commit armed robbery, and of common law robbery, and it is prejudicial error for the court to charge that defendant may be convicted of such offense even though the taking was without felonious intent. *State v. Chase,* 231 N.C. 589, 58 S.E. 2d 364. The comprehensiveness and specificality of the definition and explanation of "felonious intent" required in a charge depends on the facts in the particular case. There must be some explanation in every case. *State v. Lawrence,* 262 N.C. 162, 136 S.E. 2d 595. But, where the evidence relied on by defendant tends to admit the taking but to deny that it was with felonious intent, it is essential that the court fully define the "felonious intent" contended for by the State and also explain defendant's theory as to the intent and purpose of the taking, in order that the jury may understandingly decide between the contentions of the State and defendant on that point. In other words, where the evidence is susceptible of conflicting inferences on the question of intent, develops a direct issue on that point and makes intent the battleground of the case, full and explicit instructions on this phase is required. *State v. Lawrence, supra.* For instance, as in *Lawrence,* defendant may contend that his conduct in taking the property amounts only to a forcible trespass. There is a material difference between the intent in robbery and that in forcible trespass. ". . . in the former there is, and in the latter there is not, a felonious intention to take the goods, and appropriate them to the offender's use." *State v. Sowls,* 61 N.C. 151. A defendant is not guilty of robbery if he forcibly takes personal property from the actual possession of another under a bona fide claim of right or title to the property, or for the personal protection and safety

of defendant and others, or as a frolic, prank or practical joke, or under color of official authority. *State v. Lawrence, supra; State v. Lunsford,* 229 N.C. 229, 49 S.E. 2d 410; *State v. Curtis,* 71 N.C. 56; *State v. Sowls, supra.* Where such defenses are specifically interposed and arise on the evidence, defendant is entitled to such explanation of the law as will serve to bring clearly into focus the conflicting contentions.

It is purely and simply a matter of complying with the requirements of G.S. 1-180. The court is required to "declare and explain the law arising on the evidence."

"Ordinarily the court should charge the jury in some form that the taking must have been with the intent to steal, although where the defense was an alibi and the evidence developed no issue or contention that the taking was under a bona fide claim of right or was without any intent to steal, the instructions may be upheld notwithstanding a failure to charge in specific terms with respect to an intent to steal." 77 C.J.S., Robbery, § 49, pp. 514, 515; *Thomas v. State,* 189 S.E. 68 (Ga.); *Baygents v. State,* 122 S. 187 (Mass.); *Thomas v. State,* 391 P. 2d 18 (Alaska); *State v. Grillo,* 93 A. 2d 328 (N.J.), *cert. den.* 345 U.S. 976, 73 S. Ct. 1123, 97 L. Ed. 1391. See *State v. Childers,* 74 N.C. 180.

It is true that a plea of not guilty casts the burden on the State to prove each essential element of the offense charged beyond a reasonable doubt. 1 Strong: N. C. Index, Criminal Law, § 24. But the trial judge is not required to instruct the jury with any greater particularity upon any element of the offense than is necessary to enable the jury to apply the law with respect to such element to the evidence bearing thereon. In the instant case the defendant pleaded and offered evidence tending to prove an alibi. The *evidence* did not raise a direct issue as to intent. The court told the jury, in effect, that before they could return a verdict of guilty, they must find that defendant attempted to take the property with "intent to rob." "Rob" or "robbery" has a well defined meaning and imports an intent to steal. *Baygents v. State, supra.* The word "rob" was known to the common law and the expression "intent to rob" is a sufficient definition of "felonious intent" as applied to the robbery statute, in the absence of evidence raising an inference of a different intent or purpose.

We have considered all the assignments of error and find them to be without merit.

No error.

STATE v. WILLIAM MUNDY.

(Filed 3 November, 1965.)

1. **Criminal Law § 105—**

While the trial court has wide discretion as to the manner in which the case is presented to the jury, it is the duty of the court to explain, without special request therefor, each essential element of the offense charged and to apply the law with respect to each element to the evidence bearing thereon.

2. **Robbery § 5—**

Felonious intent is an essential element of the offense of armed robbery, of an attempt to commit armed robbery, and of common law robbery, and the court must so instruct the jury and define in some sufficient manner the term "felonious intent", the extent of the definition required being dependent upon the evidence in the particular case.

3. **Same—**

In a prosecution for armed robbery, a charge which fails to give any instruction with reference to felonious intent constituting an essential element of the offense must be held for prejudicial error.

APPEAL by defendant from *Houk, J.*, March 8, 1965, Regular Criminal Session of MECKLENBURG.

Criminal action in which the indictment charges armed robbery. Defendant entered plea of not guilty.

The State's evidence tends to establish these facts: In the late afternoon or early evening of 12 December 1963 defendant went to the home of Enos Ingram in the City of Charlotte and knocked at the door. He was carrying a package. A woman and child, relations of Enos, were in the house and answered the door. Defendant told them he had a package for Enos and they invited him in. Once inside he drew a pistol, pointed it at the occupants, and admitted an accomplice. He and his accomplice searched the house, holding the occupants at gun point, and took and carried away money, furs, watches and pistols. Defendant was later apprehended in Washington, D. C., and some of the property was recovered.

Defendant offered no evidence.

The jury found defendant "guilty as charged." A prison sentence of not less than 15 nor more than 20 years was imposed.

Attorney General Bruton and Staff Attorney Vanore for the State.
W. B. Nivens and Calvin L. Brown for defendant.

MOORE, J. Defendant excepts to the judge's charge on the ground that it failed to instruct the jury that a taking of personal prop-

erty with "felonious intent" is an essential element of the offense charged and failed to explain and define "felonious intent." The exception is well taken.

The only instruction given with respect to the law of the case consisted of a reading of the pertinent statute, G.S. 14-87. In giving instructions the court is not required to follow any particular form and has wide discretion as to the manner in which the case is presented to the jury, but it has the duty to explain, without special request therefor, each essential element of the offense and to apply the law with respect to each element to the evidence bearing thereon. 1 Strong: N. C. Index, Criminal Law, §§ 105, 107. Ordinarily the reading of the pertinent statute, without further explanation, is not sufficient.

In applying the law to the evidence and stating what the jury must find in order to render a verdict of guilty, the judge said: ". . . if the State has satisfied you that William Mundy went into that place with a gun, that he pointed this gun in the presence of these, one or more of these individuals, . . . that if he threatened their life, put them in fear of danger, injury or death, that he did take away from that premises, property which has any value, property of value, . . . then it would be your duty to convict him." It will be observed that this instruction does not require a finding that the property was taken with a felonious intent. "Felonious intent" is not mentioned or in any manner explained or defined in any part of the charge.

A taking of personal property with felonious intent is an essential element of the offense of armed robbery, of attempt to commit armed robbery, and of common law robbery. The court must so instruct the jury in every robbery case, and must in some sufficient form explain and define the term "felonious intent." The extent of the definition required depends upon the evidence in the particular case. *State v. Spratt, ante* 524. In some cases, as where the defense is an alibi or the evidence develops no direct issue or contention that the taking was under a bona fide claim of right or was without any intent to steal, "felonious intent" may be simply defined as an "intent to rob" or "intent to steal." *State v. Spratt, supra.* On the other hand, where the evidence raises a direct issue as to the intent and purpose of the taking, a more comprehensive definition is required. *State v. Lawrence,* 262 N.C. 162, 136 S.E. 2d 595; *State v. Lunsford,* 229 N.C. 229, 49 S.E. 2d 410.

The instant case is distinguished from the *Spratt* case in that in *Spratt* the court instructed the jury in effect that a taking of property with a felonious intent is an essential element of the offense and

"felonious intent" means an "intent to rob," while in the present case there was no instruction with reference to intent in any manner or form.

An essential element in robbery cases "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." *State v. Lawrence, supra; State v. Lunsford, supra.* An instruction to this effect, though not necessarily in these words, is essential in robbery cases.

New trial.

FLOYD WILLIAM WHITWORTH v. LUMBERMENS MUTUAL CASUALTY COMPANY, INC., A CORPORATION, AND HARRY L. HENDERSON AND J. MAX ROYAL, INDIVIDUALS.

(Filed 3 November, 1965.)

1. Master and Servant § 86—

Insurer who has paid a claim under our Compensation Act may not be held liable for the failure of its agents to perform their agreement with the injured employee to file his claim for the negligent injury against the third person tort-feasor, there being no evidence that the individuals were authorized by insurer to enter into any such undertaking on its behalf or that the filing of a claim on behalf of the employee was in the course of their employment as insurer's agents.

2. Same; Negligence § 1; State § 5a—

Plaintiff, injured as a result of a defect in a highway in South Carolina, alleged that the individual defendants gratuitously agreed to file his claim for his injury with the South Carolina Highway Commission and negligently failed to do so. *Held:* In view of the fact that the South Carolina statute provides for liability only if the highway department has actual or constructive notice of such defects, the absence of evidence as to when or how the defect occurred so as to supply the basis for a finding of actual or constructive notice thereof, is fatal, since there could be no recovery in the absence of such showing.

APPEAL by plaintiff from *Houk, J.*, 28 May 1965 Schedule "A" Civil Session of MECKLENBURG.

This is an action to recover damages for alleged negligent failure to file, on the plaintiff's behalf, a claim for damages with the South Carolina State Highway Department by reason of which failure the plaintiff's claim is now alleged to be barred by the South Carolina

statute. The appeal is from a judgment of nonsuit entered at the close of the plaintiff's evidence.

The complaint alleges that while the plaintiff was riding at night in the sleeping compartment of a tractor-trailer combination upon U. S. Highway 123 in South Carolina, it struck a hole in the highway caused by a washout and he was injured. It alleges that he had a right to recover damages therefor from the State of South Carolina, not to exceed $8,000, but the statute of South Carolina required that a sworn claim be filed within 180 days after the alleged injury. Plaintiff alleges that he took the necessary forms for the filing of the claim to the individual defendants, who were agents of the corporate defendant and who, as such, had handled for it his claim under the North Carolina Workmen's Compensation Act for this injury. He alleges that they gratuitously offered to perfect the claim for him and thereafter advised him that everything necessary to perfect his claim had been done, but they negligently failed to file the claim, thereby causing him to lose his right against the State to his damage in the sum of $5,427.49, this being the difference between the maximum recovery under the South Carolina statute and the payments made to him or for his benefit under the North Carolina Workmen's Compensation Act.

The answer denies that any of the defendants represented that any of them would take any action for the plaintiff with reference to perfecting his claim against the State of South Carolina. It alleges that the corporate defendant made payments to or for the plaintiff pursuant to the North Carolina Workmen's Compensation Act and that it advised the South Carolina State Highway Department of its resulting interest in any payments to be made by the State to the plaintiff on account of the accident. The defendants also plead contributory negligence by the plaintiff in relying upon the individual defendants to protect his claim.

The following is a summary of the evidence offered by the plaintiff:

On 30 April 1963 at 4:00 a.m. he was asleep in the sleeping compartment of the tractor-trailer. It struck a hole in the highway and he was injured. The hole was approximately 15 feet long, 12 feet wide and 15 feet deep. It was due to a washout. On 12 August 1963 he received forms from the South Carolina Claims Department which he carried to the defendant Royal, with whom he became acquainted when Royal, as representative of the corporate defendant, handled the settlement of his claim under the Workmen's Compensation Act. Royal believed these were the wrong forms. The plaintiff left them with Royal who said he would put the South Carolina authorities

"on notice by letter and that would take care of it." Subsequently, both Royal and Henderson told him that the State had been put on notice and the plaintiff had nothing to worry about.

Shortly after the original conversation between the plaintiff and Royal concerning the giving of notice, the corporate defendant, through Henderson, wrote to the claims agent of the South Carolina State Highway Department, with a copy to the plaintiff. The letter stated that its purpose was to notify the claims agent of the corporate defendant's interest in the matter by reason of payments made by it pursuant to the North Carolina Workmen's Compensation Act. At the time of this letter and of all conversations which the plaintiff had with Royal or Henderson, the total medical expenses of the plaintiff and the full extent of his disability had not been determined and the letter so stated.

The plaintiff filed his claim against the State of South Carolina 31 December 1963. It was denied administratively because filed after the time permitted by the statute. The plaintiff never consulted an attorney, and has instituted no legal proceeding against the State.

When the forms which he left with Royal were originally sent to him by the South Carolina State Highway Department the accompanying letter instructed him to return the forms, together with his doctor's bills and reports substantiating the amount of his claim. After learning there was a time limitation, he telephoned the defendant Royal and mentioned it to him. Royal again said that the plaintiff had nothing to worry about for the State had been put on notice and it was all right to wait until he had the final figure on medical expenses before doing anything else.

The washout undermined the highway and the pavement began to cave in when a vehicle proceeding immediately ahead of the tractor-trailer ran over the undermined portion. The South Carolina statute permits recovery, up to $8,000, by a person who is injured by reason of "a defect in any State highway," but requires a claim for injury to be filed with the Highway Department within 180 days after the alleged injury. The corporate defendant has paid $2,597.51 to or for the benefit of the plaintiff under the North Carolina Workmen's Compensation Act on account of the accident.

The plaintiff was advised by his friends to consult a lawyer and was informed by them of the existence of a time limitation upon his right to file a claim, but he felt that it was not necessary for him to consult an attorney.

Louis A. Bledsoe, Jr. and Joseph A. Moretz for plaintiff appellant.

Carpenter, Webb & Golding by James P. Crews for defendant appellees.

PER CURIAM. The plaintiff contends that the individual defendants gratuitously undertook to file the plaintiff's claim with the South Carolina Highway Department and failed to do so within the time allowed. Interpreting the evidence of the plaintiff most favorably to him, it fails completely to show any basis for a finding that the individual defendants were authorized by the corporate defendant to enter into any such undertaking on its behalf, or that the filing of a claim on behalf of the plaintiff was within their course of employment as its agents. The granting of a motion by the corporate defendant for judgment of nonsuit as to it was, therefore, proper.

The evidence shows no judicial determination that the letter written by the corporate defendant was not an adequate filing of the plaintiff's claim under the South Carolina statute, but, in any event, there is no evidence whatever to indicate when or how the washout occurred or that the South Carolina Highway Department had any notice or knowledge that it had taken place. The recent case of *Campbell v. South Carolina Highway Department,* 244 S.C. 186, 135 S.E. 2d 838, also involved a claim for injuries resulting from a cave-in of a portion of a road due to a washout. There, the Supreme Court of South Carolina said, "The Highway Department is liable for injuries caused by defects or obstructions in highways only when it has actual or constructive notice of the defect or obstruction." Therefore, if a claim had been properly filed by or on behalf of the plaintiff within the time allowed by the South Carolina statute, the evidence in this action is not sufficient to show that the plaintiff would have recovered any damages. If not, he has not been damaged by any failure of the individual defendants to file his claim even if they were under a duty to file it and did not.

Furthermore, the evidence, when interpreted most favorably to the plaintiff, shows only that the individual defendants advised him that, in their opinion, the letter written by the corporate defendant to the South Carolina Highway Department was sufficient notice of the plaintiff's claim, and that nothing else needed to be done until the plaintiff gathered together all of his medical bills and sent them to the South Carolina Highway Department. The plaintiff had a copy of this letter and was free to use his own judgment as to its effect. He was advised by friends to consult an attorney and elected not to do so.

The motions of the individual defendants for judgment of nonsuit were properly allowed.

Affirmed.

STATE v. NAMON CHURCH.

(Filed 3 November, 1965.)

1. **Criminal Law § 99—**

Upon motion for nonsuit, evidence offered by the State must be taken in the light most favorable to it, and conflicts therein must be resolved in the State's favor, the credibility and effect of the evidence being a question for the jury.

2. **Homicide § 20—**

Where the evidence tends to show that deceased was killed by a bullet fired from a pistol in the hand of the defendant, but the most incriminating evidence as to how the shooting occurred is testimony of a statement of defendant that it was an accident, *held*, the evidence is insufficient to overrule nonsuit in the absence of some showing from which culpable negligence might be found.

APPEAL by defendant from *Pless, J.*, May 1965 Session of CALDWELL.

The defendant was indicted for the murder in the first degree of Jessie Adkins Craig. He entered a plea of not guilty. He was found guilty of manslaughter and sentenced to a term of five to eight years in the State Prison. He assigns as error certain rulings as to the admission of evidence, portions of the charge to the jury and the denial of his motion for judgment of nonsuit at the close of the State's evidence. He offered no evidence.

The evidence for the State tends to show:

In the early morning of 8 November 1964, Jessie Adkins Craig died as a result of a bullet wound. The bullet entered the upper and inner quadrant of her right breast, went downward through the breast, reentered her body in the abdominal area and traveled on downward to the midline of the body and into the sacrum, from which it was removed in the course of an autopsy. It was fired from a position approximately 20 inches above and in front of the body, and from a .38 Colt revolver found by the sheriff in the glove compartment of an automobile driven by the defendant to the hospital within approximately ten minutes after the deceased was carried there in another car following the shooting. The pistol and the automobile were both owned by the defendant's father, Lonnie Church, at whose home the shooting occurred and who carried the deceased to the hospital. While at the hospital, the defendant told the deputy sheriff that the deceased was shot with a .38 pistol.

Swabbings of the hands of the defendant made shortly after the shooting, when chemically analyzed, disclosed that particles of a material contained in gunpowder were on the outside of his right hand, none being found on the inside of the right hand or on either

the inside or outside of his left hand. Similar swabbings of the hands of the deceased disclosed such particles upon the outside of her left hand and the inside of her right hand.

On the night of the shooting, one Judy Taylor, who was not called as a witness, made statements to the following effect to the deputy sheriff in the presence of the defendant, who made no response thereto:

On the night of the shooting she was visiting her sister, who lived with the deceased in a basement apartment in the home of Lonnie Church, the defendant's father. The group went out to dinner and returned to the Church home shortly after midnight. Thereupon she and her sister retired. The four year old son of the defendant occupied the same room with them. The defendant's father and, apparently, his teen-age brother also retired, leaving only the defendant and Jessie Adkins Craig still up in the house. Thirty minutes later Judy Taylor heard a shot. Immediately thereafter Jessie Adkins Craig cried out, "Oh, God," and the defendant called for his father to get up for they had to get the deceased to the hospital. Going out into the hallway, she observed the deceased lying in the hall in front of the doorway leading down to the basement apartment and the defendant and his father standing over her. As she approached them, the defendant said: "It was an accident. I didn't mean to." The defendant and his father then carried the deceased out to a car. Her sister and the defendant's teen-age brother also left, she remaining in the Church home to look after the four year old child of the defendant.

Following these statements by Judy Taylor, the deputy sheriff talked with the defendant who stated, in effect:

On the night of the shooting, the deceased, who was his girl friend, Judy Taylor, her sister, and the defendant's son went out to dinner. After eating they all returned to his father's home. He and the deceased again went out and returned after approximately 15 minutes. The deceased went to her apartment in the basement, he remaining upstairs. A few minutes later he heard the deceased scream. He went into the hall and to the door leading to the basement apartment, found the deceased partially up the steps, went down and assisted her up into the hall where she collapsed. He called his father and they carried her out to his car in which his father took her to the hospital, he following shortly in his father's car.

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

Patton, Ervin & Starnes for defendant appellant.

PER CURIAM. Upon a motion for judgment of nonsuit the evidence offered by the State must be taken in the light most favorable to the State and conflicts therein must be resolved in the State's favor, the credibility and effect of such evidence being a question for the jury. *State v. Thompson,* 256 N.C. 593, 124 S.E. 2d 728; *State v. Roop,* 255 N.C. 607, 122 S.E. 2d 363; *State v. Bass,* 255 N.C. 42, 52, 120 S.E. 2d 580.

No occupant of the house at the time of the shooting testified. There is no evidence of ill will or of a quarrel between the defendant and the deceased. There is no evidence that he intended to shoot her. There is no evidence of any reason or motive, real or supposed, which he may have had for doing so.

The only evidence as to how the shooting occurred is contained in two conflicting statements said to have been made by the defendant. Judy Taylor stated to the sheriff that the defendant, standing over the body of the deceased, said, "It was an accident. I didn't mean to." The defendant's own statement to the sheriff indicates that the shooting occurred while the deceased was not in his presence. Although there is a conflict between these two statements, each of them tends to exculpate the defendant.

Taking the evidence in the light most favorable to the State, it would justify the jury in finding that the deceased was killed by a bullet accidentally fired from a pistol in the hand of the defendant and approximately 20 inches from and above the body of the deceased.

Culpable negligence, from which death proximately ensues, makes the actor guilty of manslaughter, or possibly murder. *State v. Roop, supra.* However, the statement by the defendant that he shot the deceased by accident is not evidence from which culpable negligence may be found in the absence of any other evidence as to how the shooting occurred. The defendant's motion for judgment as of nonsuit should therefore have been granted.

Reversed.

NETTIE LOU MORRIS, ADMINISTRATRIX OF FOY L. MORRIS, DECEASED, v. WINSTON-SALEM SOUTHBOUND RAILWAY COMPANY.

(Filed 3 November, 1965.)

Railroads § 5—

Nonsuit held proper in this action for wrongful death resulting when intestate drove into the side of the second engine of a freight train which had been standing at nighttime, blocking the crossing, for some 30 seconds prior to the injury, with its ground lights, its platform light, and cab lights burning.

APPEAL by plaintiff from *Olive, E.J.*, 15 March 1965, Mixed Session of DAVIDSON.

This is an action for wrongful death as the result of injuries sustained by the plaintiff's intestate shortly after midnight on 19 October 1963 when his automobile collided with the second engine of a train of the defendant stopped upon the crossing of the track of the defendant and the highway upon which the deceased was driving. The complaint alleges there were no lights or other warnings to indicate that the crossing was blocked. The answer denies all allegations of negligence on the part of the defendant and pleads contributory negligence as a further defense. From a judgment of nonsuit entered at the close of her evidence the plaintiff appeals.

The evidence as to how the accident occurred may be summarized as follows:

The highway runs east and west, the railroad tracks approximately northwest and southeast. The pickup truck driven by the deceased was headed east upon the highway. The train was headed northwest with the result that the beam of the headlight from its lead engine was at an angle of about 52 degrees to the left of the deceased as he approached the crossing. The highway runs upgrade and straight for about 800 feet as it approaches the crossing from the west, the direction in which the deceased was driving. It levels off at the crossing. Some 330 feet from the crossing there was a sign warning that the railroad was ahead and at the crossing there were the usual cross arm signs indicating a railroad crossing, these being reflectorized. There were street lights and lights in private driveways to the left of the highway and beyond the crossing which, due to the terrain, were considerably higher than the level of the highway. These were illuminated. As the deceased approached the crossing there was a wooded area on his right. On his left there were trees and undergrowth with substantial foliage. He was familiar with this crossing. The weather was clear and the night was dark.

At 12:05 a.m. the train arrived at the crossing. The accident oc-

curred 30 seconds later. The engineer blew the whistle 300 yards from the crossing and again when about 10 or 15 feet from it. The train stopped with the back end of the lead engine still on the highway. There was about six feet of space between the back end of the lead engine and the front end of the second engine at the top, they, of course, being coupled together nearer the ground. The front of the second engine was at the approximate center of the highway. The truck, which was being driven by the deceased on his right side of the highway, struck the step of the second engine.

The train stopped to set off some cars for interchange with the High Point, Thomasville-Denton Railroad, the tracks of the two railroads connecting at this point. The conductor and the brakeman had to get off and throw the switch. The engineer was waiting for the brakes on the box cars to release, whereupon the next move would have been to back off the crossing to the point where the cars would be cut off for the interchange. The train had been standing upon the crossing only about 30 seconds when the truck crashed into the second locomotive.

The surface of the highway was black, as was the lead engine. The second engine was purple with a white stripe running along its side from end to end. On the lead engine the headlight was burning, as were a 100 watt platform light at the head of the engine, two 60 watt lights inside the cab, one on each side, and a 100 watt ground light on each side of the engine near the front, which had a covering over its top deflecting the light toward the ground. The headlight on the second engine was turned off. On this engine the lights which were turned on were the 100 watt ground lights on each side of the engine, the platform light and the two 60 watt cab lights.

The deceased was driving approximately 40 miles per hour. His lights were good and his truck was in good condition. The fireman, observing him approaching the train without slowing down, blew the whistle on the train when the truck was approximately 150 to 200 feet from the crossing and continuously thereafter until the truck crashed head-on into the second engine.

While in the hospital, believing that he was soon to die, the deceased stated that he was driving 40 miles per hour, looking straight ahead, saw no lights, heard no whistle and was on the train before he could do anything about it.

Walser, Brinkley, Walser & McGirt and DeLapp & Ward for plaintiff appellant.

Craige, Brawley, Lucas & Horton and Thomas O. Moore for defendant appellee.

PER CURIAM. The crossing was well marked and the weather was clear. The train had been stopped upon the crossing only 30 seconds prior to the accident. It had stopped there for the necessary purpose of backing up to set off cars for interchange with another carrier. The engine, with which the truck of the deceased collided, had a white stripe painted along its sides from front to rear. It had lights in its cab and near the ground upon the side struck by the deceased. The lead locomotive had its headlight burning, lights in its cab and lights on its side. The rear of this engine was upon the crossing at the deceased's left. The fireman, observing that the deceased was not slowing down, blew the engine's whistle. There is no evidence that the gap between the two engines above the coupling combined with street lights on the opposite side of the train created an illusion of an open crossing.

The evidence does not disclose actionable negligence by the railroad and judgment of nonsuit was properly entered. *Rose v. R. R.*, 210 N.C. 834, 187 S.E. 857; *Blackwell v. Hawkins*, 207 N.C. 874, 178 S.E. 554; Anno: 84 A.L.R. 2d 813, 824. The reason for the failure of the deceased to see the engine blocking the crossing is left to conjecture.

Affirmed.

CAROLYN PARDON v. COY M. WILLIAMS, ARVELLA B. WILLIAMS, AND RALPH E. PARDON.

(Filed 3 November, 1965.)

Automobiles § 41e—

Evidence tending to show that defendant parked his car without lights, with two wheels some three feet on the hard-surface, that the shoulder of the 20-foot street, both north and south of the place, was sufficiently wide to have parked the vehicle clear of the hard-surface, and that the driver of the car in which plaintiff was riding, blinded by the lights of oncoming traffic, collided with the parked car, *held* sufficient to be submitted to the jury on the issue of negligence under common law principles, notwithstanding that the manner of parking did not violate the municipal ordinance and that G.S. 20-161 was inapplicable.

APPEAL by defendant, Coy M. Williams, from *Shaw, J.*, July 12, 1965, Session of FORSYTH.

McLennan & Surratt for plaintiff appellee.
Deal, Hutchins & Minor and Edwin T. Pullen for defendant appellant.

PER CURIAM. Plaintiff seeks to recover damages for personal injuries suffered by her when the automobile in which she was a passenger collided with a parked car on Butler Street within the corporate limits of Winston-Salem. Plaintiff's husband, Ralph E. Pardon, owned and was operating the automobile in which she was riding. Defendant, Coy M. Williams, owned the other automobile involved in the collision and had parked it on Butler Street at a point across the street from his residence. The accident occurred about 9:00 P.M., 19 March 1960.

Plaintiff instituted this action against her husband, Ralph E. Pardon, and Coy M. Williams and his wife, Arvella B. Williams. During the course of the trial plaintiff took a voluntary nonsuit as to Mrs. Williams. The jury found defendant Pardon not negligent, but returned a verdict against Coy M. Williams in the amount of $2368. From judgment in accordance with the verdict, Coy M. Williams appeals.

The sole question presented by the appeal is whether the evidence is sufficient to make out a *prima facie* case of actionable negligence against appellant Williams.

The evidence, considered in the light most favorable to plaintiff, discloses these facts: Butler Street runs generally north and south and the paved portion was about 20 feet wide. On the west side of the street there was no curb and gutter and there were no residences within 500 feet of the point of the accident—it was a wooded area. Appellant's residence was on the east side of the street, and there were a number of dwellings near to and both north and south of appellant's residence on the east side of the street. About 7:00 P.M. appellant backed his car out of his driveway and parked it on the west side of the street headed north; its right wheels were on the paved portion of the street, 3 feet from the west edge of the pavement; neither the headlights nor parking lights were on. About 9:00 P.M. the Pardon car approached from the north at a speed of approximately 25 miles per hour (the maximum speed limit was 35 miles per hour), it was going upgrade and meeting traffic, the driver was blinded by the lights of a meeting car and before his vision cleared the collision occurred. The Pardon car did not get off the pavement at any point. The point of impact was three feet east of the west edge of the pavement. It was dark at the place of the acci-

dent and the color of appellant's car was dark blue. The right front of the Pardon car collided with the right front of appellant's car. At the point where appellant's car was parked the shoulder of the street was 5 feet wide. The investigating officer testified as follows: "The land falls off on the west side of Butler Street at that point. At the point where I found these two vehicles that fall off was approximately 5 feet west of the hard surface of Butler St. On down further south from that point the shoulder widened out. There is a big hole in the area where the two vehicles were; that hole was approximately 5 feet from the edge of the highway; then the shoulder widened out to I will say 10 to 12 feet back in this area southwardly. The hole is only a small hole, approximately 10 to 15 feet wide, and then the shoulder widened out after getting by that. I would say 10 to 15 feet south of where the vehicles were it widened out to about 12 feet wide."

Appellant contends that he parked his vehicle in full compliance with the pertinent ordinances of the City of Winston-Salem and, notwithstanding the fact that it was partially on the paved portion of the street, he is guilty of no negligence. According to section 17-86 of said ordinances a person may lawfully "park a vehicle in a roadway . . . parallel with the edge of the roadway headed in the direction of lawful traffic movement and with the righthand wheels of the vehicle within twelve (12″) inches of the curb or edge of the roadway." And section 17-101 provides that "Whenever a vehicle is lawfully parked at nighttime upon any street within a . . . residential district no lights need be displayed upon such parked vehicle." Appellant insists that he complied with these ordinances, except that his vehicle was not "headed in the direction of lawful traffic movement," and his conduct involved no breach of duty.

We agree that, under the facts and circumstances here presented, the direction in which his vehicle was headed could not have been a proximate cause of the collision. We also take note that G.S. 20-161 does not apply to vehicles parked in a residential district of a town or city on a street which constitutes no part of the State highway system. *Smith v. Metal Co.*, 257 N.C. 143, 125 S.E. 2d 377.

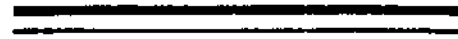
However, it is our opinion that there is sufficient evidence of negligence on the part of appellant to take the case to the jury on common law principles. Appellant's car was not disabled. He was in position to freely choose a parking place. About 15 feet south of the place where the car was parked, and about the same distance north thereof, the shoulder was 10 to 12 feet wide and the vehicle could have been parked so as to leave several feet clearance between it

and the paved portion of the street. The jury could find that in the exercise of reasonable prudence and foresight appellant could have foreseen that parking, without lights, at the narrowest place on the shoulder, partly on the pavement which was only 20 feet wide, would result in a collision with some vehicle blinded by meeting traffic, and that he was negligent in not choosing a more favorable place. "As a general rule, a motorist who desires to stop his vehicle or to leave it unattended on a street or highway is under a duty to select a suitable place, where his vehicle will not constitute an obstruction of the highway or a source of danger to other users of the highway; and this duty has been held to exist independently of any statutory requirement." 60 C.J.S., Motor Vehicles, § 330, p. 770.

In Supreme Court appellant demurred *ore tenus* to plaintiff's complaint on the ground that it does not adequately allege actionable negligence on the part of appellant. Paragraphs 9 and 10 of the complaint (as amended by leave of court and without objection of appellant at the close of the evidence) are sufficient to withstand the demurrer.

The court below properly overruled appellant's motion for nonsuit.

No error.



IREDELL COUNTY v. MRS. ELIZABETH N. GRAY, JOHN H. GRAY, JR., R. A. COLLIER, TRUSTEE, AND NORTHWESTERN BANK OF STATESVILLE, INC., AND P. P. MARSHALL.

(Filed 3 November, 1965.)

1. Payment § 4—

The burden is upon the party asserting payment to establish this affirmative defense.

2. Taxation § 39—

In this action to enforce tax liens, one of defendants testified that he paid the taxes in cash at a bank to a named person whom he believed to be the attorney for the county at the time. *Held:* In the absence of evidence that the named person was the duly authorized agent of the county to collect and receive taxes, or that the monies paid to this person were ever turned over to the treasury of the county, defendants have failed to establish the affirmative defense of payment, and a directed verdict for the county thereon is without error.

APPEAL by defendants Mrs. Elizabeth N. Gray and John H. Gray, Jr., from *McLean, J.*, 17 March 1965 Regular Civil Session of IREDELL.

Civil action in the nature of an action to foreclose a mortgage to enforce tax liens upon three tracts of real estate for the years 1938, 1939, 1940, 1943, 1945, 1952, and 1953, which taxes are allegedly due on said real estate and unpaid. The complaint alleges that defendant Elizabeth N. Gray and defendant John H. Gray, Jr., her husband, are the owners of these three tracts of real estate, that said real estate is subject to a deed of trust to defendant R. A. Collier, trustee for Peoples Loan and Savings Bank (now Northwestern Bank of Statesville, Inc.), which secures a $35,000 note, and that defendant P. P. Marshall has a lease of said real estate.

The sole answer in the record was filed by defendants Gray. Defendants Gray in their joint answer deny that any taxes for the years 1938, 1939, 1940, 1943, and 1945 are due on this real estate, and allege as a defense that they have paid Iredell County all taxes due on this real estate for these years by making payment of all such taxes to Noel Woodhouse, attorney for plaintiff. In their answer they admit that they owe taxes on this real estate to Iredell County for the years 1952 and 1953 in the amounts alleged in the complaint, and tender payment of such taxes to Iredell County. Prior to the trial of this action defendants Gray paid to Iredell County all taxes on this real estate due for the years 1952 and 1953.

When the case was called for trial, plaintiff and defendants prior to the introduction of evidence entered into a number of stipulations. We set forth below the stipulations relevant and necessary to pass on the appeal:

> "5. That if the defendants owe the taxes for either year upon which action was instituted that the correct amount for 1938 would be $148.06; for 1939—$319.73; for 1940—$430.88; for 1943—$404.63; for 1945—$373.90; that an issue as to the amounts is unnecessary.
>
> "6. It is further stipulated and agreed that the following issues are proper:
>
> "1. Have the defendants paid the taxes to Iredell County for the year 1938?
>
> "ANSWER: ....
>
> "2. Have the defendants paid the taxes to Iredell County for the year 1939?
>
> "ANSWER: ....

"3. Have the defendants paid the taxes to Iredell County for the year 1940?

"ANSWER: ....

"4. Have the defendants paid the taxes to Iredell County for the year 1943?

"ANSWER: ....

"5. Have the defendants paid the taxes to Iredell County for the year 1945?

"ANSWER: ....

"The defendants having pleaded payment of these years, the Court holds that the burden of proof is upon the defendants upon each issue."

The issues agreed upon by the parties were submitted to the jury, who answered each one of the five issues, No.

From a judgment in accord with the verdict, defendants Gray appeal.

Battley & Frank by Jay F. Frank for defendant appellants.

Land, Sowers & Avery by William E. Crosswhite for plaintiff appellee.

PER CURIAM. Plaintiff offered evidence by Mrs. Flossie King, assistant treasurer and tax collector of Iredell County, to the effect that the tax receipts on the above-mentioned three tracts of real estate for the years 1938, 1939, 1940, 1943, and 1945 were still in the tax books in her office. That when taxes are paid, the payor is given a tax receipt from the tax book marked paid, and one receipt is left in the tax book marked paid. That according to the records in her office all the taxes due on this real estate for the above-mentioned years have not been paid. Mrs. King went to work in plaintiff's tax office on 15 September 1947.

Defendant John H. Gray, Jr., testified to the following effect: He paid the taxes for the year 1938 to Mr. Woodhouse in cash at the Peoples Bank. He believes Mr. Woodhouse was attorney for Iredell County at the time. At the same time he also paid Mr. Woodhouse the taxes due on this real estate for the years 1939, 1940, 1943, and 1945. Mr. Woodhouse did not have any tax books and records with him when he paid him these taxes. He never got any tax receipts for paying taxes on this real estate for the above-mentioned years.

Payment is an affirmative defense, and it is well settled in this jurisdiction that the defense of payment must be established by the party pleading it as a defense. 3 Strong's N. C. Index, Payment, § 4.

In *Manufacturing Co. v. Jefferson,* 216 N.C. 230, 4 S.E. 2d 434, defendant mortgagors contended that at the time of the foreclosure sale the mortgage notes had been paid. The Court held, as correctly summarized in the second headnote in our Reports, as follows: "The burden was on defendants upon the issue of payment, and upon failure of proof of payment to the holders of the notes alleged to have been in default at the time of foreclosure or to their duly authorized agent, a peremptory instruction in favor of the purchaser at the foreclosure sale is without error."

In 51 Am. Jur., Taxation, § 948, it is said:

> "Taxes should be paid to the officer authorized and designated by law to collect or receive taxes. Payment to such officer operates as a complete discharge thereof, and no proceedings thereafter looking to the collection of the same tax can have any validity. Payment to any other officer is not a discharge of the tax unless the money reaches the proper officer; and if it is embezzled or lost by the officer receiving it, the taxpayer is still liable for the tax. Long acquiescence by the public officials in the collection of the tax by an officer other than the one designated by law will not estop the state from insisting upon the payment of the tax a second time if such officer when he receives the first payment fails to turn in the money to the treasury."

To the same effect, 84 C.J.S., Taxation, § 616.

G. S. 105-375, which was in full force and effect from at least the year 1939 to the present time, reads in relevant part:

> "It shall be the duty of each tax collector to employ all lawful means for the collection of all taxes in his hands; to give such bond as may be required of him; to perform such duties in connection with the preparation of the tax records, receipts and stubs as the governing body may direct; to keep adequate records of all collections; and to account for all moneys coming into his hands."

The defense of defendants Gray is payment of the taxes due Iredell County on this real estate for the above-mentioned years to one Woodhouse. Mr. Gray testified: "He was the attorney for the county at that time, I believe." Such testimony is vague and uncertain. Defendants have no evidence that Woodhouse at the time Mr. Gray testified he paid him these taxes was the duly authorized agent of Iredell County to collect or receive for Iredell County taxes on

real property situate therein, or that he had been designated or authorized by Iredell County or by law or by anyone in authority to collect or receive taxes for Iredell County on real property situate therein for these years, or that any money paid by them to Woodhouse for taxes on their real property in Iredell County for the above-mentioned years was ever received by Iredell County, or that Woodhouse ever turned a dollar of it over to the treasury of Iredell County. In the stipulations entered into by the parties prior to the introduction of evidence, Woodhouse is not mentioned. Consequently, in the light of the stipulations by the parties above set forth and all the evidence in the case, the peremptory charge, in favor of Iredell County, given by the court on each issue submitted to the jury is without error, and defendants Gray's assignments of error to the charge in this respect are overruled.

We have examined carefully the one assignment of error as to the admission of evidence, and the other assignments of error to the charge, and they are without merit and are overruled. In the trial below we find

No error.

STATE v. JODIE WILLIS WEBB.

(Filed 3 November, 1965.)

1. Criminal Law § 55—

It is competent for a witness stipulated by the parties to be an expert to testify as to the effect of stated percentages of alcohol in the bloodstream, and that the percentage found by his test of the blood of defendant exceeded the amount at which all persons were under the influence of alcohol, it being shown that the sample analyzed was timely taken, properly traced and properly identified.

2. Criminal Law § 120—

A jury has full control of its verdict up to the time it is delivered to the court and ordered recorded by the judge, and when the foreman makes a slip of the tongue which he corrects before the clerk can finish his inquiry as to whether all the jurors so say, and when the corrected verdict of guilty is confirmed by a poll of the jury, the acceptance of the verdict is without error.

APPEAL by defendant from *Mintz, J.*, March 15, 1965 Session of LENOIR.

Defendant was convicted in the LaGrange Recorder's Court of

operating an automobile upon the public highway while under the influence of intoxicating liquor, G.S. 20-138. He appealed to the Superior Court where the State's evidence tended to show the following:

Highway Patrolman B. A. Baker, traveling west on U. S. Highway No. 70 on November 21, 1964, about 6:00 p.m., met defendant who was driving east "almost astride the center line." The officer avoided a collision by swerving to the right and, almost immediately, arrested defendant, who had a very strong odor of alcohol about him. In the opinion of Patrolman Baker, defendant "was appreciably under the influence of some intoxicating beverage." The officer asked him if he wanted a blood test. His wife, who was with him, advised defendant not to take a blood test but he decided to have one. The test was made by David P. Lutz, who it was stipulated, is "a medical expert technologist qualified in the field of body fluid analysis." Mr. Lutz's analysis showed defendant's blood to have an alcoholic content of 0.18%. According to Mr. Lutz, "Some persons are under the influence of intoxicating liquor at 0.10% and some at 0.12%. But everyone is under the influence at 0.15%."

Defendant's evidence tended to show that he was cold sober when Mr. Baker arrested him and that, if the officer detected the odor of alcohol upon him, it was left over from a party which had ended at 3:00 a.m. the preceding night.

When the jury returned into court to announce its verdict the following proceedings were had:

CLERK OF THE COURT: "Gentlemen, have you arrived at a verdict?"

ANSWER BY SPOKESMAN FOR THE JURY: "Yes, we have."

CLERK OF THE COURT: "What is your verdict?"

ANSWER BY SPOKESMAN FOR THE JURY: "Not guilty."

CLERK OF THE COURT: "Not guilty, so say —?"

SPOKESMAN FOR THE JURY: "Er, I mean, guilty."

CLERK OF THE COURT: "Guilty, so say you all?"

At defendant's request, the jury was polled and each juror said that his verdict was guilty. The Clerk recorded a verdict of guilty. The Court imposed its judgment and defendant appealed.

Attorney General T. W. Bruton; Charles D. Barham, Jr., Assistant Attorney General; and Wilson B. Partin, Jr., Staff Attorney for the State.

Turner and Harrison for defendant appellant.

PER CURIAM. A qualified expert may testify as to the effect of

certain percentages of alcohol in the blood stream of human beings provided the blood sample analyzed was timely taken, properly traced, and identified. *State v. Willard,* 241 N.C. 259, 84 S.E. 2d 899. Mr. Lutz's qualifications were stipulated. His testimony, quoted in the statement of facts, went to the jury on redirect examination without objection. Substantially identical testimony was held to have been properly admitted in *State v. Dixon,* 256 N.C. 698, 124 S.E. 2d 821; *State v. Hart,* 256 N.C. 645, 124 S.E. 2d 816; *State v. Moore,* 245 N.C. 158, 95 S.E. 2d 548; *State v. Willard, supra.* The *Dixon* and *Hart* cases, *supra,* also involved testimony by Mr. Lutz. Appellant's assignment of error based on the exception to the admission of Mr. Lutz's testimony is not sustained.

The exception to the entry of judgment is also overruled. A jury has full control of its verdict up until the time it is finally delivered to the court and ordered recorded by the judge. Accordingly, if the foreman makes a mistake in announcing it, he may correct himself or any one of the jurors may correct him. To preclude mistake, the Clerk's inquiry "So say you all?" is directed to the panel immediately after their spokesman has declared the verdict. *State v. Young,* 77 N.C. 498. Even if all 12 jurors nod their assent, either the solicitor or counsel for defendant may then and there require that the jury be polled. The dissent of any juror at that time would be effectual. *State v. Dow,* 246 N.C. 644, 99 S.E. 2d 860; *State v. Cephus,* 241 N.C. 562, 86 S.E. 2d 70.

In this case, the foreman suffered a slip of the tongue which he recognized immediately and corrected before the Clerk could finish his inquiry to the others. The polling of the jury confirmed the true verdict.

In the trial below we find

No error.

STATE OF NORTH CAROLINA v. CLARENCE ANDERSON.

AND

STATE OF NORTH CAROLINA v. TOM BROWN.

(Filed 3 November, 1965.)

1. Criminal Law § 118—

A verdict will be interpreted with reference to the warrant, the evidence and the charge in order to resolve an apparent ambiguity.

2. Intoxicating Liquor § 16—

Where the warrant charges unlawful possession of intoxicating liquor for the purpose of "being sold, bartered, exchanged, given away, or otherwise disposed of * * *", and the evidence and charge relate solely to possession for the purpose of sale, the ambiguity may be resolved by reference to the evidence and charge, and it is not prejudicial if the words "bartered, exchanged, given away, or otherwise disposed of" are treated as surplusage.

3. Indictment and Warrant § 15—

A motion to quash a warrant in its entirety is properly denied when one of the counts contained therein is clearly good, even though another count may be bad for duplicity.

APPEAL by defendants from *Crissman, J.*, August 1965 Criminal Session of DAVIDSON.

These two criminal actions were consolidated for trial.

Each defendant was tried upon a warrant which charged that he (1) unlawfully possessed spirituous, vinous, and malt liquors, and (2) unlawfully possessed spirituous, vinous, and malt liquors "for the purpose of being sold, bartered, exchanged, given away, or otherwise disposed of. . . ." Defendant Anderson's offense was allegedly committed on September 11, 1964; defendant Brown's, on September 12, 1964.

Evidence for the State tended to show that on September 11, 1964, at the Dorie Miller American Legion Post in Lexington, Robert Reeves, an undercover agent for the Alcoholic Beverage Control Board, purchased a mixed drink of bourbon and soda from defendant Anderson for 60c; that on September 12, 1964, for 50c at the same place, he purchased one Budweiser beer from defendant Brown. Defendant's evidence flatly contradicted that of the State. The judge charged the jury that in Davidson County it was unlawful for any person to have in his possession "away from his home and in a place like the American Legion Post any quantity of intoxicating beverage"; that if the State had satisfied it beyond a reasonable doubt that Anderson had in his possession at the Post on the occasion in question a quantity of intoxicating beverage (bourbon) which he sold to Reeves, it would find him guilty on both counts; that if it were satisfied beyond a reasonable doubt that Brown, on September 12, 1964, had in his possession at the Post a quantity of beer for the purpose of sale, and that he sold any beer to Reeves, he would likewise be guilty on both counts. Each defendant was "found guilty by a jury." Upon each, the judge imposed one sentence of four months, suspended upon certain conditions. Both defendants appealed.

Attorney General T. W. Bruton and Assistant Attorney General James F. Bullock for the State.

McKissick & Burt for defendant appellants.

PER CURIAM. The State's evidence was fully sufficient to convict each defendant of violations of G.S. 18-2 and G.S. 18-32 as charged in the two-count warrants. Davidson County has never come within the provisions of the Alcoholic Beverage Control Act of 1937. Thus, the Turlington Act of 1933 remains the primary law there. *State v. Barnhardt,* 230 N.C. 223, 52 S.E. 2d 904.

As defined by G.S. 18-1, the word "liquor" includes both bourbon whiskey and beer. The charge of the court, as well as the evidence, made it quite clear that, on the second count, defendants were being tried for the unlawful possession of liquor *for the purpose of sale* only. Neither the evidence nor the charge referred to any barter, exchange, giving away, or other disposition of liquor in the possession of defendants. When the verdict is interpreted with reference to the warrant, the evidence, and the charge, it is unambiguous. The second count in the warrant is inexpertly drawn and defendants, in their brief, attack it for duplicity. Had it contained the conjunctive *and* instead of the disjunctive *or,* this attack would have been prevented. See *State v. Thompson,* 257 N.C. 452, 126 S.E. 2d 58; *State v. Merritt,* 244 N.C. 687, 94 S.E. 2d 825; *State v. Albarty,* 238 N.C. 130, 76 S.E. 2d 381; *State v. Williams,* 210 N.C. 159, 185 S.E. 661. Notwithstanding, we perceive no prejudice to these defendants if the words *bartered, exchanged, given away,* or *otherwise disposed of* are treated as surplusage.

The record does not show the grounds upon which defendants moved to quash the warrants when the case was called for trial. Conceding, *arguendo,* that the second counts should have been quashed for duplicity, the motions to quash were directed to each warrant in its entirety. Since the first count is clearly good, the general verdict will support the judgment. *State v. Camel,* 230 N.C. 426, 53 S.E. 2d 313; *State v. Epps,* 213 N.C. 709, 197 S.E. 580. "Where the warrant upon which defendant is tried contains two counts, and one of them is sufficient to empower the court to render judgment, defendant's motion to quash is properly denied." Strong, N. C. Index, Indictment and Warrant § 15.

Defendants' other assignments of error present nothing for decision.

No error.

Z. V. ROBINETTE v. BOBBY G. WIKE.

(Filed 3 November, 1965.)

1. Trial § 21—

Upon motion to nonsuit defendant's counterclaim, all of the evidence supporting the counterclaim must be considered in the light most favorable to defendant, since defendant is in the position of a plaintiff in regard to the counterclaim.

2. Automobiles § 41i—

Plaintiff's testimony and testimony of statements made by him tending to show that he entered a highway from a private driveway on the south, turned right and collided with defendant's vehicle, which was traveling west, and that he could see four-tenths of a mile along the highway to the east, with further evidence that plaintiff's car came to rest with one wheel over on defendant's side of the road, *is held* sufficient to be submitted to the jury on defendant's counterclaim on the issue of plaintiff's negligence in entering the driveway without maintaining a proper lookout and in driving at least a part of his truck to the left of the center of the highway.

3. Trial § 26—

Nonsuit of a counterclaim will not be entered for a slight variation between defendant's allegations and plaintiff's testimony and testimony of plaintiff's statements as to how the accident occurred, since plaintiff could not have been misled by his own testimony and statements. G.S. 1-168.

4. Trial § 48—

Denial of motion to set aside the verdict supported by the evidence will not be disturbed.

APPEAL by plaintiff from *McLaughlin, J.*, 12 April 1965 Session of ALEXANDER.

This was a suit for personal injuries and property damage in an automobile collision. The defendant counterclaimed for his own personal injuries and property damage. The jury found that the plaintiff was not injured or damaged by the negligence of the defendant, that the defendant was injured and his property damaged by the negligence of the plaintiff and that his damages were $3,200 for personal injuries and $300 for property damage. From a judgment in accordance with the verdict the plaintiff appeals. He assigns as error the court's refusal to grant his motion for judgment of nonsuit as to the counterclaim and the denial of his motion to set aside the verdict and grant a new trial on the ground that the verdict is against the greater weight of the evidence. He contends that there was no competent evidence from which negligence on the part of the plaintiff could reasonably be inferred and that there was a fatal variance between the allegations of the counterclaim and the evidence of the defendant as to the cause and place of the accident.

The defendant's further answer and counterclaim alleges: As the defendant was driving westwardly along U. S. Highway 64, upon his right side of the road and a short distance east of the driveway of the White Pine Restaurant near Conover, the plaintiff suddenly drove his pickup truck out of the driveway, which is on the south side of the highway, and attempted to drive eastwardly along the highway. In so doing he negligently drove across the center of the highway and into the defendant's lane of travel, whereupon the defendant attempted to avoid a collision but was unable to do so. The plaintiff is alleged to have been negligent in failing to keep a proper lookout, failing to yield the right of way to the defendant and failing to give way to the right in meeting an oncoming vehicle.

The plaintiff, himself, testified that he had been driving westwardly on Highway 64 about 9:45 p.m., decided to go back to the east, turned into the driveway of the restaurant at the east end of a traffic island, 44 feet long, proceeded through the restaurant grounds to the west end of the traffic island, stopped and then proceeded out into the highway, and traveled eastwardly on the highway at a speed of from 10 to 15 miles an hour back to the east end of the traffic island — the point at which he originally entered the restaurant grounds — and there the collision occurred. From the west driveway, out of which he went back upon the highway, he could see four-tenths of a mile along the highway to the east, the direction from which the defendant was coming. The vehicles collided head-on. His car came to rest on the pavement with one rear wheel over on the defendant's side of the road. The defendant's car came to rest in the restaurant driveway on the south side of the highway.

Highway Patrolman Pope, called as a witness by the plaintiff, testified: Debris was all over the highway. He could not determine the point upon the highway at which the collision occurred. The plaintiff's truck was in the north or westbound lane. The plaintiff told him that he saw the lights of the defendant's car only a split second before the impact.

The defendant testified that he does not remember anything about the accident or how it happened. He was knocked unconscious in the collision.

Corporal Hunt of the State Highway Patrol, called as a witness for the defendant, corroborated Patrolman Pope.

Adams & Dearman by C. H. Dearman, and Ray Jennings for plaintiff appellant.

Patrick, Harper & Dixon for defendant appellee.

PER CURIAM. In passing upon the plaintiff's motion for judgment of nonsuit as to the defendant's counterclaim, all of the evidence, including that offered by the plaintiff, must be interpreted in the light most favorable to the defendant, since, as to the counterclaim, the defendant is in the position of a plaintiff seeking relief. So interpreted, the plaintiff's own testimony and his own statement to the investigating patrolmen are sufficient to support a finding that he re-entered the highway from the private driveway without maintaining a proper lookout, when the automobile of the defendant was in plain view only a short distance away and that he drove at least a part of his truck over the center of the road and into the defendant's lane of travel. There is no material variance between this evidence and the allegations of the counterclaim as to where and how the collision occurred. G.S. 1-168. The plaintiff can hardly contend that he was misled by his own testimony and statements. His motion for judgment of nonsuit was, therefore, properly denied.

The credibility of the testimony and the propriety of drawing therefrom inferences which it will support were for the jury, who have considered it and decided in favor of the defendant. There was no error in the denial of the motion to set aside the verdict.

Although the alleged errors in the instructions of the court to the jury appear to have been abandoned in the brief of the plaintiff, we have considered them and find no merit therein.

No error.

MRS. OLA B. MONTGOMERY, WIDOW, OTIS C. MONTGOMERY, DECEASED, EMPLOYEE v. HORNEYTOWN FIRE DEPARTMENT, EMPLOYER; THE TRAVELERS INSURANCE COMPANY, CARRIER.

(Filed 3 November, 1965.)

Master and Servant § 88—

The statutory limitation upon the filing of a claim for compensation under the Workmen's Compensation Act is a condition precedent annexed to the right to compensation, and when no claim is filed on behalf of the widow within one year of the employee's death, proceedings instituted subsequent thereto are properly dismissed, irrespective of whether the neglect of the widow's attorneys should be imputed to her. G.S. 97-24.

APPEAL by plaintiff from *Crissman, J.*, 24 May 1965 Civil Session of FORSYTH.

On 16 August 1962, Otis C. Montgomery, the husband of plaintiff herein, died immediately following a collision of a fire truck which he was driving. At the time of his death he was a voluntary fireman with defendant Horneytown Fire Department, which department was subject to the Workmen's Compensation Act and was insured by defendant Travelers Insurance Company.

At the time of the accident the deceased was returning from a fire, and immediately following the accident the truck was found "setting up on an embankment, Mr. Montgomery was still under the wheel but slid down * * * in the left side of the truck * * *." When found, he was "gasping for breath." He was dead upon arrival at the hospital.

Dr. T. Eugene Terrell examined the deceased at the hospital. It was stipulated at the hearing that if Dr. Terrell were present he would testify "that in his opinion the probable cause of death of Otis Charles Montgomery was a myocardial infarction."

On 22 August 1962, the employer, Horneytown Fire Department, filed with the Industrial Commission a complete report, giving all the details of the accident and death, using Industrial Commission Form No. 19. This report was given Industrial Commission File No. I. C. 254930. The form contained the following language: "This report filed only in compliance with Section 97-92 and not employees' claim for compensation."

The record further discloses that on 15 December 1962 attorneys for the plaintiff notified the Industrial Commission that they represented the plaintiff and would communicate further with the Commission when they had completed their investigation.

Between 17 December 1962 and 28 August 1963 the Commission twice wrote to the attorneys for plaintiff asking that Form 33, requesting a hearing, be forwarded to the Commission.

Neither the Commission nor the court below made any findings with respect to the merits of the case, and the sole question presented on appeal is whether claim was filed as required by G.S. 97-24.

After the hearing before a Deputy Commissioner it was found that neither the widow nor anyone on her behalf filed a claim with the Industrial Commission within one year of the death of Otis C. Montgomery on 16 August 1962. This ruling was appealed to the full Commission and the full Commission affirmed the prior ruling. The Superior Court of Forsyth County affirmed the ruling of the Industrial Commission and plaintiff appeals, assigning error.

Harry H. Leake and White, Crumpler, Powell, Pfefferkorn & Green for plaintiff appellant.
Sapp & Sapp for defendant appellees.

PER CURIAM. G.S. 97-24 provides in pertinent part: "(a) The right to compensation under this article shall be forever barred unless a claim be filed with the Industrial Commission within two years after the accident, and if death results from the accident, unless a claim be filed with the Commission within one year thereafter."

This Court has held the requirement that a claim be filed in accord with the provisions of the above statute constitutes "a condition precedent to the right to compensation, and is not a statute of limitations." *Lineberry v. Mebane,* 218 N.C. 737, 12 S.E. 2d 252; *Whitted v. Palmer-Bee Co.,* 228 N.C. 447, 46 S.E. 2d 109; *Coats v. Wilson, Inc.,* 244 N.C. 76, 92 S.E. 2d 446.

The undisputed facts disclosed by the record support the conclusion of law reached by the hearing Commissioner, the full Commission and the court below. Hence, the judgment from which this appeal was taken is

Affirmed.

JACKIE W. ANDERSON AND WIFE, BARBARA W. ANDERSON; JOSEPH C. BUMGARNER AND WIFE, HELEN C. BUMGARNER; DONALD F. LAMBERT; ROBERT LEE MULLIS AND WIFE, SHIRLEY F. MULLIS; HAZEL C. BEAVER AND WIFE, JOSEPHINE A. BEAVER; WILLIAM OSCAR BROWN AND WIFE, PAULINE E. BROWN; DWIGHT NEILL AND WIFE, JUDY NEILL; JAMES F. LAMBERT AND WIFE, HAZELEEN B. LAMBERT; FRED ROBERSON AND WIFE, WILLIE ROBERSON; GLENN BALLARD AND WIFE, MRS. GLENN BALLARD; ROBERT LUTHER JOHNSTON AND WIFE, ELEANOR S. JOHNSTON, AND PHILLIP ORBISON AND WIFE, PATTY M. ORBISON v. HAROLD E. CASHION AND WIFE, VIRGINIA S. CASHION, AND J. OLIN LYLES AND WIFE, LOUISE S. LYLES.

(Filed 3 November, 1965.)

1. Trial § 40—

An issue which does not dispose of all material controversies arising on the pleadings will not support a final judgment.

2. Trial § 57—

Except in a small claim action, it is irregular for the court, in a trial by the court under agreement of the parties, to render a verdict on issues submitted to itself. G.S. 1-185.

APPEAL by defendants from *McLean, J.*, March 1965 Session of IREDELL.

Plaintiffs seek to enjoin the use by defendants of lots in a subdivision as trailer parks.

Plaintiffs allege and defendants admit these facts: Plaintiffs and defendants own lots in a subdivision known as Lakeview. Plaintiffs have constructed dwellings on their lots and reside therein. Lakeview was developed according to a general plan, and the following restrictions (and none other) are set out in all conveyances of lots of the subdivision:

> "(1) No dwelling shall have less than 850 square feet, not including porches, breezeways or garages.
>
> "(2) No house shall be erected on a lot less than 100 feet frontage."

Defendants have made plans and preparations to establish and maintain trailer parks on their lots. The trailers will each contain "less than 850 square feet," and have less than 100 feet lot frontage.

Plaintiffs further allege that the use proposed by defendants violates the restrictions, will "cause a breakup of the general plan of development" and will depreciate the value of plaintiffs' property, and that plaintiffs will be irreparably injured and without an adequate remedy at law. Plaintiffs pray that such use be enjoined.

Defendants, answering, aver that the restrictions apply only to houses and dwellings constructed on the lots in the subdivision as a part of the realty, the trailers are not houses or dwellings within the meaning of the restrictions, the trailer parks will be conducted as businesses, and the "restrictions have become obsolete and are an alienation of the property rights of defendants."

The parties waived jury trial and agreed that the judge might determine the facts, apply the law thereto, and enter judgment. Plaintiffs and defendants offered evidence in support of their respective pleadings.

The judge found no facts, but submitted to himself and answered an issue as follows:

> "Do the restrictive covenants contained in the Deeds of the plaintiffs and defendants alienate the property rights of the defendants in the operation of a trailer court or mobile home

court upon their property with more than one trailer or mobile home to each lot of 100 feet frontage, or less than 850 square feet floor space, as contained in said Deeds?

ANSWER: No."

Judgment was entered restraining defendants from using their lots as temporary or permanent trailer parks "for house trailers or other dwellings containing less than 850 feet, square feet floor area for use as residences, and further, . . . from locating mobile homes on lots containing less than 100 feet frontage . . ." Defendants were ordered to remove trailers which do not comply with the restrictions.

Kenneth B. Cruse and Marshall B. Sherrin, Jr., for defendant appellants.

Robert N. Randall for plaintiff appellees.

PER CURIAM. The issue which the court submitted to itself and answered, considered in the light of the pleadings, is of very doubtful meaning at best. Its ambiguity is such that the answer thereto will permit, in one view of the matter, the construction that the verdict is favorable to defendants and is contrary to the judgment entered. Furthermore, the issue, in any view of the matter, does not dispose of all material controversies arising on the pleadings, and therefore it will not support a final judgment. *Rubber Co. v. Distributors,* 253 N.C. 459, 117 S.E. 2d 479. The questions in controversy on the present pleadings are whether the restrictions are unenforceable in equity because of changed conditions, as alleged by defendants, and, if not, whether the uses proposed by defendants violate the restrictions, as alleged by plaintiffs.

Parenthetically, we take note that unless an action is a small claim, G.S. 1-539.5, it is irregular for the court to render a verdict on issues submitted to itself. G.S. 1-185; *Wynne v. Allen,* 245 N.C. 421, 96 S.E. 2d 422.

The verdict and judgment are vacated and there will be a

New trial.

STATE v. L. D. JACKSON.

(Filed 3 November, 1965.)

1. **Criminal Law § 99—**
   On motion to nonsuit, the evidence must be considered in the light most favorable to the State and contradictions and discrepancies must be resolved in its favor.

2. **Receiving Stolen Goods § 5—**
   Evidence of receiving stolen goods with knowledge they had been stolen *held* sufficient to overrule nonsuit.

3. **Criminal Law § 92—**
   The trial court has discretionary power to permit the introduction of additional evidence after argument to the jury.

4. **Criminal Law § 97—**
   The trial court has discretionary power to limit the scope of subsequent argument after the introduction of additional evidence.

APPEAL by the defendant from *Mintz, J.*, April 1965 Criminal Session of WAYNE.

The defendant was indicted for unlawfully and wilfully receiving and concealing stolen goods, knowing them to be stolen, namely, a quantity of copper wire valued at $220. Upon a verdict of guilty he was sentenced to be confined in jail and assigned to work under the supervision of the State Prison Department for two years. From this judgment he appeals, assigning as error the overruling of his motion for judgment of nonsuit, the ruling of the court permitting the State to reopen the case after arguments had been made to the jury, the court's limitation of subsequent arguments to the jury and certain portions of the charge.

The following is a summary of the State's evidence:

James Hobbs and others stole from a box car at the junk yard of the Goldsboro Iron & Metal Works, also known as Junk Brown's, approximately fifteen hundred pounds of copper wire in the night. Together they went to the defendant at 3:30 a.m., the same night, and asked him to buy it, telling him that they had more than a thousand pounds of it and that they had gotten it at Junk Brown's. The defendant told them he could take about eight hundred pounds of it and he gave them his check for $165 in payment therefor.

The police officers went to the defendant's place of business later in the same day and observed there some small pieces of copper wire which had been swept into a pile. The defendant then told them that at about 3:30 o'clock that morning Hobbs and his associates had come to his house, awakened him and asked him to buy the copper

which they said they had gotten from a box car at the Goldsboro Iron & Metal Works, and which the defendant then purchased from them and resold in Greenville in the morning for $225. He stated to the officers that he knew the copper was stolen and he carried it to Greenville to sell it because it would be recognized if he tried to sell it in Goldsboro.

The defendant testified in his own behalf. He acknowledged purchasing the copper from Hobbs and his associates and reselling it in Greenville the same morning. He denied knowing that the copper was stolen.

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

Braswell & Strickland for defendant appellant.

PER CURIAM. On motion for judgment of nonsuit the evidence must be considered in the light most favorable to the State and contradictions and discrepancies therein do not warrant the granting of the motion. *State v. Thompson,* 256 N.C. 593, 124 S.E. 2d 728; *State v. Roop,* 255 N.C. 607, 122 S.E. 2d 363; *State v. Simpson,* 244 N.C. 325, 93 S.E. 2d 425. There was ample evidence to support a finding of each element of the offense with which the defendant was charged and of which the jury found him guilty. There was no error in overruling the motion for judgment of nonsuit.

The trial court had discretionary power to permit the introduction of additional evidence after both parties had rested and arguments had been made to the jury. *State v. Harding,* 263 N.C. 799, 140 S.E. 2d 244. The limitation of the scope of subsequent arguments to the jury was also in the discretion of the trial court.

We have carefully examined the exceptions to the various rulings of the court upon the admission of evidence and the exceptions to the charge to the jury. We find no merit in any of them.

No error.

MYRTLE SHERRILL v. RICHARD M. BOYCE AND WIFE, JANET B. BOYCE.

(Filed 3 November, 1965.)

1. Trial § 57—

While it is irregular for the court, in a trial by the court under agreement of the parties, to submit issues to itself, where there is no objection or exception thereto such procedure will not require a new trial if it can be ascertained from the issues and the court's answers thereto that the court found ultimate facts constituting a legal basis for the judgment.

2. Trial § 52—

A finding of the amount of damages by the court under agreement of the parties is as conclusive as though the damages were established by verdict of the jury, and the court's findings in regard thereto will not be set aside on the ground the damages allowed are excessive in the absence of manifest abuse of discretion.

APPEAL by defendants from *McLean, J.*, March 1965 Session of IREDELL.

Plaintiff brought this action to recover for personal injury and property damages sustained on August 12, 1961, when defendant Janet B. Boyce drove the family-purpose automobile owned by her husband, defendant Richard M. Boyce, into the rear of plaintiff's vehicle while she was stopped at an intersection. A jury trial was duly waived. Defendants stipulated that the issue of negligence should be answered against them and that the only question for the court was the amount of plaintiff's damages. Plaintiff offered evidence tending to show that, in the accident, she suffered an acute neck strain from which she still experiences headaches and muscular spasms. Judge McLean answered an issue with reference to plaintiff's personal injuries, $8,600.00; as to her property damages, $75.00. Defendants' motion "to set the verdict aside because it was excessive" was denied. From the judgment that plaintiff recover $8,675.00, defendants appealed.

Battley and Frank for plaintiff appellee.

Adams and Dearman and C. B. Winberry for defendant appellants.

PER CURIAM. When a jury trial is waived as provided in G.S. 1-184, the court's findings of fact have the force and effect of a verdict, *Insurance Co. v. Lambeth,* 250 N.C. 1, 108 S.E. 2d 36, and an exception to the judgment presents only the question whether the facts found are sufficient to support the judgment. *Turnage Co. v. Morton,* 240 N.C. 94, 81 S.E. 2d 135. Unless the action is a small claim, G.S. 1-539.5, it is irregular for the court to render a verdict

on issues submitted to itself, G.S. 1-185. The parties here, however, seem to have contemplated this procedure. In the absence of objection and exception, a new trial will not be ordered because the judge answered issues instead of stating the facts found and conclusions of law separately "if from the judgment it can be determined what the Court found the ultimate facts to be and what the legal basis of the judgment is." *Daniels v. Insurance Co.*, 258 N.C. 660, 662, 129 S.E. 2d 314, 316. The issues, as stipulated and answered by the court, fully sustain its judgment.

In this case we have no more right to disturb the judge's answer to the issue of damages than we would have had to disturb a jury's finding. *Benton v. Willis, Inc.*, 252 N.C. 166, 113 S.E. 2d 288. The granting or denial of a motion to set aside a jury's verdict on the ground that the damages assessed are excessive or inadequate is within the sound discretion of the trial judge. *Evans v. Coach Co.*, 251 N.C. 324, 111 S.E. 2d 187. When the trial judge himself renders the "verdict," a *fortiori*, the same rule applies. Even though, upon plaintiff's evidence, reasonable minds might well differ as to the amount of damages to which she is entitled, yet an abuse of discretion is not manifest.

No error.

STATE v. GEORGE DIXON.

(Filed 3 November, 1965.)

Criminal Law § 169—

Upon the death of the defendant prior to argument of the appeal, the action abates and the appeal will be dismissed.

ON 3 February 1965 the petition of George Dixon for writ of *certiorari* to review the trial of the defendant before *Fountain, J.*, at the August Session 1963 of NASH County, was allowed.

Defendant was tried upon a bill of indictment charging him with the murder of Rosa Simmons, alias Rosa Dixon. Defendant was found guilty of murder in the first degree with recommendation of life imprisonment. From the judgment imposed, defendant gave notice of appeal to the Supreme Court. No appeal was perfected. We allowed the defendant's petition for writ of *certiorari* on 3 February 1965 and directed the court-appointed counsel to perfect the appeal and have it docketed in time to be heard in its regular order at the

Fall Term 1965. The appeal was argued before this Court on 28 September 1965.

Attorney General Bruton, Deputy Attorney General Harry W. McGalliard for the State.
Thomas G. Dill and Roy C. Boddie for defendant.

PER CURIAM. It having been suggested that the defendant has died since appeal herein was docketed and argued in this Court, the action stands abated and the appeal must be dismissed. It is so ordered. *In re LeFevre,* 243 N.C. 714, 91 S.E. 2d 926; 24A C.J.S., Criminal Law, § 1825(3), page 483.

Action abated.
Appeal dismissed.

MAE W. DULL v. LAWRENCE PAUL DULL.

(Filed 3 November, 1965.)

APPEAL by defendant from *McLaughlin, J.,* in Chambers at Statesville, North Carolina, 22 May 1965. From DAVIE.

On 21 April 1959 plaintiff instituted an action in the Superior Court of Davie County in which she sought support, maintenance, and subsistence for herself and the two minor children born of the marriage of plaintiff and defendant. She also prayed for custody of the minor children.

On the same day the pleadings were filed, a consent judgment was entered awarding plaintiff custody of said children and requiring defendant to pay $35.00 per week for the support of the children, beginning with 27 April 1959, and a like sum on or before the first day of each week thereafter, until the further orders of the court.

On 7 March 1962 the parties consented to the entry of a judgment reducing the payments for the support of the minor children to $50.00 on the first and fifteenth of each month thereafter, beginning with 15 December 1961, until the further orders of the court.

On 29 April 1965, defendant filed a motion to reduce the required payments on the ground that he was and had been handicapped physically for sometime and is not able to meet the payments.

Plaintiff answered the motion and requested an increase in the amount theretofore agreed upon on the ground that one of the

children was in high school and the other was in the sixth grade and that their needs had greatly increased. Whereupon, the court below heard the matter, found as a fact that the needs of the children are in excess of the payments theretofore agreed upon; that defendant is an able-bodied man and is employed at a weekly wage of $35.00; that he has other income from other sources; that he owns property and has sufficient income and ability to earn income from which he can adequately support the two minor children. The court on 22 May 1965 entered an order increasing the allowance to $55.00 on the first and fifteenth of each month thereafter, beginning with 1 June 1965, and continuing until the further orders of the court.

Defendant appeals, assigning error.

Robert M. Bryant for defendant appellant.
No counsel contra.

PER CURIAM. The appellant did not except to the facts found by the court below, and the findings of fact are sufficient to support the order entered below. *Goldsboro v. R. R.*, 246 N.C. 101, 97 S.E. 2d 486. Where no exceptions have been taken to the findings of fact, such findings are presumed to be correct and are binding on appeal. *Goldsboro v. R. R., supra,* and cited cases.

Orders for the support of minor children are subject to modification upon a proper showing of a change of conditions. *Blankenship v. Blankenship,* 256 N.C. 638, 124 S.E. 2d 857; *Griffin v. Griffin,* 237 N.C. 404, 75 S.E. 2d 133; *Hardee v. Mitchell,* 230 N.C. 40, 51 S.E. 2d 884.

The judgment from which this appeal was taken is
Affirmed.

STATE v. WILLIS TONY CADDELL.

(Filed 3 November, 1965.)

APPEAL by defendant from *Olive, E.J.*, June 21, 1965 Criminal Session, DAVIDSON Superior Court.

The Grand Jury returned a bill of indictment charging the defendant with the felonious breaking, entering into, and larceny of a TV set and $25.00 in money from a storehouse occupied by South Main Sunoco Service Station. Some questions arose with respect to the

form of the indictment in that it failed to designate the ownership of the property stolen. Whereupon, by agreement with the Solicitor, the defendant and his counsel, in writing, waived indictment and entered a plea of guilty to a written information signed by the Solicitor charging the felonious breaking into the storehouse occupied by South Main Sunoco Service Station and the larceny therefrom of described personal property of Carl Massey of the value of $175.00. The court imposed a single prison sentence of not less than six years nor more than ten years. The defendant appealed.

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

Ned A. Beeker, Court Appointed Counsel for defendant appellant.

PER CURIAM. The defendant's court-appointed counsel, by brief and by oral argument here, urged that the court committed error in giving consideration to the FBI fingerprint record presented to the court on the question of punishment. The record disclosed a number of arrests without showing what disposition was made of the cases.

The punishment imposed was well within the limits prescribed for housebreaking. The fingerprint record was presented in open court in the presence of defendant and his counsel. They had opportunity to point out any errors in the record or to make any explanations with respect thereto. We are sure the careful and conscientious Judge did not give any improper consideration to the fingerprint record. In the judgment, we find

No error.

STATE v. DONALD RAY NEWTON.

AND

STATE v. JAMES BASS ROBERSON ALIAS JIMMIE ROBERSON.

(Filed 3 November, 1965.)

APPEAL by defendants from *Hall, J.*, March, 1965 Criminal Session, VANCE Superior Court.

The defendants were separately indicted but tried together for the common law robbery of Fred Ray Carlisle and the felonious taking from him of the sum of $75.00 in money. At the trial the victim tes-

tified that the defendants forcibly took from him $75.00 after threats and putting him in fear of his life and safety. The evidence disclosed the parties and others had been drinking beer together. The victim's testimony was positive and complete. The defendants' denials were equally so. The defendants offered testimony of another witness, corroborating to a limited extent, their story. The jury returned a verdict of guilty. From a judgment and sentence that each of the defendants be committed to prison for not less than two years and not more than three years, each appealed.

T. W. Bruton, Attorney General, Harry W. McGalliard, Deputy Attorney General for the State.
Sterling G. Gilliam for defendant appellants.

PER CURIAM. The testimony of the prosecuting witness made out a case of common law robbery against the defendants. The testimony of the defendants made out a defense. Judge Hall submitted the issue under proper instructions. The jury resolved the conflict by accepting the victim's version.
No error.

DAVID A. HILDRETH v. UNITED STATES CASUALTY COMPANY, A FOREIGN INSURANCE CORPORATION, HARRY D. McLAUGHLIN AND OLIN NIVEN.

(Filed 10 November, 1965.)

1. **Insurance § 2—**
An insurance agent is liable to the insurer if the agent issues a policy in violation of his instructions resulting in loss to insurer.

2. **Negligence § 9—**
Where two persons are jointly liable in respect to a tort, one being liable because he is the active wrongdoer and the other by reason of constructive or technical fault imposed by law, the latter, if blameless as between himself and his co-tortfeasor, will ordinarily be allowed to recover full indemnity over against the actual wrongdoer as upon a contract implied in law.

3. **Same; Pleadings § 8— In action against insurer and its agents asserting liability on policy, insurer is entitled to file cross-action for indemnity.**
Plaintiff, after return of execution against insurer unsatisfied, sued in-

surer and its agents seeking to recover on the grounds: (1) that the agency had issued insurer's policy of liability insurance covering the loss, (2) that the issuance of the policy by the agency was within its apparent authority, (3) that if no policy was issued the agent had issued to insured a FS-1 certificate in insurer's name, and therefore insurer was estopped to deny liability. Plaintiff also contended upon facts alleged that if insured were not liable plaintiff is entitled to recover against the insurance agent purporting to have issued the policy. *Held:* Insurer is entitled to file a cross-action for indemnity against the agent on the ground that insurer's liability is secondary and arises from the wrongful conduct and breach of duty on the part of its agent, and such cross-action for indemnity is germane to plaintiff's cause of action, since plaintiff, in making out his cause of action, must prove facts in regard to the agency, the scope of the agent's authority and their respective duties and responsibilities.

APPEAL by defendant, United States Casualty Company, from *Houk, J.*, February 15, 1965, "A" Civil Session of MECKLENBURG.

Action to recover benefits under an alleged policy of automobile liability insurance.

The complaint alleges, in summary, the following facts: Harry D. McLaughlin was, on 6 May 1959, a licensed insurance agent and was the agent of United States Casualty Company (Company) for soliciting and writing automobile liability insurance at Waxhaw, N. C. McLaughlin and Olin Niven operated and maintained an insurance business as Waxhaw under the name of McLaughlin and Niven Insurance Agency (Agency). McLaughlin was authorized and permitted by the Company to designate Niven as his sub-agent with authority to transact the business of the Agency and sign McLaughlin's name to papers and documents in connection with transactions with and on behalf of the Company. The Company delivered to and permitted the Agency, and both members thereof, to have in possession application forms for automobile liability insurance, binder forms for such insurance, and FS-1 forms (North Carolina Certificate of Insurance) with the Company's name printed thereon; the Company authorized and permitted both members of the Agency to make use of these forms in writing business: and the Company thereby held out the said Agency and each member thereof as its agent, or agents, to transact the Company's insurance business. On 6 May 1959 Henry Bradley Robinson purchased from the Agency a contract of automobile liability insurance in standard form as written by the Company and in accordance with the laws of North Carolina, with limits of $5000-$10,000 liability for personal injury and $5000 property damage. Robinson's Mercury is the automobile described in the policy. Robinson paid the Agency $10 on the premium and got a receipt therefor. The Agency issued and delivered to Robinson a FS-1 on the Company's form, signed in the name of McLaughlin. The

FS-1 was filed with the State Department of Motor Vehicles. The Company never cancelled or terminated the insurance and never gave notice of cancellation or termination to the insured or the Department. The insurance was in full force and effect on 15 May 1959. On that date plaintiff was injured when the car he was driving collided with the Mercury (the insured car) driven by Robinson. The Company was given notice of the collision. Plaintiff sued Robinson in the Superior Court of Mecklenburg County and recovered judgment on 16 January 1963 in the amount of $5000 on account of the injuries received by him in the collision. Plaintiff has made demand on the Agency and the Company for payment of the judgment but they have refused to pay. Robinson has done all the things required of him under the contract of insurance as conditions precedent. If the Company is not bound by the acts of the Agency in making the contract of insurance, the members of the Agency are "themselves bound on the said contract in the same manner and to the full extent that the corporate defendant insurance company would have been had it created said contract," or the members of the Agency are liable "for breach of implied warranty of authority to insure."

McLaurin and Niven, answering, set forth these facts: Robinson applied to Niven for automobile liability insurance, and filled out an application therefor. Niven told him the premium was $112 and the application would not be "sent through" until one-half of the premium was paid. Robinson paid $10 and Niven gave him a receipt. Robinson requested a FS-1, and Niven prepared it with copies, omitting policy number, and gave Robinson the third carbon copy, after signing McLaurin's name thereto. Niven attached the original and duplicate of the FS-1 to the application and told Robinson the policy number would be entered and the form "sent through" when one-half of the premium was paid. Robinson later paid an additional $8. Both payments were later returned to Robinson. The application and original FS-1 were never "sent through." The third copy of FS-1 which had been delivered to Robinson was not sent to the Motor Vehicles Department until after the accident in question. McLaughlin and Niven never issued to Robinson a policy or an original FS-1.

United States Casualty Company, answering, deny the material allegations of the complaint and for a "Further Answer and Defense" aver that Robinson did not pay the premium for a policy of insurance or a binder and no policy or binder was ever issued by the Company. For a "Second Further Answer and Defense and as a Cross-action," the Company alleges in substance as follows: McLaughlin was the local soliciting agent for the Company in Waxhaw. He was conducting his business as agent for the Company and one

or more other insurers, under the name of McLaughlin and Niven Insurance Agency. The Company entrusted the Agency with original FS-1 forms and copies, and application forms for automobile liability insurance. The Agency was not authorized to issue a FS-1 unless it had in possession a completed application for insurance. It was obligated upon taking a completed application and issuing a FS-1 to immediately forward the application with a copy of the FS-1 to the Company. The Agency did not at any time have in possession an application completed and signed by Robinson, nor did it ever forward any such application to the Company. On 6 May 1959 the agency gave Robinson an incomplete carbon copy of FS-1 form, but did not release the original. Under the rules of the Department of Motor Vehicles, then in effect, a FS-1 to be effective was required to be the original. The Company did not authorize the Agency to issue a policy, a binder, or a FS-1 to Robinson, and the Agency did not advise the Company that it had parted with the copy of the FS-1 until after the accident in question. If the Company has any obligation to the plaintiff in this action, such liability arises from the direct and primary wrongful conduct on the part of the Agency in the breach and violation of the duties of McLaughlin to the Company, as its agent, and the Company is entitled "to be indemnified and saved harmless" by McLaughlin "of and from all amounts to which it may be adjudged indebted to the plaintiff in this action."

Plaintiff, in reply, alleges that by reason of the issuance of the copy of the FS-1 and other acts and admissions the Company is estopped to deny that it had in effect a policy of insurance.

Plaintiff moved to strike the Company's "Second Further Answer and Defense and Cross-action" in its entirety on the grounds that it "is not germane to plaintiff's cause of action," the determination of the rights and liabilities between the defendants is not necessary to a conclusion of plaintiff's action, there is not "such a community of interest between all parties to make such cross-action appropriate." the Company cannot be permitted to plead an indemnity agreement against its agent, McLaughlin, as a cross-action when plaintiff is not privy to such agreement, and the allegations of the cross-action are "incompetent, irrelevant, immaterial, redundant and prejudicial."

The court entered an order sustaining the motion and striking the said Second Further Answer and Defense and Cross-action.

Beverly H. Currin for plaintiff.

Carpenter, Webb & Golding for defendant United States Casualty Company.

MOORE, J. The sole question for determination on this appeal is whether the Company may maintain its cross-action for indemnity against its codefendant, McLaughlin, in plaintiff's action. The answer is "yes."

"An insurance agent is liable in damages for any loss sustained by the company arising from the agent's breach of duty. . . . Thus, if the agent issues a policy in violation of his instructions, he will be liable to the company for the amount of loss which it has been compelled to pay on such policy, together with the expenses incurred in connection therewith. . . ." 44 C.J.S., Insurance, § 159, pp. 834, 835. "It is ordinarily true that for breaches of duty involved in the contract of agency the principal may sue either for breach of contract for faithfulness or in tort for a breach of duty imposed by the same." *Elam v. Realty Co.,* 182 N.C. 599, 604, 109 S.E. 632.

"A cross-claim for indemnification may be asserted by one original defendant against another when it is based on allegations of primary liability arising by law in respect of plaintiff's claim as opposed to merely secondary liability thereon of the cross-claiming defendant, as in cases of active and merely passive negligence, or of direct and merely vicarious liability." McIntosh: North Carolina Practice and Procedure (2d Ed.), Vol. 1, § 1224.5 (1964 Pocket Part p. 159). Where two persons are jointly liable in respect to a tort, one being liable because he is the active wrongdoer, the other by reason of constructive or technical fault imposed by law, the latter, if blameless as between himself and his co-tortfeasor, will ordinarily be allowed to recover full indemnity over against the actual wrongdoer. *Steele v. Hauling Company,* 260 N.C. 486, 133 S.E. 2d 197; *Greene v. Laboratories, Inc.,* 254 N.C. 680, 120 S.E. 2d 82; *Amusement Co. v. Tarkington,* 247 N.C. 444, 101 S.E. 2d 398; *Hayes v. Wilmington,* 243 N.C. 525, 91 S.E. 2d 673. The doctrine of primary-secondary liability is based upon a contract implied in law. *Hunsucker v. Chair Co.,* 237 N.C. 559, 75 S.E. 2d 768. The inquiry as to primary and secondary liability, when properly pleaded and supported by evidence, is germane to plaintiff's cause of action. *Greene v. Laboratories, Inc., supra; Clothing Store v. Ellis Stone & Co.,* 233 N.C. 126, 63 S.E. 2d 118.

Plaintiff asserts, in two aspects of the case, alternative rights of recovery. He alleges facts which he contends give right of recovery against the Company, but he alleges further that if no such right exists the facts are such as to entitle him to recover against the Agency. As against the Company, he contends he is entitled to recover on one of three theories: (1) Robinson purchased a policy of insurance from the Company's agent and in the issuance of the

policy the agent acted within the scope of his actual authority as such agent, and the Company is bound by the terms of the policy; or (2) Robinson purchased a policy of insurance from the Company's agent and, even if the issuance of such policy was not within the scope of the agent's actual authority, such issuance was within the scope of the Agent's apparent authority and the Company is bound; or (3) Robinson purchased a policy of insurance from the Company's agent and, though no policy was ever actually issued, the Agent issued to Robinson a FS-1 certificate confirming that a policy of insurance was in effect, and, even though issuance of the certificate might not have been within the scope of the actual authority of the agent, it was within the scope of the agent's apparent authority and the Company is estopped by the issuance of the certificate to deny that the policy applied for and purchased was issued and in effect.

It will be observed that the transaction alleged by plaintiff, whatever the facts prove to be, concerns Robinson, the Company and its agent, McLaughlin. Plaintiff, for the purposes of this action, stands in Robinson's shoes. When the matter comes to trial plaintiff must, if he is to make out a case of liability on the part of the Company, show by evidence or admissions of defendants an agency relationship between McLaughlin and the Company, the scope thereof, and the respective duties and responsibilities as between said defendants. Once this is done and the true facts of the transaction are established, the liability of McLaughlin to the Company, if any, will arise as a matter of law, that is, as a matter of contract implied in law. The Company does not plead an indemnity agreement. It asserts that if it has incurred liability to plaintiff its liability is secondary and arose because of the wrongful conduct and breach of duty on the part of McLaughlin, which breach of duty was the direct cause of the liability, imposing primary liability on McLaughlin. The Company's cross-action is germane to plaintiff's cause of action and the court erred in striking it from the Company's answer.

Reversed.

WILLIE KEARNEY v. GLADYS AYCOCK HARE.

(Filed 10 November, 1965.)

1. Landlord and Tenant § 11—

Where a tenant for a fixed term of one year or more holds over after the expiration of the term, the lessor may eject him or recognize him as a

tenant; if lessor continues to recognize him as a tenant, a tenancy from year to year, under the same terms as those of the former lease, insofar as they are applicable, is created by presumption of law in the absence of a new contract or circumstances rebutting such presumption.

2. Landlord and Tenant § 10—

If a lease for a term of a year provides for renewal upon 30 days notice prior to the expiration of the term, a holding over by the tenant after term without giving notice does not constitute a renewal or extension under the terms of the lease, and the acceptance of rent in the former amount by the lessor after expiration of the term does not waive his right to notice.

3. Same—

This lease for a period of a year provided for extensions from year to year successively for a period of four years upon notice 30 days prior to the expiration of the current term. At the request of lessor, the tenant paid rent for the entire second year in installments beginning some two months prior to the expiration of the term. *Held:* By requesting and accepting payment of rent prior to the time lessee was required to give notice, the lessor waived notice, and the extension was effected under the lease, giving lessee the right to extend the lease for each successive year for the remainder of the four-year period upon payment of rent and the giving of due notice.

4. Same—

Provisions of a lease relating to renewals and extensions will be construed in favor of the tenant.

APPEAL by defendant from *Mintz, J.*, March 1965 Civil Session of WAYNE.

This is a controversy without action submitted to the court upon stipulated facts.

The defendant, as lessor, and the plaintiff, as lessee, entered into a written lease of a tract of land in Wayne County dated 15 November 1962 and recorded 2 July 1964. The lease provided:

"(1) This lease shall begin as of the date hereof and, unless sooner terminated shall exist and continue until the 15th day of November 1963.

"(2) As rental, the party of the second part is to pay $1,000.00 per year; but * * * should the tobacco allotment be cut to less than three acres then the party of the second part will pay $900.00 per year * * *.

"(4) Provided all rents have been paid * * * the party of the second part may at his option extend this lease for an additional term of one year, by giving to the party of the first part written notice of his intention to do so not later than thirty (30) days preceding the termination of this lease; and in the event of such extension all of the terms and conditions as herein set out shall continue in full force and effect, to include the term and condition of extend-

ing this lease from year to year, but under no circumstances can this lease be extended more than four times."

Prior to the date of the lease, the lessor had instituted a special proceeding against the owner of a contingent remainder in the land to have the land sold for division. Commissioners were appointed to make such sale and advertised the land for sale. The lessee did not know of the proceeding until 1 July 1964, more than seven months after the expiration of the original term of the lease, when he saw the commissioners' notice of sale. He was then in possession of the land and had already paid the entire agreed rent for the second year ending 15 November 1964. He promptly notified the commissioners that he claimed a lease upon the land which was valid for the crop years 1965, 1966 and 1967; that is, he contends he had a lease for the year ending 15 November 1964 with the right to extend it, year by year, for three additional years. The lessor-defendant contends the lessee-plaintiff had no right to so extend the lease.

In order to avoid a controversy which might depress the bidding at the sale, the parties agreed that the commissioners would sell the land free and clear of the plaintiff-lessee's claim and retain from the proceeds $2,400, the agreed value of his claim if it be valid, that this proceeding would be brought to determine the validity of the claim and that the $2,400 would be paid over to the plaintiff if his claim should be adjudged valid, but otherwise would be paid to the owners of the land.

Except as indicated in the provision for extension, the lease does not contain any provision as to when the rent is to be paid. The rent was paid for the year ending 15 November 1963, and for the year ending 15 November 1964, at the request of the lessor-defendant, it was paid in the following manner:

On 22 May 1963 the lessor and the lessee co-signed a note to the Branch Banking & Trust Company for $500, all of the proceeds of which were then received by the lessor. The lessee paid the note 1 November 1963. He paid an additional $100 to the lessor by check on 30 August 1963 and paid the final $300 to her by check on 9 December 1963, the total rent for the year having been reduced to $900 as provided in the lease.

The lessee gave the lessor no written notice of his intent to extend the lease to 15 November 1964 unless such notice was given by the signing and delivery of the above mentioned note and checks for the rent for such year, the note and checks not being set forth in the record.

The superior court concluded as a matter of law, upon the stipu-

lated facts, that the plaintiff had the right so to extend the lease and, therefore, was entitled to the $2,400 retained by the commissioners from the proceeds of their sale of the land. It entered judgment accordingly and from such judgment the lessor-defendant appeals.

Sasser & Duke by John E. Duke and J. Thomas Brown, Jr.; Langston & Langston by W. Dortch Langston, Jr., for defendant appellant.

Dees, Dees & Smith by William L. Powell, Jr., for plaintiff appellee.

LAKE, J. It is the contention of the lessor-defendant that by holding over after the expiration of the original one year term on 15 November 1963, even though the rent for the full second year was paid on or before 9 December 1963, the lessee-plaintiff had only a tenancy from year to year, with no right of extension beyond 15 November 1964, other than that which is inherent in a tenancy from year to year, because he did not give to the lessor-defendant, at least thirty days prior to the expiration of the original term, written notice of his intent to extend the lease to a second year.

In the absence of a provision in the lease for an extension of the term, when a tenant under a lease for a fixed term of one year, or more, holds over after the end of the term the lessor may eject him or recognize him as a tenant. *Murrill v. Palmer,* 164 N.C. 50, 80 S.E. 55. If the lessor elects to treat him as a tenant, a new tenancy relationship is created as of the end of the former term. This is, by presumption of law, a tenancy from year to year, the terms of which are the same as those of the former lease in so far as they are applicable, in the absence of a new contract between them or of other circumstances rebutting such presumption. *Williams v. King,* 247 N.C. 581, 101 S.E. 2d 308; *Murrill v. Palmer, supra; Holton v. Andrews,* 151 N.C. 340, 66 S.E. 212; *Harty v. Harris,* 120 N.C. 408, 27 S.E. 90. Such a tenancy may be terminated by either party at the end of any year thereof by giving notice of his intent so to terminate it thirty days before the end of such year. G.S. 42-14.

On the other hand, where the lease provides that the tenant may, at his option, extend the term without requiring him to give notice of such intent, if the tenant holds over after the end of the original term and pays rent as provided in the lease, the presumption is that the option to extend the term of the lease has been exercised and the tenancy continues to be that created by the lease, the rights conferred by it continuing into the extended term. *Trust Co. v. Frazelle,* 226 N.C. 724, 40 S.E. 2d 367. That is, the existence of the right to

extend the term is a circumstance which rebuts the presumption of a tenancy from year to year.

When the lease provides that the tenant may extend its term by giving notice of such intent in a specified manner or by a specified time, or both, the giving of such notice is a condition precedent to the extension of the term and if it is not so given by the specified time the right to extend the term is cut off and cannot be revived by the unilateral act of the tenant. *Realty Co. v. Demetrelis,* 213 N.C. 52, 194 S.E. 897; *Oil Co. v. Mecklenburg County,* 212 N.C. 642, 194 S.E. 114. A holding over by him, without having given the required notice, nothing else appearing, has the same effect as if the lease had contained no provision for an extension of the term. *Duke v. Davenport,* 240 N.C. 652, 83 S.E. 2d 668. The provision for notice of intent to extend the term being for the benefit of the lessor, he can waive notice. See: *Oil Co. v. Mecklenburg County, supra; Holton v. Andrews, supra.* However, his mere acceptance of rent subsequent to the expiration of the original term, even though at the same rate as provided in the lease, is not such a waiver. *Realty Co. v. Demetrelis, supra.*

Except as otherwise provided in the lease, the notice is not required to be in any particular form, it being sufficient that it shows a definite determination of the tenant to exercise his option to extend the term. *Orr v. Doubleday, Page & Co.,* 223 N.Y. 334, 119 N.E. 552; Anno: 1 A.L.R. 343; 32 Am. Jur., Landlord and Tenant, § 979; 51 C.J.S., Landlord and Tenant, § 62C(2). In construing provisions of the lease relating to renewals and extensions the tenant is favored. *Trust Co. v. Frazelle, supra.*

In the present case the lease provides that the tenant may extend the term of the lease by giving the lessor "written notice of his intention to do so not later than thirty (30) days preceding the termination of this lease." We are brought, therefore, to the questions of whether he gave such notice and, if not, whether the lessor waived it.

It is stipulated that not only was the rent for the first year, 1963, paid, but "at the request of the lessor" the rent for the entire second year, 1964, was paid in the summer and fall of 1963, the final payment being on 9 December 1963. As early as 22 May 1963, at the lessor's request, the tenant and the lessor together signed a note to the Branch Banking & Trust Company for $500, all of the proceeds of which went to the lessor and which was paid in full by the tenant 1 November 1963 "out of the rents which otherwise would have been paid to the lessor for the crop year 1964." There being nothing to indicate the contrary, it must be inferred that this was the agreement of the parties when the note was made in May. Again, on 30 August

1963, three and a half months before the original term of the lease expired, the tenant "at the request of the lessor" gave the lessor his check for $100 as a payment on the rent for the second year, 1964. The check was a written instrument. Under the circumstances, it could not have been understood by the parties otherwise than as a definite declaration by the tenant of his intent to occupy the land for the following year, which he had the right to do by extending the term of the lease.

Even if the check be not regarded as a notice in writing of the tenant's "intention" to extend the term of the lease, we think the facts stipulated show clearly a waiver of further notice by the lessor. See, 32 Am. Jur., Landlord and Tenant, § 980. This is not the case of a landowner accepting a payment for the use of his land after the original term has expired and when the tenant has already lost his right to extend the lease and the lessor has acquired a right to be paid for the use of the land during the holding over. Here, the lessor requested the tenant to pay the second year's rent before the lessor was entitled thereto and while the tenant still had the right to give the notice specified in the lease. By requesting and accepting payment of rent for the second year under those circumstances, the lessor lulled the tenant into the belief that the extension of the term through the second year was an accomplished fact and so cannot, after the expiration of the time for giving notice, be heard to say that this condition precedent to extension has not been met.

The lease was extended to 15 November 1964 by this conduct of the parties and the extension carried with it the right to renew, year by year, for 1965, 1966 and 1967, by giving for each year the specified notice. Having that right at the time of the agreement of 30 July 1964 concerning the sale and retention by the commissioners of the $2,400, the plaintiff-lessee is entitled to have those retained funds paid to him.

Affirmed.

STATE v. ALBERT BOBBY CHILDS.

(Filed 10 November, 1965.)

1. Appeal and Error § 32; Criminal Law § 148—

Motion of the Attorney General to advance this case on the docket to hear the attempted appeal from a non-appealable interlocutory order is

allowed to preclude an unwarranted delay in the trial which might prove fatal to the prosecution of the case.

2. Criminal Law § 141—

Where, upon motion for change of venue for prejudice, the court denies the motion but orders or states that it will order a special venire from a designated county, G.S. 1-86, such interlocutory order is not appealable and an attempted appeal therefrom will be dismissed.

3. Same—

An interlocutory order which does not put an end to the action is not appealable unless it destroys, impairs, or seriously imperils a substantial right of defendant.

APPEAL by defendant from *Mallard, J.*, 23 August 1965 Criminal Session of BUNCOMBE, docketed as case No. 84, Spring Term 1966; docketed as case No. 94, Fall Term, 1965.

At the June 1965 Criminal Session of the Superior Court of Buncombe County defendant was duly arraigned on three indictments, the first one of which charged him on 27 May 1965 with the felony and capital offense of rape on Mrs. Carrie Waller, a female, a violation of G.S. 14-21; the second of which charged him in one count about twelve in the night of 27 May 1965 with burglary in the first degree in breaking into the dwelling house of Mrs. Carrie Waller, a violation of G.S. 14-51, and in a second count with the larceny on the same date from said dwelling house of one hundred dollars in money, the property of Mrs. Carrie Waller; and the third of which charged him in one count on 27 May 1965 with attempting by the use or threatened use of firearms and other dangerous weapons, whereby the life of Mrs. Carrie Waller was endangered and threatened, to rob Mrs. Carrie Waller of moneys and other personal property, a violation of G.S. 14-87, and in a second count on the same date with assaulting Mrs. Carrie Waller with deadly weapons, to wit, guns, pistols, clubs, with intent to kill, and inflicting upon her serious injuries not resulting in death, a violation of G.S. 14-32. Upon his arraignment defendant through his counsel informed the court that he would stand mute. Whereupon, the court, pursuant to the provisions of G.S. 15-162, ordered a plea of not guilty to be entered in behalf of defendant in all three cases. The cases were continued until a later session for trial.

At the 23 August 1965 Criminal Session defendant's three cases were called for trial. Before proceeding with the trial defendant's attorneys, Ruben Dailey and Robert Riddle, members of the Buncombe County Bar, filed with the court a written motion alleging that due to the wide publicity given by the daily papers in Asheville and by the radio in Asheville to the alleged offenses for which de-

fendant is under indictment, and to the contents of a psychiatric examination and evaluation concerning defendant's sanity, and due to the very extensive discussion of defendant's cases by residents of Buncombe County and of the western area of North Carolina, it is impossible for defendant to obtain a fair and impartial trial by jurors from Buncombe, Madison, Haywood, Henderson, Transylvania, Swain, Cherokee, Jackson, Polk, McDowell, Burke, Yancey, Avery, Mitchell, Rutherford, Clay, Graham, Macon, or Watauga Counties. Wherefore, defendant prays that the court in its discretion enter an order removing his cases for trial "to some other county outside the area served by the Buncombe County news media and one other than the counties mentioned in this motion." Defendant offered evidence in support of his motion, and the State offered evidence against it.

Judge Mallard entered an order finding as a fact that there is no evidence of any prejudice created against defendant by any news media or otherwise, that would prevent defendant from obtaining a fair and impartial trial in Buncombe County by a jury drawn as provided by law from McDowell County. Wherefore, Judge Mallard acting pursuant to G.S. 1-86, and upon his own motion, instead of making an order of removal from Buncombe County, recited in his order, "this court will by proper order cause as many jurors as may be necessary to select a fair and impartial jury to try the defendant to be summoned, as provided by law, from McDowell County."

From this order defendant appealed to the Supreme Court. Apparently no further proceedings were had after the appeal entries were made.

Defendant on 21 October 1965 filed in the office of the Clerk of this Court a statement of case on appeal to be heard at the Spring Term 1966 of the Supreme Court. Appeals from the superior court of Buncombe County for the Spring Term 1966 will be heard by this Court during the week of 15 February 1966.

On 22 October 1965 the Attorney General, at the request of the solicitor for the nineteenth solicitorial district, made a verified written motion in these cases that they be advanced on the docket for hearing, pursuant to Rule 13, Rules of Practice in the Supreme Court, 254 N.C. 783, 792, for the following reason: Mrs. Carrie Waller, the prosecutrix in these cases, is 72 years old; that due to the alleged rape and assault made upon her she has become very nervous and depressed and is rapidly losing weight; and there is grave doubt that she will live a sufficient length of time to testify at the trial of these cases if the trial of these cases is postponed until the spring of 1966; the cases from the Twenty-eighth Judicial District, in which district

Buncombe County is, will not be called until the Spring Term 1966.

On 28 October 1965 the Attorney General notified attorneys for the defendant that upon the call of appeals from the Tenth and Twentieth Districts on Tuesday, 2 November 1965, at 10 a.m. in the Justice Building, Raleigh, North Carolina, the State of North Carolina will move before the Supreme Court that the cases of *State of North Carolina v. Albert Bobby Childs* be advanced on the docket for the reason set forth in his written motion heretofore forwarded to them. Attorneys for defendant have filed no answer to the Attorney General's motion, so far as the records of this Court disclose.

Attorney General T. W. Bruton for the State.
Ruben Dailey and Robert Riddle for defendant appellant.

PER CURIAM. Pursuant to Rule 13, Rules of Practice in the Supreme Court, the Attorney General's motion is allowed.

Not every order or judgment of the superior court is immediately appealable to the Supreme Court. The statute, G.S. 1-277, regulates the practice in respect to when an order or judgment is subject to immediate review. This statute as construed and applied by numerous decisions of this Court is well analyzed and explained in detail by Ervin, J., in *Veazey v. Durham,* 231 N.C. 357, 57 S.E. 2d 377. It would serve no useful purpose to restate here the various propositions there elucidated. The order entered by Judge Mallard here is not a final judgment which disposes of these cases as to the State and the defendant, leaving nothing to be judicially determined between them in the trial court. The order entered by Judge Mallard is an interlocutory order and was made during the pendency of these cases, which does not dispose of these cases, but leaves them for further action by the trial court in order to settle and determine the whole controversy in these three cases between the State and defendant. In *Privette v. Privette,* 230 N.C. 52, 51 S.E. 2d 925, it is said: "As a general rule an appeal will not lie until there is a final determination of the whole case. [Citing cases.] It lies from an interlocutory order only when it puts an end to the action or where it may destroy or impair or seriously imperil some substantial right of the appellant." Judge Mallard's interlocutory order does not put an end to these cases, and it does not destroy or impair or seriously imperil any substantial right of this defendant, for the reason that defendant's remedy is to note an exception at the time of the entry of Judge Mallard's order, as he did, to be considered on appeal from

a final judgment adverse to defendant, if there is one. 2 McIntosh, North Carolina Practice and Procedure, 2d Ed., § 1782(3). See also *S. v. Scales,* 242 N.C. 400, 405, 87 S.E. 2d 916, 920; *Ponder v. Cobb,* 257 N.C. 281, 300, 126 S.E. 2d 67, 81. There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from interlocutory orders. The appeal here is fragmentary and premature. In consequence, it falls under the ban of the general rule forbidding fragmentary and premature appeals from an interlocutory order, and must be dismissed. *Cowart v. Honeycutt,* 257 N.C. 136, 125 S.E. 2d 382.

Appeal dismissed.

STATE OF NORTH CAROLINA v. JAMES WAYNE MASSEY.

(Filed 10 November, 1965.)

1. Criminal Law § 131—

Under G.S. 20-176, prior to the 1965 amendment to G.S. 20-105, a person convicted of a misdemeanor for violating Article 3 of the Motor Vehicle Act in instances in which the statute does not provide other penalties, could not be sentenced to more than 60 days in jail. G.S. 14-3 does not apply to convictions under the Motor Vehicle Act.

2. Escape § 1—

A prisoner may be punished for an escape even though at the time of the escape he has completed service of the maximum legal term, but when the maximum legal term for the offense of which he was convicted plus the sentence for repeated escape have been served, he is entitled to his immediate release.

PETITION for a writ of *habeas corpus.* On *certiorari* to review order entered by *Falls, J.,* denying writ, August 30, 1965 Schedule B Session of GASTON.

Defendant-petitioner's application for a writ of *certiorari* and the Attorney General's answer show these facts: At the January 6, 1964 Criminal Session of the Superior Court of Gaston County, defendant, through counsel, entered pleas of guilty in cases numbered 5657, 5659, and 5696 to three charges of the unlawful taking of a motor vehicle, a violation of G.S. 20-105. The presiding judge, Honorable Francis O. Clarkson, consolidated the cases for judgment and imposed a sentence of two years. In consequence, defendant was com-

mitted to the State Prison Department on January 8, 1964, for two years for "temporary larceny." On May 8, 1964, while serving this sentence, defendant escaped. He was tried for this offense (Case No. 201) in Catawba County and given a sentence of 90 days to begin at the expiration of the two-year sentence imposed in Gaston County. Thereafter, on June 1, 1964 (Case No. 6463), and on June 3, 1964 (Case No. 6464), defendant again escaped. He was tried in the Superior Court of Caldwell County on December 7, 1964, for these two escapes and received a sentence of six months in each case, these sentences to run consecutively and to begin at the expiration of the sentence in Case No. 201.

Defendant, *in propria persona,* petitioned the judge presiding in Gaston County for a writ of *habeas corpus,* and counsel was appointed to represent him. Judge Falls heard the prisoner's petition on September 8, 1965. Being of the opinion that the violation of G.S. 20-105 is "a general misdemeanor, and that the sentence of two years imposed by the Honorable Francis O. Clarkson at the January 6, 1964 session is not excessive," Judge Falls entered judgment that defendant "is now lawfully confined in the State Prison System for the service of the sentences above outlined," and denied defendant's petition for discharge. On October 26, 1965, defendant's counsel applied to this Court for a writ of *certiorari.*

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

Henry M. Whitesides for defendant-petitioner.

PER CURIAM. At the time defendant committed the offense charged in cases numbered 5657, 5659, and 5696, and at the time he was sentenced therefor, the violation of G.S. 20-105 was a misdemeanor for which no specific punishment was prescribed. Immediately following this section in Volume 1C of the General Statutes of North Carolina (1953), the annotation prepared by the publisher begins with this statement: "CROSS REFERENCE. As to misdemeanors for which no specific punishment is prescribed, see § 14-3." This allusion to G.S. 14-3 was erroneous; the reference should have been to G.S. 20-176 which specifies that, unless another penalty is provided, every person convicted of a misdemeanor for the violation of Article 3 of the Motor Vehicle Act (which article includes G.S. 20-105) shall be punished by a fine of not more than $100.00, or by punishment in the county or municipal jail for not more than 60 days, or by both such fine and imprisonment. G.S. 14-3 has reference to misdemeanors other than those created by Article 3 of

Chapter 20 of the General Statutes which relates to motor vehicles. This mistaken reference to G.S. 14-3 in the annotation, carried forward biennially in the reprints of the Motor Vehicle Laws of North Carolina, created confusion which resulted, as here, in a number of excessive sentences for the violation of G.S. 20-105. On April 7, 1965, by Chapter 193 of the Session Laws of 1965, the General Assembly amended G.S. 20-105 to make its violation "punishable by fine or by imprisonment not exceeding two years, or both, in the discretion of the court."

Since defendant pled guilty to three charges of a violation of G.S. 20-105, Judge Clarkson could have imposed a maximum sentence of 180 days or 6 months. Instead, he consolidated the cases and entered one judgment which could not legally exceed 60 days. *State v. Seymour,* 265 N.C. 216, 143 S.E. 2d 69.

Defendant, having been committed on January 8, 1964, had served 60 days at the time of his first escape. Nevertheless, his remedy was a petition for *habeas corpus,* not escape. *State v. Goff,* 264 N.C. 563, 142 S.E. 2d 142. His three escape sentences, plus a maximum legal 60-day sentence under G.S. 20-105, total 17 months. Defendant has now served in excess of that time. He is entitled to his immediate release, and it is so ordered.

The Clerk of this Court will certify a copy of this order to the State Prison Department, as well as to the Superior Court of Gaston County.

Certiorari allowed.

Defendant ordered released.

STATE v. ROBERT EARL HOLLOWAY.

(Filed 10 November, 1965.)

1. Larceny § 7—

Evidence tending to show that an inventory of television sets owned by a corporation disclosed that sets having serial numbers listed were missing, and that two or three weeks later six of the sets so identified were found in possession of defendant or in the joint possession of defendant and his codefendant, *held* sufficient to overrule nonsuit.

2. Larceny § 8—

In a prosecution for larceny of goods having a value in excess of $200, the court must instruct the jury that the burden is upon the State to show that the value of the goods exceeded $200 in order to sustain a conviction

of the felony, it being established by verdict of the jury that defendant did not commit the larceny pursuant to an unlawful breaking and entering. G.S. 14-72.

APPEAL by defendant from *Clark, Special Judge,* May 16, 1965 Assigned Criminal Session of WAKE.

At October "A" Criminal Session 1963, Robert Earl Holloway (appellant), Boyd Allen Wilhelm and Oscar Timothy Robinson were indicted in a bill containing three counts, to wit: First, feloniously breaking and entering a certain building occupied by Telerent, Inc.; second, larceny of television sets of said corporation of the value of $2,700.00; and third, receiving said television sets with knowledge they had been stolen and with felonious intent. The indictment alleged said criminal offenses were committed in Wake County, North Carolina, on May 21, 1963.

At December 9, 1963 Criminal Session, Holloway (appellant) and Wilhelm were placed on trial on the first and second counts in said indictment. The solicitor elected to take a *nol. pros.* with leave as to the third count. As to each defendant on trial, the jury returned a verdict of guilty as charged in said first and second counts. Separate judgments imposing prison sentences were pronounced. Wilhelm did not appeal. Holloway did appeal and this Court, at Fall Term 1964, *S. v. Holloway,* 262 N.C. 753, 138 S.E. 2d 629, ordered a new trial on account of prejudicial error in the charge.

Holloway (appellant) was placed on trial again at the May 16, 1965 Assigned Criminal Session on the first and seconds counts in said indictment. At the conclusion of the trial, the jury returned a verdict of not guilty of breaking and entering as charged in the first count and, as to the second count, a verdict "of Guilty of Larceny as charged in the Bill of Indictment." Judgment, imposing a prison sentence of not less than six nor more than eight years, was pronounced. Defendant excepted and appealed.

Attorney General Bruton, Deputy Attorney General Lewis and Staff Attorney Magner for the State.

Douglas F. DeBank for defendant appellant.

PER CURIAM. Evidence for the State tends to show: Approximately a week prior to May 21, 1963 an inventory was taken of television sets owned by Telerent, Inc., and stored in its warehouse at 613 West North Street, Raleigh, N. C. On May 23, 1963, upon discovering that many television sets were missing, employees of Tele-

rent, Inc., took another inventory, determined that 37 sets were missing, and listed the model and serial numbers of the missing sets.

Evidence for the State tends to show each of six of the television sets taken from said warehouse was in the possession of appellant alone or in the joint possession of appellant and his codefendants at a time generally identified as the last of May or the first of June 1963. As indicated, the State relies largely on the presumption arising from the possession of goods recently stolen. In our view, the evidence was sufficient to warrant submission to the jury; and defendant's assignment of error directed to the denial of his motion for judgment as of nonsuit is without merit.

The court instructed the jury as follows: "Now, with reference to the second charge in the bill of indictment, that of larceny, I instruct you that if the State has satisfied you from the evidence and beyond a reasonable doubt that on or about the 21st day of May, 1963, in Wake County, the defendant Robert L. Holloway feloniously took and carried away property, that is, television sets of Telerent, Inc., without its consent or consent of its agent and against the will of said corporation and that said property was taken and carried away by the said Robert Earl Holloway, either alone or with others, with felonious intent to deprive Telerent, Inc., of its property permanently and feloniously and used and converted same to his own use or the use of some other than the owner, not entitled to the use thereof, if you find these facts beyond a reasonable doubt, the burden being on the State to satisfy you, it would be your duty to return a verdict of guilty of larceny as charged in the second count of the bill of indictment." Defendant excepted to this instruction on the ground that it did not require the State to prove or the jury to find beyond a reasonable doubt that the value of the television sets stolen by defendant was in excess of $200.00.

In *S. v. Cooper,* 256 N.C. 372, 124 S.E. 2d 91, it is stated: "Except in those instances where G.S. 14-72, as amended, does not apply, we are of opinion, and so decide, that to convict of *the felony* of larceny, it is incumbent *upon the State* to prove beyond a reasonable doubt that the value of the stolen property was more than $200.00; and, this being an essential element of the offense, it is incumbent upon the trial judge to so instruct the jury." It is noted that the verdict of not guilty as to the first count establishes that defendant did not commit the alleged larceny pursuant to an unlawful and felonious breaking and entering and therefore G.S. 14-72, as amended, does not apply.

Absent such breaking and entering, a verdict of guilty of larceny

of property valued at $200.00 or less was permissible; and the jury should have been so instructed. *S. v. Cooper, supra.*

For failure of the court to instruct the jury in accordance with our decision in *S. v. Cooper, supra,* defendant must be and is awarded a new trial as to the second (larceny) count of said indictment.

New trial.

STATE v. JAMES JUNIOR MITCHELL AND JAMES THOMAS HINTON.

(Filed 10 November, 1965.)

1. Criminal Law § 168—

The fact that incompetent evidence must be considered in order for there to be sufficient evidence to overrule nonsuit does not entitle defendant to reversal of refusal to nonsuit, since if the incompetent testimony had been excluded the State might have offered sufficient competent evidence to take the case to the jury.

2. Criminal Law § 71—

The competency of a confession is a preliminary question for the trial court to be determined upon the circumstances of each particular case, and if the court's findings in regard to voluntariness are supported by competent evidence, the findings are not subject to review.

3. Same—

The fact that one defendant confesses upon being confronted with the fact that an article of clothing in his possession had another's name sewed in it and that the other defendant confessed after being awakened by the first defendant and told to get items which they had taken from the store, *held* not to render the confessions incompetent, since the mere fact that the confessions were made when defendants were confronted with circumstances normally calling for explanation is insufficient to render the confessions incompetent.

4. Same—

It is not essential in every case that defendant be cautioned that he has the right to remain silent and that his statements might be used against him in order for his confession, freely and voluntarily made, to be competent.

5. Same—

Where the trial court hears evidence of the defendants and of the State in regard to the voluntariness of the confessions offered in evidence, which evidence is of record, a general finding by the court that the confessions were voluntary is sufficient, and the court is not required to find detailed facts with respect to the question.

APPEAL by defendants from *Bickett, J.*, March 29, 1965, Session of WAKE.

Criminal actions based on four indictments consolidated for trial. Defendants Mitchell and Hinton are jointly charged in bills of indictment with breaking and entering the business establishments of Julian Robinson, T/A Antone's Department Store, and Whitley Furniture Company, Inc., and with larceny of personal property of Julian Robinson, value $134. Defendant Mitchell is singly charged in bills of indictment with breaking and entering the business of Wake Builders Supply Company, Inc., and Phillip Olive, T/A Olive's Grocery, and larceny of personal property of each said owner of value less than $200. All of the places of business referred to in the indictments are located in the town of Zebulon. The alleged offenses were committed within a ten-day period.

Pleas: Not guilty. Verdict: Guilty as to both defendants on all counts. Judgments: Active prison sentences.

Attorney General Bruton, Assistant Attorney General Icenhour, and Staff Attorney Ray for the State.

Lemuel H. Davis for defendants.

PER CURIAM. Defendants assign as errors: (1) The denial of their motions for nonsuit; (2) the ruling of the court that defendants' admissions and confessions were voluntarily made; and (3) the failure of the court to "find facts in support" of such ruling.

Defendants contend that their purported confessions were involuntary and incompetent and, if excluded, the evidence is insufficient to make out a *prima facie* case on any of the charges. Even so, defendants would not be entitled to dismissal. If the confessions had been held incompetent, the State might have offered other evidence sufficient to carry the cases to the jury. *State v. Hall,* 264 N.C. 559, 142 S.E. 2d 177; *State v. McMilliam,* 243 N.C. 771, 92 S.E. 2d 202.

The court heard evidence in the absence of the jury to determine whether the purported confessions were voluntary. Deputy Sheriff Blackley, for the State, and defendants, in their own behalf, testified on the *voir dire.* The State's evidence was to this effect: A considerable amount of small change (coins) was taken from some of the establishments. The officers had information that defendant Hinton had been seen with an unusual number of coins. Blackley went to Hinton's home (he resided with his aunt) about 8:00 P.M. They sat in Blackley's car and talked. Hinton said he won the money in a gambling game. He was not detained. Blackley had been looking for Mitchell. The same night that Blackley had talked to Hinton, offi-

cer Perry found Mitchell and took him to Police Headquarters. Blackley talked to him there. Mitchell was wearing a jacket which belonged to Horace Hendricks; it was one of the items which had been taken from the Wake Builders Supply Company building; it had Hendricks' name in it. Mitchell at first said his cousin in Petersburg had given him the jacket, but when it was pointed out that his cousin's name did not correspond to the name in the jacket he admitted his part in the several offenses and gave information which led to the recovery of other stolen items he had in possession. About 11:00 P.M. the same night Blackley, officer Perry and defendant Mitchell went to Hinton's home. Hinton's aunt admitted Blackley. Hinton was asleep. Blackley awakened him and told him to get the items of clothing which had been taken from Antone's Department Store. Hinton got them from a closet on the back porch; they consisted of pants, a coat and a sweater. Hinton then admitted his part in two of the "break-ins." He was then arrested. Defendants were not assaulted or threatened and no promises were made to them. They were not specifically advised of their right to counsel or to remain silent. Mitchell's parents were informed that he had been arrested.

Defendants' testimony, if accepted as true, was sufficient to establish that their statements were made through fear and coercion.

"The court found as a fact that the confession of each defendant was freely and voluntarily made."

The question whether a confession is voluntary or involuntary must be determined upon the circumstances of each particular case. *State v. Matthews*, 231 N.C. 617, 58 S.E. 2d 625. The competency of a confession is a preliminary question for the trial court, and the court's ruling thereon is not subject to review if supported by competent evidence. It is not essential in every case that defendant be cautioned that he has a right to remain silent and that his statements might be used against him. *State v. Thomas*, 241 N.C. 337, 85 S.E. 2d 300. In the instant case the incriminating statements were made in the ordinary course of investigation. Defendants were found with stolen goods in their possession. They were not held incommunicado. They were not questioned over long periods of time. They were merely confronted with circumstances which normally call for explanation. They did not at the trial, and do not now, contend that the statements made by them were untrue. The ruling of the court below will not be disturbed.

Defendants contend, finally, that they are entitled to a new trial for failure of the judge to find detailed facts with respect to the ques-

tion whether their confessions were voluntary. Ordinarily, the court is required only to make a general finding on the ultimate question, and it is not error to refuse to find other facts. *State v. Smith,* 213 N.C. 299, 195 S.E. 819. Defendants rely on *State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344. The holding in that case must be considered in the light of the circumstances there presented. Some of the evidence heard by the trial court was not before us on appeal in that case. There are other distinguishing features.

No error.

STATE v. SPICER HERBERT GRICE.

(Filed 10 November, 1965.)

1. Criminal Law § 131—

A statutory penalty of fine or imprisonment in the discretion of the court is not a specific punishment, and therefore in the case of infamous offenses the punishment is limited by G.S. 14-2 to not more than 10 years imprisonment.

2. Rape § 16.1—

Punishment for carnal knowledge of a female child over 12 and under 16 years of age by a male person over 18 years of age cannot exceed 10 years imprisonment. G.S. 14-26, G.S. 14-2.

3. Criminal Law §§ 131, 169—

Where defendant has been sentenced to a term in excess of that allowed by statute, the cause will be remanded for proper sentence giving defendant credit for the time served under the erroneous sentence.

PETITION for a writ of *certiorari.*

Attorney General T. W. Bruton and Staff Attorney Philip O. Redwine for the State.

Defendant in propria persona.

PER CURIAM. On 28 September 1965 defendant *in propria persona* filed in this Court a petition for a writ of *certiorari* to review and vacate a judgment of imprisonment for thirty years entered against him at the January 1965 Criminal Session of New Hanover County by Peel, J., and to have the case remanded to the superior court of New Hanover County for a proper judgment.

The petition and the Attorney General's answer thereto show the following facts: At the January 1965 Criminal Session of New Han-

over County superior court, defendant, who was represented by his attorney Wallace C. Murchison, a member of the New Hanover County Bar, entered a plea of guilty to an indictment that charged him, a male person over eighteen years of age, with feloniously carnally knowing and abusing a female child, over twelve and under sixteen years of age, who had never before had sexual intercourse with any person, a felony and a violation of G.S. 14-26. The trial judge sentenced him to serve a sentence in the State's Prison for a term of thirty years.

G.S. 14-26 provides that the penalty for the offense of which defendant pleaded guilty shall be a fine or imprisonment in the discretion of the court, which is not a specific punishment, and consequently the punishment for the offense of which defendant pleaded guilty is limited by the provisions of G.S. 14-2, which reads:

> "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 be fined, in the discretion of the court, 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."

S. v. Blackmon, 260 N.C. 352, 132 S.E. 2d 880; *S. v. Canup,* 262 N.C. 606, 138 S.E. 2d 247. *S. v. Blackmon* overruled *S. v. Swindell,* 189 N.C. 151, 126 S.E. 417, and *S. v. Cain,* 209 N.C. 275, 183 S.E. 300, and "so much of the opinion in *S. v. Richardson,* 221 N.C. 209, 19 S.E. 2d 863, as holds where there is a provision in a statute to the effect that punishment shall be in the discretion of the court and the defendant may be fined or imprisoned, or both, that this is equivalent to a 'specific punishment' within the meaning of G.S. 14-2 and is not controlled thereby, is modified to the extent herein indicated."

The judgment of imprisonment for thirty years imposed upon defendant was in excess of the maximum permitted by law in this jurisdiction for the offense of which he pleaded guilty. The offense of which he pleaded guilty is an infamous offense. The judgment of imprisonment entered against defendant at the January 1965 Criminal Session of New Hanover County superior court is vacated. The case is remanded to the superior court of New Hanover County, which at its next criminal session will cause petitioner forthwith to be brought before it for the imposition of a sentence not to exceed ten years imprisonment, and in imposing sentence the trial judge shall give him credit for the time he has served under the sentence of thirty years, including any allowance for good behavior. *S. v. Canup, supra.*

Certiorari allowed.
Sentence of thirty years vacated.
Case remanded for proper judgment.

STATE v. BOBBY EARL HARRELSON.

(Filed 10 November, 1965.)

Criminal Law § 71—

Where a defendant, upon investigation of a "hit and run" accident by the police of the municipality in which he resides, telephones the police department of the city in which the accident occurred and states to an officer that he was the driver of a car involved in the accident, the fact that the officer receiving the confession did not, and had no time to, warn defendant of his constitutional right to remain silent is feckless.

APPEAL by defendant, Bobby Earl Harrelson, from *Mintz, J.*, July, 1965 Criminal Session, WAKE Superior Court.

The defendant was arrested on a warrant issued by the City Court of Raleigh charging that on December 24, 1964, he was the driver of a motor vehicle involved in a collision and accident resulting in injury to James Bell, and did thereafter unlawfully, wilfully and feloniously fail to stop at the scene of the accident on South and McDowell Streets in the City of Raleigh and render assistance, identify himself, etc., in violation of G.S. 20-166 and in violation of the ordinances of the City of Raleigh.

The Judge of the City Court found probable cause and held the defendant on bond for the action of the Superior Court. The Grand Jury returned a bill of indictment charging that the defendant wilfully and feloniously failed to stop after the vehicle which he was driving was involved in a highway accident resulting in the injury of James Bell and did fail to render reasonable assistance in providing treatment for the injury, etc. The record, including the addendum thereto, shows a jury trial in the Superior Court upon the defendant's plea of not guilty. The jury returned a verdict of guilty. From the sentence imposed, the defendant appealed.

T. W. Bruton, Attorney General, Charles D. Barham, Jr., Assistant Attorney General, Wilson B. Partin, Jr., Staff Attorney for the State.

Earle R. Purser for defendant appellant.

PER CURIAM. The defendant assigns as error (1) the Court's failure to exclude the defendant's admission to the arresting officer on the ground the officer failed to warn him of his constitutional rights to remain silent; (2) the court failed to direct a verdict of not guilty at the close of the evidence.

Officer Denny testified he went to the scene of the accident, sent the injured man, Bell, to the hospital, and ascertained from a bystander the description and license number of the vehicle which struck Bell and failed to stop. Through the Motor Vehicles Registration Department the officer ascertained that the license had been issued to the defendant, residing in Greensboro. Officer Denny contacted the police department in Greensboro. Soon thereafter the defendant called the police department in Raleigh and admitted over the telephone to Officer Denny that he was in Raleigh on South Street, going west, when this man, James Bell, walked out into the street and into the side of his car. "I did not tell him that anything he told me might be used against him. Actually, I didn't have a chance to tell him that. I didn't tell him that before he made a statement to me."

The record fails to show wherein the defendant's constitutional rights were denied him. Under the circumstances Officer Denny's evidence as to the admissions was competent. The evidence was sufficient to carry the case to the jury and to sustain the verdict.

No error.

STATE v. GARLAND BANKS.

(Filed 10 November, 1965.)

Criminal Law § 79; Searches and Seizures § 1—

Testimony disclosing that an officer was advised by a fellow officer to intercept the vehicle operated by defendant, that when the truck passed he followed, whereupon defendant and his companion abandoned the truck and fled, that the truck had cardboard boxes on its bed from which eminated the odor of whiskey, and that a search disclosed a number of gallons of whiskey in fruit jars enclosed in the cardboard boxes, *held* proper predicate for a search, and motion to suppress the evidence was correctly denied.

APPEAL by defendant from *Clark, S.J.*, First Week, May, 1965 Criminal Session, WAKE Superior Court.

Criminal prosecution upon three warrants charging unlawful transportation, unlawful possession, and unlawful possession for the pur-

pose of sale, of 102 gallons of bootleg liquor on which neither the taxes imposed by the Act of Congress nor by the State of North Carolina had been paid.

The warrants were returnable before the Recorder's Court of Middle Creek, Panther Branch, Holly Springs, and Swift Creek Townships of Wake County. From a sentence of 12 months on the roads imposed by the recorder, the defendant appealed to the Superior Court. In the Superior Court the defendant moved to suppress the evidence upon the ground that ABC Officer Munn obtained the evidence by reason of his unlawful search of defendant's motor vehicle without a warrant and by reason of that unlawful search found 102 gallons of nontaxpaid whisky concealed in fruit jars enclosed in cardboard boxes in the bed of the defendant's pickup truck.

The court made preliminary inquiry and upon the basis of the evidence, which will be discussed in the opinion, refused to suppress the evidence, permitted Officer Munn to testify before the jury. Upon the officer's testimony the jury returned a verdict of guilty. From a judgment on the verdict, the defendant appealed.

T. W. Bruton, Attorney General, George A. Goodwyn, Staff Attorney for the State.

Robert L. McMillan for defendant appellant.

PER CURIAM. ABC Officer Munn testified that while he was parked at night on Highway 55 at Kennebec Church, he received a call over his radio from a fellow officer (Sparkman) advising him to be on the lookout for the defendant and his vehicle, probably with a load of contraband. When the pickup truck passed the church the defendant was driving and another man was with him. Officer Munn followed the pickup which pulled off the road at a nearby store and stopped. When Officer Munn drove up both men got out of the pickup and left on foot. Officer Munn observed the cardboard boxes in the bed of the truck and detected the strong odor of whisky coming from the truck. His search disclosed 102 gallons of white nontaxpaid liquor.

At the time Mr. Munn searched the truck he had the message from his fellow officer to intercept the vehicle and the defendant Banks. When the truck passed, Munn followed; whereupon, both Banks and his companion abandoned the truck and fled. This background, the cardboard boxes, and the whisky odor coming from the abandoned truck were sufficient to warrant the officer in believing that he had probable cause for his successful search and rendered the search reasonable. The defendant's motion to suppress the evidence was

properly denied. No other question of importance is disclosed by the record.

No error.

STATE v. WILLIAM LEWIS CARROLL.

(Filed 10 November, 1965.)

APPEAL by defendant from *Carr, J.*, March 1965 Regular Criminal Session of WAKE.

Criminal prosecution on a bill of indictment containing two counts, to wit: First, the larceny of a described automobile, the property of one Marvin Terry Watts, of the value of $2,000.00; and second, the receiving of said automobile with knowledge it had been stolen and with felonious intent. The indictment alleged said criminal offenses were committed in Wake County, North Carolina, on February 7, 1965.

On March 5, 1965, the court, in accordance with G.S. 15-4.1, appointed counsel to represent defendant. At the trial session, which convened March 15, 1965, defendant, represented by his court-appointed counsel, pleaded not guilty; and a jury was duly chosen, sworn and impaneled.

The only evidence was that offered by the State. At the conclusion thereof, the court allowed defendant's motion for judgment as of nonsuit with reference to the receiving (second) count.

With reference to the larceny (first) count, defendant's motion for judgment as of nonsuit was overruled; and at the conclusion of the trial, the jury returned a verdict of "Guilty of Larceny of an Automobile as charged."

The court pronounced judgment imposing a prison sentence "of NOT LESS THAN THREE YEARS NOR MORE THAN FIVE YEARS," and recommended that defendant "be placed in a Youthful Offenders Camp." Defendant excepted and appealed.

An order was entered (1) permitting defendant to appeal *in forma pauperis*, (2) appointing defendant's trial counsel as his counsel in connection with his appeal, and (3) requiring that Wake County provide the necessary transcript and printing incident to defendant's appeal.

Attorney General Bruton, Deputy Attorney General Lewis and Staff Attorney Wood for the State.

M. Marshall Happer, III, for defendant appellant.

PER CURIAM. Defendant's brief brings forward his Assignments of Error Nos. 4 and 9 and Nos. 5 and 8.

Under Assignments Nos. 4 and 9, defendant contends the court erred in overruling his motion for judgment as of nonsuit and his motion to set aside the verdict.

There was evidence that, within an hour from the time Mr. Watts' automobile was removed, without his knowledge or consent, from the parking lot at his place of business, it was discovered in the possession of defendant, a person unknown to Mr. Watts; and the evidence as to the circumstances of defendant's possession was sufficient to support a jury finding that defendant had taken Mr. Watts' automobile unlawfully and with felonious intent. Suffice to say, there was ample evidence to support the verdict. Assignments Nos. 4 and 9 are without merit.

Under Assignments Nos. 5 and 8, defendant contends the court (1) failed to explain and apply the legal principle that the requisite felonious intent in larceny must exist at the time of the unlawful taking and (2) failed to give equal stress to the contentions of defendant as required by G.S. 1-180.

It is noted that defendant did not testify or offer evidence. Under the circumstances, we perceive no prejudicial error in the court's review of the respective contentions.

The court's final instruction, consistent with prior instructions, required, as a prerequisite to a verdict of guilty, that the State satisfy the jury from the evidence beyond a reasonable doubt that defendant did take and carry away Mr. Watts' automobile on February 7, 1965, and that he did so with the felonious intent *to permanently deprive* said owner of his property and to apply it to his, the taker's, own use.

It is suggested that the court should have stated as a contention of defendant that defendant may have unlawfully taken possession of Mr. Watts' automobile for some undisclosed temporary purpose and thereafter conceived the idea of appropriating it permanently to his own use. Assuming, without deciding, that the statement of such a contention would have been appropriate if specifically requested by defendant, the failure to give such instruction absent request therefor was not prejudicial to defendant.

In our view, Assignments Nos. 5 and 8 are without merit.

No reason or argument is stated and no authority is cited in defendant's brief bearing upon the other assignments of error. Hence, they are deemed to have been abandoned.

No error.

STATE v. WERNER MOHRMANN.

(Filed 10 November, 1965.)

APPEAL by defendant from *Clark, Special Judge,* Second July 1965 Special Criminal Session of WAKE.

Criminal prosecutions on two separate warrants charging that defendant on June 27, 1964, (1) wilfully failed to stop at the scene of an accident and collision, in which the motor vehicle operated by him was involved, resulting in damage to the property of one Bartell Lane, a violation of G.S. 20-166(b), and (2) operated a motor vehicle upon the public highway while under the influence of intoxicating liquor, a violation of G.S. 20-138, tried *de novo* in the superior court after appeals by defendant from convictions and judgments in the City Court of Raleigh.

The two cases were consolidated for trial.

The jury, with reference to the charge alleged in each warrant, returned a separate verdict of guilty as charged; and in each of the two cases, the court pronounced judgment that defendant pay a fine of $100.00 and costs. Defendant excepted and appealed.

Attorney General Bruton, Assistant Attorney General Barham and Staff Attorney Partin for the State.

Earle R. Purser for defendant appellant.

PER CURIAM. There was ample evidence to support the verdict in respect of the charge alleged in each of the two warrants. Hence, the assignments of error directed to the court's denial of defendant's motions for judgments as of nonsuit are without merit.

Defendant's other assignments of error do not comply with Rules 19(3) and 21. See Rules of Practice in the Supreme Court, 254 N.C. 783, *et. seq.* "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." *Brown v. Brown,* 264 N.C. 485, 488, 141 S.E. 2d

875. Nor does defendant's brief comply with Rule 28. See *Cudworth v. Insurance Co.*, 243 N.C. 584, 585, 91 S.E. 2d 580. Notwithstanding, we have examined the general arguments set forth in defendant's brief with reference to the assignments of error he attempts to bring forward. Suffice to say, such general arguments do not disclose prejudicial error.

No error.

H. C. F. WILLIAMS v. NONNIE WALLACE HADLOCK.

(Filed 10 November, 1965.)

APPEAL by defendant from *Nimocks, E.J.*, January 1965 Session of MOORE.

Civil action in which plaintiff seeks to recover $80 from the defendant for work done and performed for defendant under an alleged verbal contract and an additional amount of $117 for alleged additional work done and performed by plaintiff for defendant at her request, or a total of $197. Defendant by way of counterclaim seeks to recover from plaintiff the sum of $270 for damages allegedly done to her property by plaintiff and for money allegedly expended by defendant to complete the work plaintiff was allegedly supposed to do under the verbal contract. The case was first heard in the court of a justice of the peace and from an adverse judgment defendant appealed to the superior court. In the superior court the parties introduced evidence and the following issues were submitted to the jury and answered as shown:

> "1. What amount, if any, is the plaintiff entitled to recover of the defendant for work performed by plaintiff in behalf of defendant?
>
> "Answer: $197.00.
>
> "2. What amount, if any, is the defendant entitled to recover of the plaintiff for alleged damages to defendant's property?
>
> "Answer: $10.00."

From a judgment that plaintiff have and recover from defendant the sum of $187 with interest until paid and the costs of this action, defendant appeals to the Supreme Court.

Barrett & Wilson by W. Clement Barrett for defendant appellant.
Seawell & Seawell & Van Camp by H. F. Seawell, Jr., for plaintiff appellee.

PER CURIAM. The evidence offered by the parties was in sharp conflict. The applicable law is well settled, and not complicated. The jury under a charge by the court free from prejudicial error has answered the issues as set forth above. All defendant's assignments of error have been carefully examined, and error has not been shown that would warrant disturbing the verdict and judgment below. In the trial we find

No error.

STATE v. CARL GREEN COLLINS.

(Filed 10 November, 1965.)

APPEAL by defendant from *Bailey, J.*, April, 1965 Special Session, WAKE Superior Court.

This criminal prosecution originated by bill of indictment returned by the Wake County Grand Jury charging the defendant with operating a motor vehicle upon the public highways at a speed of 90 miles per hour in a 60-mile per hour zone. The defendant, through counsel, entered a plea of not guilty. The record and the addendum thereto disclose a lawful jury was impaneled and after hearing the evidence returned a verdict of guilty. From judgment on the verdict, the defendant appealed.

T. W. Bruton, Attorney General, Bernard A. Harrell, Assistant Attorney General for the State.

Earle R. Purser for defendant appellant.

PER CURIAM. The officer testified that the defendant operated his vehicle on Public Highway No. 64 near Apex at a speed in excess of 90 miles per hour in a zone in which the authorities had posted a maximum speed limit of 60 miles per hour. The officer used a speed testing device consisting of a battery, cables, and stop clock. The device was tested for accuracy just before and shortly after the defendant crossed this testing device. The test showed the measurements and timing to be accurate, the operator to be experienced and accurate in its use. The defendant testified, denying that he was operating the speeding vehicle, but that a driver at an excessive speed passed him going in the same direction shortly before the officers overtook and stopped him, and that the officer's identification

of his vehicle was a mistake. He offered a photograph of the road over which the officer followed him, which the court excluded. If we may assume there was technical error in not permitting the defendant to offer the photograph for the purpose of illustrating his testimony, the error is not deemed prejudicial. The officer's testimony and the defendant's as to the identity of the vehicle and driver were in direct conflict. On the question of identity of a vehicle and driver, a photographic illustration of the highway was not of material consequence. The evidence essentially presented a question of fact which the jury resolved against the defendant.

No error.

STATE v. RAY DENNIS MORGAN.

(Filed 10 November, 1965.)

APPEAL by defendant from *Brock, S.J.,* March Session 1965 of STANLY.

The defendant was charged in a bill of indictment, the first count in which charged that he unlawfully, wilfully and feloniously did break and enter a storehouse, shop, or warehouse occupied by E. H. Love and Roy L. Furr, trading as Wade H. Love Company, with intent to steal, take and carry away the merchandise, chattels, money, and valuables of the aforesaid firm; and in the second count defendant was charged with the larceny of certain items of merchandise from the storehouse of the above firm of the value of less than $200.00.

Defendant entered a plea of guilty. Before accepting such plea, the court inquired of defendant as to whether or not he understood the nature and consequences of the offenses charged, to which defendant answered that he did. Defendant then stated that he had counsel and that he was under no duress or coercion. Upon being satisfied that defendant's rights had been protected, the judge accepted defendant's plea of guilty.

The State's sole evidence consisted of that of Jack Richardson, an S.B.I. agent, who testified that defendant made a confession and admitted the crimes charged.

Judgment was entered on the charge of breaking and entering, that defendant be confined in the State's Prison for a period of not less than two nor more than four years; on the second, or larceny,

count, defendant was given a similar sentence, the latter sentence to begin at the expiration of the sentence imposed on the breaking and entering count.

Defendant gave notice of appeal and requested the court to appoint counsel to perfect his appeal. The court appointed his trial counsel to perfect his appeal in *forma pauperis*.

Attorney General Bruton, Staff Attorney Charles E. Clement for the State.

Charles H. McSwain for defendant.

PER CURIAM. Defendant's sole contention on this appeal is that the sentences imposed in the court below were excessive and harsh and, as he put it, "unwarranted by the true spirit of the statute."

Under the provisions of G.S. 14-54, the crime charged in the first count, to which defendant pleaded guilty, is punishable by a sentence in prison of four months to ten years.

The crime charged in the second count in the bill of indictment, to wit, larceny of property from a storehouse, with felonious intent, *et cetera,* is a felony as at common law, without regard to the value of the property stolen. *S. v. Cooper,* 256 N.C. 372, 124 S.E. 2d 91.

The court below could have imposed a maximum sentence of ten years on each count.

There is no merit in defendant's contention, and the sentences imposed by the court below will be upheld.

Affirmed.

LUCILLE BAKER, ADMINISTRATRIX OF ROSWELL C. BAKER, DECEASED, PLAINTIFF v. JACK F. SMITH, DEFENDANT.

(Filed 10 November, 1965.)

APPEAL by plaintiff from *Olive, E.J.,* March 1965 Civil Session of DAVIDSON.

This action was instituted May 15, 1963 by Roswell C. Baker to recover damages for personal injuries he sustained January 27, 1963, about 6:45 p.m., dusk dark, as a result of a collision between his Ford and a Chevrolet.

Baker alleged defendant was the operator of the Baker car; that Baker was riding therein; and that the collision and Baker's injuries

were proximately caused by the actionable negligence of defendant. Answering, defendant denied all of Baker's essential allegations.

Baker died April 18, 1964 from causes wholly unrelated to said collision of January 27, 1963. Baker's administratrix now prosecutes said *personal injury* action.

At the conclusion of plaintiff's evidence the court, granting defendant's motion therefor, entered judgment of involuntary nonsuit.

Charles F. Lambeth, Jr. and Harry S. Cline for plaintiff appellant.
Smith, Moore, Smith, Schell & Hunter and Walser, Brinkley, Walser & McGirt for defendant appellee.

PER CURIAM. The evidence most favorable to plaintiff tends to show: Defendant was operating plaintiff's Ford in an easterly direction on Unity Street in Thomasville at a speed of 15 or 20 miles an hour. The Chevrolet, headed in a westerly direction, was off the highway and on a "little pull-off" to defendant's right.

The only testimony as to what occurred was that of one of the occupants of the Baker car. She testified: "The right front fender of the other car and the right front fender of the car I was in—they collided right there, as it was pulling out into the highway. At the time the collision occurred the other car was off and on the highway. The car I was in was still on the highway but the other car was a little off of the highway because when they hit it knocked it back." Again: "Our car never left the highway."

We find no evidence deemed sufficient to support a finding that the collision was proximately caused by the actionable negligence of the operator of the Baker Ford. On the contrary, the evidence indicates clearly that the action of the driver of the Chevrolet in attempting to drive onto the highway from a place of safety on the "pull-off" was the sole proximate cause of the collision.

Apparently, the identity of the owner and driver of the Chevrolet is unknown. Nothing in the record indicates that such driver lingered at the scene of collision.

The judgment of involuntary nonsuit is affirmed.

Affirmed.

FRANCES QUEEN ROBERTS v. LOYAL OWEN ROBERTS.

(Filed 10 November, 1965.)

APPEAL by defendant from order entered February 6, 1965 by *Walter E. Johnston, Jr., Resident Judge,* in an action pending in FORSYTH Superior Court.

This action was instituted December 6, 1961, for divorce from bed and board, custody of minor children and attorney's fee.

Plaintiff and defendant were married on or about September 7, 1949. Three children were born of the marriage, Sharon Joan, Vicki Lynn and Allen Robin.

After hearing, an order was entered by Johnston, J., on December 27, 1961, in which plaintiff was awarded full custody and control of said minor children and defendant was ordered to pay $30.00 per week for the support of plaintiff and of said children and a fee to plaintiff's counsel.

Subsequently, in the Superior Court of Wilkes County, defendant obtained an absolute divorce on the ground of two years separation.

On January 29, 1965, plaintiff filed a motion that the court order defendant to pay $50.00 per week for the support of said three children; to pay designated medical and hospital bills incurred in behalf of one or more of said children; and to reimburse the First Federal Savings and Loan Association on account of its payment of delinquent taxes on the residence property originally owned by plaintiff and defendant as tenants by entirety and in which plaintiff and said three children reside.

On February 6, 1965, after a hearing on plaintiff's motion, defendant's answer thereto and affidavits, Johnston, J., based on findings of fact set forth therein, entered an order providing:

"NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the weekly support payments heretofore ordered to be paid by the defendant for the support of the three minor children of the marriage be increased from $30.00 per week to $45.00 per week, said payments to be made each week on or before Friday of each week, beginning on the 12th day of February 1965, and continuing each and every Friday thereafter until further ordered by this Court, for the use and benefit of Sharon Joan Roberts, Vicki Lynn Roberts, and Allen Robin Roberts; that the defendant pay H. Glenn Pettyjohn, Attorney for the petitioner and said minor children, the sum of $125.00; and that the costs of this action be taxed by the Clerk against the defendant."

Defendant excepted to said order and to specified findings of fact set forth therein and appealed.

H. Glenn Pettyjohn for plaintiff appellee.
H. Grady Barnhill, Jr. and John E. Hall for defendant appellant.

PER CURIAM. There is no contention that, in relation to the needs of the children, the amount of the required payments is excessive. The findings challenged by defendant relate to defendant's ability to make such payments. However, in our view, the evidence was sufficient to support each of the challenged findings of fact; and the findings of fact fully support the judgment.

It is noted that the cause is open for further orders. If conditions warrant modification of the order of February 6, 1965, plaintiff or defendant is at liberty to move for such modification.

Affirmed.

MANNING P. COOKE v. R. W. OUTLAND, PRESIDENT AND DIRECTOR OF THE BANK OF RICH SQUARE, R. B. OUTLAND, VICE-PRESIDENT AND DIRECTOR OF THE BANK OF RICH SQUARE, AND MRS. R. B. OUTLAND, W. C. CONNER, AND A. A. BRYAN, DIRECTORS OF THE BANK OF RICH SQUARE, AND THE BANK OF RICH SQUARE.

(Filed 24 November, 1965.)

1. Statutes § 5—

Even though an amendment limiting the application of a statute provides that the amendment should not affect pending litigation, such amendment is pertinent in an action instituted prior to its effective date for the purpose of showing that prior to the amendment the Legislature considered the statute to be applicable to the excluded class.

2. Corporations § 4—

In the absence of statutory restriction, a shareholder in a private corporation has a common law right to inspect and examine the books and records of the corporation at a proper time and place for a proper purpose, and this right may be enforced by mandamus, but such right is not absolute but is addressed to the sound discretion of the court and does not lie to permit a mere fishing expedition or for a purpose not germane to the protection of the stockholder's legitimate interests as a stockholder.

3. Same—

By provision of statute in this State, G.S. 55-38, a shareholder owning five per cent of the shares of a private corporation and who has held such shares for a period of six months is entitled to inspect the records and books of the corporation at a proper time and place for a proper purpose.

4. Same; Banks and Banking § 1—

The Business Corporation Act applies to domestic banks, and in the absence of statutory restriction a shareholder of a banking corporation has the same right as a shareholder in any other private corporation to inspect its records and books at a proper time and place for a proper purpose. The statutory restriction contained in the 1965 amendment to G.S. 55-38 is not applicable to this action instituted prior to the effective date of the amendment.

5. Same—

Written demand of a shareholder for inspection of the records and books of a corporation for the purpose of enabling the shareholder to determine the value of his stock and to investigate the conduct of the management of the corporation to determine whether it is being efficiently managed, states proper purposes for inspection, and the burden rests upon the corporation and its officers, if they desire to defeat the demand, to allege and prove that the demand was not made for a proper purpose germane to the stockholder's status but was to advance a speculative purpose or some other improper purpose.

6. Same—

The right of a qualified shareholder to inspect the records of a bank for a proper purpose at a proper time and place may not be denied upon the contention that the examination would violate the confidential relationship between the bank and its customers.

7. Same—

The statutory powers vested in the State Banking Commission and the Commissioner of Banks do not affect or curtail or prevent the right of a qualified bank shareholder to inspect the records of the bank for a proper purpose, and such right may not be denied on the ground that the shareholder had failed to exhaust his administrative remedies before the Commissioner of Banks or the Banking Commission.

LAKE, J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Bundy, J.*, 18 January 1965 Session of NORTHAMPTON.

Civil action in the nature of *mandamus* by plaintiff, a shareholder of record in the Bank of Rich Square, a domestic corporation, to enforce his rights, pursuant to G.S. 55-38(b), to examine the books and records of account and minutes of the Bank of Rich Square. In his petition he also alleges that he is entitled, pursuant to G.S. 55-38(d), to secure a judgment against the individual defendants, jointly and severally, for $500, as a penalty by reason of their refusing to allow him, pursuant to his written demand, to make such an examination of the books and records of account and minutes of the Bank of Rich Square, and he also alleges in his petition that he

is entitled to secure a judgment against the individual defendants, jointly and severally, for such other damages to which he may be entitled.

These facts are alleged in the petition, and admitted to be true in the joint answer of defendants: The Bank of Rich Square is a domestic corporation created by private law of the General Assembly at its 1903 Session. It has outstanding 500 shares of common stock, and no other stock. The individual defendants are officers and directors of the Bank of Rich Square. R. W. Outland is president and director of the Bank, and he and members of his immediate family own 337½ shares of its outstanding stock. Ownership of its remaining 162½ shares is divided among 21 minority stockholders, of whom plaintiff is the largest shareholder owning 17½ shares. Plaintiff is "a qualified shareholder" of the Bank within the language of G.S. 55-38(a), in that he has been a shareholder of record in the Bank for at least six months immediately preceding his demand for an examination and production of the books and records of account of the Bank.

This is a summary of the remainder of his petition: By letter dated 11 September 1964 he made written demand upon defendants, and each one of them, that he be given the right at reasonable times, for proper purposes, to examine at the place where they are kept and to make extracts from them, the books and records of account of the Bank of Rich Square, and he stated in his written demand the proper purposes for which he desired to make such examination; that a copy of his written demand is attached to his petition, marked Exhibit A, and made a part thereof. Exhibit A is a copy of a letter addressed to R. W. Outland, president of the Bank of Rich Square, and purports to have been sent by registered mail. This is a summary of the pertinent parts of Exhibit A, except when quoted: On 9 January 1964, there was presented by the president of the Bank of Rich Square at the Bank's annual stockholders' meeting a complete annual president's report, a 1963 Statement of Income and Dividends (Comparative 1962-63). An examination of this statement shows many items included therein which are equivocal. Many questions are presented by the Bank's published Call Reports of Condition of the Bank, and of the loan policy, which questions need clarification. There appear to be variations between reasonable estimations of this stockholder and those shown by the Bank's capital account changes for four consecutive periods of 1963, and this stockholder desires to ascertain the reason for the variations and the manner in which they were derived. There appear to be variations between reasonable estimations of this stockholder and those shown

by the Bank's capital account changes for the four report periods of each year beginning with the year 1950 and for each succeeding year up to the present time. In the office of the register of deeds for Northampton County there appear on the public record all the recorded, secured deeds of trust, lien bonds and chattel mortgages of the Bank of Rich Square. Many questions arise from the descriptive and nondescriptive appearances of these recorded loans as well as those instruments securing loans from the Bank of Rich Square which are not recorded. Inasmuch as the general deposit accounts of the Bank do not appear to be a factor in the assessment liability of this shareholder's stock, he has no desire to examine any depositors' accounts in the Bank except those accounts of officers, directors, and employees. He wishes to be assured there is an absolute lack of preferential treatment, that good faith prevails in the operation of the Bank, and that the Bank is not operating in a manner that is oppressive to its customers, stockholders, and the public. For the purpose of ascertaining the true financial condition of the Bank, the present and potential value of his stock in the Bank, the efficiency of its management, the good faith of its officers, and the probability and extent of assessment liability of the stock which he owns, he deems it necessary and proper to request to examine "the books, records, and statements of the Bank of Rich Square in reference to the loans made by the Bank from the beginning of the year 1950 up to the time of my inspection of the Bank's records." His demand for an examination of the Bank's records was refused.

Pursuant to the provisions of G.S. 55-38, he has a clear legal right to be allowed to examine the books and records of account of said Bank, which are in the actual or constructive possession of defendants, and defendants have a clear legal duty to produce said books and records of account and to allow plaintiff to examine them and make extracts therefrom.

The defendants in their joint answer admit that plaintiff made written demand upon them to examine and to make extracts from the books and records of the Bank and to examine the personal accounts of its officers, directors, and employees, but they deny that plaintiff has stated or alleged any proper purpose for such examination and, therefore, they denied plaintiff's written demand. And further answering plaintiff's petition the defendants allege in substance: Defendants, acting upon the advice of counsel and upon advice of the North Carolina Commissioner of Banks, refused to allow plaintiff to examine the deposit accounts of anyone in the Bank of Rich Square, because such examination would violate the confidential relationship existing between the Bank and its deposi-

tors. Defendants have refused plaintiff's repeated demands to examine the records of loans made by the Bank, because such an examination would violate the confidential relationship existing between the Bank and its borrowers. Defendant Bank always keeps its stockholders' books available to plaintiff and all other stockholders, as directed by G.S. 53-85. R. W. Outland, president and director of the Bank of Rich Square, has informed plaintiff that he could examine the stockholders' books and other corporate records which would not disclose depositors' accounts and individual loan records, and he further informed plaintiff that he might have access to such books and records of the Bank as the North Carolina Banking Commissioner might authorize and direct the Bank to make available to him. Plaintiff has on several occasions examined the Called Reports of Condition of the Bank filed with the North Carolina Banking Commission by the Bank of Rich Square. The Bank of Rich Square is subject to rules, regulations, and instructions promulgated by the North Carolina Commissioner of Banks, pursuant to G.S. 53-104, for the protection of "the interests of the depositories, creditors, stockholders, and public in their relations with" the Bank. Plaintiff has failed to exhaust administrative remedies provided under General Statutes Chapter 53, in that the North Carolina Banking Commission is vested with authority to conduct hearings "upon any matter or thing which may arise in connection with the banking laws of this State * * *." G.S. 53-92. Consequently, plaintiff, having other adequate remedy, is not entitled to a writ of *mandamus*. Plaintiff was formerly employed as cashier of the Bank of Rich Square, but while he was acting as cashier of this Bank and during usual banking hours, he conducted business transactions for himself or members of his family in competition with said Bank, and in 1943 his employment as cashier was terminated by the Bank. All the information requested by plaintiff has been made available to him, except records showing transactions with customers of the Bank. Defendants stand ready and willing to allow plaintiff to examine such books and records of the Bank of Rich Square as he may be entitled to examine under the laws of this State, but they verily believe that to allow plaintiff's capricious, vexatious demand to examine records of depositors and borrowers would damage irreparably the Bank of Rich Square.

On 4 January 1965, Bundy, J., signed an order requiring defendants to appear before him in the Northampton County Superior Court in the courthouse, at 10 a.m. on 18 January 1965, and show cause, if any they could, why a writ of *mandamus* as prayed for by plaintiff in his petition should not be granted.

The show cause order came on to be heard before Bundy, J., at the specified time and place at the 18 January 1965 Session of Northampton County Superior Court, where the parties were present with their counsel. Judge Bundy entered a judgment which contains the following recitals:

> "And it appearing to the court that no question of fact is raised by the pleadings herein, to wit, plaintiff's petition and defendants' answer, and it further appearing that neither plaintiff nor defendants have requested or demanded a jury trial; and it being stipulated in open court that the court may make its findings, its conclusions and enter judgment after term and out of the district; and the court having made the following findings and conclusions:"

Judge Bundy made nine findings of fact. His first eight findings of fact are to the effect that the Bank of Rich Square is a domestic corporation, has 500 shares of capital stock outstanding, and that its capital stock is owned by the persons as alleged in the petition and admitted in the answer. Plaintiff is now and has been a shareholder of record in the Bank of Rich Square for at least six months immediately preceding 11 September 1964. That plaintiff by letter dated 11 September 1964, a copy of which is attached to the petition marked Exhibit A, made written demand upon defendants that he be given the right to examine and make extracts from books and records of account of the Bank of Rich Square, and that defendants refused to grant such demand and request. His ninth and last finding of fact is to the effect that plaintiff has instituted no formal proceedings and demanded no hearing before the North Carolina Banking Commission.

Based upon his findings of fact, Judge Bundy made the following conclusions of law:

> "a. That plaintiff has failed to exhaust administrative remedies available under North Carolina General Statutes, Chapter 53, before the North Carolina Banking Commission in seeking the relief prayed for and sought by the Petition for Writ of *Mandamus* filed herein;
>
> "b. That plaintiff's written demand, Petitioner's Exhibit A, fails to state a proper purpose for inspection and examination of the books and records of account of defendant corporation; and
>
> "c. That to allow and order defendants to permit such examination and inspection of the books and records of account of

defendant corporation by plaintiff shareholder would be a violation of the confidential relationship between defendant corporation and its customers."

Based upon his findings of fact and conclusions of law, Judge Bundy ordered and decreed that plaintiff's petition for writ of *mandamus* be denied, that his action be dismissed, and that he be taxed with the costs.

From the judgment, plaintiff appeals to the Supreme Court.

Boyce & Lake by Eugene Boyce for plaintiff appellant.

J. Buxton Weaver and Martin & Flythe by Perry Martin for defendant appellees.

PARKER, J. Plaintiff assigns as errors Judge Bundy's three conclusions of law and the signing of the judgment.

Plaintiff bases his action in the nature of *mandamus* to enforce his rights as "a qualified shareholder" in the Bank of Rich Square to examine the books and records of account of the Bank of Rich Square upon the provisions of G.S. 55-38(a) and (b). He bases that part of his action seeking to recover from the individual defendants $500 as a penalty for their refusing to allow him, pursuant to his written demand, to make such an examination of the books and records of account of the Bank of Rich Square, and to recover from them such other damages to which he may be entitled upon G.S. 55-38(d).

The allegations in the petition and the admissions in defendants' answer show that plaintiff is "a qualified shareholder" in the Bank of Rich Square as the words "a qualified shareholder" are defined in G.S. 55-38(a).

G.S. 55-38(b) reads as follows:

"(b) A qualified shareholder, upon written demand stating the purpose thereof, shall have the right, in person, or by attorney, accountant or other agent, at any reasonable time or times, for any proper purpose, to examine at the place where they are kept and make extracts from, the books and records of account, minutes and record of shareholders of a domestic corporation or those of a foreign corporation actually or customarily kept by it within this State. A qualified shareholder in a parent corporation shall have the aforesaid rights with respect to the books, records and minutes of a domestic subsidiary corporation or those of a foreign subsidiary corporation actually or customarily kept by it within this State. A shareholder's rights

under this subsection may be enforced by an action in the nature of *mandamus*."

G.S. 55-38(d) reads in relevant part:

"(d) Any officer or agent or corporation * * * refusing to allow a qualified shareholder to examine and make extracts from the aforesaid books and records of account, minutes and record of shareholders, for any proper purpose, shall be liable to such shareholder in a penalty of ten per cent (10%) of the value of the shares owned by such shareholder, but not to exceed five hundred dollars ($500.00), in addition to any other damages or remedy afforded him by law, but the court may decrease the amount of such penalty on a finding of mitigating circumstances. It shall be a defense to any action for penalties under this section that the person suing therefor has at any time sold or offered for sale any list of shareholders of such corporation or any other corporation or has aided or abetted any person in procuring any list of shareholders for any such purpose, or has improperly used any information secured through any prior examination of the books and records of account, or minutes, or record of shareholders of such corporation or any other corporation."

The explanatory comment accompanying Senate Bill 49 which was introduced in the 1955 Session of the General Assembly, and which became the Business Corporation Act, G.S. Chapter 55, has this comment under G.S. 55-38: "PURPOSE: To define with some definiteness the rights of inspection of shareholders and to impose some safeguards against fishing expeditions, especially by recent transferees." Section 55-38 of this bill and G.S. 55-38 are identical, except that G.S. 55-38 contains subsection (e), which, of course, caused the following subsections of G.S. 55-38 to bear different letters, *e.g.*, subsection (e) of the bill is subsection (f) of G.S. 55-38.

Chapter 609, 1965 Session Laws of North Carolina, is entitled, "An Act to prevent unreasonable disclosure of bank customer records." It reads in relevant part:

"*The General Assembly of North Carolina do enact:*

"Section 1. G.S. 55-38 is amended by adding at the end thereof a new subsection to be designated subsection (i), reading as follows:

"'(i) Provided that nothing in this Section shall be construed to authorize a shareholder of a banking corporation to examine the deposit records or loan records of a bank customer, except

upon order of a court of competent jurisdiction for good cause shown.'

"Sec. 2. Nothing in this Act shall affect pending litigation."

The present action was commenced by the issuance of summons on 31 December 1964. Therefore, the 1965 amendment to G.S. 55-38 does not apply to the litigation here, but it is pertinent as showing that the General Assembly considered the provisions of G.S. 55-38 applicable to banking corporations.

C.S. 1146 (afterwards former G.S. 55-50) provided for the appointment of an auditor upon a refusal by a private corporation to commence an audit within 30 days after a request by the required number of shareholders. This statute was construed and applied in *Cole v. Trust Co.,* 221 N.C. 249, 20 S.E. 2d 54. In this case defendant contended C.S. 1146 does not apply to banks. After stating that this contention could not be sustained, the Court said:

> "* * * It [C.S. 1146] embraces all domestic corporations organized for profit in which the beneficial interests and pro rata ownership are represented by shares of stock, and is applicable as well to banks and trust companies organized under the laws of North Carolina as to other business or industrial corporations. *Rhodes v. Love,* 153 N.C. 468 (472), 69 S.E. 436. By sec. 87, ch. 4, Public Laws 1921 (Michie's Code, 224 [j]), it is provided that the laws relating to private corporations are applicable to banks, unless inconsistent with the business of banking."

G.S. 53-135 reads:

> "All provisions of the law relating to private corporations, and particularly those enumerated in the chapter entitled 'Corporations,' not inconsistent with this chapter or with the business of banking, shall be applicable to banks."

According to the admitted facts in the pleadings, the Bank of Rich Square is a "corporation" within the intent and definition of "corporation" set forth in G.S. 55-2, in that it is a corporation for profit and having a capital stock which has been created by a special act of the General Assembly of this State. In addition, domestic banks must have by express statutory provision, G.S. 53-6, capital stock. G.S. 55-3 reads in relevant part: "(a) The provisions of this chapter shall apply to every corporation for profit, * * * unless the corporation is expressly excepted from the operation hereof or unless there is other specific statutory provision particularly applicable to

the corporation or inconsistent with some provisions of this chapter, in which case that other provision prevails." Domestic banking corporations are not expressly excepted from the operation of our Business Corporation Act, and we know of no "specific statutory provision particularly applicable" to domestic banks operating in North Carolina or inconsistent with some provisions of our Business Corporation Act, so as to make such provision prevail, nor has any such specific statutory provision been called to our attention. In *White v. Smith,* 256 N.C. 218, 123 S.E. 2d 628, we held that the provisions of our Business Corporation Act, G.S. 55-37(a)(3), concerning shareholders' lists, and G.S. 55-64, concerning voting lists, are applicable to savings and loan associations, and *mandamus* is expressly authorized by G.S. 55-37(b) to compel compliance. It is our opinion, and we so hold, the provisions of our Business Corporation Act are applicable to domestic banks operating in North Carolina.

A shareholder of a banking corporation, like a shareholder of any other private corporation, has, in the absence of statutory restriction, a common law right to inspect and examine the books and records of the banking corporation at a proper time and place and for a proper purpose, and his right of inspection and examination is generally enforceable by *mandamus* proceedings against the banking corporation and its officers or agents having charge of the books and records sought to be reached. This right of inspection and examination rests upon the proposition that those in charge of the banking corporation are merely the agents of the stockholders, who are the real and beneficial owners of the property, the legal title to which is held by the banking corporation, and it has sometimes been said that a shareholder's assertion of right to inspect and examine a corporation's books and records is one merely for the inspection and examination of what is his own. Since the common law right of inspection and examination grows out of the shareholder's relationship to the corporation, and is given to him for the protection of his interests, it is generally recognized that the common law right is qualified by requiring that it be exercised in good faith for purposes germane to his status as a shareholder, and it seems that a proper demand or notice is a prerequisite to the exercise of such right. *White v. Smith, supra; Guthrie v. Harkness,* 199 U.S. 148, 50 L. Ed. 130; *State v. Crookston Trust Co.,* 222 Minn. 17, 22 N.W. 2d 911; 9 C.J.S., Banks and Banking, § 69; 10 Am. Jur. 2d, Banks, § 68; Annot. 15 A.L.R. 2d 11, §§ 2, 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 18, 19; 5 Fletcher, Cyclopedia Corporations, Per. Ed. §§ 2213, 2214; Robinson, N. C. Corporation Law and Practice (1964), § 58. The annotation in 15 A.L.R. 2d covers over 82 pages, and is a very thorough discussion

of the "Purposes for which stockholder or officer may exercise right to examine corporate books and records" of a private corporation, and contains citations of a legion of cases from most, if not all, of the states of this nation.

In Fletcher, *ibid,* § 2214, it is said: "Even at common law the writ of *mandamus* would not issue as a matter of course to enforce the mere naked right or to gratify mere idle curiosity, but it was necessary for petitioner to show some specific interest at stake rendering the inspection necessary, or some beneficial purpose for which the examination is desired."

Plaintiff, "a qualified shareholder," as defined in G.S. 55-38(a), in the Bank of Rich Square, a domestic banking corporation, is granted by G.S. 55-38(b) of our Business Corporation Act—the 1965 amendment to G.S. 55-38 not being applicable to this litigation—a right, upon written demand stating the purpose thereof, in person, or by attorney, accountant or other agent, at any reasonable time or times, *for any proper purpose,* to examine at the place where they are kept and make extracts from, the books and records of account, minutes and record of shareholders of the Bank of Rich Square.

Considering the huge size of many modern corporations and the necessarily complicated nature of their bookkeeping, it is plain that to permit their thousands of stockholders to roam at will through their records would render impossible not only any attempt to keep their records efficiently, but the proper carrying on of their businesses. Recognizing such fact, G.S. 55-38(b), as applicable in this case, gives plaintiff a right of inspection and examination "for any proper purpose." It does not give him an absolute right of inspection and examination for a mere fishing expedition, or for a purpose not germane to the protection of his economic interest as a shareholder in the corporation.

In 2 Model Business Corporation Act, Annotated, p. 127, it is said: "In regulating the shareholders' inspection rights, the legislatures have avoided specific definitions of proper purpose, leaving to the courts the job of balancing the interests involved, primarily on the basis of common law."

Plaintiff alleges in effect that he desires to examine the books and records of the Bank of Rich Square for the purpose of ascertaining the true financial condition of the Bank, the present and potential value of his stock in the Bank, the efficiency of its management, and the probability and extent of assessment liability of the stock which he owns. This is said in Annot. 15 A.L.R. 2d 11, § 8, p. 42: "One of the reasons most commonly alleged by stockholders seeking to inspect the corporation's books and records is a desire to de-

termine the value of their stock in the corporation, and, where the stockholder is proceeding in good faith, it appears that an inspection will readily be granted for this purpose." In support of the text, authorities are cited from many jurisdictions. This is said in Annot. 15 A.L.R. 2d, 11, § 7, p. 30: "Since the stockholders are, in a sense, the beneficial owners of the corporate assets, and thus the persons primarily interested in seeing that the concern is efficiently and profitably managed, it has generally been held that they are entitled to inspect the books and records in order to investigate the conduct of the management, determine the financial condition of the corporation, and generally take an account of the stewardship of the officers and directors, at least where there are circumstances justifying some suspicion of mismanagement." Voluminous authority is cited to support the text.

In *White v. Smith, supra,* the Court said: "At common law stockholders in private corporations have the right to make reasonable inspection of a corporation's books to assure themselves of efficient management."

Guthrie v. Harkness, supra, was a case in which the Supreme Court of the United States reviewed a judgment of the Supreme Court of the State of Utah, which affirmed a judgment of a trial court in that State, awarding a writ of *mandamus* to compel the directors of a national bank to permit a stockholder to inspect the books at such times as would not interfere with the business of the bank. The Supreme Court of the United States affirmed the decision of the Supreme Court of the State of Utah. In its opinion the Court said:

> "In *State ex rel. Doyle v. Laughlin,* 53 Mo. App. 542, a stockholder in an incorporated bank had been denied by the directors the right to inspect the books for the purpose of acquainting himself with the conduct of its affairs and to learn how it was managed. The court there held that he was entitled to a writ of *mandamus* to compel the inspection, and this notwithstanding the bank contended that it occupied such a confidential and trust relation to its customers and depositors that it would be a breach of duty on its part to open up the books to the inspection of the relator. The authorities are fully examined, and the right of the shareholders to inspect the books for proper purposes and at proper times is recognized, in *Re Steinway,* 159 N.Y. 251, 45 L.R.A. 461 53 N.E. 1103; *Com. ex. rel Sellers v. Phoenix Iron Co.,* 105 Pa. 111, 51 Am. Rep. 184. To the same effect are *Deaderick v. Wilson,* 8 Baxt. 108-137; *Lewis v. Brain-*

erd, 53 Vt. 520; and *Huylar v. Cragin Cattle Co.,* 40 N.J. Eq. 392-398, 2 Atl. 274.

* * *

"It is suggested in argument that, if the shareholder has this right, it may be abused, in that he may make an improper use of the knowledge thus gained. * * * In the case before us no reason is shown for denying to the stockholder the right to know how his agents are conducting the affairs of a concern of which he is part owner. Many legal rights may be the subjects of abuse, but cannot be denied for that reason. A director, who has the right to an examination of the books, may abuse the confidence reposed in him. Certainly this possibility will not be held to justify a denial of legal right, if such right exists in the shareholder. The possibility of the abuse of a legal right affords no ground for its denial. *State ex rel. Doyle v. Laughlin,* 53 Mo. App. 542; *People ex rel. Gunst v. Goldstein,* 37 App. Div. 550, 56 N.Y. Supp. 306. The text-books are to the same effect as the decided cases. Cook, Stocks & Stockholders, § 511; Boone, Banking, § 235; Angell & A. Priv. Corp. 607.

"It does not follow that the courts will compel the inspection of the bank's books under all circumstances. In issuing the writ of *mandamus* the court will exercise a sound discretion, and grant the right under proper safeguards to protect the interests of all concerned. The writ should not be granted for speculative purposes, or to gratify idle curiosity, or to aid a blackmailer, but it may not be denied to the stockholder who seeks the information for legitimate purposes. *Re Steinway,* 159 N.Y. 250, 45 L.R.A. 461, 53 N.E. 1103; Thomp. Corp. §§ 4412 *et seq.*"

In 5 Fletcher, Cyclopedia Corporations, Per. Ed., § 2253.1, it is said: "Although there is respectable authority to the contrary, the majority common-law rule seems to be that the burden of proving that stockholders, who have made a demand for an inspection of the books of corporation and have been refused, were acting from improper motives rests upon the defendant."

The State of Oregon has a statute very similar to G.S. 55-38 before the 1965 amendment thereto. In *Rosentool v. Bonanza Oil and Mine Corp.,* 221 Ore. 520, 352 P. 2d 138, the Court held that where shareholder, who has either owned stock for six months prior to demand or who is the holder of at least five per cent of the outstanding stock, seeks by *mandamus* to compel the corporation to permit inspection, if petition shows on its face that the requested inspection is for a proper purpose, the demand should be granted unless the

corporation alleges defensive facts tending to establish bad faith or the fact that inspection is not sought for a proper purpose, and the burden of establishing such bad faith or improper purpose rests upon the corporation. In its opinion, after discussing a number of cases from other jurisdictions supporting its view, the Supreme Court of Oregon said:

> "Until an examination of the corporate records is obtained, the shareholder often can do nothing more than entertain a belief of mismanagement, and, in the absence of express legislative command, to place the burden of proof upon the shareholder in a situation such as that now under review would in many cases defeat the very grounds upon which a right of inspection of corporate records is said to exist. * * *
>
> "Where the request of a shareholder for an inspection of corporate records indicates on its face that it is for a proper purpose, that is, for a lawful and reasonable purpose germane to his status as a shareholder, the burden shifts to the defendant to show that the inspection should not be granted because it tends to advance a purpose inimical or hostile to the corporation or the other shareholders, or that the purpose of the shareholder is to gratify his curiosity or harass or annoy the corporation or its management, or is to advance a speculative or some other improper purpose of the shareholder."

There is a comment on this case in Robinson, N. C. Corporation Law and Practice, p. 169.

In *Goldman v. Trans-United Industries, Inc.,* 404 Pa. 288, 171 A. 2d 788, the Court said:

> "The common law right of a shareholder to inspect the books of a corporation is not an absolute right—it rests on conditions of propriety and reasonableness as to time, place and purpose. The Business Corporation Law of May 5, 1933, P.L. 364, § 308(B), 15 P.S. § 2852-308(B), which is based on the Model Business Corporation Act, § 35 (9 U.L.A.), is merely a codification of the common law rule. The requested relief will not be granted where the purpose is proven to be improper or unreasonable, but the burden of so proving is on the corporation."

Hausner v. Hopewell Products, Inc., 10 A.D. 2d 876, 201 N.Y.S. 2d 252, was proceedings on application for directive permitting petitioner to inspect and make copies of books, papers, and records of a corporation. In its opinion the Court said: "Petitioner is not required

to sustain the burden of proving his good faith. On the contrary, appellants have the burden of proving the bad faith on his part which they allege in their answer."

In *William Coale Development Co. v. Kennedy,* 121 Ohio St. 582, 170 N.E. 434, the Court said:

> "When the stockholder is asking the right to inspect the corporate books, records, papers, and documents, or the corporate property, such request is attended by a presumption of good faith and honesty of purpose until the contrary is made to appear by evidence produced by the officers or agents who are seeking to defeat such inspection. The burden of proof on this question should not be borne by the stockholder, but should be borne by the agents or officers objecting to the inspection."

The written demand and petition of plaintiff for an examination of the books and records of account of the Bank of Rich Square, pursuant to the provisions of G.S. 55-38(b)—the 1965 amendment to G.S. 55-38 is not applicable to this litigation—indicate on their face that it is for the purpose of determining the value of his stock in the Bank of Rich Square, and of investigating the conduct of its management to determine the Bank of Rich Square's financial condition, and whether it is efficiently managed, a proper purpose germane to his status as a shareholder in the Bank, with the exception that it would seem on the face of the written demand and petition that an examination of the records of the amounts on deposit in the names of the officers, directors, and employees of the Bank is not germane to plaintiff's status as a shareholder. Upon such a showing, in our opinion, and we so hold, the burden of proof then rests upon the defendants, if they desire to defeat his demand, to allege and show by facts, if they can, not merely by a denial that his demand is not for a proper purpose, that the examination should not be granted because it is not made in good faith, and would tend to advance a purpose inimical or hostile to the corporation or the other stockholders, or that the purpose of plaintiff is to gratify his curiosity, or primarily to vex, harass or annoy the corporation or its management, or is to advance a speculative purpose, or some other improper purpose of plaintiff.

It is to be clearly understood that we are not here concerned with G.S. 55-38(f), which reads in part: "Notwithstanding the foregoing provisions of this section, *upon proof of proper purpose by a shareholder of a domestic or foreign corporation* * * *." (Emphasis supplied.) What we have said as to burden of proof in respect to G.S.

55-38(b) is not to be taken or considered in respect to burden of proof as to G.S. 55-38(f). See *Rosentool v. Bonanza Oil and Mine Corp., supra;* Robinson, N. C. Corporation Law and Practice, p. 169.

The trial judge erroneously concluded as a matter of law "that plaintiff's written demand, Petitioner's Exhibit A, fails to state a proper purpose for inspection and examination of the books and records of account of defendant corporation," and plaintiff's assignment of error thereto is sustained.

Plaintiff's assignment of error to the trial judge's third conclusion of law is sustained, for the reason that if plaintiff, "a qualified shareholder" in the Bank of Rich Square, is entitled to a writ of *mandamus* to compel an examination of the books and records of account of the Bank, the writ of *mandamus* cannot be denied because the Bank contends it would be a violation of the confidential relationship between the Bank and its customers to permit such an examination. *Guthrie v. Harkness, supra; State v. Crookston Trust Co., supra; State ex rel. Doyle v. Laughlin,* 53 Mo. App. 542; Annot: Ann. Cas. 1916C, 703.

Plaintiff's assignment of error to the trial judge's first conclusion of law, "That plaintiff has failed to exhaust administrative remedies available under North Carolina General Statutes, Chapter 53, before the North Carolina Banking Commission in seeking the relief prayed for and sought by the Petition for Writ of *Mandamus* filed herein," is sustained. This erroneous conclusion of law is evidently based upon paragraph "f" of defendant's further answer reading as follows: "The plaintiff has failed to exhaust administrative remedies provided under Chapter 53 of the North Carolina General Statutes, in that the North Carolina Banking Commission is vested with authority to conduct hearings 'upon any matter or thing which may arise in connection with the banking laws of this State. . . .' N. C. Gen. Stat. Section 53-92; therefore, plaintiff, having other adequate remedy, is not entitled to a WRIT OF MANDAMUS." The statutory powers vested by G.S. Chapter 53 in the State Banking Commission and the Commissioner of Banks do not affect or curtail or prevent plaintiff's rights as "a qualified shareholder" in the Bank of Rich Square to demand an examination of the books and records of account of the Bank of Rich Square under the provisions of G.S. 55-38(a) and (b), and such statutory powers vested in the State Banking Commission and the Commissioner of Banks are no reason for denying plaintiff's right of examination, if he is entitled thereto. *State v. Crookston Trust Co., supra.*

Plaintiff's assignment of error to the judgment is sustained.

The judgment below is reversed, and the cause is remanded to the Superior Court of Northampton County for further proceedings in accordance with the applicable law set forth in this opinion.

Reversed and remanded.

LAKE, J., took no part in the consideration or decision of this case.

NORAH ADELL LEGGETTE, WIDOW, AND NORAH ADELL LEGGETTE, NEXT FRIEND OF MAVIS LEGGETTE CARLILES, BRENDA DARNELLE LEGGETTE, JUDY CAROLINE LEGGETTE, DOROTHY LOU ANN LEGGETTE, MINOR CHILDREN OF CLAYTON LEE LEGGETTE, DECEASED, EMPLOYEE v. J. D. McCOTTER, INC., EMPLOYER, AND CASUALTY RECIPROCAL EXCHANGE, CARRIER; AND CROWDER CONSTRUCTION COMPANY, EMPLOYER, AND AETNA CASUALTY & SURETY COMPANY, CARRIER.

(Filed 24 November, 1965.)

1. Master and Servant § 51—

The operator of heavy equipment may be held the employee of both the general employer and the special employer with regard to liability under the Workmen's Compensation Act when the general employer leases the heavy equipment to a special employer who directs the work being performed and who has the power of terminating the employment at the work site but no power to terminate the general overall employment.

2. Same— Findings, supported by evidence, held to support conclusion that liability for award should be split between general and special employers.

The evidence tended to show that the general employer leased heavy equipment with operator at a stipulated sum per hour to the special employer, that both the general and special employers were subject to the Workmen's Compensation Act in regard to the injury in suit, that the operator had exclusive control of the equipment but that the particular work to be done with the equipment was under the direction of the special employer, who could terminate the employment at the site but not the general employment, and that on the occasion in question the operator was using the equipment in aiding the employees of the special employer in raising a steel beam in place under the supervision of the special employer's superintendent of construction, and that while the beam was being raised it fell back and fatally injured the equipment operator. *Held:* The evidence is sufficient to support the findings and conclusions of the Industrial Commission that at the time of the injury the operator was in the dual employment of both the general and special employers, and that the award for compensation should be split between them and their insurance carriers.

BOBBITT, J., concurs in result.

APPEAL by defendants Crowder Construction Company and Aetna Casualty & Surety Company from *Hubbard, J.,* November Session 1964 of BERTIE.

These defendants appeal from an order signed on 20 February 1965, remanding this case to the Industrial Commission for specific findings of fact that the deceased employee, Clayton Lee Leggette (Leggette), was subject to the direction and control of defendant Crowder Construction Company (Crowder); and for an award against defendant Crowder and defendant Aetna Casualty & Surety Company (Aetna); and for a finding that defendant J. D. McCotter, Inc. (McCotter) and Casualty Reciprocal Exchange (Exchange) are not liable in any respect, the Industrial Commission having affirmed the hearing commissioner who split the workmen's compensation award between the two employer defendants and their carriers.

The evidence adduced before the hearing commissioner tends to show that defendant Crowder in May 1963 was engaged in constructing a school building on U. S. Highway 13 in Windsor, North Carolina. Defendant McCotter, with its principal place of business in Washington, North Carolina, sells building supplies, manufactures building block, operates "Ready-Mix" concrete plants, and occasionally rents to its building supply customers pieces of heavy equipment. McCotter owned a Hough front-end loader valued at $16,000 to $18,000, which was rented to Crowder in November 1962 at a rate of $10.00 per hour; this rental covered the services of Leggette, the operator of the front-end loader.

Leggette, from November 1962 until the time of his accidental death on 14 May 1963, worked at the site of the school construction project in Windsor. Leggette was under the supervision of Fred S. Kennedy (Kennedy), Crowder's superintendent of the school construction project. Leggette drove a McCotter truck from his home in Washington to Windsor every workday, carrying his tools, fuel and "what not" for servicing the front-end loader. McCotter paid Leggette a wage of $65.00 per week when he worked regularly, and billed Crowder monthly for the use of the front-end loader and operator. Leggette had been employed by McCotter, at intervals, for the five years prior to his death. Leggette was shown on the Social Security records of McCotter and McCotter paid workmen's compensation and unemployment insurance on Leggette. The undisputed evidence tends to show that Crowder had authority to terminate Leggette's employment at the Crowder site but only McCotter could terminate Leggette's general employment.

Leggette used the loader to push and load dirt and other materials and to do whatever he was called upon to do with the loader by Kennedy. "The machine was at Crowder's disposal and so was Lee (Leggette)." Kennedy testified, "There was nobody (who) could even start it (the loader) up. He (Leggette) was in the entire charge of that machine and he was the * * * boss of that machine. I told him what I wanted done with the machine. * * * We used the machine as a multi-purpose machine, not for just digging dirt. It does anything you need if you pay ten bucks an hour. Mostly Mr. Leggette moved earth. If I told him to move something else he did if he could. He loaded trucks, pulled them out of the ditch, even poured concrete with the bucket. I told him to pour concrete. * * * I directed him what I wanted him to do."

On the day of the accident, six laborers, under Kennedy's supervision, were attempting to place a steel I-beam, weighing about 565 pounds, sixteen feet long, on top of two vertical columns, ten feet high, sixteen feet apart. "I (Kennedy) did not let it be known to him (Leggette) that I wanted the beams put up there, we were putting them up and he volunteered to sit it up for me. He was pulling the subgrade down to haul stone on it in order to pour the floor and we were working right in the cafeteria area, he was grading * * *. He stopped doing that about ten minutes before we started to move the beams. He stopped doing it and came over there where the beams were because we were straining out there in the mud and he came over and said he would help us, and I accepted the help. I was in charge of putting up the beam. To my knowledge this machine hadn't been used to lift any beams prior to this." Kennedy also testified with respect to lifting the beam by use of the front-end loader, "If I had told him not to do it he wouldn't have done it."

Crowder's employees placed the steel beam on the bucket of the front-end loader. Kennedy placed a hand on the beam "to put it into position like I (Kennedy) wanted it." Kennedy then ordered Leggette to lower the steel beam after it was first lifted, and Leggette "backed off and put a track under there so he could get it exactly right." In the process of lifting the beam the second time, Leggette apparently pushed the wrong valve or lever, causing the bucket to turn, and the steel beam fell on Leggette, causing injuries from which he died on that day.

George Lewis Simpson, one of defendant Crowder's truck drivers, testified, "On May 14th I was working for Mr. Kennedy and he was my boss. * * * I was present there when they were lifting a beam involving Mr. Leggette and some of the other fellows working for

Crowder Construction Company. When they laid the beam up on the bucket I asked Mr. Kennedy did he think I better get the chains out of my truck and fasten that beam to the bucket before they picked it up and he said, 'I don't think it will be no danger in it,' and I said, 'I know some danger in it, best to fasten it down.' "

From the order entered in the court below, defendants Crowder and Aetna appeal, assigning error.

Carter & Ross for plaintiff appellees.

Young, Moore & Henderson by B. T. Henderson, II, and J. Allen Adams for defendant appellants.

Barden, Stith, McCotter & Sugg by D. C. McCotter, Jr., for defendant appellees.

DENNY, C.J. The determinative question on this appeal, based on the facts revealed by the record, is simply this: Is Crowder or McCotter, or both of them, together with their carriers, liable to the plaintiffs as the result of the death of Leggette?

In *Weaver v. Bennett,* 259 N.C. 16, 129 S.E. 2d 610, a statement from *Nepstad v. Lambert* (Minn.), 50 N.W. 2d 614, is quoted as follows:

> " 'Though well established, the loaned-servant principle has proved troublesome in its application to individual fact situations. The criteria for determining when a worker becomes a loaned servant are not precise; as a result, the state of the law on this subject is chaotic. Respectable authority for almost any position can be found, for even within a single jurisdiction the decisions are in conflict.' "

In the instant case, both the general employer and the special employer were subject to the provisions of our Workmen's Compensation Act at the time of the injury and death of Leggette. This factual situation did not exist in *Shapiro v. Winston-Salem,* 212 N.C. 751, 194 S.E. 479, or in *Weaver v. Bennett, supra.* Therefore, the identical question presented here was not before the Court for determination in either of those cases.

In 99 C.J.S., Workmen's Compensation, § 47, page 242, *et seq.,* it is said:

> "* * * (A)n employee may simultaneously be in the general employment of one employer and in the special or temporary employment, for a particular purpose or occasion, of another, with all the legal consequences of the relation with the latter.

> "Where such dual relationship exists, an employee injured in the special employment may, according to some authorities, be granted compensation as against either employer or against both, at least where at the time of the injury both the general and the special employers exert over the employee some measure of control, not necessarily complete, and there is a common or joint participation in the work and benefit to each from its rendition."

Likewise, in Workmen's Compensation Law by Larson, Vol. I, § 48.23, at page 716, we find the following statement:

> "The closest cases are those in which the 'business' of the general employer consists largely of the very process of furnishing equipment and employees to others. When, for example, a truck owner furnishes trucks and drivers at a profit to himself for the regular use of the special employer, it might at first seem that the bulk of the work being done is that of the special employer, and special employers have been held liable, in these circumstances. But it is also possible to say that the owner is advancing his own business, which is simply the business of furnishing such equipment and labor for profit, and, particularly when the facts show ultimate retention of control for the protection of expensive equipment, it is quite common to find the general employer remaining liable. * * *"

Also from the last cited authority, § 48.30, at page 719, it is said:

> "The factor that seems to play the largest part in lent-employee cases is that of furnishing heavy equipment. Many cases have found continuing liability in the general employer when he furnishes operators together with road equipment, excavating equipment, steam and truck shovels, trucks, air drills, air riveters and barges. Although there are *contra* cases, the majority of the decisions have been influenced by the arguments both that the general employer would naturally reserve the control necessary to ensure that his equipment is properly used, and that a substantial part of any such operator's duties would consist of the continuing duty of maintenance of the equipment."

In § 48.40, pages 719 and 720 of Larson's Workmen's Compensation Law, we find the following:

> "Joint employment occurs when a single employee, under contracts with two employers, simultaneously performs the work of

> both under the control of both. In such a case, both employers are liable for workmen's compensation. * * *
>
> "There has always been a noticeable reluctance on the part of Anglo-American courts to emulate the wisdom of Solomon and decree that the baby be divided in half. Courts are showing an increasing tendency, however, to dispose of close lent-employee cases by adopting this sensible compromise, rather than by insisting on an all-or-nothing choice between two employers both bearing a close relation to the employee. * * *"

We think the work being done at the time of Leggette's death was beneficial to McCotter and Crowder. It was a practice of McCotter to rent pieces of heavy equipment to its customers, and Crowder was a customer of McCotter. McCotter was receiving $10.00 per hour for the use of the front-end loader and the operator of this heavy piece of equipment rented to Crowder. It made no difference to McCotter whether Leggette was loading trucks, excavating, or pouring cement, he got the same amount as rental for the equipment and the operator. Crowder's superintendent testified with respect to the use Crowder made of the machine. "It does anything you need if you pay ten bucks an hour. Mostly Mr. Leggette moved earth. If I told him to move something else he did if he could. He loaded trucks, pulled them out of the ditch, even poured concrete with the bucket. I told him to pour concrete. * * * I directed him what to do."

The evidence is also to the effect that at the time Kennedy was supervising the attempt to place the steel beam with six laborers, Leggette was operating the front-end loader in that very area, pulling the subgrade down in order to pour the floor in the cafeteria area. Leggette stopped the machine and "came over there where the beams were because we were straining out there in the mud and he came over and said he would help us, and I (Kennedy) accepted the help."

The evidence on this record supports the conclusion that Leggette had complete charge of the front-end loader. He was responsible for its repair and maintenance as well as for its operation. Crowder could have stopped Leggette if his work had been unsatisfactory, but Crowder did not have the authority to discharge him and assign one of Crowder's own employees to operate the front-end loader. However, Crowder's evidence does support the view that Leggette was completely under the direction of Kennedy with respect to the type of work to be done with the front-end loader. In fact, Kennedy, Crowder's superintendent, testified with respect to lifting the steel

beam by use of the front-end loader, "If I had told him not to do it he wouldn't have done it."

We think the facts here support the view that plaintiffs had the right to proceed against either Crowder or McCotter, or both.

In *Famous Players Lasky Corp. v. Industrial Accident Com'n.*, 228 P. 5 (Cal.), an aircraft corporation rented an airplane and pilot to the picture corporation by the day. The picture corporation was to give the pilot orders as to the flights to be made in connection with the filming of a picture. After a trial run, the picture corporation told the pilot he would have to fly lower. While flying at 75 feet he struck an air pocket and crashed. Both employers were held liable for workmen's compensation.

In the case of *De Noyer v. Cavanaugh,* 116 N.E. 992 (N.Y.), De Noyer was employed by Cavanaugh as a truck driver. Cavanaugh arranged with an Oil Company to furnish a horse and driver to be used in connection with a tank wagon of the Oil Company for delivery of oil and gasoline. While De Noyer was employed by the Oil Company for this purpose, he was accidentally killed. The Court said:

> "Even where no property of the general employer is intrusted to the employe to be used in the special employment, the general employer pays the compensation, may direct the employe when to go to work, and may discharge him for refusal to do the work of the special employer. The Industrial Commission, therefore, has full power to make an award against the general employer. It does not follow that by the application of this rule the special employer is not to be held in any case. The fact that a workman has a general and a special employer is not inconsistent with the relation of employer and employe between both of them and himself. If the men are under the exclusive control of the special employer in the performance of work which is a part of his business, they are, for the time being, his employes. *Comerford's* Case, 224 Mass. 571, 573, 113 N.E. 460. Thus at one and the same time they are generally the employes of the general employer and specially the employes of the special employer. As they may under the common law of master and servant look to the former for their wages and to the latter for damages for negligent injuries, so under the Workmen's Compensation Law they may, so far as its provisions are applicable, look to the one or to the other, or to both, for compensation for injuries due to occupational hazards * * * and the Industrial Commission

may make such an award as the facts in the particular case may justify. * * *"

In *Dennison v. Peckham Road Corporation,* 295 N.Y. 457, 68 N.E. 2d 440, Bouley & Company, a contractor, engaged in excavating a cellar, leased a power shovel from Peckham and engaged one Roitoro an employee of the lessor, to assist in operating the shovel. Roitoro was killed in the course of this employment. The Workmen's Compensation Board found that the lessor and lessee were general and special employers respectively and apportioned the award equally between the two. The Appellate Division reversed the award as to Peckham, the general employer, and its carrier, and directed that the proceeding be remanded to the Board for the purpose of making an award solely against Bouley. The Court of Appeals of New York reversed the Appellate Division and affirmed the award of the Workmen's Compensation Board.

In the case of *Mendel v. Fort Scott Hydraulic Cement Co.,* 147 Kan. 719, 78 P. 2d 868, a cement company engaged in quarrying work rented certain blasting equipment and loaned men to an ice company for the purpose of blasting rock in a sewer ditch being constructed, generally, under the supervision of the ice company. The workmen continued at all times in the employ of the cement company, which paid them less than it received from the ice company for their work and which retained full power to discharge them. Both the cement company and the ice company and their insurance carriers were held liable for compensation to a workman who was injured by an explosion while working in the sewer ditch.

In *Scott v. Savannah Electric & Power Co.,* 84 Ga. App. 553, 66 S.E. 2d 179, an employee was directed by his general employer to do certain work for an electric company and received injuries arising out of and in the course of his employment with the electric company. The Court held the employee was a special employee of the electric company at the time of his injury and could recover compensation from either employer or both.

In the case of *Wing v. Clark Equipment Co.,* 286 Mich. 343, 282 N.W. 170, plaintiff was an efficiency engineer for Corporations Auxiliary Company, said company hiring him out to industrial plants, who would place himself among the workers of its plant to determine production efficiency. While so engaged for defendant, plaintiff was injured. The Michigan Court held that plaintiff was an employee of both corporations for the purpose of determining rights under the Workmen's Compensation Act and that under such dual employment

both employers could be held liable for compensation for injuries to the employee.

In *Hobelman v. Mel Krebs Construction Co.*, 188 Kan. 825, 366 P. 2d 270, the claimant, Herman Hobelman, regularly worked for Joe Kreutzer Construction Company (Kreutzer), a general contractor. This company owned a large crane and made a business of renting it to other contractors in the same area. Respondent Mel Krebs Construction Company (Krebs) was also a general contractor in said area. On the date claimant sustained his accidental injuries Krebs was constructing a building in Garden City, Kansas. It was agreed between Kreutzer and Krebs that Kreutzer would furnish to Krebs the crane and operator for the purpose of setting steel beams at the Garden City project. Hobelman was not the crane operator but was assigned to help assemble the crane. Krebs requested Hobelman to remain and help in setting the steel beams because Krebs was shorthanded. Kreutzer acceded to the request of Krebs and Krebs was to pay Kreutzer $2.00 per hour for Hobelman's services. Hobelman was kept on the payroll of his general employer. Hobelman was injured while engaged in the course of his employment with Krebs. The Supreme Court of Kansas held both the general and special employers liable and quoted the following from the opinion in the case of *Mendel v. Fort Scott Hydraulic Cement Co., supra:*

> " 'Where a general employer loans his workman to another and directs him to do certain work which is being done under the supervision and control of such other or special employer, and which work is also a part of the general employer's trade or business in which injuries are compensable under the compensation act, and the workman continues at all times in the employ of the general employer who pays his compensation and who remains vested with full power to discharge him for refusal to do the work for the special employer which he was directed to do, such employee, if injured while engaged in such work, may look to both employers and their respective insurance carriers for compensation.' "

Among the other cases holding that a lent employee who is injured in special employment may recover from either the special or the general employer, or both, we cite: *Wright v. Cane Run Petroleum Co.*, 262 Ky. 251, 90 S.W. 2d 36; *Lunday v. Department of Labor and Industries*, 94 P. 2d 744 (Wash.); *Hill v. Samaritan Hospital*, 75 N.Y.S. 2d 718; *Cook v. Buffalo General Hospital*, 308

N.Y. 480, 127 N.E. 2d 66; *Diaz v. Ulster Vegetable Growers Co-Operative,* 282 App. Div. 426, 123 N.Y.S. 2d 321; *Bright v. Bragg,* 175 Kan. 404, 264 P. 2d 494; *National Automobile Ins. Co. v. Industrial A. Com'n.,* 143 P. 2d 481 (Cal.); 152 A.L.R., Anno. — Workmen's Compensation — Special Employer, page 816, *et seq.*

In our opinion, the findings of fact of the hearing commissioner which were adopted as the findings of the full Commission, are supported by competent evidence and are sufficient to support the conclusions of law upon which the award was made.

The judgment of the court below is reversed and this cause is remanded for entry of judgment affirming the award of the Industrial Commission.

Reversed and remanded.

BOBBITT, J., concurs in result.

STATE v. HOWARD CARTER, JR.

(Filed 24 November, 1965.)

1. Witnesses § 1—

The competency of a nine-year old girl to testify is addressed to the sound discretion of the trial judge, and where the record discloses an investigation by the court showing that the child was intelligent and had an understanding of the sanctity of an oath, the record fails to show any abuse of discretion in permitting the child to testify.

2. Rape § 1—

Consent of prosecutrix which is induced by fear and violence is void and is no legal consent.

3. Rape § 5— Evidence of defendant's guilt of rape held sufficient to be submitted to the jury.

The State introduced plenary evidence that defendant had carnal knowledge of his nine-year old stepdaughter and that defendant did so by force in pushing her to the kitchen floor and forcefully and brutally having sexual intercourse with her. The evidence further tended to show that the only other occupants of the house at the time were four children younger than prosecutrix. *Held:* The evidence is sufficient to permit the jury to find that the failure of the nine-year old prosecutrix to resist was induced by fear, and therefore that the act was accomplished by force and against her will and without her consent, and in a prosecution upon an indictment drawn under the first clause of G.S. 14-21, charging defendant with feloniously ravishing and carnally knowing the prosecutrix by force and against her will, nonsuit was correctly denied, and her testimony that she did not re-

sist defendant does not alter this result, since, considered in relation to the facts in evidence, the failure to resist was probably predicated upon fear of defendant and the obvious futility of resistance.

4. Criminal Law § 99—

On motion to nonsuit, the evidence is to be considered in the light most favorable to the State and the State is entitled to every reasonable inference of fact which may reasonably be deduced therefrom, with contradictions and discrepancies resolved in its favor.

5. Criminal Law § 121—

A motion in arrest of judgment will lie only for a fatal defect appearing on the face of the record proper, and cannot be based upon an asserted variance between the indictment and proof.

APPEAL by defendant from *Hall, J.*, 1 March 1965 Criminal Session of VANCE.

Criminal prosecution on an indictment charging that Howard Carter, Jr., the defendant, "on or before the 17 day of December 1964, with force and arms, at and in the county aforesaid, did unlawfully, wilfully and feloniously ravish and carnally know Shirley Elizabeth Silver, a female, by force and against her will."

Defendant, who was represented by his attorney Linwood T. Peoples, entered a plea of not guilty. Verdict: "Guilty as charged to the crime of rape with recommendation of imprisonment for life."

From a judgment of imprisonment for life in the State's prison (G.S. 14-21), defendant appeals.

Attorney General T. W. Bruton, Deputy Attorney General Harry W. McGalliard, and Staff Attorney George A. Goodwyn for the State.

Linwood T. Peoples for defendant appellant.

PARKER, J. Defendant assigns as error the denial of his motion for judgment of compulsory nonsuit made at the close of the State's evidence, and the denial of a similar motion made at the close of all the evidence.

Shirley Elizabeth Silver's first testimony was, "I am nine years old." Whereupon, counsel for defendant objected to her testifying further on the ground that she was incompetent as a witness due to her age. The judge had the jury to retire to their room, and in their absence heard testimony as to her competency. She testified on direct examination in substance as follows: She is nine years old. She puts her trust in God. She knows the difference between right and wrong, and she knows what it means to tell a story. It means that you will be telling a story to God, and if you tell a story to God,

you will go to the bad place. She is in the third grade at school. She testified on cross-examination in substance: She lives with her mother. Defendant is her stepfather. She has been to church, but does not now go regularly. Her mother and her teacher told her it was bad to tell a story. She makes 100's in school; she makes A, B, and C on her report cards. This in substance is her testimony in reply to questions by the judge: She knows the difference between telling a story and telling the truth. When she was sworn on the Bible, she knew it meant to tell the truth when she testified in court. She knows a story is something that is not true. She intends to tell the truth in this case, and she is not going to tell a story. The judge found that she was competent to testify, to which the defendant objected and excepted.

The competency of this nine-year-old girl to testify as a witness in the case was a matter resting in the sound discretion of the trial judge, and considering her testimony above narrated, no abuse of judicial discretion appears. The judge's ruling was correct. *S. v. Satterfield,* 207 N.C. 118, 176 S.E. 466 (a seven-year-old child); *S. v. Gibson,* 221 N.C. 252, 20 S.E. 2d 51 (a five-year-old child); *S. v. Merritt,* 236 N.C. 363, 72 S.E. 2d 754 (a five-year-old child); *McCurdy v. Ashley,* 259 N.C. 619, 131 S.E. 2d 321 (a six-year and five- or six-month-old child).

After Shirley Elizabeth Silver was held to be a competent witness, the jury returned to the courtroom, and she testified in substance on direct examination: Defendant Carter is her stepfather. On 17 December her mother got up and went off to work in a cotton field, leaving her, defendant, and her little brothers and sisters, aged three, four, six, and seven years, in the home with her. She went into the kitchen to prepare breakfast for her little brothers and sisters, while they were dressing in their bedroom. Defendant came into the kitchen and pushed her down on the floor. She did not want him to push her down on the floor. He got on top of her on the floor, slapped her twice, told her not to holler, and told her to shut up. She then testified to the effect that defendant had sexual intercourse with her on the floor, and that she was hurt and bled. It would serve no useful purpose to set forth the sordid details of defendant's acts. After defendant finished with her, he left the house. After he left, Rosa Mann came to the house, fixed her up, and went for Pearl Macon. When they returned, Shirley fell on the floor. They picked her up, put her in a chair, and went for her mother. They carried her to a hospital in Henderson. In the hospital Dr. P. N. Avery put her on a table and put her to sleep. She doesn't know what the doctor

did to her. She spent the night in the hospital. She testified on cross-examination: "No, I did not resist Poochy [defendant] in any way. No, I did not slap him."

Rosa Mann's testimony is to this effect: When she arrived at Shirley Elizabeth Silver's home, Shirley told her she was hurt and was bleeding. She put some pieces of cloth on her and told her that would last until her mother came. She left, and Shirley called her and said she needed changing again. Shirley was "real bloody." She asked Shirley if anybody had bothered her and Shirley said her stepfather had. She found Shirley's mother and brought her home.

Dr. P. N. Avery is a medical doctor in Henderson and was a witness for the State. It was stipulated by defendant and the State that he is a medical expert. He testified in substance: He examined Shirley on 17 December 1964 in the hospital in Henderson. He found quite a lot of blood, a large blood clot in her vagina, and wounds in her vagina. At first he could not make a full examination because of her pain and trauma. He took her to the operating room and put her to sleep. He then found she had a laceration of the vagina one and one-half inches long, and another laceration of the vagina one-half an inch long. While she was asleep, he sewed up her lacerations, taking eleven stitches. She lost a lot of blood. His examination disclosed her vagina had been penetrated. Shirley told him that on this morning defendant threw her on the floor, got on her, and had intercourse with her.

K. K. Robinson, a deputy sheriff of Vance County and a witness for the State, testified that he talked to Shirley at the hospital. His testimony is to the effect that Shirley told him defendant had had intercourse with her.

Defendant's evidence is to this effect: Soon after his wife left their home, he left in a car driven by Louise Richardson, who carried him to town to get his driver's license. He did not return home until 5 or 6 p.m. that day. He did not molest or bother Shirley in any way. He did not slap her. When he arrived home, he asked where Shirley was. The children said she was in the hospital. When his wife came home, he asked her what was wrong with Shirley, and she said somebody had been messing with her. He said it was not he. That night the officers came to his house with a warrant and arrested him.

The indictment charges that defendant did feloniously ravish and carnally know Shirley Elizabeth Silver, a female, by force and against her will. First clause of G.S. 14-21. The indictment does not charge defendant with carnally knowing and abusing Shirley Eliza-

beth Silver, a female child, under the age of twelve years, second clause of G.S. 14-21, in which case neither force nor lack of consent need be alleged or proven, the reason being that by virtue of the second clause of G.S. 14-21 such child under the age of twelve years is presumed incapable of consenting. *S. v. Johnson,* 226 N.C. 266, 37 S.E. 2d 678; *S. v. Strickland,* 254 N.C. 658, 119 S.E. 2d 781.

Defendant contends that the State is required to show according to its indictment here that defendant ravished and carnally knew Shirley Elizabeth Silver by force and against her will, that proof of force and lack of consent are necessary elements of the rape charged in the indictment, and that considering the State's evidence, in the light most favorable to it, the State has no evidence sufficient to carry the case to the jury on the question of lack of consent on the part of Shirley Elizabeth Silver. That Shirley testified: "No, I did not resist Poochy [defendant] in any way. No, I did not slap him." Defendant cites in his brief in support of his contention: *S. v. Johnson, supra; S. v. Strickland, supra; S. v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424; 44 Am. Jur., Rape, § 104, p. 968. These three cases and the section in Am. Jur. cited by defendant are not precisely in point, in that they do not discuss the question of lack of consent by a young child, when the indictment does not allege her age, but alleges merely that she was a female, and was feloniously raped by force and against her will, under the first clause of G.S. 14-21.

The State has plenary evidence that defendant had carnal knowledge of Shirley Elizabeth Silver. If such knowledge were obtained "by force and against her will," as charged in the indictment here, it was rape, otherwise not, under the indictment here. *S. v. Thompson,* 227 N.C. 19, 40 S.E. 2d 620. The State has ample evidence that defendant had carnal knowledge of Shirley Elizabeth Silver by force. In this connection, "the phrases 'against the will of the female' and 'without her consent' mean the same thing. Any attempted distinction would be meaningless and could only confuse a jury if it were attempted." *Wilson v. State,* 49 Del. 37, 109 A. 2d 381, *cert. den.* 348 U.S. 983, 99 L. Ed. 765.

This is said in 44 Am. Jur., Rape, § 13, p. 910:

> "Consent of the woman from fear of personal violence is void. Even though a man lays no hands on a woman, yet if by an array of physical force he so overpowers her mind that she dares not resist, or she ceases resistance through fear of great harm, the consummation of unlawful intercourse by the man is rape. The age of the prosecutrix is always important to be considered in such cases."

To the same effect, 75 C.J.S., Rape, § 12(c), p. 475 *et seq.*

"A consent obtained by the use of force or fear due to threats of force is void, and the offense then rape." 1 Wharton's Criminal Law and Procedure (Anderson Ed. 1957), § 311, p. 649.

S. v. Thompson, supra, was a criminal prosecution on an indictment charging the defendants with rape. The evidence for the State tends to show that on the night of 17 March 1946 the defendants severally had sexual intercourse with the prosecuting witness, who testified: "I did not object to the intercourse these defendants had with me because I was so frightened, I was afraid they would kill me; it was against my wishes and against my will. . . . I did not consent; I used as much force as I could to keep them from having sexual intercourse with me." The Court held that the State had made out a case for the jury, and the opinion states:

> "True, the prosecutrix unwittingly says she did not 'object to the intercourse' which the defendants had with her, but this was predicated upon the reason stated that she feared for her life, and 'it was against my wishes and against my will.' She further says: 'I did not consent; I used as much force as I could to keep them from having sexual intercourse with me.' It is conceded that the 'force' necessary to constitute rape, need not be actual physical force. 52 C.J. 1024. Fear, fright, or coercion, may take the place of force. 44 Am. Jur. 903."

S. v. Cross, 12 Iowa 66, 79 Am. Rep. 519, is in point. Defendant was charged with the commission of the crime of rape, and was found guilty of an assault with intent to commit rape. He assigns as error that the court erred in overruling the motion for a new trial, based upon the ground that the verdict was contrary to the law and evidence. The prosecutrix was 15 years of age. The defendant was a married man of the age of 35. The Court in its opinion said:

> "Consent involves submission, but a mere submission by no means necessarily involves consent. For it might be admitted, in most cases, that the submission of an adult female to such an outrage necessarily proved consent. The mere submission of a child, however, in the power of a strong man, can by no means be taken to be such consent as to justify the prisoner in point of law: *Regina v. Banks,* 8 Car. & P. 574; *Regina v. Day,* 9 *Id.* 722.
>
> "In this case, differing from that of *State v. Tomlinson,* 11 Iowa 401, the prosecutrix is a mere child, was in the hands of a strong man, and may have been overcome by fear and submitted without consenting. This the jury may have found, and

> we are by no means prepared to say they were not justified in so doing. Then his conduct in placing her in the room, with the other circumstances disclosed, show his purpose and intention so unmistakably that we conclude that the verdict was fairly justified, and the case is therefore affirmed."

We have examined the case of *Regina v. Day* and it supports the statement of law in the opinion.

In *Bailey v. Commonwealth,* 82 Va. 107, the defendant was found guilty of rape. The evidence in this case is to this effect: In the nighttime defendant entered the bed of his fourteen-year-old stepdaughter, which was situated in a room in which three other small children were sleeping. There were no other persons in the house. The prosecutrix forbade the defendant from getting in the bed with her but made no further resistance. The defendant got in bed with her and had sexual intercourse. The Court in its opinion said:

> "A consent induced by fear of bodily harm or personal violence is no consent * * *.
>
> "In a case when in the dead hour of darkness and of night, in a house where there is no help, save from three sleeping children, the oldest eight or ten years old, with the knowledge that her mother and older sister are beyond call and beyond reach, a girl fourteen years of age sees her stepfather preparing himself to come to bed to her, asserting his unlawful desires toward her, and she finds courage to forbid him to enter her bed, she has perhaps expressed her refusal to consent to the unlawful cohabitation to as great an extent as the law will require, before holding the unnatural ravisher to the law's penalties.
>
> * * *
>
> "The sexual intercourse, under the circumstances of this case, make out a case of rape, and the judgment of the county court of Giles County must be affirmed."

Shirley Elizabeth Silver, a nine-year-old child, was alone in the house with defendant, her stepfather, and four little brothers and sisters younger than she was. She was in the kitchen preparing breakfast for these children. Defendant, her stepfather and a grown man, came into the kitchen, pushed her down on the floor against her will, got on top of her on the floor, slapped her twice, told her not to holler, and forcibly and brutally had sexual intercourse with her. It is true that on cross-examination she testified: "No, I did not resist Poochy [defendant] in any way." Considering the age of Shirley, the uselessness or impossibility of any resistance by her pushed down on

the floor with defendant, a grown man, on top of her and slapping her, and only four small children except defendant and herself in the house, and the degree of force used on her by defendant, it is our opinion, and we so hold, the State's evidence would reasonably permit a jury to find that the mere failure of this nine-year-old child in the power of defendant, a grown man, to resist, and most probably induced by fear and violence not to resist, was no consent, and that defendant ravished and raped her by force and against her will and without her consent. The trial judge properly overruled defendant's motion for judgment of compulsory nonsuit.

The practice is thoroughly settled in this jurisdiction that on a motion to nonsuit, the evidence is to be considered in its most favorable light for the State, and the State is entitled to every inference of fact which may reasonably be deduced from the evidence, and contradictions and discrepancies in the State's evidence are for the jury to resolve and do not warrant the granting of the motion of nonsuit. *S. v. Simpson,* 244 N.C. 325, 93 S.E. 2d 425; *S. v. Thompson, supra.*

Defendant assigns as error the denial of his motion in arrest of judgment on the ground that the State's evidence does not conform to the allegations contained in the indictment. This assignment of error is overruled. "A motion in arrest of judgment can be based only on matters which appear on the face of the record proper, or on matters which should, but do not, appear on the face of the record proper. * * * The evidence in a case is no part of the record proper. * * * In consequence, defects which appear only by the aid of evidence cannot be the subject of a motion in arrest of judgment." *S. v. Gaston,* 236 N.C. 499, 73 S.E. 2d 311.

Defendant's last assignment of error is the court "committed error in failing to declare and explain the law regarding the elements of rape and the evidence arising thereon." This assignment of error is overruled. We have carefully studied the court's charge to the jury and find no error therein that would warrant disturbing the verdict and judgment below.

An addendum to the record filed in this Court shows that a lawful jury of eleven men and one woman were duly selected, sworn and empaneled to try the issues joined in this case between the State of North Carolina and the defendant Howard Carter, Jr.

Shirley Elizabeth Silver testified: "I am nine years old. I put my trust in God." Over nineteen centuries ago, Jesus was with his disciples in Galilee, and he called a little child unto him and set him in the midst of them and said: "But whoso shall offend one of these

little ones which believe in me, it were better for him that a millstone were hanged about his neck, and that he were drowned in the depth of the sea." The Gospel according to St. Matthew (King James' version), chapter 18, verse 6.

Defendant has had a fair trial, free from error, and must abide, as best he can, the consequences of the atrocious act of which the jury found him guilty.

No error.

JOE ERVIN WALSH v. UNITED INSURANCE COMPANY OF AMERICA.

(Filed 24 November, 1965.)

1. **Insurance § 3—**

The rule that a contract of insurance must be construed strongly against insurer and liberally in favor of insured applies when the language of the policy is ambiguous or is susceptible of more than one construction and does not apply when the language of the policy is plain and unambiguous and susceptible of only one reasonable construction, in which event the courts will enforce the contract according to its terms.

2. **Insurance § 29—**

The provisions of a health policy that insured should be continuously confined within doors by sickness or disease in order to be entitled to specific benefits has been construed by the courts as descriptive of the extent of the illness rather than a restriction on insured's conduct or activities.

3. **Same— Evidence held to show defendant did not suffer confining illness as defined by the policy.**

The health policy in suit defined continuous confinement as one continuously confining insured within doors because of sickness, subject to the sole exception that the right to the benefits should not be defeated because insured should visit his physician for treatment or go to a hospital for treatment which could not be administered in insured's house. Insured's evidence disclosed total disability to carry on his business of farming, but also that during the period in question, consonant with his physician's instructions, insured took walks over level parts of his farm, took trips to the beach, and operated his automobile within reason. *Held:* Defendant's evidence negates continuous confinement as defined by the policy and nonsuit should have been entered in his action for special benefits for a confining illness.

APPEAL by defendant from *Pless, J.*, March, 1965 Session, CALDWELL Superior Court.

The plaintiff, Joe Ervin Walsh, instituted this civil action against United Insurance Company of America for the recovery of $2,735 allegedly due as sickness benefits under a policy of insurance providing coverage for accidents, sickness and hospitalization. The provisions of the policy pertinent to this inquiry are:

> "SICKNESS BENEFITS
> PART ELEVEN CONFINING TOTAL DISABILITY BENEFITS FOR LIFE — SICKNESS
>
> "If 'such sickness' causes continuous total disability and total loss of time, and requires continuous confinement within doors and regular and personal attendance by a licensed physician, surgeon, osteopath or chiropractor, other than the Insured, the Company will periodically pay at the rate of the Monthly Benefit stated in the Policy Schedule for one day or more, beginning with the date of the first medical treatment during disability, so long as the Insured lives and is so disabled and confined, suffers such loss of time and requires such personal attendance.
>
> "The term 'confinement within doors' where ever used in this policy, is hereby defined as confinement of the Insured continuously inside the house because of 'such sickness' except that the right of the Insured to recover under the policy shall not be defeated because he visits his physician for treatment or goes to a hospital for treatment when such treatment cannot be administered in the home of the Insured.
>
> "PART TWELVE NON-CONFINING TOTAL DISABILITY BENEFITS FOR THREE MONTHS — SICKNESS
>
> "If 'such sickness' does not require continuous confinement within doors but does cause continuous total disability and total loss of time and requires regular and personal attendance by a licensed physician, surgeon, osteopath or chiropractor, other than the Insured, the Company will periodically pay at the rate of the Monthly Benefit stated in the Policy Schedule, beginning with the date of the first medical treatment during disability, for the period the Insured is so disabled, suffers such loss of time and requires such personal attendance, but not exceeding three months for any one sickness."

The plaintiff seeks to recover under the continuous total disability, total loss of time, and *continuous confinement within doors* provisions of the policy. The plaintiff testified in substance and as

quoted that he became ill in April, 1962. Theretofore he had operated his 700-acre farm near the town of Lenoir. He cultivated crops, cut timber, kept approximately 200 head of cattle. "The circumstances surrounding my first illness and hospitalization in April of 1962 were that I hadn't been feeling good and had right smart of trouble with headaches. One morning about two o'clock, I woke up sick and I started to the bathroom and I fell, and just for a moment or so I was unconscious. That must have been when I hurt my elbow; and then I just taken cold chills and big beads of perspiration would pop out on me and then I would burn up. The next morning, I got my wife to drive me to the doctor, which was the occasion the doctor first testified to."

When asked to explain to the jury why he had not worked between April 16, 1962 and December 31, 1962, the plaintiff replied: "Because the doctor told me not to. As for my physical feelings during this period, if I would do a small amount of walking, my knees and legs would swell and I couldn't sleep at night and didn't feel good, and if I was to get the least bit hot, I would take a headache. When I was in the hospital one time, I got a headache and it took them 22 hours to get it stopped. During that period I did a whole lot of sleeping and sitting on the sun porch, and when I felt like it I would drive myself to the doctor, and when I didn't feel like it, he would give me a certain medicines and shots and he would tell me not to, and I would get somebody else to drive me. Most of the time on these occasions my wife would drive me—either her or my brother or her brother would be around to take me.

"Yes, I took a trip to Virginia Beach by car. My wife did most of the driving, but I drove some of the way. When we got there, I laid around on the beach and sat around the house. We stayed seven days, the best I remember, and then came back home. During this period I started retiring some of this land because I had more than I could take care of and I couldn't take care of it; but I did nothing with my own hands to earn any money." * * *

"I don't know how far Virginia Beach is from Lenoir, you will have to tell me because I do not remember the mileage. I do know we spent the night in Raleigh. I had a brother who is older than I am that had a house rented down there and he called me and told me to come and spend a week with him and it wouldn't cost me anything. Dr. Gibbons had told me before then to go and he has told me since then to go. He didn't say what beach to go to. I did go to Myrtle Beach.

"I drove part of the way to Virginia Beach, however far it was, and we went in one day and one night and stayed more than a week, I think it was ten days. I didn't go to the doctor while I was there or to the hospital because I get my prescriptions filled here and taken them with me."

Dr. J. J. Gibbons, admitted to be a medical expert specializing in general medicine and surgery, testified: "In April of 1962 I had occasion to see the plaintiff, Mr. Joe Walsh, in my office at the Dula Hospital. The date was April 16, 1962. I examined him at that time in the out-patient department of my office and he was admitted to the hospital for further study. The records at that time show that he had hypertension, high blood pressure, with some mild generalized arteriosclerosis (hardening of the arteries). Also at that time he was treated for a recent injury to his left elbow, which was thought to be primarily a contusion bruise type of injury. He was found to have a mild form of hypothyroidism — that is a deficiency of the thyroid gland, and an elevated blood cholesterol. The patient was obviously somewhat agitated and anxious. This was essentially the findings on this admission. X-rays were taken on that admission of the chest, left elbow, skull, sinuses, and of the abdomen. A note was made here of findings in the lower back that he was found to have osteo-arthritic changes — that is, a degenerative type of arthritis. He was in the hospital from the 16th to the 19th, four days. Tests were done for his kidneys, what we call an IRV paralgram, and that was essentially within normal limits; did not show any specific thing. The blood nitrogen, urea nitrogen, was up slightly. That is another test for kidney function. That was elevated slightly. He was dismissed on the 19th of April."

"Q. What instructions, if any, did you give him at that time with regard to his work, Doctor?"

"A. I felt, in view of the elevated blood pressure and the severe associated anxiety, that the man should definitely be observed for a while — rest and convalescence, and so he was advised at that time. He was followed along very closely thereafter.

"He was advised at that time not to work. Prior to this time I had not treated Mr. Walsh as a physician. . . . This 54 year old white male with anxiety and anxiety state with agitated depressive reaction . . . gastroduodenitis with an incipient duodenal ulcer, hypertensive cardiovascular disease, with slight generalized arteriosclerosis, hypothrophis arthritis of his entire back and hypocholesterol anemia due to mild hypothyroidism, was admitted, treated, discharged much improved. . . . I specified that he go to

the seacoast for a multiple of reasons — one, for the allergy, and the other being the arthritis; and an additional reason: the agitated depressive type of nervousness he portrayed. * * *

"From April until June, I never restricted him to walk short distances, and as long as his blood pressure was staying within limits, I never considered him disabled from driving his car a reasonable distance, although on occasions I had restricted that because at times when he was running 190 and 190 blood pressure, I felt it was a little unwise. His wife had driven him on those occasions; I know that to be a fact, but under ordinary circumstances he was able to drive his car. . . . It was hilly where he lived, so I limited him on his walking around his farm because we do have evidence on the cardiogram that he had some early mild cardiac heart muscle changes so that very definitely (he) was restricted. * * *

"This plaintiff was very definitely authorized and told to report in at frequent intervals for these continued check-ups during the period in question. I instructed him in the same period to get out for short walks on flat land, without climbing. It was good for his health and circulation and good for his arthritis. My instructions to him with reference to his participation in farm operations remained the same constantly throughout."

The doctor further testified: "In my opinion, he was disabled, totally, from farming."

The parties, by stipulation, identified and put in the record the policy, admittedly in force during the period involved.

The defendant, without offering evidence, moved for judgment of nonsuit which the court denied. The defendant excepted. The jury answered the issue of total disability and continuous confinement within doors in favor of the plaintiff and allowed recovery in the sum of $2,550.00. From the judgment on the verdict, the defendant appealed.

Ted G. West, Marvin Wooten for plaintiff appellee.

Townsend & Todd by James R. Todd, Jr., for defendant appellant.

HIGGINS, J. In construing insurance contracts the courts generally take into account the fact that the contracts are carefully drawn by lawyers representing the insurance companies and the coverage is sold by skillful agents to individuals who are unfamiliar with the niceties of insurance law. By reason of the position of the parties, the courts construe the contracts most strongly against the insurer and most liberally in favor of the insured. *Electric Co. v. Ins. Co.,* 229

N.C. 518, 50 S.E. 2d 295; *Glenn v. Ins. Co.,* 220 N.C. 672, 18 S.E. 2d 113; *Duke v. Assurance Corp.,* 212 N.C. 682, 194 S.E. 91; *Jolley v. Ins. Co.,* 199 N.C. 269, 154 S.E. 400; *Underwood v. Ins. Co.,* 185 N.C. 538, 117 S.E. 790; *Banks v. Ins. Co.,* 95 U.S. 673. This rule applies where the language used is ambiguous or is susceptible of more than one construction. However, it is generally held, certainly by this Court, that where the language of an insurance policy is plain, unambiguous, and susceptible of only one reasonable construction, the courts will enforce the contract according to its terms. *Huffman v. Ins. Co.,* 264 N.C. 335, 141 S.E. 2d 496; *Hardin v. Ins. Co.,* 261 N.C. 67, 134 S.E. 2d 142; *Parker v. Ins. Co.,* 259 N.C. 115, 130 S.E. 2d 36.

For many years the courts have been construing confinement exclusively within doors provisions of health policies and many, including our own, have held that continuous confinement within doors clauses shall be construed as descriptive of the extent of the illness or injury rather than a restriction on the insured's conduct or activities. *Glenn v. Ins. Co., supra; Mutual Benefit Health and Accident Association v. Cohen,* 194 Fed. 2d 232, 8th Ct., *Cert. denied,* 243 U.S. 965, 96 L. Ed. 1362; *Occidental Life Ins. Co. v. Sammons,* 271 S.W. 2d 922 (Ark.); *Struble v. Occidental Life Ins. Co.,* 120 N.W. 2d 609 (Minn.); *Suits v. Ins. Co.,* 249 N.C. 383, 106 S.E. 2d 579.

This case differs from all others in this one material respect: heretofore all courts have placed their own interpretations on the continuous confinement within doors clauses, giving the insured the benefit of the most liberal construction possible. This, however, is the only case insofar as our research has disclosed that the parties have agreed and placed in the contract their interpretation of what the clause means. The parties hereto have agreed that the clause means "confinement of the Insured continuously inside the house because of such sickness, except that the right of the Insured to recover under the policy shall not be defeated because he visits his physician for treatment or goes to the hospital for treatment when such treatment cannot be administered in the *house* of the Insured." (emphasis added.)

In this case the plaintiff's medical evidence shows total disability to carry on the business of farming. The plaintiff's doctor testified that he advised reasonable activity — walks over the level parts of the farm, trips to the beach, reasonable operation of an automobile, etc. The insured admitted he engaged in the permitted activities. By these admissions the plaintiff excludes himself from coverage under the continuous confinement within doors provision of the policy. Another section of the policy (not here involved) furnishes coverage

for total disability. The right of recovery in this action, however, required the plaintiff to show that his disability has confined him continuously within doors which, by agreement of the parties means inside the house except for visits to his doctor or to the hospital for treatment which cannot be "administered in the house of the Insured." The parties having thus agreed, so shall they be bound.

The court should have granted the motion for nonsuit. This decision renders it unnecessary to pass on the defendant's request for special instructions or to the form of the issues submitted. The judgment of the Superior Court of Caldwell County is

Reversed.

NANNIE SEARS McCAIN AND HUSBAND, DACUS P. McCAIN, JR. v. BETTY SEARS WOMBLE AND HUSBAND, BENNIE WOMBLE, EARL O. SEARS AND WIFE, ELSIE B. SEARS, AND BARBARA ANN S. BERGE AND HUSBAND, PHIL BERGE.

(Filed 24 November, 1965.)

1. Partition § 12—

The fact that the life tenant's three children, who are the contingent remaindermen under a devise of a share in common to their mother for life with remainder to her next of kin, join and are joined with their mother in an exchange of deeds executed solely for the purpose of partition with another of the tenants in common, is no evidence that the parties treated the contingent remaindermen as owning a vested remainder.

2. Wills § 27—

Testator's intent must be ascertained from the language used by him in the instrument and not what others think the language means.

3. Same—

The intent of testator is to be gathered from the four corners of the will, and the intent as thus ascertained must be given effect unless contrary to some rule of law or at variance with public policy.

4. Same—

When the language of a will clearly expresses the intent of testator which is consonant with rules of law and public policy, such intent must be given effect, and extrinsic evidence is not competent to establish a different intent. This rule includes the designation of beneficiaries.

5. Same—

Ordinary words will usually be given their ordinary meaning, and technical words will be construed in their technical sense unless the will discloses a contrary intent.

6. Wills § 45—

The words "next of kin" will be interpreted as having the established technical sense of "nearest of kin" unless the will indicates that testator did not use them in their technical sense.

7. Same; Wills § 43—

The will in question devised a life estate to testator's daughter with remainder to her "next of kin." *Held:* There being nothing in testator's will to indicate that he did not intend to use the words "next of kin" in their technical sense, such meaning must be ascribed to them, and the will devises a *contingent remainder to the children of the life tenant,* and precludes the principle of representation.

APPEAL by petitioners and respondents Betty Sears Womble and her husband, Bennie Womble, from *Hubbard, J.*, January 1965 Civil Session of NASH.

The undisputed facts involved herein are as follows:

Isaac Womble (Isaac), in 1899, executed a will whereby he devised and bequeathed to his wife Cherry a life estate in all his real and personal property for the term of her natural life or widowhood. In the fifth item of his will, Isaac devised in fee simple, subject to his wife's life estate, all his real property to his children, Ella, Mary, James, Dorsey and Martha, setting forth in his will that he had already given to his five other children, naming them, all of his estate he intended for them to have. Isaac directed that after the death of his wife, his children named in Item 5 of said will should divide the real property devised so that "each of said five children to have the same number of acres as near as can reasonably be to make just partitions * * *." In February 1903 the testator executed a codicil to his will whereby the fifth item was changed so that "all the property, real and personal, which I have given herein to Mary Womble be loaned to her for life, and after her death be given to her next of kin." Isaac died on 15 September 1903, seized of some 260 acres of land in Nash County, North Carolina, survived by his wife Cherry and ten children, the five mentioned in Item 5 of his will and the other five for whom he had already provided.

In November 1905, James, Dorsey, Ella, Mary and Martha and their spouses were parties to an *ex parte* proceeding in Nash County Superior Court. In that proceeding it was alleged and determined that James and Isaac, subsequent to the execution of Isaac's will and prior to his death, had agreed to purchase from one Batchelor a 107-½ acre tract of land, the same being separate and in addition to the 260 acre tract held by Isaac at his death; that Isaac should pay the first of three installments and James the latter two; that upon James' paying the latter two installments, Isaac would execute a deed in fee

simple to James for the 107-½ acre tract which James would take in lieu of his interest in Isaac's estate under the fifth item of his will. Judgment was rendered whereby a deed to the 107-½ acre tract was executed by Isaac's executor, under commission of the court, to James. James, in turn, executed a deed conveying his interest in the tract devised to him under the fifth item of the will to Dorsey, Ella, Mary and Martha, thereby vesting in them title to the real estate devised in Item 5 of the will, which gave Dorsey, Ella, Mary and Martha each an undivided one-fourth interest in said tract of land. Cherry Womble died 22 December 1932.

In 1909, commissioners appointed by the Clerk of the Superior Court of Nash County, to divide the lands of the said Isaac Womble according to the provisions of his last will and testament allotted certain lands (Lot No.4) of Isaac to Ella W. Calhoun. However, Mary Womble Sears went into possession of Lot No. 4 and was recognized as the owner thereof. Ella went into possession of Lot No. 2 which had been allotted to Mary.

In 1934, Ella executed a quitclaim deed to Mary W. Sears and Mary's children, Cicero Sears, Betty Sears Womble and Nannie Sears Trussell (now Nannie Sears Trussell McCain) in which Ella quitclaimed all her interest in Lot No. 4. Mary and her aforementioned children executed to Ella a quitclaim deed to Lot No. 2, quitclaiming their interest in and to said lot.

Mary died in 1962, survived by Betty Sears Womble and Nannie Sears McCain, her daughters, and Earl O. Sears and Barbara Ann Sears Berge, children of her son Cicero who had predeceased her.

Nannie Sears Trussell McCain is the petitioner in this action against Betty Sears Womble, her sister, and Earl O. Sears and Barbara Ann Sears Berge, children of Cicero Sears, her deceased brother, to determine the interest of the parties in Lot 4 of Isaac's land. The respective spouses of each are also parties to this proceeding.

Petitioner alleges that upon the death of her mother, Mary Womble Sears, she became seized in fee absolute of a one-half undivided interest in and to Lot No. 4.

The trial judge found as a fact that the term "next of kin," as used in Isaac's will, was not used in a clear and unambiguous fashion, and "upon inquiry into the surrounding circumstances at the times the Will and Codicil were executed, the court finds that Isaac Womble intended that the property devised to Mary would be held by her for life, with any remainder to Mary's children, if any (the children of any deceased child to take the share that their parent would have

taken if living), and if Mary had no children, then to her brothers and sisters. Isaac Womble did not intend to disinherit the children of any child of Mary who might die before Mary."

Judgment was rendered to the effect that Nannie Sears Trussell McCain and Betty Sears Womble each owns a one-third interest in Lot No. 4, and that Earl O. Sears and Barbara Ann Sears Berge each own a one-sixth undivided interest in said lot. From this judgment, petitioners and respondents Betty Sears Womble and her husband appeal, assigning error.

Valentine & Valentine for Betty Sears Womble and husband, respondent appellants.

Field & Cooper and Leon Henderson, Jr., for Nannie Sears McCain and husband, petitioner appellants.

Battle, Winslow, Merrell, Scott & Wiley for respondents Sears, appellees.

Evans & Shannonhouse for respondents Berge, appellees.

DENNY, C.J. This matter was heard by the court below without a jury, a jury having been expressly waived by counsel for all parties. The court heard the evidence and examined the proof offered by the respective parties, found the facts, and entered judgment as hereinabove set out.

Appellants' assignment of error No. 5 is based on an exception to finding of fact No. 10, which reads as follows:

> "By their dealings with the lands devised in the residuary clause of Isaac Womble's Will (including the exchange of deeds in 1934 described in paragraph 6 of the petition) the heirs of Isaac Womble, including the parties to this proceeding, have over a period of many years given a practical construction to the term of said Will and Codicil, recognizing between themselves that Mary Womble Sears held a life estate, and that there was a vested remainder in each of the said three children, so that upon the death of any child the children of said deceased child would take the share that their parent would otherwise have received."

In our opinion, neither the oral evidence nor the documentary proof admitted in the hearing below, supports this finding of fact.

It is true that the quitclaim deed from Ella Calhoun named Mary Womble Sears and her three children as grantees in the deed in which Ella quitclaimed to the grantees her interest in Lot No. 4 of Isaac's

land. It clearly appears, however, that this deed was executed for the sole purpose of vesting title to Lot No. 4 in Mary Womble Sears in the exact manner she would have held it under the terms of her father's will and codicil had she been allotted Lot No. 4 of Isaac's land in the partition proceedings, and the deed so stipulates. This deed in no way purports to add to or take from the devise Isaac made to his daughter Mary, but on the contrary purports to vest in Mary a life estate in said Lot No. 4, then, at her death, to go to her next of kin in fee simple.

Now with respect to what Isaac intended by limiting Mary's interest in his estate to an estate for life and after her death to go to her next of kin. Isaac's will must be interpreted from the language used by him and not according to what others might think he meant or what he might have thought the words "next of kin" meant, unless he had expressed a different meaning with respect thereto.

This Court has repeatedly held that the intent of the testator is the polar star that must guide the courts in the interpretation of a will. 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. *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356; *Smith v. Mears,* 218 N.C. 193, 10 S.E. 2d 659; *Williams v. Rand,* 223 N.C. 734, 28 S.E. 2d 247; *House v. House,* 231 N.C. 218, 56 S.E. 2d 695; *Elmore v. Austin,* 232 N.C. 13, 59 S.E. 2d 205; *Mewborn v. Mewborn,* 239 N.C. 284, 79 S.E. 2d 398; *Clark v. Connor,* 253 N.C. 515, 117 S.E. 2d 465; Strong's North Carolina Index, Vol. IV, Wills, § 27, page 502, *et seq.*

In the case of *Elmore v. Austin, supra,* Ervin, J., speaking for the Court said:

> "In construing a will, the court seeks to ascertain and carry into effect the expressed intention of the testator, *i.e.,* the intention which the will itself, either explicitly or implicitly, declares. * * * Where the language employed by the testator is plain and its import is obvious, the judicial chore is light work; for in such event, the words of the testator must be taken to mean exactly what they say. * * * But where the language in the will does not clearly express the testator's purpose, or when his intention is obscure because of the use of inconsistent clauses or words, the court finds itself confronted by a perplexing task. In such case, the court calls to its aid more or less arbitrary canons or rules of testamentary construction designed by the law to resolve any doubts in the language of the testator in favor of interpretations which the law deems desirable. 57 Am.

Jur., Wills, §§ 1120, 1124; Am. Law Inst. Restatement, Property, Vol. 3, § 243."

Appellants also assign as error the signing and entry of the judgment on the ground the same is not supported by competent evidence and is erroneous in law.

In *Shoup, Smith and Wallace v. Trust Co.*, 245 N.C. 682, 97 S.E. 2d 111, it is said:

"Ordinarily, extrinsic evidence is admissible to identify persons embraced within a class to whom a devise or bequest has been made. However, in the absence of ambiguous language in the will, extrinsic evidence, either parol or written, may not be admitted 'to vary, contradict, or add to the terms of the will, or to show a different intention on the part of the testator from that disclosed by the language of the will, * * *.' 57 Am. Jur., Wills, § 1040, page 674; *Field v. Eaton,* 16 N.C. 283; *Reeves v. Reeves,* 16 N.C. 386; *Blacknall v. Wyche,* 23 N.C. 94; *Kinsey v. Rhem,* 24 N.C. 192; *Barnes v. Simms,* 40 N.C. 392, 49 Am. Dec. 435; *Thomas v. Lines,* 83 N.C. 191; *Wooten v. Hobbs,* 170 N.C. 211, 86 S.E. 811; *Trust Co. v. Wolfe, ante,* 535, 96 S.E. 2d 690, and cited cases; Anno. — Will — Construction — Extrinsic Evidence, 94 A.L.R. 26."

In the case of *Clark v. Connor, supra,* this Court said:

"* * * Ordinarily nothing is to be added to or taken from the language used, and every clause and every word must be given effect if possible. Generally, ordinary words are to be given their usual and ordinary meaning, and technical words are presumed to have been used in a technical sense. If words or phrases are used which have a well-defined legal significance, established by a line of judicial decisions, they will be presumed to have been used in that sense, in the absence of evidence of a contrary intent. * * *"

In the absence of some expression to show the testator meant otherwise, the words "next of kin" have had a well-defined legal significance and have been uniformly interpreted to mean nearest of kin. *Jones v. Oliver* (1844), 38 N.C. 369; *Simmons v. Gooding* (1848), 40 N.C. 382.

In the last cited case Pearson, J., later C.J., said:

"If to the words 'next of kin' these words had been added, 'as in case of intestacy' or 'as by the statute of distributions,' or if

> the language of that statute had been adopted, 'to the next of kin in equal degree, or to those who legally represent them,' we might have included the grandchildren; but upon the words 'next of kin,' simply, they cannot be included. Children are in the first degree; grandchildren are in the second degree. We have no right to bring grandchildren as near as children, unless the testator had made known to us by his will that such was his intention."

We find nothing in the will of Isaac Womble to indicate that he did not intend to use the words "next of kin" in the technical sense which these words have been construed to mean in our long line of judicial decisions. *Redmond v. Burroughs,* 63 N.C. 242; *Harrison v. Ward,* 58 N.C. 236; *Williamson v. Cox,* 218 N.C. 177, 10 S.E. 2d 662; *Williams v. Johnson,* 228 N.C. 732, 47 S.E. 2d 24; *Trust Co. v. Bass,* 265 N.C. 218, 143 S.E. 2d 689.

In the last cited case, Sharp, J., speaking for the Court, said:

> "* * * It is the rule in this jurisdiction, as well as in England and a substantial number of the other American jurisdictions, that the words *next of kin* 'mean "nearest of kin" and that in the construction of deeds and wills, unless there are terms in the instrument showing a contrary intent, the words "next of kin," without more, do not recognize or permit the principle of representation.' * * *"

We hold that Nannie Sears McCain and Betty Sears Womble each owns an undivided one-half interest in Lot No. 4 of Isaac's land, and that Earl O. Sears and Barbara Ann Sears Berge have no right, title or interest in said tract of land.

This cause will be remanded to the end that judgment be entered in accord with this opinion.

Reversed and remanded.

MRS. LYDIA S. WISE, PLAINTIFF v. ARTHUR HOYLE VINCENT, ORIGINAL DEFENDANT AND QUEEN CITY COACH COMPANY, CARL JERRY BALL AND WARREN CHARLES JONES, ADDITIONAL DEFENDANTS.

AND

MRS. LYDIA L. STRONACH, PLAINTIFF v. ARTHUR HOYLE VINCENT, ORIGINAL DEFENDANT AND QUEEN CITY COACH COMPANY, CARL JERRY BALL AND WARREN CHARLES JONES, ADDITIONAL DEFENDANTS.

(Filed 24 November, 1965.)

1. Torts § 4—

The original defendant is entitled to have an additional defendant joined for contribution under G.S. 1-240 upon allegation of facts supporting the conclusions that the additional defendant was guilty of negligence which concurred in proximately causing plaintiff's injuries, notwithstanding the original defendant also alleges in the alternative that the additional defendant was guilty of negligence constituting the sole proximate cause of the injury and also that, if the original defendant were negligent, the negligence of the additional defendant intervened and insulated such negligence.

2. Automobiles § 42f—

The fact that a vehicle collides with the rear of a preceding vehicle furnishes some evidence of negligence in following too closely or in failing to keep a proper lookout.

3. Negligence § 8—

There may be two or more proximate causes of an injury, and if negligence from separate and distinct sources or agencies, even though operating independently of each other, join and concur in producing the result complained of, the author of each is liable.

4. Negligence § 7—

If any degree, however small, of causal negligence is attributable to a person, he incurs liability therefor.

5. Negligence § 8—

If the negligence of one party continues up to the moment of impact, such negligence cannot be insulated by the negligence of another.

6. Automobiles § 43— Allegations and evidence held to raise issue of concurring negligence for the determination of the jury.

The verdict of the jury established that the original defendant was guilty of negligence proximately causing plaintiffs' injuries, resulting when the original defendant's car struck the rear of the standing car in which they were passengers. The allegations and evidence of the original defendant were to the effect that the original defendant was slowing down in an attempt to stop before hitting the standing vehicle when the additional defendant's vehicle struck the rear of his vehicle, causing it to collide with even greater force with the standing vehicle. *Held:* Demurrer to the original defendant's cross-action for contribution was properly denied.

APPEAL by additional defendant, Warren Charles Jones, from *Pless, J.*, October 1964 Civil Session of AVERY.

The actions grew out of a multi-vehicle collision which occurred about 6:00 P.M. on 11 June 1962 on U. S. Highway 70 about two miles west of Swannanoa at or near the intersection of said highway and the Buckeye Cove Road. At this location the highway is thirty feet wide and has three traffic lanes. At the time of the collision the weather was clear and the highway was dry. Plaintiff Wise was the owner and operator of a Chevrolet automobile which was headed east and had been stopped and was standing in the south lane of Highway 70 behind a passenger bus. Plaintiff Stronach was a passenger in the Chevrolet. While standing behind the stopped bus, the Chevrolet was struck in the rear by an automobile owned and operated by defendant Vincent. Plaintiffs were injured and each filed suit against Vincent. The actions were later consolidated for trial. The pleadings in the two actions are, so far as this appeal is concerned, so nearly identical that we treat them herein as though a single action is involved.

Plaintiffs allege that the collision and the injuries suffered by them were caused by the negligence of defendant Vincent, and that he was negligent in failing to keep a reasonable lookout, failing to keep his vehicle under proper control, and operating his car at a speed greater than was reasonable and prudent under the circumstances.

Defendant Vincent, answering, denies that he was negligent and says: (a) He was going east and as he approached the place where the accident occurred he saw the bus and the Chevrolet stopped behind it, he applied brakes and was in the act of stopping and would have done so except that Arthur Warren Jones, driving his Ford automobile, struck the rear of his (Vincent's) car, causing it to go forward and collide with the Chevrolet. (b) The injuries to plaintiffs were proximately caused by the negligence of Jones, and Jones was negligent in that he was not keeping a reasonable lookout, was operating his Ford at an unlawful speed, failed to keep his car under proper control, and was following too closely. (c) If Vincent was negligent, which he denies, his negligence was insulated by the intervening negligence of Jones. (d) If Vincent was negligent, which he denies, the negligence of Jones joined and concurred with his negligence in producing the injuries to plaintiffs, and Vincent is entitled to contribution from Jones, G.S. 1-240.

On motion of Vincent, Jones was made an additional defendant in order that Vincent might prosecute his cross-action against him for contribution. (Queen City Coach Company, owner of the bus in question, and Carl Jerry Ball, driver of the bus, were also made

additional defendants, but Vincent took voluntary nonsuits as to them before trial.)

Additional defendant Jones, answering, denies that he was negligent and avers that the negligence of Vincent was the sole proximate cause of the collision and the resulting injuries to plaintiffs.

When the cases came on for trial Jones demurred *ore tenus* to original defendant Vincent's cross-action on the ground that Vincent "has failed to state a cause of action for affirmative relief or otherwise." The demurrer was overruled and Jones excepted.

The jury found that plaintiffs were injured by the negligence of original defendant Vincent, awarded plaintiffs substantial damages, and found that additional defendant Jones was jointly and concurrently negligent in causing the injuries. Judgment was entered in favor of plaintiffs against the original defendant for the amounts specified in the verdict, and in favor of the original defendant against additional defendant Jones for one-half of the recoveries.

Fouts & Watson for Original Defendant, appellee.
Uzzell & Dumont for Additional Defendant, appellant.

MOORE, J. The first question raised is whether original defendant Vincent states facts sufficient to constitute a cause of action for contribution against additional defendant Jones.

The applicable rules of law are stated in *Hayes v. Wilmington,* 243 N.C. 525, 91 S.E. 2d 673, as follows:

> "1. Liability for contribution under the provisions of G.S. 1-240 may not be invoked except among *joint* tortfeasors. Therefore, in order for one defendant to join another as a third-party defendant for the purpose of contribution, he must allege facts sufficient to show *joint* tortfeasorship and his right to contribution in the event plaintiff recovers against him. *Hayes v. Wilmington,* 239 N.C. 238, 79 S.E. 2d 792.
>
> "2. In order to show *joint* tortfeasorship, it is necessary that the facts alleged in the cross complaint be sufficient to make the third party liable to the plaintiff along with the cross-complaining defendant in the event of a recovery by the plaintiff against him. *Hunsucker v. Chair Co.,* 237 N.C. 559, 75 S.E. 2d 768. Also, the allegations of the cross complaint must be so related to the subject matter declared on in the plaintiff's complaint as to disclose that the plaintiff, had he desired to do so, could have joined the third party as a defendant in the action. *Hobbs v. Goodman,* 240 N.C. 192, 81 S.E. 2d 413; *s.c.,* 241 N.C.

297, 84 S.E. 2d 904. However, it is established by our decision that when a defendant in a negligent injury action files answer denying negligence but alleging, conditionally or in the alternative, that if he were negligent, a third party also was negligent and that the negligence of such third party concurred in causing the injury in suit, the defendant is entitled, on demand for relief by way of contribution, to have such third person joined as a co-defendant under the statute, G.S. 1-240. *Freeman v. Thompson,* 216 N.C. 484, 5 S.E. 2d 434; *Lackey v. Sou. Ry. Co.,* 219 N.C. 195, 13 S.E. 2d 234; *Wilson v. Massagee,* 224 N.C. 705, 32 S.E. 2d 335."

In applying legal principles to the pleadings in that case, the opinion states:

"True, the allegations to the effect that the negligence of the power company concurred with the negligence of Cooper and Neal are made in the alternative, expressly conditioned upon actionable negligence being found against them. However, we think such conditional plea of concurrent negligence is sufficient to enable Cooper and Neal to invoke the right of contribution under the statute, G.S. 1-240. There is no merit in the power company's contention that the conditional plea of joint and concurrent negligence as made by Cooper and Neal is a mere conclusion of the pleader to be disregarded. The form of the plea as made has the sanction of the Court. See *Freeman v. Thompson, supra* (216 N.C. 484); *Lackey v. Sou. Ry. Co., supra* (219 N.C. 195); *Mangum v. Sou. Ry. Co.,* 210 N.C. 134, 137, 185 S.E. 644.

"Nor is there any merit in appellee's further contention that the conditional plea of concurrent negligence made by Cooper and Neal is destroyed by their positive denials of negligence and by their allegations of negligence over against other defendants asserted in other portions of their amended answer. As to this contention, it is enough to say that a defendant who elects to plead a joint tortfeasor into his case is not required to surrender other defenses available to him. Nor may an additional party defendant who is brought in as a joint tortfeasor on cross complaint of an original defendant escape the plea against him by borrowing from contradictory allegations made by the cross-complaining defendant by way of defense against the plaintiff or by way of separate pleas over against other defendants. It is elemental that a defendant may set up and rely upon con-

tradictory defenses. *Freeman v. Thompson, supra* (216 N.C. 484)."

The cross-action in the instant case states facts sufficient to charge additional defendant Jones with negligence in several particulars, and these facts are so related to the subject matter of plaintiffs' complaints as to disclose that plaintiffs, had they desired to do so, could have joined Jones as an original defendant in the action. And Vincent also alleges that if it should be found that he was negligent in any respect as charged in the complaints, then the negligent acts and omissions of Jones joined and concurred with his (Vincent's) negligence in causing plaintiffs' injuries. Vincent asks that Jones be made a party defendant, according to the provisions of G.S. 1-240, in order that he may be required to make contribution in case of a recovery by plaintiffs against Vincent. In our opinion the demurrer was properly overruled. See *Read v. Roofing Co.*, 234 N.C. 273, 66 S.E. 2d 821.

Appellant contends that the court erred in overruling his motion for nonsuit of original defendant's cross-action.

The evidence considered in the light most favorable to the original defendant (he occupies the position of plaintiff in his cross-action for contribution) discloses the following facts:

Testimony of original defendant Vincent: He was travelling east and first observed the bus and the Chevrolet stopped behind it when he was about six car lengths away. He was going slightly upgrade. The highway had three lanes, but the center lane was blocked out with yellow marks and there were only two lanes for traffic. When he was five or six car lengths away he took his foot off the accelerator and his car began to slow down; he began to apply brakes when he was four or five car lengths away and he intended to stop behind the Chevrolet. His brakes were holding at first. When he was three or four car lengths from the Chevrolet his car dashed forward and his head snapped back; he was applying his brakes but they were not stopping the car. At that time he did not realize that his car had been struck behind. He wanted to turn left but this movement was delayed momentarily to allow a meeting car to pass. He turned as soon as he could, but the right front of his car struck the left front of the Chevrolet. He then crossed the highway and came to rest in the ditch. While at the scene a highway patrolman showed him red paint on his rear bumper, and the bumper was dented. He then saw a red Ford standing about one and one-half car lengths behind the Chevrolet. The whole front of the red Ford was smashed in, "the hood was slightly ajar and the front end bent

in." The front end of the Chevrolet was up against the right rear of the bus.

Testimony of additional defendant Jones on adverse examination, introduced by Vincent: Jones owned the red Ford and was driving it on this occasion. He was going east. Jones' car struck the rear of Vincent's car. The Vincent car and the Jones car were both moving when they collided. The Vincent car was in the middle lane when it was struck; it then veered to the left and off the highway. After Jones' car struck Vincent's car it stopped immediately; it did not hit the Chevrolet.

Plaintiffs' evidence is not included in the record. But the verdict established the actionable negligence of Vincent and he did not appeal. Plaintiff's complaint alleges that Vincent was negligent as to lookout, control and speed. From the unchallenged verdict and judgment we must assume that one or more of these specifications of negligence on Vincent's part was a proximate cause of the collision of Vincent's car with the Chevrolet in which plaintiffs were seated and that a collision would have occurred regardless of the activities of Jones.

Vincent alleges that Jones was negligent as to lookout, control, speed and following interval. From the evidence it was permissible for the jury to find that when Vincent's car was three or four car lengths from the stopped Chevrolet, it was struck in the rear by Jones' Ford, knocked forward with added momentum, its brakes rendered ineffective and its control rendered more difficult, and the added momentum continued effective to the moment of the impact of Vincent's car on the Chevrolet. The fact that Jones' Ford collided with the rear of Vincent's car furnished some evidence that Jones was negligent as to speed and control, was following too closely, or failed to keep a proper lookout. *Powell v. Cross,* 263 N.C. 764, 140 S.E. 2d 393; *Dunlap v. Lee,* 257 N.C. 447, 126 S.E. 2d 62; *Clark v. Scheld,* 253 N.C. 732, 117 S.E. 2d 838; *Clontz v. Krimminger,* 253 N.C. 252, 116 S.E. 2d 804. There may be two or more proximate causes of an injury. These may originate from separate and distinct sources or agencies operating independently of each other, yet if they join and concur in producing the result complained of, the author of each cause would be liable. *Barber v. Wooten,* 234 N.C. 107, 66 S.E. 2d 690. If any degree, however small, of causal negligence is attributable to a person, he incurs liability thereby. *Rattley v. Powell,* 223 N.C. 134, 25 S.E. 2d 448. The evidence is sufficient to justify a finding that Jones' negligence remained active and effective to the moment of plaintiffs' injuries, concurred with the negligence of Vincent and contributed to the injuries sustained.

The assignments of error relating to the admission of evidence and the charge are not sustained.

No error.

THE HATTERAS YACHT COMPANY v. SNEED HIGH, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

(Filed 24 November, 1965.)

1. Taxation § 23—

A proviso of a taxing statute stipulating that certain transactions should be taxed at a lower rate than that made applicable generally, or providing that as to certain transactions the total tax should not exceed a specified amount, is a partial exception and comes within the rule that statutory exemptions from a tax are to be strictly construed.

2. Statutes § 5—

It will be presumed, when consonant with the context and in the absence of an expression to the contrary, that the Legislature intended that a term used in a statute should be given its natural and ordinary meaning and not its generic meaning, and the statutory or judicial definition of such term in connection with other statutes is not controlling and at best may only throw some light upon the usage in the statute in question.

3. Taxation § 23—

An administrative interpretation of a taxing statute which has continued over a long period of time with the silent acquiescence of the Legislature should be given consideration in the construction of the statute.

4. Taxation § 29—

A pleasure yacht, self-propelled by an internal combustion engine, while a self-propelled motor vehicle, is not one designed primarily for use upon the highways within the meaning of G.S. 105-164.4(1), and is subject to the State's three per cent sales tax, it being apparent that "highways" was not used in the statute in its generic sense.

APPEAL by plaintiff from *Bickett, J.*, 19 April 1965, Civil Session of WAKE.

The plaintiff instituted this action under G.S. 105-266.1 to recover sales taxes paid by it under protest as the result of an assessment of such taxes by the Commissioner of Revenue on account of sales by the plaintiff of motor yachts. The action was tried by the judge without a jury upon stipulated facts, summarized as follows:

On or about 10 November 1961, plaintiff filed with the Commis-

sioner a report showing the following information concerning taxable sales by it of motor yachts:

DATE OF SALE	SALE PRICE	TAX DUE (As Computed by Plaintiff)
12-15-60	$20,206.41	$ 80.00
10-1-61	34,381.95	120.00
10-3-61	16,600.00	120.00

Plaintiff so computed its tax liability on account of these sales upon the theory that the rate of tax upon the 1960 sale was one per cent (1%) of the sale price subject to a maximum tax of $80.00, and that the rate of tax upon the 1961 sales was one per cent (1%) of the sale price subject, in each instance, to a maximum tax of $120.00.

On 19 June 1962, the Commissioner, acting under G.S. 105-241.1, notified plaintiff that he proposed to assess an additional tax of $1,815.64 upon plaintiff on account of the said sales for the reason that the applicable rate of tax as to each of the sales was three per cent (3%) of the sale price with no maximum limit upon the amount of the tax.

On 18 July 1962, plaintiff paid the additional assessment under protest.

By letter dated 19 March 1964, received by the Commissioner on 23 March 1964, plaintiff filed its claim for a refund of the amount so paid under protest. The claim for refund was denied 25 March 1964, and on 3 June 1964, plaintiff requested a hearing before the Commissioner, which hearing was had on 30 June 1964. On 11 September 1964, the Commissioner notified plaintiff that its claim for refund was denied. This action was instituted on 8 October 1964.

Each of the yachts in question is a boat more than 30 feet in length, is designed for use upon the navigable waters of North Carolina and of the United States, and is self-propelled by means of an internal combustion engine, gasoline or diesel, which engine is an integral part of the boat. Each is a pleasure craft not engaged in commercial fishing.

The plaintiff contends that such boat is a "motor vehicle" within the meaning of G.S. 105-164.4(1) and, therefore, the said sales by it are taxable only at the rate and to the extent shown in its original report to the Commissioner. Otherwise, the plaintiff concedes that the additional assessment was proper.

In its administration of the Revenue Act, the Department of Revenue has uniformly construed the term "motor vehicle" as not including pleasure watercraft and has applied the three per cent (3%) tax, without limit, to all sales of such watercraft.

Upon these facts the superior court concluded as a matter of law that the plaintiff had not made timely demand for refund with reference to the tax assessed on account of the sale made on 15 December 1960, but had made such demand in due time as to the two sales in 1961. It further concluded as a matter of law that such yachts are not "motor vehicles" within the meaning of the statute and that the sales thereof are subject to tax at the rate of three per cent (3%) of the sale price. Accordingly, the court entered judgment dismissing the action. The plaintiff did not except to the conclusion that the demand for refund on account of the 1960 sale was not made in due time. Consequently, the only question presented upon this appeal is as to whether such a yacht is a "motor vehicle" within the meaning of G.S. 105-164.4(1).

Rodman & Rodman by Edward N. Rodman for plaintiff appellant.

Attorney General Bruton; Deputy Attorney General Abbott for defendant appellee.

LAKE, J. G.S. 105-164.4, which is part of the North Carolina Sales and Use Tax Act of 1957, as amended, provides:

> "There is hereby levied and imposed, in addition to all other taxes of every kind now imposed by law, a privilege or license tax upon every person who engages in the business of selling tangible personal property at retail * * *. (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 * * *. Provided, however, that in the case of the sale of any airplane, railway locomotive, railway car or the sale of any motor vehicle, the tax shall be only at the rate of one per cent (1%) of the sales price, * * * but at no one time shall the maximum tax with respect to any one such airplane, railway locomotive, railway car or motor vehicle, including all accessories attached thereto at the time of delivery thereof to the purchaser, be in excess of one hundred twenty dollars ($120.00)."

The same section of the statute then defines the term "motor vehicle" as follows:

> "For the purposes of this section, the words 'motor vehicle' mean any vehicle which is self-propelled and designed primarily for use upon the highways, any vehicle which is propelled by electric power obtained from trolley wires but not operated upon

rails, and any vehicle designed to run upon the highways which is pulled by a self-propelled vehicle, but shall not include any implement of husbandry, farm tractor, road construction or maintenance machinery, or equipment, special mobile equipment as defined in G.S. 20-38, nor any vehicle designed primarily for use in work off the highway."

G.S. 105-164.13, which is a part of the same Act, exempts entirely sales of specified types of articles, including sales of "boats" to commercial fishermen for use by them in such fishing. It is stipulated that these yachts do not fall into that category.

Provisions in a tax statute granting exemptions from the tax thereby imposed are to be strictly construed in favor of the imposition of the tax and against the claim of exemption. *Sale v. Johnson,* 258 N.C. 749, 129 S.E. 2d 465; *Distributors v. Shaw,* 247 N.C. 157, 100 S.E. 2d 334; *Investment Co. v. Cumberland County,* 245 N.C. 492, 96 S.E. 2d 341; *Motor Co. v. Maxwell,* 210 N.C. 725, 188 S.E. 389; *Rich v. Doughton,* 192 N.C. 604, 135 S.E. 527. A proviso in such a statute taxing certain transactions at a lower rate than that made applicable in general, or providing that as to certain transactions the total tax shall not exceed a specified amount, there being no such limitation generally, is a partial exemption and is, therefore, to be strictly construed against the claim of such special or preferred treatment.

The Act first imposes a license tax upon "every person who engages in the business of selling tangible personal property at retail" at the rate of three per cent (3%) of the sale price of each article so sold. G.S. 105-164.4(1). This is the general rule, applicable except as otherwise provided to every sale of every type of article. The Act then provides that sales of certain, specified types of articles are "exempted from the tax imposed by this article." G.S. 105-164.13. Provisos incorporated into G.S. 105-164.4(1) create a third class of transactions, as to which the tax is computed at a smaller percentage of the sale price, coupled in some instances with a limitation of the maximum tax to be imposed on account of the sale of any single article within the category. The question for us is, Into which of these classes of transactions did the Legislature intend a sale of a pleasure yacht, self-propelled by an internal combustion engine, to fall?

Obviously, a sale of such a yacht falls within the general classification subject to the three per cent (3%) rate of tax, unless the yacht is a "motor vehicle." Whether such a yacht is a motor vehicle within the usual meaning of that term is immaterial, for the

Legislature in this statute has defined a motor vehicle to be "any vehicle which is self-propelled and designed primarily for use upon the highways." It is stipulated that the yachts in question are self-propelled and they are, of course, vehicles. We come, therefore, to the question, Is a yacht designed primarily for use upon the highways? The statute does not define "highways."

Definitions of "highway" contained in other statutes are not controlling. The same is true of judicial constructions of the term as used in other statutes. At best, they only throw some light upon the normal usage of the term, for, nothing else appearing, the Legislature is presumed to have used the words of a statute to convey their natural and ordinary meaning. *Seminary v. Wake County,* 251 N.C. 775, 112 S.E. 2d 528. The question is, What did the Legislature mean by "highways" as used in this proviso granting a special, partial exemption from a tax?

There have been numerous decisions by this Court and by the courts of other jurisdictions, which, when read without regard to the matters then at issue, appear to give support to the contention of the plaintiff. Thus, in *Parsons v. Wright,* 223 N.C. 520, 521, 27 S.E. 2d 534, this Court said, "The term highway is the generic name for all kinds of public ways, whether they be carriage-ways, bridle-ways, foot-ways, bridges, turnpike roads, railroads, canals, ferries or navigable rivers." In *Taylor v. Paper Co.,* 262 N.C. 452, 457, 137 S.E. 2d 833, the Court said, "A navigable stream is a public highway," and in *Gaither v. Hospital,* 235 N.C. 431, 444, 70 S.E. 2d 680, it was said, "[N]avigable waters constitute a public highway, which the public is entitled to use for the purposes of travel either for business or pleasure." A careful reading of these decisions reveals, however, that in each of them the Court was concerned with the right of the plaintiff to travel upon or use a particular way, or to prevent an obstruction thereof, or to acquire a different way across the land of another. For similar expressions from other jurisdictions see: *Summerhill v. Shannon,* 235 Ark. 617, 361 S.W. 2d 271 (use of a road upon the grounds of a school); *Canard v. State,* 174 Ark. 918, 298 S.W. 24 (defendant charged with driving while drunk upon a paved road within the grounds of a fair); *Trucking Co. v. Bowers,* 173 Oh. St. 31, 179 N.E. 2d 346 (refund of gasoline tax); *Toy v. Atlantic ETC. Co.,* 176 Md. 197, 4 A. 2d 757 (obstruction of a navigable stream); *Savage Truck Line v. Commonwealth,* 193 Va. 237, 68 S.E. 2d 510 (miles traveled on ferry included in computing tax due State for use of highways). We think the true rule was stated by the Supreme

Court of Illinois in *People v. Wheeling,* 24 Ill. 2d 267, 181 N.E. 2d 72, where it said:

> "The term 'highway' is a generic one 'frequently used in a very broad sense with the result that no fixed rule with regard to its meaning can be given, and its construction depends on the intent with which it is used, as determined by the context.' (39 C.J.S., Highways, § 1). In discussing the meaning to be given to the term 'highway' it has been pointed out that whether 'streets, ferries, railroads, toll roads, rivers or rural roads are all meant to be included in a particular statute can not, in many instances, be asserted without a careful study of the entire statute and a full consideration of all the matters which the courts usually call to their assistance in ascertaining the meaning and effect of legislative enactments.' " See also, 1 Elliott, Roads and Streets (4th Ed.), § 1.

Though this Court had said in *Parsons v. Wright, supra,* that a railroad is a highway within the broad, generic sense, and though a locomotive is a self-propelled vehicle designed primarily for use upon such a road, the Legislature at the 1963 session amended G.S. 105-164.4(1) so as to insert "railway locomotive" in the proviso here in question. This seems a clear indication that the Legislature did not intend that "highway" would be interpreted in the broad, generic sense in the definition of "motor vehicle" contained in this same proviso.

The parties have stipulated, "It has been the long-standing and uniform administrative interpretation of the Department of Revenue to classify pleasure water craft as subject to the 3% sales and use tax rather than as 'motor vehicles' within the intent and purview of the Sales and Use Tax Act." An administrative interpretation of a tax statute which has continued over a long period of time with the silent acquiescence of the Legislature should be given consideration in the construction of the statute. *Knitting Mills v. Gill,* 228 N.C. 764, 47 S.E. 2d 240. The growing use of pleasure watercraft in this State increases the likelihood that the Department's view of the matter has been well known. The Legislature has not seen fit to change the language of the statute. On the contrary, at the 1965 session Senate Bill No. 75 was introduced for the purpose of amending the proviso in G.S. 105-164.4(1) by inserting the word "boat" following the word "airplane." The proposed change in the Act was not enacted. The legislative record indicates that the bill was not brought to a vote.

In normal usage the word "highway" does not connote a waterway, and we think it clear that a strict construction of this statute does not show an intent by the Legislature to take sales of pleasure yachts out of the general class of sales which are taxed at three per cent (3%) of the sale price. The assessment of the additional tax was in accord with the statute and the dismissal of this action for refund was proper.

Affirmed.

STATE v. JACK GUTHRIE, JACK DAVIS AND EUGENE THOMAS.

(Filed 24 November, 1965.)

1. Conspiracy §§ 3, 4—

Conspiracy to commit an unlawful act and the commission of the unlawful act are separate offenses, and under an indictment charging unlawful conspiracy and the commission of the unlawful act pursuant to the conspiracy a defendant may be convicted of the substantive offense, even though the jury finds him not guilty of conspiracy, and the words "in furtherance of the unlawful conspiracy" in the charge of the substantive offense will be treated as surplusage.

2. Conspiracy § 3—

A conspiracy is an agreement by two or more persons to do an unlawful act, or to do a lawful act in an unlawful way or by unlawful means, and it is not necessary that the agreement be accomplished, the agreement itself being the offense.

3. Conspiracy § 5—

Acts and declarations of co-conspirators in furtherance of the common design are admissible against all co-conspirators.

4. Schools § 15; Criminal Law § 65— Evidence of identity of defendant as one of crowd disturbing school and defacing property held for jury.

Evidence tending to show that numerous persons who were opposed to the consolidation of the high schools in question came upon the grounds of one of the schools, that one of them broke open the transom and entered a locked schoolroom while class was in session, unlocked the door, that members of the crowd removed the teacher bodily from the building, together with testimony of the teacher in pointing out one of defendants, that he thought that defendant was one of the crowd who carried him out, *held* sufficient to be submitted to the jury in a prosecution of such defendant under G.S. 14-273, but as to the other defendants, nonsuit should have been entered for want of evidence identifying them as members of the crowd.

APPEAL by defendants from *McLean, J.*, May Criminal Session 1965 of MADISON.

Defendants Jack Guthrie, Jack Davis and Eugene Thomas were tried upon a bill of indictment charging in the first count that Paul Ballard, Jack Guthrie, Eugene Thomas, Joe Fowler, Jack Davis, Herbert Baker and Jeter Roberts "did unlawfully, wilfully, and feloniously agree, plan, combine, conspire and confederate, each with the other, to unlawfully, wilfully and feloniously interrupt and disturb the public school at Walnut, North Carolina, within and without the Walnut School building where said school was being held on the 22nd day of August, 1962 * * *." The second count of the bill of indictment charged that the above-named defendants "did unlawfully, wilfully interrupt and disturb the public school at Walnut, North Carolina, by assaulting teachers and lunch room personnel and defacing and damaging Walnut School property, all in furtherance of the unlawful conspiracy aforesaid * * *."

The State was permitted to proceed to trial against these defendants and Jeter Roberts on the above bill of indictment, and to continue the case against Joe Fowler and Herbert Baker, according to the record. The record is silent as to what disposition, if any, was made of the case against Paul Ballard.

During the trial and before defendants had an opportunity to offer evidence, Jeter Roberts became ill and a mistrial was ordered and the case continued as to him.

The State's evidence tends to show that action had been taken by the Madison County Board of Education to consolidate Walnut High School with the Marshall High School and to transfer all the seventh and eighth grade students at Marshall to the Walnut School.

Many people in the Walnut school district strenuously objected to the consolidation of the two high schools. Two public meetings were held to protest the consolidation, one on 14 August 1962 and another on Tuesday night, 21 August 1962. At the first meeting approximately $600.00 was subscribed for the purpose of employing counsel to oppose the consolidation. At the second meeting, consisting of between one to three hundred persons, ways and means were discussed to defeat the consolidation. These defendants were present at this meeting. Roy Ramsey attended the second meeting and testified for the State that Joe Fowler "told them how they would fight consolidation. He said we'll bring the kids in here, let they stay at Walnut, where they belong; we won't let them go to Marshall; we'll bring them to the Walnut School for ten days and at the end of ten days we'll see what happens. He (Fowler) was referring to all the high

school children that had normally been going to Walnut High School."

On the morning of 22 August 1962, the first day of the 1962-1963 school year at Walnut School, defendants Guthrie, Davis and Thomas, and approximately 100 to 150 "outsiders," were present at or about the Walnut School. Auburn Wyatt, principal of the Walnut School, testified for the State that, "* * * (T)here was just a lot of people inside the building milling around, a lot of people on the outside milling around * * * some of them were * * * high school students * * * some of them were adults."

Floyd Wallin, a school bus driver on 22 August 1962, stopped his school bus on the road in front of the Walnut School to allow his passengers to alight therefrom. Joe Fowler, Herbert Baker and defendant Thomas got on the bus. Wallin testified that Thomas "told me to take it (the bus) out to the church * * * and park it, (that) I wasn't taking no children on to Marshall to school and for me to surrender the keys to them, (that) they didn't want no trouble. * * * I gave Eugene Thomas the keys." Wallin recovered his keys from the school principal's office in time to carry the students home.

Leroy Gosnell, a school bus driver on 22 August 1962, testified for the State that he saw defendants Thomas and Guthrie inside the Walnut School and heard defendant Thomas remark "something in the manner of let's go down the hall and get the teachers, but I believe he said Mr. Deaton, the teacher Deaton, some way like that, anyway Deaton's name was mentioned * * *."

U. B. Deaton, a teacher at the Walnut School on 22 August 1962, testified for the State that while he was in his classroom, with the door locked and some of his pupils present, "a crowd * * * in the hall, of men and boys * * * hoisted someone on their shoulder and knocked * * * the transom loose, and came down inside the room and opened the door from the inside. * * * (T)here was a crowd of men and boys in the hall, they rushed into the room making mild threats. * * * (T)hey forcibly removed me from the classroom * * * through the hall, down the stairway and ordered me not to return to the building. * * * Six to eight men picked me up and carried me from the classroom. I did not know any of those men at that time. I have since learned who some of them were. * * * I can't remember their names, maybe faces." When inquiry was made as to whether he saw any of the men who helped carry him out of his classroom sitting with defense counsel, the witness indicated he recognized one wearing a striped shirt, sitting at the end of the table. Defendant Thomas was requested to stand. Thomas stood up. The

witness was then asked the question, "Is that the one you referred to, Mr. Deaton?" The witness answered, "I think it was, yes." Then on cross examination, Mr. Deaton stated, "Yes, sir, I believe he (Thomas) was one of them."

The jury found defendants not guilty on the first count but guilty on the second count. Each defendant was sentenced to seven months in the common jail of Madison County, to be assigned to work under the supervision of the Prison Department, as provided by law. From the judgments imposed, defendants appeal, assigning error.

Attorney General Bruton, Deputy Attorney General Ralph Moody, Staff Attorney Andrew A. Vanore, Jr., for the State.

Mashburn & Huff for defendants.

DENNY, C.J. We shall not undertake a *seriatim* discussion of the 225 assignments of error based on the more than 500 exceptions set out in the record.

The first assignment of error is to the refusal of the court below to quash the second count in the bill of indictment, to wit, that the defendants "did unlawfully, wilfully interrupt and disturb the public school at Walnut, North Carolina, by assaulting teachers and lunch room personnel and defacing and damaging Walnut School property, all in furtherance of the unlawful conspiracy aforesaid, * * *" charging a violation of G.S. 14-273, which reads in pertinent part as follows:

> "If any person shall wilfully interrupt or disturb any public or private school * * *, within or without the place where such * * * school is held, or injure any school building, or deface any school furniture, apparatus or other school property, * * * he shall be guilty of a misdemeanor, and shall, upon conviction, be fined or imprisoned or both in the discretion of the court."

The defendants contend that since the substantive charge set out in the second count in the bill of indictment is followed by the words, "all in furtherance of the unlawful conspiracy aforesaid," the defendants having been acquitted on the conspiracy count, they cannot be convicted of the substantive charge contained in the second count. This identical contention was raised in *S. v. McCullough,* 244 N.C. 11, 92 S.E. 2d 389, and we held: "The fact that the second count states that the substantive offense was committed pursuant to the conspiracy, will be treated as surplusage." This assignment of error is overruled.

Defendants also assign as error the refusal of the court below to sustain their motion for judgment as of nonsuit as to the second count in the bill of indictment, made at the close of the State's evidence and renewed at the close of all the evidence.

A conspiracy is an agreement by two or more persons to do an unlawful act, or to do a lawful act in an unlawful way or by unlawful means, and it is not necessary that the agreement be accomplished, the agreement itself being the offense. *S. v. Potter,* 252 N.C. 312, 113 S.E. 2d 573; *S. v. Hedrick,* 236 N.C. 727, 73 S.E. 2d 904; *S. v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686; *S. v. Whiteside,* 204 N.C. 710, 169 S.E. 711. Acts and declarations of co-conspirators in furtherance of the common design are admissible against all conspirators. *S. v. Kirkman,* 252 N.C. 781, 114 S.E. 2d 633.

While there was voluminous evidence in the trial below tending to show the existence of a conspiracy to obstruct and prevent the execution of the order of the Madison County Board of Education, consolidating the Walnut High School with the Marshall High School and the transfer of the seventh and eighth grade students from the Marshall School to the Walnut School, the jury did not so find and acquitted the defendants on the conspiracy count. Therefore, it is necessary, in order to sustain a conviction of the defendants on the second count, for the State to show beyond a reasonable doubt that each defendant violated the statute, G.S. 14-273, as charged in the second count.

There is evidence tending to show that defendant Thomas and other unidentified persons, on 22 August 1962, forcibly removed U. B. Deaton, a teacher at Walnut School, from his classroom and from the school building, and ordered him not to return thereto. On the other hand, there is no evidence tending to show that Jack Guthrie or Jack Davis assaulted any teacher or lunch room employee, or that they or either of them interferred with any teacher or lunch room employee in any manner whatsoever; neither is there any evidence tending to show that they or either of them defaced and damaged any of the Walnut School property.

We have carefully studied the evidence against these defendants and, in our opinion, the evidence adduced in the trial below was insufficient to carry the case to the jury on the second count against Jack Guthrie and Jack Davis, and the motion for judgment as of nonsuit on the second count, as to them, should have been allowed. However, as to defendant Eugene Thomas, in our opinion the evidence was sufficient to require its submission to the jury on the second count, and we so hold; therefore, the motion for judgment as of nonsuit, as to him, was properly overruled.

The defendants assign as error numerous portions of the court's charge to the jury on the second count in the bill of indictment. A careful examination of these assignments fails to show any prejudicial error, and they are overruled.

Consequently, the verdict and judgments against Jack Guthrie and Jack Davis are reversed, and the verdict and judgment against Eugene Thomas will be upheld.

As to defendants Guthrie and Davis —

Reversed.

As to defendant Thomas —

No error.

GEORGE K. CUTTER, JOHN H. CUTTER, III, AND GEORGE K. CUTTER, JR. v. CUTTER REALTY COMPANY, INC., A CORPORATION, J. H. CUTTER AND COMPANY, INC., A CORPORATION, E. C. GRIFFITH, W. R. CUTHBERTSON, COLONEL FRANCIS J. BEATTY, MARY ANNE DAVIS, J. B. BOSTICK, I. THEODORE LEADER, TRUSTEE FOR PRUDENTIAL REAL ESTATE TRUST.

(Filed 24 November, 1965.)

1. **Appeal and Error § 6—**

In an action by stockholders to prevent the corporation from conveying realty and to cancel a contract to convey, the question of whether plaintiffs are entitled to file *lis pendens* is not rendered moot by the joinder of the purchaser in the contract to convey, since the notice of *lis pendens* is not limited in its effect to such purchaser.

2. **Lis Pendens—**

Lis pendens is now statutory in this State, and there can be no valid notice of *lis pendens* except in actions of the types enumerated by the statute. G.S. 1-116(a).

3. **Same—**

An unauthorized notice of *lis pendens* may be cancelled upon motion prior to the hearing of the action on its merits. G.S. 1-120 is not applicable to cancellation of an unauthorized notice.

4. **Same—**

The purpose of *lis pendens* is to give notice of a claim which is contra or in derogation of the record.

5. **Same —**

An action by stockholders against the corporation and its subsidiary and the officers and directors thereof to restrain the subsidiary from conveying

land owned by it, to restrain the corporation from assuming the liabilities of the subsidiary, and to rescind a contract for the sale of the land by the subsidiary is not for the purpose of establishing a trust or lien upon realty nor an action "affecting title" within the purview of G.S. 1-116(a), and therefore order cancelling notice of *lis pendens* upon motion was properly entered.

APPEAL by plaintiffs from *Patton, E.J.*, 31 May 1965 Schedule "D" Non-Jury Civil Session of MECKLENBURG.

This is an appeal from an order cancelling and removing from the records of the office of the Clerk of the Superior Court of Mecklenburg County a notice of *lis pendens* filed by the plaintiffs in this action.

The plaintiffs are stockholders of J. H. Cutter & Company, Inc., hereinafter called Cutter & Company. The Cutter Realty Company, hereinafter called the Realty Company, is a wholly owned subsidiary of Cutter & Company.

Cutter & Company formerly owned a tract of land at the corner of East Fourth Street and South Tryon Street in the City of Charlotte. Desiring to construct thereon a multi-story office building, it sought the assistance of the North Carolina National Bank in financing the construction of the building. It caused the Realty Company to be formed as its wholly owned subsidiary and conveyed to the Realty Company the land in question.

The Realty Company then commenced the construction of the building, entering into financial arrangements with the bank. The building has never been entirely completed but is substantially so and practically all of it is, or is soon expected to be, occupied by tenants. For the year ending 31 July 1964, the Realty Company operated at a loss, having then fewer tenants and less rental income than at the time this action was brought.

In the construction of the building indebtedness totalling $4,250,-000 was incurred to the North Carolina National Bank, for which both Cutter & Company and the Realty Company became liable, and in addition the Realty Company incurred indebtedness totalling $750,000 to the general contractor and other creditors, some of whom claimed liens upon the building. All of these debts became due and the two companies were without sufficient funds to pay them. Temporary financing was obtained with which to pay creditors other than the North Carolina National Bank. Permanent financing of the building was not obtained.

A contract for the sale of the building to Prudential Real Estate Trust, hereinafter called Prudential, for $5,300,000 was negotiated and approved by the directors and the stockholders of Cutter & Com-

pany and of the Realty Company, the plaintiffs, who are stockholders of Cutter & Company, being the only shareholders who are opposed to such sale. The contemplated closing date for the proposed sale was 15 June 1965. Immediately upon learning of the proposed sale, the plaintiffs notified Prudential, the North Carolina National Bank, and the officers and directors of both Cutter & Company and the Realty Company of their objection thereto.

On 26 May 1965 the plaintiffs instituted this action, causing summons to be issued, and contemporaneously applied for and obtained from the Clerk an extension of time within which to file their complaint. At the same time the plaintiffs caused to be filed in the office of the Clerk of the Superior Court of Mecklenburg County a notice of *lis pendens* describing the land in question. In their application for an extension of time in which to file their complaint, and in the notice of *lis pendens,* the plaintiffs state the nature and purpose of their action as follows:

> "The nature and purpose of the action is the stockholders of J. H. Cutter and Co., Inc., derivative action to restrain execution by the officers and directors of Cutter Realty Co., Inc. (a wholly owned subsidiary of J. H. Cutter and Co., Inc.) of a deed for the Cutter Building and land, 201 S. Tryon Street, Charlotte, North Carolina, (now called American Building) to Prudential Real Estate Trust (or a corporation to be formed by said Prudential Real Estate Trust); restrain the assumption on the part of J. H. Cutter and Co., Inc. of liabilities of Cutter Realty Co., Inc.; and rescind contract executed by officers of Cutter Realty Co., Inc. for sale of said land and building to Prudential Real Estate Trust."

On 3 June 1965 the defendants filed their motion to cancel and remove from the records the notice of *lis pendens,* to which motion the plaintiffs filed their verified answer.

On 10 June 1965 the motion was heard and the order from which this appeal is taken was entered. The order contains no findings of fact. It recites merely that it appeared to the court from an examination of the entire record that the said motion to cancel the *lis pendens* filed by the plaintiffs should be allowed, and orders that the notice of *lis pendens* be cancelled and removed from the records and that the Clerk make such entry upon the *lis pendens* book and indexes.

On 30 June 1965 the Realty Company executed and delivered its deed conveying the land in question to Prudential, the deed purporting to convey a fee simple title, subject to the condition that if it

be finally determined that the Realty Company does not have legal authority to make such conveyance the deed would be null and void, the land reverting to the Realty Company, its successors or assigns in fee simple absolute.

Weinstein, Waggoner & Sturges by William J. Waggoner for plaintiff appellants.

Grier, Parker, Poe & Thompson by Joseph W. Grier, Jr. and James Y. Preston for defendant appellees.

LAKE, J. After the appeal was docketed in this Court the appellees moved to dismiss it as moot on the ground that, following the entry of the order in question, Prudential was made a party to the action and entered a general appearance so that it will be bound by the final judgment, whether or not the notice of *lis pendens* was properly ordered and cancelled. The motion to dismiss is denied. The appeal did not become moot by Prudential's becoming a party. If the notice of *lis pendens* was proper and remains in effect not only Prudential, but every other subsequent purchaser during the life of the notice, will be bound by the judgment in this action. G.S. 1-118. Without such notice of *lis pendens,* a bona fide purchaser or lien creditor not a party to the action and having no actual notice thereof would not be subject to a judgment rendered after his acquisition of title or lien. We must, therefore, consider the appeal upon its merit.

The common law rule of *lis pendens* has been replaced in this State by the provision of G.S. 1-116 to G.S. 1-120.1. *Arrington v. Arrington,* 114 N.C. 151, 19 S.E. 351. Thus, there can be no valid notice of *lis pendens* in this State except in one of the three types of actions enumerated in G.S. 1-116(a), which reads as follows:

> "(a) Any person desiring the benefit of constructive notice of pending litigation must file a separate, independent notice thereof, which notice shall be cross-indexed in accordance with G.S. 1-117, in the following cases:
> "(1) Actions affecting title to real property;
> "(2) Actions to foreclose any mortgage or deed of trust or to enforce any lien on real property; and
> "(3) Actions in which any order of attachment is issued and real property is attached."

Since it appears clearly from the plaintiffs' statement of the nature of their action that it does not fall into Class 2 or Class 3, the alleged notice of *lis pendens* is not valid unless this is an action "affecting title to real property."

The provisions of G.S. 1-120 with reference to cancellation of a notice of *lis pendens* are applicable to the cancellation of a valid notice. If the notice filed in the office of the Clerk was not authorized by the statute, the court had jurisdiction to cancel it, upon the motion of the owner of the record title to the land, without waiting for the termination of the action. *Parker v. White,* 235 N.C. 680, 71 S.E. 2d 122; *McGurk v. Moore,* 234 N.C. 248, 67 S.E. 2d 53.

In *Arrington v. Arrington, supra,* the Court said:

> "The rule *lis pendens,* while founded upon principles of public policy and absolutely necessary to give effect to the decrees of the court is, nevertheless, in many instances very harsh in its operation; and one who relies upon it to defeat a bona fide purchaser must understand that his case is *strictissimi juris.*"

Thus, notice of *lis pendens* may not properly be filed except in an action, a purpose of which is to affect directly the title to the land in question or to do one of the other things mentioned in the statute. The *lis pendens* statute does not apply, for example, to an action the purpose of which is to secure a personal judgment for the payment of money even though such a judgment, if obtained and properly docketed, is a lien upon land of the defendant described in the complaint. *Jarrett v. Holland,* 213 N.C. 428, 196 S.E. 314; *Threlkeld v. Land Company,* 198 N.C. 186, 151 S.E. 99, *Horney v. Price,* 189 N.C. 820, 128 S.E. 321; McIntosh, N. C. Practice and Procedure, 2d Ed., § 963; 54 C.J.S., Lis Pendens, § 9.

In *Insurance Co. v. Knox,* 220 N.C. 725, 18 S.E. 2d 436, Barnhill, J. said:

> "The effect of *lis pendens* and the effect of registration are in their nature the same thing. They are only different examples of instances of the operation of the rule of constructive notice. One is simply a record in one place and the other is a record in another place. Each serves its purpose in proper instances. They are each record notices.
>
> "Hence, the law of *lis pendens* and the statute requiring the registration of instruments affecting title to real property must be construed in *pari materia.* Otherwise, the one would be destructive of the other.
>
> "When so construed the rule *lis pendens* applies in actions to set aside deeds or other instruments for fraud, to establish a constructive or resulting trust, to require specific performance, to correct a deed for mutual mistake and in like cases where there is no record notice and where otherwise a prospective pur-

chaser would be ignorant of the claim. That is, *lis pendens* notice is required when the claim is *contra* or in derogation of the record."

It appears from the plaintiffs' statement of the nature of their action, the complaint not having been filed at the time of the order entered by Patton, E.J., that it has three purposes: (1) To restrain the officers and directors of the Realty Company, the holder of the record title, from executing a deed conveying that title to Prudential; (2) to restrain Cutter & Company from assuming the liabilities of the Realty Company; and (3) to rescind a contract for the sale of the land by the Realty Company to Prudential. Upon this appeal we are not concerned with the sufficiency of the allegations of the complaint, with the right of the plaintiffs as stockholders of Cutter & Company to maintain this action, or with the merits of the matter. The only question before us at this time is whether the action, as described in the plaintiffs' statement of it, is an action "affecting title" to the land in question. We hold that it is not such an action. It is not for the purpose of bringing about any change in the record title, but is brought for the purpose of preventing a change therein. It is not for the purpose of establishing a trust or lien upon the property. This is not an action of a type in which G.S. 1-116 permits the filing of a notice of *lis pendens* and, therefore, the order cancelling the notice filed by the plaintiffs was properly entered.

Affirmed.

J. D. MARTIN v. C. L. UNDERHILL.

(Filed 24 November, 1965.)

1. **Appeal and Error § 38—**

Assignments of error not brought forward in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

2. **Trial § 51—**

A motion to set aside the verdict as being contrary to the weight of the evidence is addressed to the sound discretion of the trial court and denial of the motion is not reviewable in the absence of manifest abuse of discretion.

3. **Trial § 21—**

On motion to nonsuit, plaintiff's evidence must be taken as true and all conflicts therein resolved in his favor, giving him the benefit of all reason-

able inferences to be drawn from the evidence, and no consideration must be given to defendant's evidence which tends to contradict or impeach plaintiff's evidence.

4. Trusts § 19—

Evidence that prior to a judicial sale the parties agreed that defendant would bid on the property for plaintiff and, if he should become the highest bidder, would take title for plaintiff, and would thereafter convey title to plaintiff upon plaintiff's payment of the purchase price plus a fee, and that pursuant to the agreement defendant purchased the property at the sale, *is held* sufficient to be submitted to the jury in an action to enforce the parol trust.

5. Contracts § 8—

A contract to stifle bidding at a judicial sale is *contra bonos mores* and void, and will be declared so *ex mero motu* when such defect appears from the evidence of either party, since such defect may not be waived.

6. Same—

Evidence to the effect that defendant agreed to go to a judicial sale and bid on the property for plaintiff, without evidence that at the time of the agreement defendant intended to attend the sale or bid upon the property on his own account, *held* not to disclose a purpose to prevent or discourage the bidding and does not disclose that the contract was void as against public policy.

7. Frauds, Statute of § 6a—

A resulting trust does not come within the statute of frauds.

8. Trusts §§ 17, 19—

The burden is upon plaintiff to establish a resulting trust by clear, cogent and convincing proof, but whether plaintiff's evidence has that convincing quality is a question for the jury and not for the court upon motion to nonsuit.

APPEAL by defendant from *Carr, J.*, First April 1965 Regular Civil Session of WAKE.

This is a suit to have the defendant declared constructive trustee of a tract of land in Wake County and of certain farm equipment, and to compel him to convey the same to the plaintiff and to account for rents and profits therefrom. The complaint alleges that the land and the equipment were sold at a public sale by a trustee, that the plaintiff and defendant agreed that the defendant, for a fee of $500, would attend the sale and bid for the plaintiff and, if the successful bidder, would take title to the property in his own name but would then convey it to the plaintiff upon demand, that he was the highest bidder at the sale and received a deed for the property but then refused to convey it to the plaintiff. The answer admits that the defendant became the highest bidder for the property at such sale

and received a deed from the selling trustee. It denies all other material allegations of the complaint and alleges as a further defense the invalidity of the alleged contract because it was not in writing as required by the Statute of Frauds.

The jury found that the defendant agreed with the plaintiff to take title to the property in trust for the plaintiff and to convey it to him upon payment of the purchase price and the fee of $500. The court thereupon entered judgment that the defendant took title to the property as constructive trustee for the plaintiff and ordered him to convey it to the plaintiff upon the latter's tender of the amount found by the court to be due, the parties having agreed that the amount, if any, to be so tendered might be found by the court. From such judgment the defendant appeals, assigning as error the refusal of the court to grant his motion for judgment as of nonsuit, the refusal of the court to set aside the verdict as contrary to the weight of the evidence and the action of the court in entering the said judgment.

The evidence offered by the plaintiff tends to show: The plaintiff learned that the property was to be sold at a foreclosure sale. Desiring to buy it, but believing that if he, himself, bid for the property he would have to bid more than if he got someone else to bid for him, he asked the defendant to bid for him, take the title and hold it until the then occupant vacated the premises and thereupon convey it to the plaintiff, offering to pay the defendant $500 for so doing. The defendant agreed. The plaintiff and the defendant approached the sale separately. The plaintiff stood away from the defendant and by signals indicated to the defendant from time to time to raise the bids placed by others, which the defendant did. After thus raising the bid several times, the defendant became the highest bidder at $11,000. Following the sale, the defendant deposited $600 with the selling trustee. The plaintiff and the defendant then separately proceeded to the plaintiff's place of business and the plaintiff gave the defendant a check for $600 to cover the deposit which the defendant had just given to the selling trustee. This check has never been cashed. After the time allowed for an upset bid expired, the selling trustee conveyed the property to the defendant, who, pursuant to his own suggestion to the plaintiff, paid the amount of his bid with his own money. Thereafter, when the plaintiff demanded a deed conveying the property to him, the defendant refused. The $500 fee has not been paid to the defendant, he having previously suggested that it be paid to him with the amount of the purchase price when he conveyed the property to the plaintiff, which he has refused to do.

The defendant offered evidence tending to show: He saw the notice of the foreclosure sale, went to look at the property, got the

plaintiff to take him to the foreclosure sale, asked the plaintiff if he was interested in buying the property and, upon being told that the plaintiff was not interested in doing so, decided to buy it for his own account. He became the highest bidder at $11,000, gave the selling trustee his check for $600 covering the required deposit, and after the time for an upset bid expired, with no such bid being made, employed an attorney to examine the title, for which service he paid the attorney. Upon being advised that the title was good, he paid the amount of his bid to the trustee with money drawn from his own savings account and received a deed to the property. Thereupon, he paid the taxes upon the property and paid for a policy of fire insurance. He had no agreement with the plaintiff to buy the property for the plaintiff. The plaintiff never gave him a check for $600 or for any other amount.

Mordecai, Mills & Parker for defendant appellant.
George R. Ragsdale for plaintiff appellee.

LAKE, J. The appellant does not bring forward into his brief or cite therein any authorities in support of his assignment of error with reference to the overruling of his motion to set aside the verdict as being against the greater weight of the evidence and, on that ground, to grant a new trial. Such assignment is, therefore, deemed abandoned. Rule 28, Rules of Practice in the Supreme Court. In any event, this motion was addressed to the sound discretion of the trial judge whose ruling, in the absence of manifest abuse of discretion, is not reviewable on appeal. *Grant v. Artis,* 253 N.C. 226, 116 S.E. 2d 383; *Pruitt v. Ray,* 230 N.C. 322, 52 S.E. 2d 876.

In passing upon the defendant's motion for a judgment of nonsuit, the plaintiff's evidence must be taken to be true, conflicts therein must be resolved in his favor, all reasonable inferences which can be drawn therefrom favorable to him must be drawn, and no consideration can be given to the defendant's evidence tending to contradict or impeach the plaintiff or to show the existence of a different state of facts. *Coleman v. Colonial Stores, Inc.,* 259 N.C. 241, 130 S.E. 2d 338; *Ammons v. Britt,* 256 N.C. 248, 123 S.E. 2d 579; *Eason v. Grimsley,* 255 N.C. 494, 121 S.E. 2d 885. When so considered, the evidence is amply sufficient to show, as the jury found, that before they went to the sale the parties agreed that the defendant would bid on the property for the plaintiff and, if he became the highest bidder, would take title in trust for the plaintiff and, thereafter, would convey it to him upon the plaintiff's paying the defendant the purchase price

plus the fee of $500 for the defendant's services. Such evidence requires the overruling of the motion for judgment as of nonsuit unless the contract so shown is unenforceable because its purpose was unlawful or by reason of some other defect inherent in the contract itself. The appellant does not contend otherwise in his brief and did not do so in his oral argument before us.

In support of his contention that his motion for nonsuit should have been allowed, the appellant argues in his brief and orally that the alleged contract is not enforceable because its purpose was to stifle the bidding at a public sale and, therefore, was against public policy.

As long ago as *Smith v. Greenlee,* 13 N.C. 126, it was said:

> "A sale at auction is a sale to the best bidder, its object a fair price, its means competition. Any agreement, therefore, to stifle competition is a fraud upon the principles on which the sale is founded. It * * * vitiates the contract between the parties so that they can claim nothing from each other."

It is well established in this and other jurisdictions that a contract to stifle or to puff bidding at a public sale at auction is *contra bonos mores* and will not be enforced at the suit of either party. *Lamm v. Crumpler,* 233 N.C. 717, 65 S.E. 2d 336; *Owens v. Wright,* 161 N.C. 127, 76 S.E. 735; *Davis v. Keen,* 142 N.C. 496, 55 S.E. 359; *Bailey v. Morgan,* 44 N.C. 352; 7 Am. Jur. 2d, Auctions and Auctioneers, §§ 28, 29.

The appellant did not allege in his answer that the contract is unenforceable because against public policy. Nevertheless, if such defect in the agreement appears from the evidence of either party, the court will, on its own motion, refuse to enforce the contract, this being a defect beyond the power of the parties to waive even by an express stipulation. *Cansler v. Penland,* 125 N.C. 578, 34 S.E. 683.

The appellant's difficulty arises from the fact that these sound principles of law have no application to this case since the evidence does not indicate any agreement to stifle the bidding at the foreclosure sale. The defendant testified that there was no agreement whatever between the parties concerning his bidding. The plaintiff's evidence indicates that there was an agreement to the effect that the defendant would place bids for the plaintiff and, if successful, would take title in his name for the plaintiff's benefit and, on demand and payment of the purchase price and fee, would convey to the plaintiff.

Construing the evidence as we must upon a motion for judgment of nonsuit, it indicates no intention on the part of the defendant, at the time of this agreement, to attend the sale or bid upon the property for his own account. The purpose of the agreement was not to prevent or discourage him from doing so. There is no indication that the plaintiff had any knowledge of any change of intent on the part of the defendant until after the sale was completed and he called upon the defendant for a deed in accordance with their agreement.

Public policy does not forbid one, desiring to purchase land at a foreclosure sale, to employ an agent to bid for him. There is no requirement that the fact of the agency or the identity of the principal be made public at the sale. The nondisclosure of the principal's interest in acquiring the property at the sale does not discourage other persons from bidding. There were other bidders at the sale in question. There is nothing to indicate that they did not bid up to what they believed to be full value of the property being sold. The contract between the plaintiff and the defendant was, therefore, not against public policy. It created a fiduciary relationship between them which was valid and binding.

It is well settled in this State that such an agreement to acquire the legal title to land and to hold it in trust for a person other than the grantor is not within the Statute of Frauds and such parol trust is enforceable. *Paul v. Neece,* 244 N.C. 565, 94 S.E. 2d 596; *Rush v. McPherson,* 176 N.C. 562, 97 S.E. 613; *Allen v. Gooding,* 173 N.C. 93, 91 S.E. 694; *Avery v. Stewart,* 136 N.C. 426, 48 S.E. 775; *Owens v. Williams,* 130 N.C. 165, 41 S.E. 93; *Cobb v. Edwards,* 117 N.C. 244, 23 S.E. 241; Lee, North Carolina Law of Trusts (2d Ed.), 67, 68.

In *Paul v. Neece, supra,* this Court, speaking through Winborne, C.J., said:

> "[I]t is uniformly held to be the law in this State that where one person buys land under a parol agreement to do so and to hold it for another until he repays the purchase money, the purchaser becomes a trustee for the party for whom he purchased the land, and equity will enforce such an agreement."

In *Avery v. Stewart, supra,* at p. 437, speaking through Walker, J., the Court said:

> "If the legal title is obtained by reason of a promise to hold it for another, and the latter, confiding in the purchaser and relying on his promise, is prevented from taking such action in his own behalf as would have secured the benefit of the property to

himself, and the promise is made at or before the legal title passes to the nominal purchaser, it would be against equity and good conscience for the latter, under the circumstances, to refuse to perform his solemn agreement and to commit so palpable a breach of faith. It would be strange indeed if such conduct is beyond the reach of a court of equity, and if the party who has been grossly deceived and injured by it is without a remedy. The fact that the defendant in this case paid the purchase price out of his own money should not alter the case to the prejudice of his victim."

In order to establish that the grantee in a deed, absolute upon its face, holds title subject to such a parol trust, the evidence of the agreement so to hold it must be clear, cogent and convincing, *McCorkle v. Beatty,* 226 N.C. 338, 38 S.E. 2d 102, but whether the evidence has that convincing quality is a question for the jury upon proper instructions from the court, the rule as to the sufficiency of the proof to withstand a motion for judgment of nonsuit being the same as in other cases. *Cunningham v. Long,* 186 N.C. 526, 120 S.E. 81; *Hendren v. Hendren,* 153 N.C. 505, 69 S.E. 506; *Gray v. Jenkins,* 151 N.C. 80, 65 S.E. 644. The court properly instructed the jury as to the degree of proof required to establish the alleged trust and the jury found in favor of the plaintiff.

There was no error in denying the motion for judgment as of nonsuit and entering the judgment upon the verdict returned by the jury.

No error.

ROBERT J. BAILEY, BY HIS GUARDIAN, FIRST NATIONAL BANK OF CATAWBA COUNTY, INC. v. GENERAL INSURANCE COMPANY OF AMERICA, INC.

(Filed 24 November, 1965.)

1. Trial §§ 19, 31—

The sufficiency of the evidence to withstand motion for nonsuit and for a peremptory instruction against the plaintiff presents a question of law for the court.

2. Insurance § 57—

Use of a vehicle with the owner's permission within the coverage of a policy of liability insurance may be either express, or implied from the course of conduct between the parties or the relationship between them disclosing acquiescence signifying assent.

3. Same— Evidence held insufficient to show that driver was operating car with permission of insured.

Evidence tending to show that insured's daughter drove the family purpose car on a trip to another town, that she then went on another trip with her fiance in his car and while she was gone a mutual friend drove the car to a party and was involved in a wreck causing the injury to plaintiff, that insured had never seen this friend except on one occasion several months prior to the accident when he was a passenger in the vehicle occupied by insured's daughter and driven by her fiance, *held* insufficient to show that the daughter's friend was driving the car with the implied permission of insured within the coverage of the liability policy, and nonsuit was properly entered in an action against insurer after return of execution against the driver unsatisfied.

4. Same—

Ordinarily, one permittee within the coverage of a liability policy does not have authority to select another permittee without specific authority from the named insured.

APPEAL by plaintiff from *Riddle, S.J.*, March, 1965 Session, BURKE Superior Court.

The plaintiff, as guardian, instituted this civil action on behalf of its ward, Robert J. Bailey, to recover from the defendant the sum of $10,000.00 allegedly due under the omnibus clause of its liability insurance policy issued to Robert T. Stutts, covering the use of a 1959 Chevrolet automobile registered in his name. By its terms the policy protected not only the named insured, but also: (1) any resident of his household, and (2) any other person using such automobile, provided the actual use thereof is with the permission of the named insured.

The evidence disclosed that Frankie Stutts, minor daughter of the named insured, a member of his household, apparently had rather free use of the insured vehicle. On October 22, 1960, she drove the Chevrolet from the home in Gaston County to visit her school mate, Irene McGuirk, in Morganton, Burke County. Dane Hamilton, a friend of Frankie Stutts whom she later married, called for Frankie at the McGuirk home and took her in his automobile to visit his parents in Linville. Frankie left the Chevrolet at the McGuirk home. On similar occasions Miss McGuirk had driven the Chevrolet without obtaining permission from Frankie. On such occasions when the use had been reported to Frankie, she had stated that the use was o.k., provided she had enough gas left to enable her to get back home.

While Frankie Stutts and Hamilton were at Linville, William Harbison, III, in his mother's Plymouth, came to the McGuirk home to call on Irene. The couple decided to attend a party at Lake James. The radio on the Harbison vehicle was not working properly so the

couple decided to drive the Stutts Chevrolet. After attending the party at Lake James and another party at the Hickory Wild Life Club during which drinks were served, the insured vehicle was involved in an accident in which Robert J. Bailey was injured. At the time, Harbison was driving, Miss McGuirk was by his side, and another couple were in the back seat.

Robert J. Bailey instituted a civil action against Harbison and Robert T. Stutts for the recovery of damages resulting from his injuries. By judgment of voluntary nonsuit, the action was dismissed as to Robert T. Stutts. A verdict of $10,000.00 was returned against Harbison. The judgment is unsatisfied. This action was instituted for the purpose of holding the defendant insurance company liable for the judgment upon the ground that Harbison was using the insured automobile with the permission of the named insured, Robert T. Stutts.

The evidence disclosed that the owner, Stutts, had seen Harbison only once before the accident. During the summer preceding the accident, Dane Hamilton, whom Frankie Stutts later married, Miss McGuirk and Harbison left the Stutts home in the insured vehicle for a visit to the beach at Pawley's Island, South Carolina. At the time the party left, Hamilton was driving. Frankie was by his side. Harbison and Irene McGuirk were in the back seat. Mr. Stutts spoke to them as they left. He knew Hamilton, his daughter's friend, and later her husband, was driving. The evidence fails to disclose that he ever saw Harbison on any other occasion, or ever at any time consented for him to drive the insured vehicle or ever knew that he had driven it.

There was evidence, however, that on the way to and from the beach, and while there, Harbison did some of the driving.

At the close of the evidence, Judge Riddle entered judgment of involuntary nonsuit. The plaintiff appealed.

Byrd, Byrd & Ervin by Robert B. Byrd, John W. Ervin, Jr., for plaintiff appellant.

Hollowell & Stott and John H. McMurray by Grady B. Stott, John H. McMurray for defendant appellee.

HIGGINS, J. A summary of the evidence presented at the trial is set forth in the statement of facts. When viewed in the light most favorable to the plaintiff, giving him the benefit of all legitimate inferences, and resolving all contradictions and inconsistencies in his favor, if the evidence permits a legitimate inference that at the time

of the accident William Harbison, III, was driving the insured vehicle with the permission of Robert T. Stutts, the named insured, the case should have been submitted to the jury; otherwise nonsuit or a peremptory instruction against the plaintiff was required. The sufficiency of the evidence to withstand motion for nonsuit or for a peremptory instruction against the plaintiff presents a question of law for the court. *Raper v. McCrory-McLellan Corp.*, 259 N.C. 199, 130 S.E. 2d 281; *Walker v. Story*, 256 N.C. 453, 124 S.E. 2d 113; *Ammons v. Britt*, 256 N.C. 248, 123 S.E. 2d 579.

The owner's permission for the use of the insured vehicle may be expressed or, under certain circumstances, it may be inferred. "Where express permission is relied upon it must be of an affirmative character, directly and distinctly stated, clear and outspoken, and not merely implied or left to inference. On the other hand, implied permission involves an inference arising from a course of conduct or relationship between the parties, in which there is mutual acquiescence or lack of objection under circumstances signifying assent." *Hawley v. Ins. Co.*, 257 N.C. 381, 126 S.E. 2d 161; *Hooper v. Casualty Co.*, 233 N.C. 154, 63 S.E. 2d 128; *Coletrain v. Coletrain*, 238 S.C. 555, 121 S.E. 2d 89. However, the relationship between the owner and the user, such as kinship, social ties, and the purpose of the use, all have bearing on the critical question of the owner's implied permission for the actual use. *Hawley v. Ins. Co., supra; Samuels v. American Auto Ins. Co.*, 150 Fed. 2d 221 (10th Ct.); *Harper v. Hartford Accident & Indemnity Co.*, 111 N.W. 2d 480 (Wis.).

In this case there is no evidence the named insured had ever seen the driver, Harbison, except on one occasion and that was months before the accident. Evidence is lacking that the owner ever permitted Harbison to drive the insured vehicle or had any knowledge that he had ever done so. Actually, there is no evidence the insured's daughter, Frankie, consented for Harbison to operate the vehicle or knew that he was operating it at the time of the accident. There is no evidence she had authority to give her father's permission for Harbison to drive it on the night of the accident. Ordinarily, one permittee does not have authority to select another permittee without specific authorization from the named insured. *Hays v. Country Mutual Ins. Co.*, 192 N.E. 2d 855 (Ill.); *Peterson v. Sunshine Mutual Ins. Co.*, 273 Fed. 2d 53 (8th Ct.); *West v. McNamara*, 111 N.E. 2d 909 (Ohio); *Hamm v. Camerota*, 290 P. 2d 713 (Wash.); 160 A.L.R., p. 1195, *et seq;* 5 A.L.R. 2d 666.

The provisions of the defendant's policy are drawn in conformity with the requirement of G.S. 20-279.21(b)(2). Thus far the omnibus

clause has been interpreted by this Court according to the "moderate" rule rather than the "hell and high water" rule, as applied in *Parks v. Hall,* 189 La. 849, 181 So. 191; *Coco v. State Farm Mutual Auto Ins. Co.,* 136 So. 2d 288 (La.); and recommended in 41 N.C. Law Review 232, *et seq.*

The plaintiff's evidence fails to show his injury is covered by the defendant's policy. Failure to show coverage requires nonsuit. *Kirk v. Ins. Co.,* 254 N.C. 651, 119 S.E. 2d 645; *Slaughter v. Ins. Co.,* 250 N.C. 265, 108 S.E. 2d 438; *Fallins v. Ins. Co.,* 247 N.C. 72, 100 S.E. 2d 214.

The judgment entered in the Superior Court of Burke County is Affirmed.

J. LAMPROS WHOLESALE, INC. v. NORTH CAROLINA BOARD OF ALCOHOLIC CONTROL.

(Filed 24 November, 1965.)

1. Intoxicating Liquor § 2—

License to sell and distribute beer is a privilege granted by the State Board of Alcoholic Control to those meeting the standards which the Board has set up, and such license may and should be revoked if the Board determines, after notice and a hearing, that the licensee has failed to observe the Board's regulations or failed to obey the laws of the State pertaining to the sale of beer.

2. Same—

Evidence that the licensee for a period of some two years had followed the general practice of giving free beer and quantity discounts to large customers, *held* sufficient to support the Board's findings and conclusions and to justify the revocation of the permit, and the Board's order of revocation must be affirmed on appeal, the Board's findings being conclusive when supported by evidence.

3. Constitutional Law § 14—

The General Assembly has authority to regulate the sale and distribution of intoxicating liquors.

APPEAL by petitioner from *Bickett, J.,* in Chambers, August 9, 1965, WAKE Superior Court.

On March 24, 1964, J. Lampros Wholesale, Inc., by verified petition, invoked the jurisdiction of the Superior Court of Wake County to review an administrative decision of the North Carolina Board of Alcoholic Control, effective September 1, 1964, revoking petitioner's

distributor's or wholesale malt beverage permit. To the petition for judicial review were attached as exhibits: (1) The Board's notice reciting 64 specific violations of the regulations of the Board and General Statutes charged against the petitioner as grounds for the revocation; (2) the petitioner's answer to the charges and demand for a hearing; (3) the findings of fact made by Assistant Director Weathersby after three days hearing in which petitioner and his counsel participated; (4) the petitioner's exceptions to the findings of fact, conclusions and recommendation; (5) the petitioner's request for review by the Board of Alcoholic Control; (6) the Board's findings and conclusions of law and its order revoking the permit; (7) the testimony of the witnesses and evidence produced at the hearing before Assistant Director Weathersby.

At the hearing, Judge Bickett reviewed the detailed charges filed against petitioner, on the basis of which the Board, after notice and full hearing, had entered the order of revocation. Judge Bickett reviewed the evidence taken by Assistant Director Weathersby, upon the basis of which he recommended that the permit be revoked.

In summary, the Board made findings that the petitioner's salesmen had falsified the records on numerous occasions and that the petitioner had failed properly to supervise the business. Here are a few of the specific findings:

"2. On July 4, 1963, driver-salesman . . . Vanlandingham - - - gave one free case of Busch Bavarian beer . . . to Eli J. Monsour . . . and did falsify . . . invoices Nos. 14276 and 14277 when he listed . . . 10 cases of beer and actually delivered 11 cases . . . in violation of the Board's regulations 11(a) and 24(b) and G.S. 18-69.1(3) . . . and 18-136.

"4. On December 6, 1963, driver-salesman . . . of J. Lampros, Inc., did falsify and keep inaccurate records by listing on sales invoice No. 13446 a sale and delivery of 25 cases of beer to Eli J. Monsour . . . when he actually delivered 27 cases. . . .

"9. On November 14, 1963, J. Lampros Wholesale, Inc., gave 14 free cases of Busch Bavarian beer . . . on purchase order No. 5405 to Pope Air Force Open Mess . . . in violation of regulation 24(b) and G.S. 18-69.1(3) . . . 18-78(a) (d) and 18-136.

"10. On November 14, 1963, J. Lampros Wholesale, Inc., sold and delivered 50 cases of Busch Bavarian beer to Pope AFB Open Mess, Fort Bragg at a price of $2.50 per case . . . Invoice No. 12108, when the list price . . . for that item was $2.90 per case (in violation of the regulations and statutes listed in No. 9).

"18. During the years 1962 and 1963 it was a general practice for J. Lampros Wholesale, Inc., to give free beer and quantity dis-

counts . . . to larger customers (in violation of regulations and statutes listed in No. 9)."

Judge Bickett entered a preliminary order staying the license revocation until the hearing. After full review, Judge Bickett entered this order:

> "The findings of fact and decision of the respondents herein are supported by competent, material and substantial evidence in view of the entire record as submitted and the substantial rights of the petitioner have not been prejudiced; that said decision is in compliance with applicable constitutional provisions, within the statutory authority or jurisdiction of the respondents and pursuant to law and lawful procedure, is neither arbitrary nor capricious and upon the entire record the decision herein judicially reviewed should be affirmed."

The petitioner excepted and appealed.

T. W. Bruton, Attorney General, George A. Goodwyn, Staff Attorney for the State.

Heman R. Clark, James R. Nance, James R. Nance, Jr., for petitioner appellant.

HIGGINS, J. The General Assembly has established the State Board of Alcoholic Control and given it authority to regulate and supervise the sale and distribution of alcoholic beverages. Only those authorized by the Board and granted its permit may engage in the sale and distribution of beer. A permit is a privilege granted only to those who meet the standards which the Board has set up and may, and should be, revoked if the permittee fails to keep faith with the Board by observing its regulations and obeying the laws of the State. Before a permit may be revoked the permittee is entitled to notice and a hearing before the Board. *Boyd v. Allen,* 246 N.C. 150, 97 S.E. 2d 864.

"Authority to conduct a hearing and determine whether a State retail (or wholesale) 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." *Freeman v. ABC Board,* 264 N.C. 320, 141 S.E. 2d 499. The agency that hears the witnesses and observes their demeanor as they testify—the Board of Alcoholic Control—is charged with the duty of finding the facts. The Board's 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; *Sinodis v. ABC Board,* 258 N.C. 282, 128 S.E. 2d 587.

In this case Judge Bickett concluded the evidence before the Board was sufficient to warrant the Board's findings and conclusions, and to justify the revocation of the permit. Under authorities of the cases herein cited, and many others, the duty of the court is to review the evidence and determine whether the Board had before it any material and substantial evidence sufficient to support its findings. "Hence it is that the findings of the Board, when made in good faith and supported by evidence, are final." *Freeman v. ABC Board, supra.*

Both the North Carolina and the Federal Constitutions recognize the authority of the State, through its legislative branch, to regulate the sale and distribution of intoxicating liquors. *Ziffrin, Inc. v. Reeves,* 308 U.S. 132; *Boyd v. Allen, supra.*

The judgment of the Superior Court of Wake County is

Affirmed.

DAYTON LAMONDE BARBER v. WILLIAM MITCHELL HEEDEN AND PATRICIA ANNE HEEDEN.

(Filed 24 November, 1965.)

1. **Automobiles §§ 41g, 42g—**

Evidence tending to show that defendant operated an automobile so that it skidded from a servient highway onto the dominant highway, blocking plaintiff's lane of travel, causing plaintiff, in the emergency, to turn to his left and collide with a vehicle approaching from the opposite direction, *held* sufficient to take the issue of negligence to the jury and not to disclose contributory negligence as a matter of law on plaintiff's part.

2. **Negligence § 28—**

An instruction which in effect places the burden upon defendant to prove by the greater weight of the evidence that the facts were in accord with his contentions, negating negligence on his part, must be held for reversible error, even though correct instructions were given in other parts of the charge.

3. **Trial § 34—**

The burden of proof is a substantial right, and erroneous or conflicting instructions thereon must be held for prejudicial error.

4. Appeal and Error § 42—

Conflicting instructions on a material point, the one correct and the other incorrect, must be held for prejudicial error, since it cannot be ascertained that the jury in coming to a verdict was not influenced by the incorrect charge.

5. Automobiles § 46—

An instruction to the effect that if the jury found from the greater weight of the evidence that plaintiff approached an intersection at a speed of 70 to 80 miles per hour and that such speed was a proximate cause of the collision, to answer the issue of contributory negligence in the affirmative, must be held for error as requiring the jury to find that plaintiff's speed was excessive to the stipulated degree in order for it to constitute unlawful speed.

6. Same—

Separate instructions to answer the issue of contributory negligence in the negative if the jury failed to find that plaintiff was traveling at excessive speed, or failed to keep a proper lookout, or failed to keep his vehicle under control, must be held for error as requiring a negative answer to the issue if plaintiff was free of contributory negligence in any one of the aspects relied on, since the issue should be answered in the affirmative if plaintiff was guilty of contributory negligence constituting a proximate cause of the injury in any one of such aspects.

APPEAL by defendants from *May, Special Judge,* January 25, 1965 Conflict Session of JOHNSTON.

Plaintiff sustained personal injuries and property damage as a direct result of a collision that occurred May 14, 1963, about 9:15 p.m., in Johnston County, on N. C. Highway No. 50, between his southbound Chevrolet car, operated by him, and a northbound truck (of Jesse Jones Sausage Company) operated by Hubert Lester Mangum. Plaintiff alleged the said collision and his injuries and damage were proximately caused by the actionable negligence of Patricia Anne Heeden in respect of the way and manner in which she operated the Buick car of her brother, William Mitchell Heeden. Plaintiff alleged that Patricia was a member of William's household; that William owned and maintained the Buick for the pleasure, comfort and convenience of himself and his said sister; that the Buick was used by her with his knowledge and consent; and that William is responsible for Patricia's actionable negligence.

Highway No. 50 runs north and south. It is 20 or 21 feet wide and has two driving lanes. Secondary Road No. 1319 joins and extends west from No. 50 at a point approximately six miles north of Benson.

On May 14, 1963, No. 1319 west of No. 50 was in the process of being paved, was "sticky, just been poured," and there was sand and gravel on the portion thereof within 100-150 feet of No. 50. Near

the southwest corner of said junction, a stop sign faces motorists traveling east on No. 1319. The store and filling station premises of Jasper (Jack) Langdon are on the northwest corner, fronting on No. 50. The gasoline tanks are about 50 feet back (west) and the store is about 70 feet back (west) from No. 50. The entire area around Langdon's premises is paved. Paved portions of Langdon's premises extend to and connect with paved portions of No. 50 and No. 1319.

On May 14, 1963, a dirt road extended east from No. 50 at a point "probably 60 or 70 feet" north of the junction described above. It is not clear whether this dirt road was also known as No. 1319. There is an offset of 60-70 feet between the two junctions. On the east side of No. 50, south of said dirt road and across from Langdon's said premises, there was a Shell service station.

Prior to the accident, plaintiff traveled south on No. 50 and Miss Heeden traveled east on No. 1319.

Plaintiff's allegations and evidence are to the effect that the Heeden Buick approached and entered No. 50, "spun around twice . . . in front of plaintiff's automobile" and "completely stopped in (his) lane of the highway," and that plaintiff, being then only 30-40 feet away and confronted by a sudden emergency, "cut to the left" and struck the front of the northbound truck.

Defendants' allegations and evidence are to the effect that no portion of the Buick got closer than ten feet to No. 50; that Miss Heeden's immediate destination was Langdon's store and service station; that, approaching No. 50, she applied her brakes when on the portion of No. 1319 covered by sand and gravel; that her brakes did not take hold and the Buick skidded "only just a half a turn," then stalled and was stopped in No. 1319, facing the Langdon premises, when plaintiff's southbound car appeared on No. 50.

There was no contact of any kind between plaintiff's Chevrolet and the Heeden Buick.

Plaintiff alleged defendants were negligent in that Miss Heeden: (a) operated said Buick on No. 1319 at a dangerous speed without regard to the surface conditions and without stopping before entering No. 50; (b) operated said Buick in wilful and wanton disregard of the rights and safety of plaintiff; (c) operated said Buick without due caution and circumspection and in a manner so as to endanger plaintiff; (d) failed to exercise proper control in her operation of said Buick and caused it to skid into the westerly lane of No. 50; and (e) failed to yield the right of way to plaintiff lawfully approaching on No. 50.

Defendants denied all of plaintiff's allegations relating to actionable negligence and conditionally pleaded the contributory negligence

of plaintiff as a bar to recovery. Defendants alleged, as contributory negligence, that plaintiff operated his Chevrolet (a) at a high and dangerous rate of speed, (b) in a careless and reckless manner, (c) without keeping a proper lookout, and (d) without keeping his vehicle under proper control.

The issues submitted, without objection, and the jury's answers thereto, are as follows: "1. Was the plaintiff injured as a result of the negligence of the defendant Patricia Anne Heeden, as alleged in the Complaint? Answer: Yes. 2. Did the plaintiff, Dayton Lamonde Barber, contribute to his own injury, as alleged in the Answer? Answer: No. 3. Was the defendant, Patricia Anne Heeden, acting as the agent of William Mitchell Heeden under the family purpose doctrine, as alleged in the Complaint? Answer: Yes. 4. What amount, if any, is the plaintiff entitled to recover? Answer: $17,055.64."

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

Emanuel & Emanuel for plaintiff appellee.
Young, Moore & Henderson for defendant appellants.

BOBBITT, J. Defendants, in their brief, contend (1) that the evidence was insufficient to warrant submission of an issue as to defendants' alleged actionable negligence, and (2) that plaintiff's evidence discloses contributory negligence as a matter of law, and therefore the court erred in overruling their motion made at the conclusion of all the evidence for judgment of nonsuit. However, careful consideration impels the conclusion that the evidence, when considered in the light most favorable to plaintiff, was sufficient to require submission of these issues for jury determination. Having reached this conclusion, we deem it appropriate to refrain from further discussion of the evidence presently before us. *Byrd v. Motor Lines,* 263 N.C. 369, 372, 139 S.E. 2d 615, and cases cited.

Included in the portion of the charge relating to the first (negligence) issue, the court instructed the jury as follows:

"Members of the jury, I further charge you that *if you find from the evidence, and by its greater weight,* that on May the 14th, 1963, Miss Heeden was operating the Buick automobile along Rural paved road No. 1319, and that said road intersected with Highway No. 50, and that there is erected on Rural Road 1319 a Stop Sign directing traffic to come to a stop before entering Highway No. 50, and you further find that the defendant, Miss Heeden, never reached Highway No. 50, and that she never entered the westerly lane of travel of Mr. Barber, the plaintiff, and that she turned her automobile off

of the rural paved road number 1319 before reaching the western lane of Highway No. 50 and that she turned off and turned onto the apron of Jack Landon's Service Station without ever having reached the intersection, I charge you that *if you so find from the evidence, and by its greater weight,* that then, and in that event, Miss Heeden would not be guilty of any negligence whatsoever and you would answer the First Issue No." (Our italics.)

Defendants' assignment of error based on their exception to the quoted excerpts from the charge is well taken. The clear implication of this instruction is that the burden of proof was on defendants to satisfy the jury from the evidence and by its greater weight that the facts are as stated in this instruction. Elsewhere in the charge the court instructed the jury correctly that the burden of proof was on plaintiff to establish by the greater weight of the evidence the alleged actionable negligence of defendants.

These propositions are well settled: "The rule as to the burden of proof constitutes a substantial right, for upon it many cases are made to turn, and its erroneous placing is reversible error." *Williams v. Insurance Co.,* 212 N.C. 516, 518, 193 S.E. 728, and cases cited; *Owens v. Kelly,* 240 N.C. 770, 774, 84 S.E. 2d 163, and cases cited. Moreover, as stated by Barnhill, J. (later C.J.), in *S. v. Overcash,* 226 N.C. 632, 39 S.E. 2d 810: "When there are conflicting instructions to the jury upon a material point, the one correct and the other incorrect, a new trial must be granted. We may not assume that the jurors possessed such discriminating knowledge of the law as would enable them to disregard the erroneous and to accept the correct statement of the law as their guide. We must assume instead that the jury in coming to a verdict, was influenced by that part of the charge that was incorrect." See *Graham v. R. R.,* 240 N.C. 338, 350, 82 S.E. 2d 346, and cases cited; and *Crow v. Ballard,* 263 N.C. 475, 478, 139 S.E. 2d 624, and cases cited.

In the portion of the charge relating to the second (contributory negligence) issue, the court, immediately after referring to defendants' contention that the jury should be satisfied from the evidence and by its greater weight "that the plaintiff himself contributed to his own injury by his negligence," instructed the jury as follows:

"She says and contends that on this occasion the *defendant* was operating his automobile at a high and dangerous rate of speed in a careless and reckless manner. She says and contends that he was traveling at a speed of some seventy to eighty miles an hour.

"The Court charges you that if you find from the evidence and by its greater weight, that the *defendant* was traveling at a rate of speed of seventy to eighty miles an hour, that such speed would be

in excess of that permitted by law at that intersection, and if you find that he was traveling at that rate of speed, that would constitute negligence on his part, and if you further find that such negligence on his part was a proximate cause of the injury and damages that he sustained, then the Court instructs you that you should answer that Second Issue Yes; *if you fail to so find, you should answer the Second Issue No.*" (Our italics.)

In the quoted excerpt, it seems clear the court inadvertently said "defendant" when intending to say "plaintiff." While this inadvertence may have tended to confuse, we assume, for present purposes, that the jury understood the instruction as if "plaintiff" had been used. So considered, the vice in this instruction is that the jury was instructed to answer the *second* (contributory negligence) *issue*, "No," if defendants failed to satisfy the jury from the evidence and by its greater weight that *the precise facts* were as stated in this instruction. This instruction was erroneous and prejudicial to defendants. Excessive speed was *only one* of defendants' alleged specifications of plaintiff's contributory negligence. Moreover, proof by the greater weight of the evidence that plaintiff was traveling at a speed of 70 to 80 miles an hour was not required to establish that plaintiff was contributorily negligent even in respect of alleged excessive speed. In like manner, the court, in giving separate instructions bearing upon each of defendants' other specifications of the alleged contributory negligence of plaintiff, charged the jury to answer the *second* (contributory negligence) *issue*, "No," if defendants failed to satisfy the jury from the evidence and by its greater weight that the precise facts were as stated in the instruction.

Under well established legal principles referred to above, we are constrained to hold that the error in the (second) quoted excerpt and similar instructions was not cured by the fact that conflicting instructions, albeit correct, were given elsewhere in the fifty-page charge.

Since the errors referred to are sufficient to require a new trial, we deem it unnecessary to consider other assignments of error based on exceptions to the charge. Upon retrial, the questions raised by such assignments may not recur.

New trial.

STATE v. J. M. HOCKADAY.

(Filed 24 November, 1965.)

1. Public Officers § 11—

G.S. 128-16 provides for the removal of a public officer for the causes enumerated for the protection of the public, and a proceeding thereunder is not a criminal prosecution, and therefore the 1959 amendment bringing justices of the peace within the purview of that statute does not preclude prosecution of a justice of the peace under G.S. 14-230 for corrupt malfeasance, this statute being applicable by its terms unless it is elsewhere provided that the defaulting officer might be indicted.

2. Criminal Law § 4—

A proceeding for removal of a public officer under G.S. 128-16 is not a criminal prosecution for punishment but is a civil proceeding.

3. Statutes § 11—

Repeals by implication are not favored.

APPEAL by defendant from *Carr, J.*, March 1965 Criminal Session of WAKE.

At November "A" Term, 1959, the grand jury returned a true bill of indictment charging that defendant, on or about August 17, 1959, in Wake County, "a justice of the peace in Wake Forest Township, Wake County, North Carolina, duly elected to the duties of that office and having taken the oath prescribed for said office, and after qualifying for said office, unlawfully, willfully and corruptly violated his oath of office according to the true intent and meaning thereof" in the way and manner specifically set forth, in violation of G.S. 14-230.

At the April 18, 1960 Term defendant, through counsel, pleaded not guilty. The jury returned a verdict of guilty. The court pronounced judgment (April 28, 1960) as follows:

"The judgment of the court is that the defendant be confined in the common jail of Wake County for a term of NOT LESS THAN EIGHTEEN MONTHS NOR MORE THAN TWENTY-FOUR MONTHS and assigned to work under the order and supervision of the State Prison Department. Upon motion of defendant and with his consent this sentence is suspended and placed on probation for 5 years, upon condition that he pay $500 fine and costs. Defendant is hereby removed from the office of Justice of the Peace of Wake County, N. C., as of this date."

In addition, the court entered a separate probation judgment (April 28, 1960) which included the provisions quoted above and specified in detail the conditions (of probation) on which the 18-24 months sentence was suspended for five years.

Defendant did not appeal from said judgment(s).

The hearing below was on defendant's undated "Motion in the Cause" (verified November 30, 1964) in which defendant asserts that, prior to the alleged misconduct of defendant set forth in said indictment, the General Assembly had repealed G.S. 14-230, as related to justices of the peace, by its enactment of Chapter 1286, Session Laws of 1959, which amended G.S. 128-16 so as to bring justices of the peace within its provisions, and therefore the court at said term in 1960 "had no jurisdiction of his person or of the charge against him."

Defendant prayed that said judgment at said term in 1960 be set aside and that the amount of the fine and court costs paid by defendant be refunded.

Judge Carr entered judgment denying defendant's said motion. Defendant excepted and appealed. On appeal, defendant assigns as error "the action of the court in refusing to set aside the judgment of Hooks, J., entered Apr. 28, 1960."

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

John W. Hinsdale for defendant appellant.

BOBBITT, J. G.S. 14-230 is a part of G.S. Chapter 14, which bears the caption, "Criminal Law," and of Article 31 thereof, which bears the caption, "Misconduct in Public Office." Under G.S. 14-230, a justice of the peace (or other official specified therein) is guilty of a misdemeanor if he wilfully omits, neglects or refuses to discharge any of the duties of his office "for default whereof it is not elsewhere provided that he shall be indicted." If such officer, after his qualification, wilfully *and corruptly* omits, neglects or refuses to discharge any of the duties of his office or wilfully and corruptly violates his oath of office according to the true intent and meaning thereof, his punishment is by fine or imprisonment in the discretion of the court *and* removal from office. *S. v. Anderson,* 196 N.C. 771, 773, 147 S.E. 305, and cases cited; *Moffitt v. Davis,* 205 N.C. 565, 570, 172 S.E. 317. Defendant was indicted, convicted and sentenced for violation of this criminal statute.

Defendant emphasizes the clause, "for default whereof it is not elsewhere provided that he shall *be indicted.*" (Our italics.) He contends the 1959 amendment of G.S. 128-16 precluded indictment and prosecution under G.S. 14-230.

G.S. 128-16 provides:

"Officers subject to removal; for what offenses.—Any judge or prosecuting attorney of any court inferior to the superior court; any

justice of the peace, any sheriff, police officer, or constable, shall be removed from office by the judge of the superior court, resident in or holding the courts of the district where said officer is resident upon charges made in writing, and hearing thereunder, for the following causes: (1) For wilful or habitual neglect or refusal to perform the duties of his office. (2) For wilful misconduct or maladministration in office. (3) For corruption. (4) For extortion. (5) Upon conviction of a felony. (6) For intoxication, or upon conviction of being intoxicated."

The 1959 amendment, which inserted the words, "any justice of the peace," was in force and effect from and after the ratification thereof on June 20, 1959. Chapter 1286, Session Laws of 1959.

The indictment on which defendant was tried, convicted and sentenced related to alleged misconduct of defendant on or about August 17, 1959. If defendant were subject to indictment and prosecution under G.S. 128-16, it may be conceded that defendant, by reason of the clause of G.S. 14-230 quoted above, would not have been subject to indictment and prosecution under G.S. 14-230. The fallacy in defendant's position is that defendant was not subject to indictment and prosecution under G.S. 128-16.

G.S. Chapter 128 bears the caption, "Offices and Public Officers." Article 2 thereof, consisting of G.S. 128-16 through G.S. 128-20, bears the caption, "Removal of Unfit Officers." G.S. 128-17 through G.S. 128-20 prescribes the procedure *for the removal from office* of a justice of the peace (or other officer named therein) for a cause specified in G.S. 128-16. G.S. 128-16 does not purport to create a criminal offense. Nor does any provision of Chapter 128, Article 2, provide for prosecution by indictment or otherwise for any criminal offense.

The statutory provisions now codified as G.S. Chapter 128, Article 2, were considered in *S. v. Hamme,* 180 N.C. 684, 104 S.E. 174. There the proceeding was to remove from office the prosecuting officer of a recorder's court. Clark, C.J., for the Court, said: "The officer may be removed for misconduct or failure to perform the duties of his office, whether such failures were willful or habitually negligent; the statute was evidently enacted for the protection of the public, and not for the punishment of the delinquent officer. It is not a criminal proceeding for his punishment, but is a civil proceeding brought in the name of the State upon the relation of five qualified electors in the county. (Citation.) The delinquent officer is not entitled to have the issues of fact tried by a jury."

While the 1959 Act provided that all laws and clauses of laws in conflict therewith were repealed, we perceive no conflict between

G.S. 14-230 and G.S. 128-16 as amended by the 1959 Act. No provision of the 1959 Act amending G.S. 128-16 refers to G.S. 14-230. Nor may it be reasonably implied that, by bringing justices of the peace within the provisions of G.S. 128-16, the General Assembly intended to exempt justices of the peace from indictment and prosecution for the criminal offenses defined in G.S. 14-230. Repeals by implication are not favored. *S. v. Lance,* 244 N.C. 455, 457, 94 S.E. 2d 335.

It is noted that G.S. 7-115 provides procedure for the removal from office of a justice of the peace *appointed by a resident superior court judge.* In this connection, see *Swain v. Creasman,* 255 N.C. 546, 122 S.E. 2d 358; *s.c.,* 260 N.C. 163, 132 S.E. 2d 304.

Obviously, at said 1960 Term, when defendant was tried, convicted, sentenced, placed on probation, and thereupon paid the fine and costs, the court had jurisdiction "of his person."

The sole and basic ground on which defendant's "Motion in the Cause" is predicated is without merit. Hence, the judgment of Judge Carr is affirmed.

Affirmed.

FRANCES PERRY DAWSON v. CAROLINA POWER & LIGHT COMPANY.

(Filed 24 November, 1965.)

1. Negligence § 37a—

A person entering a business establishment for the purpose of paying a bill is an invitee.

2. Negligence § 37b—

A proprietor is not an insurer of the safety of his invitees but is under duty to exercise ordinary care to keep his premises within the compass of the invitation in reasonably safe condition and to give warning of hidden dangers or unsafe conditions of which the proprietor knows or in the exercise of reasonable supervision and inspection should know.

3. Negligence § 37f—

Evidence tending to show that plaintiff invitee, after paying her bill, slipped on a little mud or a little bit of water just inside the door of the office, without evidence that the proprietor had created such condition or that the condition had existed for a sufficient length of time to give the proprietor notice thereof, *is held* insufficient to overrule nonsuit.

4. Negligence § 37b—

The mere fact that a proprietor has no mat on the floor at the entrance of its office during a period of rain is not negligence, and a proprietor cannot be held under duty to keep a person continuously mopping the floor to avoid dampness during a rainy spell.

5. Appeal and Error § 38—

Assignments of error not brought forward in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

APPEAL by plaintiff from a judgment of compulsory nonsuit entered by *Riddle, S.J.*, 1 March 1965 Civil Session of RANDOLPH.

Ottway Burton for plaintiff appellant.
Smith & Casper and Sherwood H. Smith, Jr., and A. Y. Arledge for defendant appellee.

PARKER, J. This is a civil action to recover damages for personal injuries resulting from a fall in defendant's office at 318 Sunset Avenue, Asheboro, North Carolina, allegedly caused by defendant's actionable negligence in, during a rainy day, permitting dampness or water to be on its office floor, and in not providing a floor mat for customers to wipe their feet on. Defendant in its answer denies that it was negligent, and conditionally pleads contributory negligence of plaintiff.

Plaintiff assigns as error the judgment of compulsory nonsuit entered at the close of her evidence by the court on defendant's motion.

Plaintiff's evidence, considered in the light most favorable to her, shows the following facts, which we summarize, except when we quote:

Defendant Power and Light Company maintains an office at 318 Sunset Avenue, Asheboro, where its customers may come and pay their bills for electric power furnished them by defendant. For about three years prior to 18 December 1961 plaintiff had gone into this office monthly to pay her bill for electric power furnished to her home by defendant.

On 18 December 1961 it had been raining since she got up. Defendant's office opened about 9 a.m. About 10 a.m. on this morning she entered defendant's office in Asheboro to pay defendant her bill for electric power furnished her home by defendant. The office according to her testimony at one place in the record was 60 to 70 feet wide, and according to her testimony at another place in the record was 30 feet wide. She entered by a swinging glass door, permitting a person to go in and out. The floor to the office was light colored, slick, and highly polished. In the office was a table on the left-hand side and a counter where bills are usually paid. She walked from the door about 25 feet to the table, and paid her bill to a man sitting there. At the time no other person was in the office. After paying her bill, she turned and started walking out of the office. About six feet from the door her "foot slipped on the dampness on the floor," and she fell

down on the floor, sustaining by reason of her fall personal injuries. She also testified: "The condition of the wax surface of the floor of the lobby when I walked in was a white highly polished floor and had dampness on the floor where I slipped. It was slick." She was wearing "flats," rubber-bottom shoes. In walking out she watched where she was going. There was no floor mat at the entrance to defendant's office.

After plaintiff fell, her husband, who was in a barber shop for the purpose of having his hair cut, was notified of her fall and went to defendant's office. When he went in the office there was "a little mud" and "a little bit of water" and dampness on its floor just inside the door. His wife was sitting in a chair crying, and the left side of her dress was muddy and damp.

Plaintiff's evidence shows that in entering defendant's office to pay her bill to defendant she had invitee status. 3 Strong's N. C. Index, Negligence, § 37a; 65 C.J.S., Negligence, § 43(1).

However, defendant was not an insurer of the safety of plaintiff who entered its office during business hours to pay her bill. *Long v. Food Stores,* 262 N.C. 57, 136 S.E. 2d 275; *Powell v. Deifells, Inc.,* 251 N.C. 596, 112 S.E. 2d 56; 38 Am. Jur., Negligence, § 131.

Under the circumstances shown by plaintiff's evidence, the law imposed upon defendant the legal duty to exercise ordinary care to keep in a reasonably safe condition the entrance to its office and the floor where plaintiff is expected to go on the premises in paying her bill, so as not unnecessarily to expose her to danger, and to give her warning of hidden dangers or unsafe conditions of which it knew, or in the exercise of reasonable supervision and inspection should know. *Long v. Food Stores, supra; Raper v. McCrory-McLellan Corp.,* 259 N.C. 199, 130 S.E. 2d 281; *Powell v. Diefells, Inc., supra.*

In *Long v. Food Stores, supra,* it is said:

> "The inviter is charged with knowledge of an unsafe or dangerous condition on his premises during business hours created by his own negligence or the negligence of an employee acting within the scope of his employment, or of a dangerous condition of which his employee has notice. In such cases the inviter is liable if injury to an invitee proximately results therefrom, because the inviter is deemed to have knowledge of his own and his employees' acts. [Citing authority.] But where the unsafe or dangerous condition is created by a third party, or where there is no evidence of the origin thereof, an invitee proximately injured thereby may not recover, unless he can show that the unsafe or dangerous condition had remained there for such length of time that the inviter knew, or by the exercise of reasonable care should have known, of its existence. [Citing authority.]"

This is said in 62 A.L.R. 2d, Annotation, § 9, p. 57: "* * * [I]t is universally held that the *res ipsa loquitur* doctrine is inapplicable in suits against business proprietors to recover for injuries sustained in falls on floors within the business premises which are alleged to have been rendered slippery by the presence thereon of water, oil, mud, snow, etc."

In *Blake v. Tea Co.*, 237 N.C. 730, 75 S.E. 2d 921, the Court said: "So far, however, this Court has not held that water alone, unmixed with oil or grease or other slippery substance, on a floor over which an invitee may be expected to pass, creates a hazard against which the proprietor must guard. Counsel do not call our attention to any decision from any other jurisdiction to that effect."

Plaintiff has no allegation in her complaint that there was mud on the floor of defendant's office. Her allegation and her own testimony are that she slipped on the wet or damp floor. The only evidence as to mud is the testimony of her husband that when he entered the office after his wife fell, there was "a little mud" just inside the door on the floor of the office, and on the left side of her dress.

No inference of actionable negligence on defendant's part arises from the mere fact that on a rainy day plaintiff suffered personal injuries from a fall occasioned by slipping on some dampness or on "a little mud" and "a little bit of water" just inside the door of defendant's office. *Murrell v. Handley*, 245 N.C. 559, 96 S.E. 2d 717; *Fanelty v. Jewelers*, 230 N.C. 694, 55 S.E. 2d 493; *Barnes v. Hotel Corp.*, 229 N.C. 730, 51 S.E. 2d 180; *Livingston v. Friend Bros.*, 302 Mass. 602, 29 N.E. 2d 193. "The fact that a floor is waxed does not constitute evidence of negligence." *Barnes v. Hotel Corp., supra; Murrell v. Handley, supra.* Plaintiff has no evidence that defendant, before her fall, had any notice or knowledge that the floor of its office just inside the door was damp or had "a little mud" and "a little bit of water" on it at that place. Plaintiff has no evidence that defendant created such a condition there or permitted it to be there. Plaintiff has no evidence that any customer had entered the office that morning before she did. No fact or circumstance adduced at the trial suggests that the dampness or "a little mud" or "a little bit of water" existed on the floor of its office just inside the door for any appreciable period of time before plaintiff stepped upon it and fell. In consequence, plaintiff's evidence does not support the theory that defendant by the exercise of reasonable care should have known of its existence and avoided injury to plaintiff by removing it or warning plaintiff of its presence prior to her fall.

There is an absence of any evidence showing that it is a common practice or precaution of prudent storekeepers or keepers of offices

under similar conditions to have on rainy days a mat or other covering at the entrance of their stores or offices or on the floors of their stores or offices for invitees entering to wipe their feet on. There is no evidence here of any structural or unsafe defect at the entrance to defendant's office or in respect to the floor of its office. Plaintiff has no evidence tending to show that defendant did or omitted to do anything which a storekeeper or the keeper of an office of ordinary care and prudence would do under the same circumstances for the protection of its customers or other invitees. Under the facts and conditions shown here, the mere fact that defendant had no mat at the entrance to its office or on the floor of its office when the fact that it was raining was as apparent to plaintiff as to defendant is not negligence. *Conaway v. McCrory Stores Corp.,* 82 Ga. App. 97, 60 S.E. 2d 631; *Parks v. Montgomery Ward,* 198 F. 2d 772. See 62 A.L.R. 2d Annotation, § 10, [c], p. 61, where it is said: "On the question whether negligence inheres in the proprietor's failure to place mats or other abrasive covering (such as a nonslip compound) on a floor made slippery by water, oil, mud, etc., no clear-cut answer is furnished by the holdings of the courts: the issue appears to be controlled by the facts presented in individual cases." Following this statement is an annotation on cases on the subject.

Powell v. Deifells, Inc., supra, is factually distinguishable in that, *inter alia,* the manager of the store knew the floor was slippery when wet, and when wet it was customary to put mats at the entrance and mop the floor with dry mops on rainy days.

What was said in *Sears, Roebuck & Co. v. Johnson,* 91 F. 2d 332, 339, is apposite here:

> "If what was shown in this case was sufficient to permit recovery, it would require store owners to have a mopper stationed at the doors on rainy days for the sole purpose of mopping up after every customer entering or leaving the premises. Every store owner would be required to be an insurer against such accidents to public invitees who came in on rainy days with wet shoes."

Plaintiff's evidence, when considered in the light most favorable to her, does not make out a *prima facie* case of actionable negligence against defendant.

Plaintiff has one assignment of error to the exclusion of evidence. It is deemed to be abandoned for the reason she has not brought it forward and discussed it in her brief. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783, 810. Even if this excluded evidence

had been competent and had been admitted, it would not change our decision.

The judgment of compulsory nonsuit below is

Affirmed.

EDWARD PERNAY STEWART, PLAINTIFF v. VICTOR TYSON GALLIMORE, ORIGINAL DEFENDANT AND MICHAEL KAYLER, ADDITIONAL DEFENDANT.

(Filed 24 November, 1965.)

1. **Trial § 21—**

Upon motion of nonsuit, the evidence must be considered in the light most favorable to plaintiff, giving him the benefit of all reasonable inferences which may be drawn therefrom, and all conflicts must be resolved in his favor.

2. **Negligence § 26—**

Nonsuit on the ground of contributory negligence is proper only when plaintiff's own evidence establishes this defense so clearly that no other reasonable inference can be drawn therefrom.

3. **Automobiles § 41h—**

Evidence to the effect that defendant approached an intersection without keeping a proper lookout, that he turned left into the intersecting road across plaintiff's lane of travel without giving signal and without first proceeding to the center of the intersection, *held* sufficient to be submitted to the jury on the issue of negligence.

4. **Automobiles § 42g—**

Plaintiff's evidence was to the effect that the driver of his car approached the intersection within the legal speed limit, and struck defendant's car which had approached from the opposite direction and which turned left without signal across plaintiff's lane of travel, and the only evidence offered by plaintiff tending to show excessive speed was testimony to the effect that his car traveled some 156 feet after the collision with its right wheels in the ditch for a considerable part of that distance. *Held:* Plaintiff's evidence does not disclose contributory negligence as a matter of law on the part of plaintiff's driver.

5. **Negligence § 7—**

A proximate cause may be an act or omission which does not immediately precede the injury or damage, and therefore proximate cause and immediate cause are not synonymous.

6. **Appeal and Error § 42—**

An instruction to the effect that plaintiff's contributory negligence would bar recovery if one of the "immediate" causes of the injury, rather than

one of the "proximate" causes thereof, will not be held for prejudicial error when the evidence is to the effect that each act or omission attributable to plaintiff continued up to the moment of collision and that, if they occurred, they were of necessity proximate causes as well as immediate causes thereof.

APPEAL by original defendant from *Shaw, J.*, May 1965 Session of STANLY.

Action for damages to the automobile of the plaintiff resulting from a collision between it and the automobile owned and driven by the defendant, which occurred 15 June 1963, on Highway 49 in Stanly County. It is stipulated that at the time of the collision, the plaintiff's automobile was being driven by Michael Kayler under circumstances such that any negligence of Kayler would be attributable to the plaintiff.

The original defendant filed an answer alleging a cross-action against Kayler, who, in turn, filed an answer thereto alleging a counterclaim against the original defendant. Prior to trial the original defendant and the additional defendant submitted to judgments of voluntary nonsuit upon such cross-action and counterclaim. The action was tried as one between the plaintiff and the original defendant only and the additional defendant is not a party to this appeal.

The plaintiff alleges that his automobile was being driven westwardly on Highway 49 and that the defendant, proceeding eastwardly thereon, without giving any signal of his intention so to do, drove his automobile to the left of the center line of the highway at its intersection with Rural Public Roads Nos. 1005 and 1134 and caused it to collide with the automobile of the plaintiff. The defendant, in his answer, denies negligence by him, alleges that he was making a left turn at such intersection and that the collision was due solely to negligence by Kayler in his operation of the plaintiff's automobile at an excessive speed, while under the influence of intoxicating liquor and without keeping a proper lookout and in his failure to yield the right of way to the defendant's vehicle which was already within the intersection. Alternatively, the alleged negligence of Kayler is pleaded as contributory negligence chargeable to the plaintiff.

The jury answered the issues in favor of the plaintiff and from a judgment entered upon the verdict the defendant appeals, assigning as errors the denial of his motion for judgment as of nonsuit and a portion of the instructions to the jury upon the issue of contributory negligence. In this portion of the charge the court, after listing the alleged acts and omissions of Kayler alleged by the defendant to constitute contributory negligence, said: "If you find any of these violations and find it by the greater weight of the evidence and

further find that such negligent acts of the plaintiff was one of the immediate causes of this collision which combined and concurred with the alleged negligence of the defendant to produce this collision, then you would answer this second issue in favor of the defendant, that is, 'yes.' " The defendant contends that the court should have used the word "proximate" instead of the word "immediate" in this sentence.

Evidence offered by the plaintiff tends to show: At the intersection Highway 49 is straight and level with an unobstructed view in either direction for at least 1,000 feet. The collision occurred near noon; the weather was clear and the road dry. The plaintiff's car, driven by Kayler, was headed west. The defendant was headed east. He intended to make a left turn into Rural Paved Road No. 1005. Debris from the accident was on the plaintiff's side of Highway 49, west of the center of Rural Paved Road No. 1005, projected. The plaintiff's car came to rest in the ditch on his right, 165 feet west of the debris, having proceeded with its right wheels in the ditch for a considerable part of this distance. The defendant's car came to rest in the westbound lane of Highway 49 and west of the center line of Rural Paved Road No. 1005, projected. The defendant stated to the investigating patrolman that as he approached the intersection he was looking at his speedometer, which he had just had repaired, to see if it was working and he did not observe the plaintiff's car until the collision occurred. The points of impact were the left front door of the plaintiff's car and the left front of the defendant's. Kayler first observed the defendant's car when it was approximately 360 feet from the intersection, at which time Kayler, in the plaintiff's car, was approximately 1,000 feet east of the intersection. He observed the defendant's car continuously until the collision occurred. It was proceeding approximately 25 miles an hour eastwardly toward the intersection and veered over the center line into the westbound lane, but gave no signal of an intent to turn. Kayler was then driving approximately 50 to 55 miles an hour, the speed limit being 60. At the time of the collision the defendant's automobile was six or eight feet across the center lane in the westbound lane of Highway 49. Kayler took his foot off the accelerator but did not apply the brakes on the plaintiff's car because, as he said, "The accident happened too fast."

The defendant offered testimony tending to show: He was driving 25 to 30 miles an hour eastwardly on Highway 49. As he approached the intersection, he turned on his left turn signal light. He looked east along Highway 49 but saw no car approaching when he began his turn. He began his turn before reaching the intersection and had crossed entirely into the westbound lane of Highway 49 when the

collision occurred. As he got to the intersection, he observed the plaintiff's car approaching about 100 feet away at a speed of at least 90 miles per hour. He stopped and the left side of the plaintiff's car struck the left side of his car, damaging both vehicles. Approximately one mile east of the scene of the collision the plaintiff's car passed a westbound truck, the driver of which estimated the speed of the plaintiff's car at that time to have been 75 or 80 miles an hour. Kayler had drunk some beer that day and at the hospital, to which he was taken on account of injuries sustained by him, he had a "carefree manner." No odor of an intoxicant was detected. Prior to this accident Kayler had been convicted in various courts of five different offenses of speeding.

Richard L. Brown, Jr., S. Craig Hopkins for original defendant appellant.

D. D. Smith for plaintiff appellee.

PER CURIAM. Upon a motion for judgment as of nonsuit the evidence must be considered in the light most favorable to the plaintiff, all reasonable inferences in his favor must be drawn therefrom and all conflicts must be resolved in his favor. *Coleman v. Colonial Stores, Inc.*, 259 N.C. 241, 130 S.E. 2d 338; *Ammons v. Britt*, 256 N.C. 248, 123 S.E. 2d 579; *Jenkins v. Electric Co.*, 254 N.C. 553, 119 S.E. 2d 767. A nonsuit on the ground of plaintiff's contributory negligence can be granted only when his own evidence shows such negligence by him so clearly that no other reasonable inference can be drawn therefrom. *McNamara v. Outlaw*, 262 N.C. 612, 138 S.E. 2d 287.

So interpreted, the evidence is sufficient to permit a finding that the defendant approached the intersection without keeping a proper lookout, that he gave no signal of his intent to turn to his left, that he did not proceed to the center of the intersection before commencing his left turn and that he drove upon the left of the center of Highway 49 as he approached the intersection. Thus, the evidence is sufficient to permit the jury to find in favor of the plaintiff upon the first issue. G.S. 20-146, 153, 154. While the distance traveled after the impact may tend to show that Kayler was driving at an excessive speed, other evidence offered by the plaintiff is to the contrary. No other evidence offered by the plaintiff tends to show negligence by Kayler. Consequently, a judgment of nonsuit on this ground could not properly have been entered.

In his charge, the judge instructed the jury as to contributory negligence and as to proximate cause. No exception was taken to these portions of the charge. Then, after recounting the alleged acts

and omissions of Kayler, which defendant contends constituted contributory negligence, he added the sentence including the phrase "one of the immediate causes" to which the defendant excepts. Technically, it was error to use the phrase "one of the immediate causes" rather than "one of the proximate causes" in this instruction. A proximate cause may be an act or omission which does not immediately precede the injury or damage. *Harvell v. Lumber Co.*, 154 N.C. 254, 70 S.E. 389. However, each act or omission by the plaintiff's driver shown by the defendant's evidence, assuming it to be true, continued up to the moment of the collision. Such acts or omissions, if they occurred, and if they were proximate causes of the collision were also immediate causes of it. When considered in the light of these circumstances, and in connection with other portions of the charge with reference to negligence and causation, the use of the term "one of the immediate causes" was harmless error and not prejudicial to the defendant. Such error is not a sufficient basis for granting a new trial. *Burgess v. Construction Co.*, 264 N.C. 82, 140 S.E. 2d 766.

No error.

LEE J. SIMPSON v. WILLIE WOODROW LYERLY.

(Filed 24 November, 1965.)

1. **Trial § 21—**

Upon motion of nonsuit, plaintiff's evidence must be taken as true and all conflicts resolved in his favor, giving him the benefit of all reasonable inferences which may be drawn therefrom, and defendant's evidence in contradiction of that of plaintiff must be disregarded.

2. **Negligence § 26—**

Nonsuit on the ground of contributory negligence is proper only when plaintiff's own evidence establishes contributory negligence so clearly that no other reasonable conclusion may be drawn therefrom.

3. **Automobiles § 41h—**

Plaintiff's evidence to the effect that as the driver of his truck was in the act of passing defendant's car, defendant turned abruptly left to enter a private driveway without giving any signal of his intention to turn left, and collided with the truck, causing the damage in suit, *held* sufficient to take the issue of negligence to the jury. G.S. 20-154.

4. **Automobiles § 42e —**

The evidence tended to show that defendant suddenly turned left to enter a private driveway and collided with plaintiff's truck as the truck

was in the process of passing defendant's car, and that the driver of plaintiff's truck failed to sound his horn, *held* not to disclose contributory negligence as a matter of law, since, if the truck had been following too closely, such act could not have been a proximate cause of the accident, and the failure to sound a horn is not contributory negligence *per se*. G.S. 20-149.

APPEAL by defendant from *Shaw, J.*, May 1965 Session of STANLY.

This is an action for damage to the plaintiff's truck and packhaul and for loss of a load of brick as the result of a collision between the automobile of the defendant and the truck of the plaintiff. The plaintiff alleges that, as his truck was in the act of passing the defendant's automobile, the defendant turned the automobile sharply to his left, without giving any signal of his intention to do so, drove it into the truck and caused the truck to turn over. The defendant denies any negligence on his part and pleads contributory negligence on the part of the plaintiff as an alternative further defense. The defendant also alleges a counterclaim for damages to his automobile. The jury answered the issues in favor of the plaintiff. From a judgment upon the verdict the defendant appeals, assigning as error only the denial of his motion for judgment as of nonsuit upon the plaintiff's action.

The plaintiff's evidence tends to show: At approximately 6:30 a.m. on 6 November 1963, the truck of the plaintiff was being driven westwardly on Highway #70 about three miles west of Salisbury. On the back of the truck was a packhaul loaded with brick. It was getting light but the lights of all vehicles were turned on. The defendant's automobile entered the highway from a side road immediately in front of the truck. It proceeded westwardly, in front of the truck, so slowly that the speed of the truck had to be reduced to approximately 25 miles per hour in order to avoid running into the rear of the car. The automobile and the truck so proceeded along the highway for about a quarter of a mile, with the truck 20 to 30 feet behind the automobile, until they passed some curves and reached a straight stretch of the highway. At that point the highway is a two lane road, 16 feet wide, with a white line in the center. The driver of the truck, having looked for signals from the automobile and observing none, then increased his speed to 35 miles per hour and went over into the left lane and began to pass the automobile without blowing his horn. As the truck drew up beside the automobile, the defendant, without giving any signal, and knowing the truck was behind him, turned his automobile to the left and crossed the center line, intending to enter a private driveway. His left front fender collided with the right front fender and wheel of the truck. The driver of the truck, in an effort to avoid a more serious collision, turned

further to his left and the truck went into the ditch. The truck was damaged and the packhaul and bricks were destroyed.

The defendant's evidence tends to show: After entering Highway #70 and proceeding westwardly thereon, he observed the truck approaching from his rear. The lights of both vehicles were burning. He was driving from 20 to 30 miles per hour. As he approached a private driveway to his left, he turned on his left turn signal light, pumped his brakes so as to cause his brake lights to flash on and began to reduce his speed. The truck behind him then began slowing down, so he started to make his left turn into the driveway. The truck hit his automobile at the left front door.

Richard L. Brown, Jr., for defendant appellant.
Staton P. Williams, Gerald R. Chandler for plaintiff appellee.

PER CURIAM. In passing upon the defendant's motion for judgment as of nonsuit, the court must consider the plaintiff's evidence as true, resolve all conflicts therein in his favor, give him the benefit of all reasonable inferences which may be drawn in his favor, and disregard so much of the defendant's evidence as contradicts that of the plaintiff or tends to show a different state of facts. *Coleman v. Colonial Stores, Inc.*, 259 N.C. 241, 130 S.E. 2d 338; *Ammons v. Britt,* 256 N.C. 248, 123 S.E. 2d 579; *Jenkins v. Electric Co.*, 254 N.C. 553, 119 S.E. 2d 767. A judgment of nonsuit may not be entered on the ground of the plaintiff's contributory negligence unless the plaintiff's own evidence establishes such negligence by him so clearly as to permit no other reasonable conclusion. *McNamara v. Outlaw,* 262 N.C. 612, 138 S.E. 2d 287. When so considered, the evidence is amply sufficient to support a finding that the defendant was negligent and his negligence was the proximate cause of the collision and of the plaintiff's damage. G.S. 20-154; *Coach Co. v. Fultz,* 246 N.C. 523, 98 S.E. 2d 860; *Grimm v. Watson,* 233 N.C. 65, 62 S.E. 2d 538.

If the driver of the plaintiff's truck had been following the defendant's automobile too closely, his doing so was not a proximate cause of the collision for the collision occurred when the truck was in the act of passing the defendant's automobile and entirely in its left lane. The failure of the driver of the truck to sound his horn before beginning to pass the defendant's automobile was a violation of the statute. G.S. 20-149. However, this statute provides that such failure is not negligence or contributory negligence *per se,* but is merely a circumstance to be considered with other facts in determining whether there was negligence or contributory negligence. This was a question

for the jury. The jury considered it and determined the issue in favor of the plaintiff.

No error.

STATE OF NORTH CAROLINA v. FLOYD NELSON PRICE.

(Filed 24 November, 1965.)

1. Indictment and Warrant § 9 —

An indictment which does not incorporate the word "feloniously" or charge that the offense is a felony cannot support a conviction of an offense greater than a misdemeanor.

2. Assault § 11—

An indictment charging that defendant assaulted a named person with intent to kill and did inflict serious and permanent bodily injuries not resulting in death by setting his victim afire, is sufficient to charge an assault where serious injury was inflicted.

3. Criminal Law § 78—

The fact that subsequent to the assault the defendant marries the prosecuting witness does not render her an incompetent witness against him at the trial. G.S. 8-57.

4. Criminal Law § 147—

The duty of defendant's counsel to have proper record made up for appeal, including a true copy of the bill of indictment showing return by the grand jury, applies under the Rules of the Court equally to counsel appointed for indigent defendants.

APPEAL by defendant from *Burgwyn, E.J.*, April 12, 1965 Criminal Session of JOHNSTON.

Defendant was tried upon a bill of indictment which charged that on June 27, 1964, he "did unlawfully and willfully assault one Mavis O'Neal Cole with intent to kill said Mavis O'Neal Cole and did inflict serious and permanent bodily injuries not resulting in death by setting fire to Mavis O'Neal Cole with burning paper bags he had set afire after he had tied the hands and feet of Mavis O'Neal Cole against the form of the statute in such case made and provided and against the peace and dignity of the State."

The State's evidence tends to show: On June 27, 1964, Mavis O'Neal Cole and defendant were not married; they had been going together for three years, and she had spent many nights with him. On the Saturday night in question Mavis "was sitting at a little

'honky tonk' joint in a pickup truck with James Pulley." When defendant found her, he pulled her out of the truck and took her to his home. He told her he was going to burn her to death. Both had been drinking beer all night, and defendant was "pretty drunk." About midnight he tied her wrists and feet together, threw some brown paper bags on the bed, set them and the bed on fire, and pushed her down into the flames. Her hands, arms, and breasts were severely burned. The mattress and bed clothing were also badly burned, but the two lay on the bed the rest of the night. The next day her sister took her to the doctor. She remained in the hospital five weeks, and skin grafting was required. On January 10, 1965, defendant married Mavis who, upon the trial, testified that she gave evidence against defendant because the solicitor said she had to testify. The jury's verdict was "guilty as charged." From a judgment that defendant be imprisoned for a period of two years, defendant appeals.

T. W. Bruton, Attorney General; Harrison Lewis, Deputy Attorney General; and William F. Briley, Trial Attorney for the State.
Knox Jenkins, Jr., for defendant appellant.

PER CURIAM. The bill of indictment in this case indicates that the solicitor set out to charge defendant with the crime of felonious assault as defined in G.S. 14-32, yet he failed to incorporate in it the word *feloniously*. Therefore, as we have repeatedly held, the indictment does not charge a felony. *State v. Lawrence,* 264 N.C. 220, 141 S.E. 2d 264; *State v. Whaley,* 262 N.C. 536, 138 S.E. 2d 138. It does, however, specifically charge an assault wherein serious injury was inflicted. Although it would seem to come within the definition, *State v. Cauley,* 244 N.C. 701, 94 S.E. 2d 915, it is not necessary to decide whether a burning paper bag, under the circumstances of its use here, constituted a deadly weapon. See also *Commonwealth v. Farrell,* 322 Mass. 606, 78 N.E. 2d 697.

The jury having convicted defendant of a misdemeanor "as charged," and the court having sentenced defendant accordingly, no error appears upon the face of the record. The evidence was plenary to overcome defendant's motion for nonsuit, and his contention that Mavis O'Neal Cole was an incompetent witness because he had married her before the trial is without merit. G.S. 8-57. Defendant's other assignments of error do not require discussion. They point out no error in the court's instructions to the jury. *State v. Wilson,* 263 N.C. 533, 139 S.E. 2d 736. We have, however, carefully examined the entire charge, and we find no reasonable cause to believe that the

jury was misled by it. Nothing in the transcript shows error prejudicial to the defendant — on the contrary!

We are constrained to say that the record in this case, as stipulated and agreed to by the solicitor and the attorney for defendant, and certified by the clerk, did not contain a true copy of the bill of indictment, nor did it show that the included bill had ever been returned by the grand jury. In this instance, we have secured from the Clerk of the Superior Court a properly authenticated and certified copy of the bill which shows that it was duly returned in the words and form appearing in the statement of facts. Obviously, officers of the General Court of Justice should not impose such a burden upon the appellate division, and it is one which we will not ordinarily assume. We further point out that the rules of the Supreme Court of North Carolina are no less applicable to indigent defendants and their court-appointed counsel than they are to all others.

No error.

WILLIAM PAUL BURNS, EMPLOYEE v. GEORGE RIDDLE, EMPLOYER, NON-INSURER.

(Filed 24 November, 1965.)

Master and Servant § 93—

Where appellant properly presents for review jurisdictional findings of the Industrial Commission it is the duty of the Superior Court to review the evidence and make its independent findings as to the jurisdictional facts, and when it appears that the Superior Court affirmed the findings of the Commission upon the assumption that the jurisdictional findings were binding if supported by competent evidence, the cause must be remanded.

APPEAL by defendant from *Copeland, Special Judge,* March 1, 1965 Session of LEE.

Plaintiff was injured May 7, 1963 when his right arm was cut by a saw. Asserting he sustained such injury by accident arising out of and in the course of his employment by defendant, he seeks compensation therefor under the Workmen's Compensation Act. Defendant denies liability on the ground he is "an individual sawmill and logging operator with less than ten (10) employees, who saws and logs less than sixty (60) days in any six consecutive months and whose principal business is unrelated to sawmilling or logging," and is exempt from said Act under the section thereof codified as G.S. 97-2(1).

Deputy Commissioner Thomas, the hearing Commissioner, made findings of fact, conclusions of law and awarded compensation; and, on appeal by defendant, his findings of fact, conclusions of law and award were adopted and affirmed by the full Commission. In the superior court, after hearing on defendant's appeal from the full Commission, judgment was entered in which "the Court finds as a fact that there is competent evidence in the record to support the findings of fact of Deputy Commissioner Thomas, and that the conclusions of law based thereon are correct and are supported by law," and "ORDERED, ADJUDGED AND DECREED that the appeal of the defendant employer be and same is hereby in all respects overruled and the findings of fact of Deputy Commissioner Thomas and of the Full North Carolina Industrial Commission and the conclusions of law based thereon are hereby ratified, approved and confirmed." Defendant excepted and appealed.

On appeal to this Court, the only assignment of error brought forward relates to whether the Commission had jurisdiction. This assignment of error is based on defendant's exception to that portion of Finding of Fact No. 2 providing, "Defendant sawed and logged more than 60 days during the six months preceding June 7, 1963," and to Conclusion of Law No. 1 providing that "plaintiff and defendant were subject to and bound by the Workmen's Compensation Act, defendant regularly employing more than five employees and being engaged in sawmilling for more than 60 days on the Ammons' job. G.S. 97-2(1)."

Pittman, Staton & Betts for plaintiff appellee.
Hoyle & Hoyle for defendant appellant.

PER CURIAM. As indicated, defendant's assignment of error is directed solely to the finding of fact, "Defendant sawed and logged more than 60 days during the six months preceding June 7, 1963," and to the conclusion of law predicated thereon. Defendant's brief states: "There is no question raised about the injury coming from the job."

In *Askew v. Tire Co.*, 264 N.C. 168, 174, 141 S.E. 2d 280, in which prior (conflicting) decisions are reviewed, it is stated: "The Commission's findings of jurisdictional facts are not conclusive on appeal to superior court, even if supported by competent evidence." Here, the finding of fact "that there is competent evidence in the record to support the findings of fact of Deputy Commissioner Thomas" indicates clearly that the judge was proceeding under a misapprehension of the applicable law, that is, on the premise that the Commission's

findings of jurisdictional facts were binding upon him if supported by any competent evidence and that he was without authority to make independent findings. Hence, the judgment of the court below is vacated and the cause is remanded to the superior court for further hearing on defendant's exceptions to the Commission's findings of fact and conclusions of law pertinent to its jurisdiction. *McGill v. Lumberton,* 215 N.C. 752, 3 S.E. 2d 324, and cases cited therein, and numerous subsequent decisions in accord therewith.

Upon such further hearing, the court will make its independent findings as to the determinative jurisdictional facts. If it is determined upon such independent findings that the Commission had jurisdiction, the court will affirm the Commission's award in its entirety. If it is determined that the Commission did not have jurisdiction, the court will vacate the Commission's award.

It is noteworthy that, with reference to the disputed jurisdictional fact(s), the evidence is conflicting.

Error and remanded.

L. F. PIERCE v. JOE MURNICK, T/A C & M PROMOTION.

(Filed 24 November, 1965.)

1. **Games and Exhibitions § 2—**

The purchaser of a ticket of admission to a wrestling match is an invitee, and the promoter, while not an insurer of the spectator's safety, is under duty to use reasonable care to prevent injury through a defect in the condition of the premises or by the actions of the contestants in the course of the match.

2. **Same—**

Precautions which the promoter must take to guard against injury to spectators vary with the nature of the exhibition, but the law does not require him to take such precautions as will unreasonably impair the enjoyment of the exhibition by the usual patrons.

3. **Same—**

The evidence tended to show that a spectator at a wrestling match, purchasing and using a ringside seat, was injured when a wrestler was thrown from the ring so that he fell against plaintiff. The evidence further tended to show that plaintiff was a habitual spectator at wrestling matches and that the ring and seating arrangements were such as were habitually used at such exhibitions. *Held:* Nonsuit was properly entered, if not for the insufficiency of evidence of negligence, then on the ground of contributory negligence.

APPEAL by plaintiff from *Carr, J.*, August 1965 Civil Session of LEE.

This is a suit for damages for personal injuries alleged to have been received by the plaintiff, while a spectator at a wrestling match promoted by the defendant, as the result of a wrestler's being thrown from the ring so that he fell against the plaintiff, who was occupying a ringside seat for which he had paid the regular price. The answer denies negligence on the part of the defendant and pleads contributory negligence on the part of the plaintiff as a further and alternative defense. The only assignment of error is the granting of the motion of the defendant for judgment as of nonsuit at the close of the plaintiff's evidence.

The evidence offered by the plaintiff tends to show: On 23 July 1963, the defendant promoted a wrestling match in the Dorton Arena at the State Fair Grounds in Raleigh. Tickets of admission were sold and the plaintiff and his party purchased such tickets entitling them to ringside seats in the front row, which seats he and his party occupied. The match was conducted in the customary wrestling ring, consisting of a square platform, approximately three feet higher than the level of the floor upon which the ringside seats were located, with a post at each corner and ropes running around the ring from post to post. The first row of ringside seats, in which row the plaintiff's seat was located, was approximately seven feet from the edge of the ring. The plaintiff was an habitual spectator at such wrestling matches, having attended a match each week for several months. He had also observed many wrestling matches on television. On this occasion the ring itself and the arrangement of seats for the spectators about the ring were, in all respects, normal. Other than the ropes of the ring there was no guard or shield between the contestants in the ring and the front row of seats for the spectators. In the course of the match, one of the wrestlers, weighing approximately 240 pounds, was knocked or thrown by his opponent over the topmost rope. He landed on his feet outside the ring in the space between the ring and the plaintiff's seat. Before he could regain his balance, or check his momentum, he staggered into and fell against the plaintiff. His elbow struck the plaintiff in the lower abdomen or side and his body fell against the plaintiff's leg, resulting in injuries to the plaintiff. On other occasions the plaintiff had observed wrestlers thrown or pushed out of the ring through the ropes but not over the ropes. In purchasing their tickets, the plaintiff and his party requested ringside seats and paid the usual charge therefor. When the plaintiff found that his seat was in the first row, he did not request that he be

seated elsewhere. Other seats were available five or six rows back from the ring.

Hoyle & Hoyle for plaintiff appellant.

Teague, Johnson & Patterson by Robert M. Clay for defendant appellee.

PER CURIAM. The purchaser of a ticket of admission to a wrestling match is an invitee of the promoter. The promoter is not an insurer of his safety while upon the premises, but is under the duty to use reasonable care to prevent injury to him through a defect in the condition of the premises or by the action of the contestants in the course of the match. See: *Aaser v. City of Charlotte, ante,* p. 494; *Dockery v. Shows,* 264 N.C. 406, 142 S.E. 2d 29; *Lynn v. Wheeler,* 260 N.C. 658, 133 S.E. 2d 514; *Williams v. Strickland,* 251 N.C. 767, 112 S.E. 2d 533; *Hahn v. Perkins,* 228 N.C. 727, 46 S.E. 2d 854; *Anderson v. Amusement Co.,* 213 N.C. 130, 195 S.E. 386. The precautions which the promoter must take to guard against injury to the spectators vary with the nature of the exhibition. The law does not require him to take steps for the safety of his invitees such as will unreasonably impair the enjoyment of the exhibition by the usual patrons of such contests.

It is a matter of common knowledge that ringside seats at wrestling and boxing matches command higher admission charges than other seats because the spectators at such contests desire to be near the contest and have an unobstructed view of the proceedings. As the plaintiff's evidence shows, it is not customary, at such matches, to have shields or barriers between the ring and the spectators. Wrestling is one of the most ancient of sports. The plaintiff's evidence shows that this particular exhibition was conducted in a ring such as has been used habitually for wrestling matches from time immemorial. His evidence indicates nothing unusual about the seating arrangements for spectators. He had been a regular attendant at matches promoted by this defendant over a period of many weeks.

The evidence does not show negligence by the defendant, but if the defendant was negligent the plaintiff's own evidence shows that he, himself, was contributorily negligent by sitting in an exposed position when he knew, or should have known, that a contestant might be thrown from the ring.

Affirmed.

STATE v. HERSHEL FRAZIER CARVER.

(Filed 24 November, 1965.)

Searches and Seizures § 1—

A search warrant is not required for search by officers of a car of one of defendants at the scene where defendants were apprehended in the act of breaking and entering a store.

APPEAL by defendant Hershel Frazier Carver from *McLean, J.*, July, 1965 Session, BUNCOMBE Superior Court.

The defendant and Herman Mitchell Hutchinson were charged in bills of indictment: (1) the felonious possession implements of house breaking without lawful excuse (specifying a long list, including a crowbar, sledge hammer, punches, etc.); (2) the felonious breaking and entering Moore's Bakery for the purpose of committing larceny. The offenses are alleged to have occurred in Asheville on April 17, 1965.

The evidence disclosed that about midnight on April 16-17, 1965, two police officers discovered the defendants attempting to break into Moore's Bakery which contained various articles of personal property, including money and two safes. The police officers had gone to the building pursuant to a call from an informer. Hutchinson was in the act of prying the door open with a crowbar; Carver was assisting by pulling on the door when the officers arrived. Hutchinson started to run, refused to halt at the officers' command, and he was shot and wounded. The defendant remained at the door with his hands up. The police officers searched a parked automobile about 60 or 70 feet across the street from the bakery. Witnesses had told the officers that they had seen the two defendants leave the automobile and, being suspicious, notified the officers. This information caused them to go to the bakery where they apprehended the defendants attempting to open the door. The officers found a wrench, sledge hammer, punches, and other tools in a kit on the floorboard of the automobile behind the front seat. There was a jacket over the tool kit containing these articles.

The jury returned a verdict of guilty on the count of possessing the house breaking tools, and of an attempt to break and enter. From a judgment of eight to ten years for possessing the tools, and 20 to 24 months on the second charge, to run consecutively, the defendant Carver appealed.

T. W. Bruton, Attorney General, Charles E. Clement, Staff Attorney for the State.

Gary A. Sluder for defendant appellant.

PER CURIAM. The defendant's court-appointed counsel has strenuously argued here that the court committed error in permitting the State to introduce the sledge hammer and other tools found in the automobile. The defendant Carver admitted the car was his, but he insists the implements were not admissible because they were obtained from a vehicle without a search warrant. However, the officers had been advised of the suspicious circumstances surrounding the two defendants and their automobile parked nearby at midnight, and the search was made only after the two men had been observed in the act of breaking into the bakery. This evidentiary background gave the officers probable cause to search the automobile and rendered the search reasonable. In the trial and judgment, we find

No error.

STATE v. HENRY H. GARRIS.

(Filed 24 November, 1965.)

1. Criminal Law § 131—

A sentence within the statutory maximum may not be held excessive.

2. Same—

The fact that others tried on similar charges are given shorter sentences is not ground for legal objection, the punishment imposed in a particular case, if within statutory limits, being within the sound discretion of the trial judge.

3. Same; Escape § 1—

Defendant's contention that his punishment for escape constituted double punishment because he would lose his rewards and privileges for good conduct *held* untenable, the Prison Commission having been given authority to promulgate and apply rules in this regard and the matter being administrative and not judicial. G.S. 148-13.

APPEAL by defendant from *McLean, J.*, August 1965 Session of CATAWBA.

Criminal action in which defendant is charged with feloniously escaping from the State prison system while serving therein an active prison sentence theretofore imposed by the Superior Court of Nash County pursuant to a conviction for felonious breaking and entering. G.S. 148-45.

Upon inquiry by the court whether he desired counsel, defendant requested that counsel be appointed to represent him. Thereupon the court appointed attorney John C. Stroupe, Sr., who conferred at length with defendant. When the case was called for trial defendant through his appointed counsel entered a plea of guilty to the charge. Defendant, in response to questions then propounded to him directly by the court, stated that he was under no disability, he understood the nature of the charge and that upon a plea of guilty he could be imprisoned for as much as three years, he had conferred with his lawyer about the case, he freely and voluntarily entered the plea of guilty, and neither the solicitor, his attorney, any law enforcement officer, nor anyone else had by threat or promise influenced or induced him to enter the plea.

The court heard evidence offered by the State showing that defendant has escaped prison. Defendant and his counsel stated to the court that they did not desire to offer any evidence. Thereupon, the court entered judgment imposing a prison sentence of one year.

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

John C. Stroupe, Sr., for defendant.

PER CURIAM. Defendant contends (1) that the sentence imposed is excessive, (2) that the sentence is discriminatory in that other defendants tried on similar charges at the same session were given shorter sentences, and (3) that defendant will suffer double punishment because the prison department "will take (away) all the good time and change his release date," thereby extending the former sentence and adding thereto the sentence herein imposed.

The foregoing objections are not sustained. The sentence of one year was not excessive; the court could have imposed a two-year sentence. G.S. 148-45. There is no requirement of law that defendants charged with similar offenses be given the same punishment. The punishment imposed in a particular case, if within statutory limits, is within the sound discretion of the presiding judge. The prison rules and regulations respecting rewards and privileges for good conduct ("good time") are strictly administrative and not judicial. G.S. 148-13. The legislature has authorized the State Prison Commission to promulgate, publish, enforce and apply such rules. G.S. 148-11. Whether a prisoner shall benefit thereby depends on his own conduct. The giving or withholding of the rewards and privileges under

these rules is not a matter with which the courts are authorized to deal.

Affirmed.

STATE v. EDWARD HERRING.

(Filed 24 November, 1965.)

1. Criminal Law § 71—

The evidence for the State *held* sufficient to support a finding that defendant's confession was freely and voluntarily made, notwithstanding defendant's evidence *contra*, and the admission of the confession in evidence was not error.

2. Larceny § 8—

Unless the larceny was by breaking and entering, the trial court is required to charge that the jury must find beyond a reasonable doubt that the value of the property exceeded $200 before the jury can find defendant guilty of the felony.

APPEAL by defendant from *Bickett, J.*, May Criminal Session 1965 of WAKE.

Defendant was tried upon a bill of indictment charging him with the larceny of an automobile. Defendant entered a plea of not guilty. From a verdict of guilty of larceny of an automobile as charged, and a sentence of not less than four nor more than seven years in the State's Prison, at hard labor, defendant appeals, assigning error.

Attorney General Bruton, Deputy Attorney General Harrison Lewis, Staff Attorney Fred P. Parker, III, for the State.

Alfonso Lloyd, R. P. Upchurch for defendant.

PER CURIAM. Defendant assigns as error the admission in evidence of a purported confession made by defendant to Jack Richardson, an S.B.I. agent, while under arrest for escape.

The trial judge, in the absence of the jury, heard the evidence of the State bearing on the voluntariness of the confession and the evidence offered by defendant with respect thereto.

Defendant, a prisoner, was assigned to work at the Motor Pool of the State of North Carolina. Defendant's hours were from 12 o'clock noon until 9 o'clock at night. On 17 May 1962, about 8:30 p.m., it was discovered that defendant was missing from his place of work at

the Motor Pool. The next morning it was discovered that a State-owned 1962 Chevrolet 4-door automobile, bearing North Carolina permanent license No. PA 702, was missing. This car was found on 18 May 1962 in Garland, North Carolina, by the Garland Police Department and was delivered, undamaged, to the State. Defendant was thereafter arrested at his home near Garland and returned to Raleigh.

Defendant testified on *voir dire* that he told Mr. Richardson that he took the automobile and that he made this statement to Mr. Richardson upon the "promise to me that I might get a small sentence." Mr. Richardson testified that he made no promise whatever to defendant; that defendant made his confession after defendant had a talk with his mother in his (Richardson's) presence as to whether or not he should talk to him (Richardson) about it. His mother said, "She wanted him to go ahead and tell the truth and get the matter straightened out."

The court below held that whatever statement defendant made to the officer was free and voluntary on the part of the defendant and was without coercion.

The facts in this case are not like those in the case of *Escobedo v. Illinois,* 378 U.S. 478, 12 L. Ed. 2d 977, and this assignment of error is overruled.

Defendant assigns as error the failure of the court below, in its charge to the jury, to require the jury to find beyond a reasonable doubt that the property alleged to have been stolen by defendant exceeded the value of $200.00 before the jury could find defendant guilty of larceny as charged in the bill of indictment. This assignment of error is well taken and a new trial is granted on authority of *S. v. Cooper,* 256 N.C. 372, 124 S.E. 2d 91 and *S. v. Holloway,* 265 N.C. 581, 144 S.E. 2d 634.

New trial.

STATE v. WILLIE HUNT.

(Filed 24 November, 1965.)

1. Indictment and Warrant § 9—

An indictment charging every essential element of a statutory offense is sufficient, notwithstanding it fails to specify the statute under which it was drawn.

2. Constitutional Law § 36; Escape § 1—

A defendant convicted of breaking and entering and larceny who is assigned to work under the work-release program, G.S. 148-33.1, may be sentenced to not more than two years imprisonment for failing to return to custody of the Prison Department, and a sentence of 21 months cannot be held cruel or unusual.

APPEAL by defendant from *Mintz, J.*, July "A" Criminal Session 1965 of WAKE.

Defendant was indicted at the May Criminal Session 1965 of the Superior Court of Wake County for the felony of failing to return to the custody of Major R. M. Lennon, Pope Prison, on 19 June 1963, while assigned to work under the work-release program, as provided by G.S. 148-33.1. The bill of indictment further charges that defendant at the aforesaid time was serving a sentence of three to five years in the State's Prison system, for breaking and entering and larceny, imposed at the March Session 1962 of the Superior Court of Wake County, when he failed to return to prison under the work-release program.

Defendant entered a plea of guilty as charged. The court imposed a sentence of 21 months and assigned defendant to work under the Prison Department, this sentence to run consecutively with the sentence imposed at the March Session 1962 of the Superior Court of Wake County.

Defendant appeals, assigning error.

Attorney General Bruton, Asst. Attorney General James F. Bullock, Staff Attorney Leon H. Corbett, Jr., for the State.

Boyce & Lake for defendant.

PER CURIAM. Defendant contends the bill of indictment is defective in that it attempts to charge a violation of G.S. 148-45 but does not refer to the "particular statutory offense sought to be charged."

We hold that the bill of indictment is sufficient to meet the requirements of G.S. 15-153. It has been repeatedly held, since the adoption of the foregoing statute, that all that is required in a warrant or bill of indictment is that it be sufficient in form to express the charge against the defendant in a plain, intelligible, and explicit manner, and to contain sufficient matter to enable the court to proceed to judgment and thus bar another prosecution for the same offense. Furthermore, reference to a specific statute upon which the charge in a warrant or bill of indictment is laid, is not necessary to

its validity. *S. v. Anderson,* 259 N.C. 499, 130 S.E. 2d 857. There is no merit in this contention.

The appellant attacks the sentence imposed in the court below on the ground that it is "too lengthy" and, therefore, should be deemed cruel and unusual punishment of this defendant.

It is provided in G.S. 148-45: "* * * 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. * * *"

The sentence imposed by the court below is authorized by the above statute, and no prejudicial error has been shown.

Affirmed.

LAKE, J., took no part in the consideration or decision of this case.

E. B. TINDAL, JR., T/A APEX OIL COMPANY v. O. J. MILLS.

(Filed 24 November, 1965.)

Compromise and Settlement—

An offer of settlement by the execution of a series of promissory notes in the full amount of the claim is not an offer of compromise, and is competent in evidence.

APPEAL by defendant from *Carr, J.*, April 1965 Civil Session of WAKE.

Action upon an open account for goods sold and delivered.

Plaintiff alleges that during the period 29 June 1961 to 31 October 1961 defendant purchased from him specified merchandise, which was delivered to defendant at his request and upon his engagement to pay therefor, there is a balance of $6,609.74 due by defendant to plaintiff on account thereof, and defendant refuses to pay the same. Defendant denies plaintiff's allegations and avers that defendant's wife was the owner and operator of the business to which the merchandise was allegedly delivered, defendant was not connected with said business in any way during the period in question, plaintiff knew this, and defendant is not indebted to plaintiff in any amount.

Plaintiff and defendant offered evidence tending to support their respective allegations. Issues were submitted to and answered by the jury as follows:

"1. Is the defendant indebted to the plaintiff?
Answer: Yes.
"2. If so, in what amount?
Answer: $6,609.74."

Judgment was entered in accordance with the verdict.

Holleman and Savage for plaintiff.
Seawell & Harrell for defendant.

PER CURIAM. Defendant makes twenty-one assignments of error and brings forward and discusses eleven of these in his brief. It is noted that none of the assignments relied on, except that relating to nonsuit, complies with Rules 19(3) and 21 of the rules of practice in the Supreme Court. 254 N.C. 797, 803. See *Brown v. Brown,* 264 N.C. 485, 141 S.E. 2d 875. However, we have carefully examined and considered each of them.

Defendant seems to stress, somewhat more than his others, the contention that the court erred in admitting, over his objection, testimony by plaintiff and one of plaintiff's witnesses that defendant offered to give a series of notes in discharge of the debt in question. Defendant contends this testimony relates to an unaccepted offer of compromise and was incompetent. Plaintiff and his witness testified that defendant did not deny, but acknowledged, the debt in its entirety, and offered to pay it in full by giving a series of promissory notes of $1000 each, payable in successive years, and that plaintiff declined to defer payment as thus suggested. Defendant testified that no such offer was made. In our opinion the testimony in question does not constitute an offer of compromise. ". . . negotiations alleged to constitute all or any part of an unsuccessful compromise treaty may be admitted as admissions of liability where it appears that they proceeded on the tacit assumption that the entire amount claimed was actually due, or where there was no denial, express or implied, of liability and the only questions discussed were the amount to be paid, the terms, time or method of payment, or whether the declarant should be given some incidental advantage in consideration of payment." 31A C.J.S., Evidence, § 285, pp. 730, 731. See also *Tapp v. Dibrell,* 134 N.C. 546, 47 S.E. 51.

Plaintiff's evidence is sufficient to withstand nonsuit. The evidence of plaintiff and defendant is in sharp conflict. The jury has resolved

the matter in favor of plaintiff. Nothing has been presented which justifies a reversal of the judgment or a new trial.

No error.

JOSEPH STANLEY v. PRYDE W. BASINGER & COMPANY, INC., AND PRYDE W. BASINGER.

(Filed 24 November, 1965.)

Trial § 4—

When plaintiff's counsel appears and announces his readiness to proceed to trial when the cause is called on a "clean-up" calendar, the court has no authority to dismiss the action on the ground of laches for failure to prosecute the action.

APPEAL by plaintiff from *Gwyn, J.*, March 1965 Session of ROWAN.

By this action, instituted on June 2, 1960, plaintiff seeks to recover damages for defendants' alleged conversion of an automobile. The case was tried at the May 1961 Term, and the jury answered the issues in favor of plaintiff. By an order entered May 18, 1961, the presiding judge set aside the verdict as being against the greater weight of the evidence. Thereafter neither plaintiff nor defendants moved to calendar the case for trial; it lay *perdu.* At the March 1965 Session, this case, along with a number of others, was placed upon a "clean-up calendar." After receiving a copy of this calendar, defendants' counsel wrote a letter on March 8, 1965 to the presiding judge, Honorable Allen H. Gwyn, requesting "that this matter be dismissed upon the call of the clean-up calendar." When the case was called, as calendared, at 9:30 a.m. on March 18, 1965, plaintiff and his counsel were present in court and announced their readiness for trial. Neither defendants nor their counsel were in court. In response to Judge Gwyn's inquiry as to why the case had not been retried, counsel for plaintiff replied that "there was not much involved and nobody pushed it." His Honor then nonsuited the cause for that plaintiff had been "guilty of laches for failure to prosecute." From this judgment plaintiff appeals.

Archibald C. Rufty for plaintiff appellant.

Grier, Parker, Poe & Thompson by Gaston H. Gage for defendant appellees.

PER CURIAM. Had plaintiff failed to appear when this case was called for trial pursuant to the calendar, or had plaintiff refused to go to trial after being ordered to proceed, the court below, either under G.S. 1-222(4), or in its inherent power, "could have dismissed the cause 'as of nonsuit' after plaintiff had been called and failed to prosecute" his suit. *Sykes v. Blakey,* 215 N.C. 61, 64, 200 S.E. 910, 912. Plaintiff here, however, was present and ready for trial when his case was called. Under these circumstances, the judge was without authority to dismiss the action.

Reversed.

IN THE MATTER OF THE PETITION OF HOUSING AUTHORITY OF THE CITY OF DURHAM FOR ADMINISTRATIVE REVIEW OF DECISION OF COMMISSIONER OF REVENUE CONCERNING CLAIM FOR REFUND OF SALES AND USE TAXES FOR PERIOD BEGINNING SEPTEMBER 1, 1963, AND ENDING DECEMBER 31, 1963.

(Filed 24 November, 1965.)

Taxation § 29—

A judgment denying a housing authority refund of sales taxes on articles purchased by it from retailers affirmed on authority of *Housing Authority v. Johnson, Commissioner of Revenue,* 261 N.C. 76.

APPEAL by petitioner from *Copeland, S.J.,* August 1965 Nonjury Civil Session of WAKE.

This action was brought by petitioner, Housing Authority of the City of Durham, a public body organized pursuant to Chapter 157 of the General Statutes, for a refund of sales taxes which it had paid on purchases from retailers during the year 1963. Claim for refund was made according to the provisions of G.S. 105-266.1. The Commissioner of Revenue denied the claim and the Tax Review Board sustained his decision. G.S. 105-241.2. Petitioner then applied for judicial review by the Superior Court of Wake County as provided by G.S. 105-241.3 and G.S. 143-306, *et seq.* From its judgment affirming the Tax Review Board, petitioner appeals to this Court.

Allen, Steed & Pullen; Edwards & Manson; McClelland & Barefoot for petitioner appellant.

Thomas Wade Bruton, Attorney General, and Charles D. Barham, Jr., Assistant Attorney General for respondent appellee.

PER CURIAM. The precise question presented by this appeal was decided adversely to petitioner in *Housing Authority v. Johnson, Comr. of Revenue,* 261 N.C. 76, 134 S.E. 2d 121. The judgment of the court below is

Affirmed.

STATE v. CLIFFORD DELAIN DAVIS.

(Filed 1 December, 1965.)

1. **Rape §§ 4, 18—**

Testimony that a defendant, charged with rape or assault with intent to commit rape, was intoxicated at the time the crime was committed is competent as part of the *res gestæ.*

2. **Same; Criminal Law § 38—**

Whether defendant's intoxication before and after the crime is competent upon the question of defendant's intoxication at the time the crime was committed is a question of remoteness to be determined upon the facts of each particular case.

3. **Same—**

Defendant testified to the effect that he drank some beer prior, and again subsequent, to the time the crime was committed, and prosecutrix testified that at the time of the crime she smelled alcohol on his breath but that he did not act like a drunk person. Testimony of an officer that some three and one-half hours after the commission of the crime defendant was intoxicated to the extent he was staggering is incompetent to show defendant was intoxicated at the time the crime was committed.

4. **Rape §§ 4, 18; Criminal Law § 33—**

Where defendant, charged with rape, appears in front of the prosecutrix' house shortly after midnight, some three and one-half hours after the crime was committed, it is competent to show as a circumstance throwing light on his conduct, that he was then intoxicated, since if defendant had been sober his appearance at that time and place would be a circumstance strongly suggesting innocence, but if he were intoxicated and guilty it would explain his abnormal and unusual conduct in appearing where he might be readily identified as the assailant.

5. **Evidence § 15—**

When evidence is material and competent, objection on the ground that it would tend to discredit a party in the eyes of the jury, is untenable.

6. **Criminal Law § 107—**

Where the court correctly defines a term in its charge to the jury, it is not ground for exception that the court fails to repeat the definition each time the term is repeated in the charge.

APPEAL by defendant from *Bickett, J.,* February 15, 1965, Criminal Session of JOHNSTON.

Criminal action in which the indictment charges that defendant, Clifford Delain Davis, on "The 28th day of December, 1964, . . . did, unlawfully, wilfully and feloniously ravish and carnally know Eugenia Elizabeth Upchurch a female, by force and against her will . . ."

Defendant entered a plea of not guilty. The State's evidence, in brief summary, tends to establish these facts: About 8:35 P.M. on 28 December 1964 prosecutrix, age 19, entered her car which was parked across the street from the public library in Smithfield. As she started her car, defendant (age 24, a married man) opened the right front door and jumped in. He held an open knife at her throat and caused her to drive to a secluded spot about two miles east of Smithfield. By means of force and threats he had two acts of sexual intercourse with her. On the way back to Smithfield defendant asked prosecutrix if she knew who he was. For fear he might kill her she told him she did not. She had known who he was for six or seven years, but had never associated, or had any conversation, with him. He got out of the car in a residential section of Smithfield. Prosecutrix went to her home and promptly reported that she had been raped.

Defendant testified that he had known prosecutrix for sometime, he rode with her on this occasion and had the acts of intercourse with her, she offered no objection or resistance.

The jury returned a verdict of "guilty of an assault with intent to commit rape." The court sentenced defendant to prison for a term of not less than 12 nor more than 15 years.

Attorney General Bruton and Staff Attorney Vanore for the State.
Knox V. Jenkins, Jr., for defendant.

PER CURIAM. Defendant contends that he is entitled to a new trial by reason of the admission of irrelevant and prejudicial evidence, and error in the charge.

(1) An agent of the State Bureau of Investigation was permitted to testify, over defendant's objection, that he saw defendant immediately in front of prosecutrix' home about 12:30 A.M. on the night in question and defendant was then "intoxicated to the extent he was staggering on the street." Defendant contends that the testimony with respect to intoxication is irrelevant and without purpose other than to prejudice the jury against him, and, further, is incom-

petent as proof of an unrelated criminal offense when defendant did not put his character at issue.

The following general principles are pertinent. Testimony of the condition of one accused of rape or assault with intent to commit rape, as to drinking or intoxication, at the time of the crime is admissible as a part of the *res gestæ.* 75 C.J.S., Rape, § 59, p. 531. ". . . in a prosecution for assault with intent to rape it has been held proper to show that accused was drinking before or about the time of the alleged offense, to show his condition at the time of the offense, to show a condition of mind which might render him reckless of consequences, or to corroborate the testimony of prosecutrix that she had detected the odor of liquor on her assailant." *Ibid,* p. 532. But evidence that accused was drunk several hours after the time of the alleged offense is properly excluded. *Pusley v. State,* 210 P. 306 (Okla.). See also *Raynor v. Railroad,* 129 N.C. 195, 39 S.E. 821. Where intoxication is an issue at the trial, the question whether the existence of intoxication at a particular time is competent to show the existence of that condition at another time is a question of materiality or remoteness to be determined upon the facts of each particular case, including the length of time intervening and the showing, if any, whether the condition remained unchanged. *State v. Kelly,* 227 N.C. 62, 40 S.E. 2d 454; *State v. Dawson,* 228 N.C. 85, 44 S.E. 2d 527.

In order to determine the relevance and competency of the testimony in question, it must be considered in relation to other evidence on the subject and to the conduct of defendant. Defendant testified that before the alleged crime he was at the Riverside Tavern drinking beer and he remained there at least an hour. Prosecutrix testified that at the time of the crime defendant did not "act like a drunk person" but when he got in the car she smelled alcohol on his breath. Defendant testified that after the occurrence he returned to the tavern and remained there until 11:00 P.M., that sometime thereafter he was passing the home of prosecutrix, saw seven or eight police cars parked on both sides of the street and a "lot of people on the lawn," and he stopped and walked up the street toward the house and was asked by an officer what he wanted. An officer testified that on this occasion defendant "was staggering on the street" (this is the testimony objected to). Defendant explained his condition at that time thus: "I had some beer in me. I did have enough alcohol in me so that it didn't matter how cold it was at that time. I was not in a staggering condition at that time."

The testimony that defendant was staggering on the street in front of the home of prosecutrix about 12:30, three and one-half hours

after the alleged crime, has no tendency to prove that defendant was intoxicated at the time of the alleged crime, and is not competent for such purpose. Indeed, the State does not contend that defendant was drunk at the time of the offense. Yet, in our opinion the testimony is not irrelevant or incompetent. That defendant appeared at the home of prosecutrix after she had reported the assault and during the early stages of investigation, when officers and citizens had there assembled, has significance. If defendant was sober and in normal condition, his appearance at that time and place was a circumstance strongly suggesting innocence. Defendant could contend, with much force, that a guilty person, in full possession of his faculties, does not ordinarily put himself in a position to be readily identified as the assailant and to be readily apprehended. On the other hand, if he was intoxicated and in a staggering condition he would probably be in a state of mind reckless of consequences and conducive of abnormal and unusual conduct. Thus, his condition on the occasion, if one of intoxication, would tend to weaken the inference of innocence which might otherwise arise. Therefore, the testimony is competent as bearing upon his mental state and motive in appearing at the home of prosecutrix.

"It is not required that evidence bear directly on the question in issue, but it is competent if it shows circumstances surrounding the parties necessary to an understanding of their conduct and motives and the reasonableness of their contentions." 2 Strong: N. C. Index, Evidence, § 15. "When evidence is material and competent, objection on the ground that it would tend to discredit a party in the eyes of the jury, is untenable." *Ibid.* If, as defendant contends, evidence of drinking and intoxication strongly prejudiced him in the eyes of the jury, the challenged testimony added very little to the picture otherwise developed by the evidence on this point.

(2) The court instructed the jury that they might return one of the following verdicts: guilty of rape, guilty of rape with recommendation of life imprisonment, guilty of assault with intent to commit rape, guilty of assault with a deadly weapon, guilty of assault on a female (defendant being a male person over the age of 18 years), or not guilty. In explaining to the jury the elements of an assault with intent to commit rape, the court defined "assault" as "an unlawful intentional offer or attempt by force or violence to do injury, that is, bodily harm or hurt, to the person of another, and it must be intentional." Thereafter, in explaining the law with respect to an assault with a deadly weapon, the judge said: "The court will not again define what is meant by assault because the same definition applies

here as in the other except that this is with a deadly weapon." And in explaining assault on a female the court said: "the same definition of assault that I have heretofore given you applies in this case, on this count."

Defendant does not contend that the definition given is erroneous, but insists that the failure to repeat the definition in explaining the lesser grades of the offense charged confused the jury and could have led them to the conclusion that all of the elements of assault with intent to commit rape were embraced in assault with a deadly weapon and assault on a female.

Defendant's contention is not sustained. We cannot say as a matter of law that the jury were, or might have been, confused by instructions which are clear, simple and unambiguous. There is no requirement of law that a trial judge must repeat a definition each time the word or term (once defined) is repeated in the charge. *State v. Young,* 286 S.W. 29 (Mo.). See also *State v. Tyndall,* 230 N.C. 174, 52 S.E. 2d 272; *State v. Killian,* 173 N.C. 792, 92 S.E. 499.

No error.

STATE v. SIDNEY LEE ABERNATHY.

(Filed 1 December, 1965.)

1. ***Indictment and Warrant* § 9—**

Where a warrant properly and sufficiently charges defendant with the commission of a statutory offense and then alleges evidentiary matter descriptive of the manner and means by which the offense was committed, the evidentiary averments will be treated as surplusage and cannot warrant quashal.

2. **Indictment and Warrant § 7—**

Quashal of indictments and warrants is not favored. G.S. 15-153.

3. **Automobiles § 65—**

Evidence tending to show that defendant, in driving his automobile on a public street, struck a traffic island knocking down iron posts thereon, traveled on the left side of the street, made a left turn in the path of an approaching truck, etc., and that when an officer interviewed him some 20 minutes thereafter defendant appeared to be intoxicated, *held* sufficient to be submitted to the jury on the charge of careless and reckless driving. G.S. 20-140(a)(b).

APPEAL by defendant from *McLaughlin, J.,* 1 February 1965 Criminal Session of GUILFORD, Greensboro Division.

Criminal prosecution upon a warrant that charges defendant on 25 September 1964 with the careless and reckless driving of an automobile on a public highway in the words of G.S. 20-140(a) and (b), and then immediately thereafter the warrant contains these words: "[I]n that — he did — operate left of center, fail to reduce speed striking two traffic islands on Lee and Silver Avenue, and had been drinking, also hit a parked motor vehicle at 800 block of Lexington Avenue, all in violation of General Statutes of North Carolina, Chapter 20, Section 140." From a conviction and sentence of imprisonment in the municipal-county court of Greensboro, criminal division, defendant appealed to the superior court, where he pleaded not guilty, and was found guilty as charged in the warrant by the jury.

From a judgment of imprisonment for six months, and that he pay a fine of $500 and the costs, defendant appeals.

Attorney General T. W. Bruton, Assistant Attorney General Charles D. Barham, Jr., and Staff Attorney Wilson B. Partin, Jr., for the State.

Cahoon & Swisher for defendant appellant.

PER CURIAM. Before pleading to the warrant defendant moved to quash it on two grounds: (1) It fails to allege a criminal offense, and (2) the warrant after charging careless and reckless driving of an automobile in violation of G.S. 20-140, then specified what defendant did, that this had the effect of limiting the charge in the warrant to these specific acts alleged in the warrant, and these specific acts do not constitute the careless and reckless driving of an automobile within the intent and meaning of G.S. 20-140.

The warrant charges the offense of careless and reckless driving of an automobile on a public highway in the words of G.S. 20-140(a) and (b), and is sufficient to charge the offense set forth in that statute. *S. v. Wallace,* 251 N.C. 378, 111 S.E. 2d 714.

S. v. Wynne, 151 N.C. 644, 65 S.E. 459, is in point. In that case the indictment charged defendant with unlawfully selling spiritous liquors by the small measure to Alex Weaver and Alonzo Wynne, and then alleged certain acts descriptive of the manner and means by which the offenses were committed. The trial court granted a motion to quash the indictment. The Supreme Court reversed, and the opinion states in part:

> "It was error to grant the motion to quash. The bill charges an 'unlawful sale of liquor by the small measure.' It is unnecessary to pass upon the effect of the evidential matters charged. The bill is complete without them. *Utile per inutile non vitiatur.*

A verdict of guilty, or not guilty, is only as to the offense charged — not of surplus or evidential matters alleged. Revisal, sec. 3254, forbids a bill to be quashed 'if sufficient matters appear therein to enable the court to proceed to judgment.' The use of superfluous words will be disregarded. *S. v. Guest,* 100 N.C. 410; *S. v. Arnold,* 107 N.C. 861; *S. v. Darden,* 117 N.C. 697; *S. v. Piner,* 141 N.C. 760. . . .

"The charge of an unlawful sale of liquor is plainly made. If that is proved, the defendant is guilty. If it is not proved, he is not guilty. The additional facts charged are surplusage and ought not to have been charged."

In 4 Wharton's Criminal Law and Procedure, Anderson Ed. 1957, § 1767, it is said:

"It is the general rule that mere surplusage will not vitiate an indictment or information which, without regard to the surplusage, certainly and definitely alleges matter sufficient to charge the offense sought to be charged, and that superfluous or unnecessary averments or words may ordinarily be rejected as surplusage. . . .

". . . When an indictment properly and sufficiently charges the accused with the commission of a specific offense, it is not rendered defective by additional language descriptive of the manner and means by which it was committed, such matter being at most only surplusage."

The warrant here properly and sufficiently charges defendant with the commission of the offense of the careless and reckless driving of an automobile on a public highway in violation of G.S. 20-140(a) and (b), and the evidentiary matters alleged in the warrant descriptive of the manner of defendant's driving to the effect that he did operate left of center, strike two traffic islands, etc., is rejected as surplusage.

Quashing of indictments and warrants is not favored. G.S. 15-153. *S. v. Greer,* 238 N.C. 325, 77 S.E. 2d 917. The trial court properly denied defendant's motion to quash the warrant, and defendant's assignment of error to such ruling is overruled.

Defendant introduced no evidence. 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 these facts as stated in the record:

"On September 25, 1964, at about 9:30 p.m. the defendant drove his automobile on Lee Street in Greensboro, striking cement traffic islands at the intersections of Lee Street and Silver

> Avenue and Lee Street and Tate Street, that his automobile for some distance travelled westwardly in the portion of Lee Street provided for eastbound traffic, that his car knocked down iron posts in the traffic islands, that the car was damaged and appeared to be hard to steer, that the defendant turned off Lee Street to his left on Lexington Street, in the path of an approaching truck which applied its brakes, that his car was weaving at times, that it struck a parked automobile on Lexington Avenue, that he stopped at his home on McCormick Street and went in; that later policeman Avinger talked to him at the home about twenty minutes after the defendant entered his home and that he then appeared to be intoxicated."

The State's evidence was amply sufficient to carry its case to the jury on the offense charged in the warrant, and defendant's assignment of error to the denial of his motion for judgment of nonsuit is without merit.

Defendant's assignment of error to the judgment is overruled. The judgment imposed was authorized by the specific language of G.S. 20-140.

Defendant's other assignment of error is formal.

The judgment below is

Affirmed.

WILLIAM A. PRIVETTE v. HAROLD BRYON CLEMMONS AND IDA M. CLEMMONS.

(Filed 1 December, 1965.)

Automobiles § 41a—

Evidence tending to show merely that plaintiff, while a passenger in a car, fell asleep, and that he awoke when the car ran onto the right-hand shoulder of the road at a straight and level place, went some 20 yards and hit a ditch, causing the injuries in suit, *held* insufficient to overrule nonsuit.

APPEAL by plaintiff from *Bickett, J.*, February 1965 Civil Session of BRUNSWICK.

Action to recover damages for personal injuries suffered by plaintiff in an automobile accident. The accident occurred 6 September 1963 on North Carolina Highway 211, about 6 miles east of the town of Supply in Brunswick County. Plaintiff was a passenger in a car

owned by defendant Ida M. Clemmons and operated by defendant Harold Bryon Clemmons.

Plaintiff's evidence discloses these facts: Plaintiff was in Southport and asked male defendant for a ride to Supply. They left Southport about 8:00 P.M. Male defendant was driving and plaintiff was in the front seat on the right-hand side; they were the only occupants of the car. Plaintiff fell asleep en route and awoke when the car ran onto the right-hand shoulder of the road. The car "went about 20 to 25 yards, something like that before it ever hit the ditch. It went 23 steps after it hit the ditch." Plaintiff's right arm was broken and he was carried to a hospital. The weather was fair. The road was straight and level at the place of the accident; the hardsurface was 18 feet wide, and the shoulder 4 feet wide. The shoulder "had been raked up" and was soft. Before plaintiff fell asleep the car "was running along at moderate speed; around the speed limit" (55 miles per hour).

Plaintiff alleges he was injured by male defendant's negligence, consisting of reckless driving, driving at a speed greater than was reasonable and prudent under the circumstances, failure to maintain a reasonable lookout, failure to keep the vehicle under proper control, failure to decrease speed, and failure to heed signs "warning of hazardous conditions."

At the close of plaintiff's evidence, the court allowed defendants' motion for nonsuit.

Sullivan and Horne for plaintiff.
James, James & Crossley for defendants.

PER CURIAM. The motion for nonsuit was properly allowed. The evidence utterly fails to support the specifications of negligence set out in the complaint. And there is no showing that the accident was caused by any negligence of defendants. See *Fuller v. Fuller,* 253 N.C. 288, 116 S.E. 2d 776; *Ivey v. Rollins,* 250 N.C. 89, 108 S.E. 2d 63.

Affirmed.

CARL MEARES, JOHN DOUGLAS ELLIOTT, LOUISE HAMMONDS AND H. G. McNEILL, PLAINTIFFS v. A. H. POWELL, B. A. POWELL, AND ALBERT HENRY POWELL, T/DA POWELLS WAREHOUSE, DEFENDANTS.

(Filed 1 December, 1965.)

Appeal and Error § 50—

Even though the Supreme Court may review the evidence in injunction proceedings, the findings of the lower court are presumed correct with the burden upon appellant to assign and show error, and therefore when there are no exceptions or assignments of error with references to the findings of fact, and the facts found support the interlocutory order, the interlocutory order will be affirmed.

APPEAL by defendants from *Copeland, Special Judge,* then presiding over the August 23, 1965 Session of Brunswick Superior Court, from an order entered August 27, 1965, in Chambers, at Southport, North Carolina, in an action pending in COLUMBUS Superior Court.

Action instituted August 5, 1965 for injunctive relief and damages on account of alleged trespass by defendants upon described land in Fair Bluff, North Carolina, allegedly owned by plaintiffs.

A temporary order issued August 5, 1965 by Judge Mallard restrained defendants, their servants and employees, "from entering and going upon" the subject land and "from preventing plaintiffs from the full and exclusive use and enjoyment" thereof. The hearing before Judge Copeland was to determine whether this temporary order should be continued in effect until the final hearing. The evidence before Judge Copeland consisted of (1) the verified complaint, (2) an affidavit of B. A. Powell, a defendant, (3) photographs, and (4) a map of the land claimed by plaintiffs.

Findings of fact made by Judge Copeland and set forth in his order are summarized as follows: Plaintiffs are the owners and in possession of the land in controversy. Defendants own an interest in adjoining land. Defendants have trespassed upon plaintiffs' land (1) by erecting poles thereon obstructing plaintiffs' access thereto and (2) by forcibly removing therefrom fertilizer pallets belonging to plaintiffs. Defendants' acts of trespass have caused injury and damage to plaintiffs and have deprived them of the full use and enjoyment of their property. Unless defendants are restrained, defendants will commit similar acts of trespass. Public streets of Fair Bluff afford adequate means of access to the tobacco warehouse on defendants' property. Continuance of the restraining order "will preserve the status quo . . . until the said cause is tried on its merits."

Based on said findings of fact, Judge Copeland "ordered, adjudged and decreed that the restraining order entered in this cause on Au-

gust 5, 1965, be and the same is hereby continued in full force and effect until the final determination of this action on its merits."

Defendants excepted "to the entering of the foregoing Order" and gave notice of appeal. They "assign as a single Error the signing of the Order continuing the temporary injunction for that the Plaintiff Appellees had failed to make sufficient showing of irreparable injury to invoke the equitable remedy of injunction to retain the status quo."

Williamson & Walton and David M. & W. Earl Britt for plaintiff appellees.

Powell, Lee & Lee for defendant appellants.

PER CURIAM. While this Court, when considering an appeal from an order granting an interlocutory injunction, is not bound by the lower court's findings of fact, but has the power to weigh the evidence and review such findings, "(t)he Supreme Court nevertheless indulges the presumption that the findings of the hearing judge are correct, and requires the appellant *to assign and show error in them.*" (Our italics.) *Huskins v. Hospital,* 238 N.C. 357, 362, 78 S.E. 2d 116.

Since defendants have no exception or assignment of error with reference thereto, Judge Copeland's findings of fact are presumed and deemed correct; and the facts so found are sufficient to support the interlocutory order entered by Judge Copeland in the exercise of his discretion. Hence, the interlocutory order is affirmed.

Affirmed.

STATE v. HERMAN EARL CREECH.

(Filed 1 December, 1965.)

Criminal Law § 162—

Exception to the admission of evidence is waived by permitting evidence of the same import to be introduced thereafter without objection.

APPEAL by defendant from *Bickett, J.,* June Mixed Session 1965 of COLUMBUS.

The defendant was tried and convicted upon a warrant issued by the Recorder's Court at Whiteville, North Carolina, charging him with driving a motor vehicle, on or about 23 August 1964, upon the public streets and highways of the State of North Carolina, while

under the influence of intoxicating liquor. From the judgment imposed the defendant appealed to the Superior Court of Columbus County where he was tried *de novo* on the original warrant.

The jury returned a verdict of guilty. The court imposed a sentence of sixty days in the common jail of Columbus County, to work under the supervision of the State Prison system. Sentence was suspended for a period of twelve months upon payment of a fine of $100.00 and costs. The defendant appeals, assigning error.

Attorney General Bruton, Asst. Attorney General Charles D. Barham, Jr., for the State.

John A. Dwyer for defendant appellant.

PER CURIAM. The appellant assigns as error the admission of evidence to the effect that he was under the influence of an intoxicating beverage at 8:10 p.m., on 23 August 1964, as being too remote, since the evidence tended to show he was arrested at 10:30 p.m. on that night.

The State's evidence tends to show these facts:

Two police officers of the Town of Lake Waccamaw saw the defendant at approximately 8:10 p.m., on 23 August 1964, at the scene of an accident, and the defendant was under the influence of intoxicating liquor at that time. Following the investigation of the accident, which required about thirty minutes, the officers issued the defendant a citation for driving while under the influence of intoxicating liquor.

The Mayor of Lake Waccamaw testified that he agreed to take the defendant and his female companion a short distance down the road where defendant could get a ride to his home. The Mayor further testified, without objection, that in his opinion the defendant was intoxicated at the time he transported him and his companion a part of the way to defendant's home.

About 10:30 p.m. on the same night, the defendant drove his Chevrolet pickup truck south on Rural Paved Road 1700. A State Highway patrolman testified that at the intersection of Rural Paved Road 1700 and Highway 74-76 "there is a median in the middle of the road with two signs on it. The first sign is a Keep Right sign, and the second a Stop Sign. The pickup traveling south ran onto the median, struck the Keep Right sign, knocked it down and continued on over the median over onto the right side and stopped on the shoulder of the road before entering 74-76." The patrolman arrested the defendant who was alone and driving the truck, and charged the defendant with driving upon the highways while under the influence

of an intoxicating liquor. The patrolman swore out the warrant upon which the defendant was tried below and testified at the trial in the Superior Court that in his opinion the defendant at the time he was arrested was under the influence of some alcoholic beverage.

The State's evidence was sufficient to carry the case to the jury and the defendant does not contend otherwise. Moreover, the defendant waived any benefit he claimed under the above assignment of error by permitting later testimony as to his intoxicated condition at approximately 8:10 to 8:40 p.m. to be admitted without objection. *S. v. Cauley,* 244 N.C. 701, 94 S.E. 2d 915; *S. v. Oxendine,* 224 N.C. 825, 32 S.E. 2d 648.

A careful consideration of the remaining assignments of error leads us to the conclusion that no prejudicial error has been shown that would justify a new trial.

No error.

STATE OF NORTH CAROLINA v. MARVIN T. BYNUM.

(Filed 1 December, 1965.)

APPEAL by defendant from *Gambill, J.,* April 12, 1965 Criminal Session of GUILFORD (Greensboro Division).

This criminal proceeding was instituted in the Domestic Relations Court of Guilford County. There defendant was tried and convicted upon a warrant which charged that, while living with his wife, he wilfully failed to provide adequate support for her (G.S. 14-325). From the judgment there imposed, defendant appealed to the Superior Court where, upon a trial *de novo,* the State's evidence was sufficient to establish these facts:

Defendant married the prosecuting witness on January 25, 1964, and took her to live with his mother. This arrangement proved unsatisfactory. About August 1st, defendant told his wife to go to the home of her aunt until he could provide an apartment, and they "would see each other as much as possible and spend nights together." Thereafter they lived together during weekends, either at a motel, his mother's, or her aunt's home. They saw each other more than once a week — "two or three times, or four or five, as much as (they) could." In November 1964, the prosecuting witness became pregnant with his child which, at the time of the trial, she was expecting in July. Defendant is an able-bodied, healthy man who was

employed by a funeral home when he was married. Thereafter he worked for a construction company and for a lumber company. On February 24, 1965, the date on which the warrant was issued, he was not working; at the time of the trial he was employed. Defendant frequently drank intoxicants to excess but, when sober, "he is all sweet." When intoxicated, he beat his wife and accused her of infidelity. Between August 1964 and April 1965, he contributed to his wife's support only $25.00. Ten dollars of this sum he spent for her medicine.

The jury found defendant guilty as charged. From a prison sentence, suspended upon the usual condition in such cases, defendant appeals.

Attorney General T. W. Bruton and Assistant Attorney General Bernard A. Harrell for the State.

Elreta Melton Alexander for defendant appellant.

PER CURIAM. Defendant offered no evidence; the State's evidence, considered in the light most favorable to it, *State v. Kelly,* 243 N.C. 177, 90 S.E. 2d 241, was plenary to withstand defendant's motion for nonsuit. The charge, when considered contextually, fully complies with G.S. 1-180. The jury has found the facts against defendant, and, there being no error in law, he must abide the results of his trial.

No error.

JESSIE W. BRANCH, EXECUTRIX OF ESTATE OF DOUGLAS M. BRANCH v. DELHART DEMPSEY AND WALTER LEROY SIMONS.

(Filed 15 December, 1965.)

1. Automobiles § 52—

While the evidence must be considered in the light most favorable to plaintiff on motion to nonsuit, if plaintiff seeks to hold the employer liable under the doctrine of *respondeat superior,* the evidence must be sufficient to permit the inference that the employee was negligent and acted under circumstances such as to impose liability upon the employer.

2. Automobiles § 54f—

The effect of G.S. 20-71.1 is to make proof of ownership *prima facie* proof of agency, and a statement in a motion for change of venue that movant was the owner of one of the vehicles involved in the collision is sufficient to present the question of agency to the jury, but the statute raises no presumption of negligence, and in order to hold the owner liable the plaintiff must introduce evidence competent as against the owner that the driver was negligent and that such negligence was the proximate cause of the injury.

3. Principal and Agent § 4—

Statements of the alleged agent are incompetent to prove the fact of agency.

4. Automobiles § 54e; Evidence § 31— G.S. 20-71.1 does not render post rem admission of agent competent against principal.

There was no evidence that the driver of the vehicle involved in the collision made any statement at the scene of the collision or en route to the hospital, but a patrolman testified that he talked to the driver at the hospital and later at the police station and that the driver made a statement to the effect that the accident occurred in a certain manner as he was attempting to make a left turn from the highway into a driveway. There was no evidence of agency except the *prima facie* case arising by virtue of G.S. 20-71.1. *Held:* The driver's statement was not a part of the *res gestæ* and there being no evidence that the statement was made in the discharge of any authority conferred upon the driver by the owner of the vehicle, the statement of the driver is incompetent against the owner to prove negligence of the driver.

5. Same—

Neither G.S. 20-166 nor G.S. 20-166.1 nor G.S. 20-166.1(e) has the effect of rendering the statement made by the driver of a vehicle subsequent to the accident in suit competent as against the registered owner of the vehicle to prove negligence or proximate cause.

6. Automobiles § 41h—

Testimony of a statement of the driver to the effect that when he attempted to make a left turn from the highway into a private driveway the motor of the truck stalled, and that while the truck was in gear he undertook to start the motor, causing it to lunge forward immediately into the path of a vehicle approaching from the opposite direction, held sufficient to be submitted to the jury on the issue of the driver's negligence, it being for the jury to determine whether the driver in fact made the statement and whether it correctly recounted what occurred and whether the inference of negligence should be drawn therefrom.

7. Automobiles § 55.1—

Evidence permitting the conclusion that a vehicle was in good condition approximately 30 minutes prior to the collision in suit, that it was involved in a collision with defendant's vehicle, and that immediately thereafter it was damaged about its front so that it was of no value except for salvage, is amply sufficient to support a finding that the damage was the result of the collision.

8. Death § 1—

Evidence tending to show that approximately 30 minutes before the collision in suit testate was in good health and sound physical condition, that immediately after the collision he was found dead, strapped in the driver's seat of his car, with injuries about his face, shoulders and chest, that the steering wheel of his vehicle was bent upward, and that his head was hanging forward upon his chest and, unless held in position, would fall about, *held* sufficient to support the inference that testate's death was the result of the collision.

9. Pleadings § 25—

The trial court has the discretionary power to permit an amendment to a motion to correct an asserted typographical error.

10. Same; Evidence § 44—

A medical expert may not testify as to the cause of death based solely upon a purely superficial examination of the body of one whom the expert had not theretofore seen, since his testimony must be based upon facts within his own knowledge brought out in evidence or upon hypothetical facts embodied in proper questions.

11. Death § 1; Evidence § 24—

A certified copy of a death certificate is competent in evidence to prove the fact of death, the time and place where it occurred, the identity of the deceased, the bodily injury or disease which was the cause of death, the disposition of the body, and other matters relating to the death, but statements from unidentified sources repeated or summarized therein by the coroner are incompetent in evidence. G.S. 130-73.

12. Trial § 17—

Where a document is offered in its entirety and portions of it contain incompetent matter, the ruling of the court excluding it from evidence will not be held for error.

PARKER, J.,concurring in part and dissenting in part.

DENNY, C.J., joins in the opinion of PARKER, J.

SHARP, J., concurring in part and dissenting in part.

APPEAL by plaintiff from *Bundy, J.*, February 1965 Session of BERTIE.

This is an action for the wrongful death of Dr. Douglas M. Branch, General Secretary-Treasurer of the North Carolina Baptist State Convention, and for damages to his 1961 Dodge station wagon, both alleged to have resulted from a collision between the station wagon and a 1956 Ford truck owned by the defendant Simons and driven by the defendant Dempsey.

In substance, the complaint alleges: On 1 February 1963, at approximately 1:30 p.m., Dr. Branch was driving his 1961 Dodge sta-

tion wagon southwardly and on his right side of U. S. Highway 13, approximately half a mile north of Ahoskie. At the same time the 1956 Ford truck owned by Simons was being driven northwardly upon the highway by the defendant Dempsey in performance of his duties as agent of Simons. Dempsey drove the truck negligently in that, among other things, he drove it when it was in a defective condition and, suddenly and without warning, attempted to make a left turn into a private driveway and drove directly into the path of the Branch vehicle when it was so near as to make a collision inevitable, thereby causing the truck and station wagon to collide with the result that Dr. Branch was killed and his station wagon damaged. The defendant Simons was also negligent in that he permitted Dempsey to drive his truck when he knew Dempsey to be an incompetent and careless driver and the truck to be in a defective condition.

The defendants filed separate answers which are identical, except as noted. Each denies all allegations of negligence. Each admits that Simons was the owner of the truck which bore 1963 North Carolina license plate 5349-RC. Each admits that Dr. Branch died on 1 February 1963, and that the plaintiff is the duly qualified executrix of his estate. Each admits that, at the place in question, U. S. Highway 13 is a paved two lane highway running from north to south and is straight, level, and unobstructed for a considerable distance in either direction with a white center line dividing the two lanes of traffic. Each denies all other allegations of the complaint except that Simons in his answer admits "he is advised that there was a collision on U. S. Highway 13 near Ahoskie, North Carolina, on February 1, 1963, involving a truck of this defendant and another motor vehicle." Each answer pleads, as a further defense, contributory negligence by Dr. Branch in operating his vehicle without adequate brakes, without keeping a proper lookout, at a greater speed than was lawful and prudent under the circumstances, without having his vehicle under proper control and without using or applying the brakes thereon.

The action was originally instituted in Wake County, and was removed to Bertie County for trial on motions filed by the defendants which were identical except as noted. Both motions were offered in evidence by the plaintiff. Each stated:

> "(1) That this is an action for alleged wrongful death, said action being brought by Jessie W. Branch, Executrix of the Estate of Douglas M. Branch, and said alleged cause of action arose out of an automobile collision occurring on the first day of February, 1963, in Hertford County, North Carolina, on U. S. Highway 13 at a point approximately five-tenths of a mile

north of the Town of Ahoskie in Hertford County, North Carolina; that said collision involved an automobile being operated by the deceased who was traveling alone, and a truck owned by [Simons] * * * and operated by [Dempsey] * * *.

* * *

"(4) That as herein indicated, this is an action for alleged wrongful death and it is *not* in dispute that the deceased met his death as a result of the accident * * *." (Emphasis supplied.)

Dempsey further stated in his motion:

"(7) That as a result of the collision between the two vehicles referred to above, this defendant sustained serious personal injuries * * * [and] intends to assert a counterclaim for personal injuries against the estate of the deceased; * * *."

When these motions were offered in evidence each defendant was permitted, over objection, to amend paragraph four of his motion, by changing the word "not" to the word "now," on the ground that the original word was a typographical error. Counsel for the plaintiff then read to the jury paragraph four of each motion as originally written.

The plaintiff then introduced evidence tending to show the age, employment, earning capacity, habits, health and life expectancy of Dr. Branch, the damage done to his station wagon and its value immediately before and after the collision. She also introduced evidence tending to show:

Dr. Branch was last seen alive a few minutes after 1:00 p.m. on the day of his death, at which time he was in good health and physical condition. At approximately 1:30 p.m., at the scene of the alleged collision, his body was found in the driver's seat of his severely damaged station wagon with the safety belt fastened. There was no indication of life. The steering wheel was bent upward and the dash was dented. The windshield was broken on the driver's side. Dr. Branch's head was hanging with his chin upon his chest, there was blood upon his face and his nose had been damaged. His hands were hanging down beside him. In removing his body from the vehicle it was necessary to support his head so that it would not fall about. Upon arrival at the hospital, at approximately 2:00 p.m., he was pronounced dead by the examining physician. There were abrasions upon the chest, a bruise upon the right shoulder and bones grated in the right arm when it was moved.

The highway was wet from a light rain. There was no intersection of highways at the point of the alleged collision but private driveways led into the highway from both sides, this being a residential

section. The Branch vehicle was found stopped, headed south upon its right side of the road. It was badly damaged, the front end, fender, hood and bumper were bent. The truck was on its right of the center of the road, its front end being about 10 feet from the Branch vehicle. The right front, right fender, right wheel, bumper and hood of the truck were damaged. Debris, composed of broken glass and dirt, lay on the highway in the southbound (Branch) lane of traffic. Dempsey was at the scene when the investigating highway patrolman arrived, approximately 15 minutes after the collision. He rode from there to the hospital in the ambulance with the body of Dr. Branch and the ambulance crew. There is no evidence that he made any statement at the scene of the collision or en route to the hospital. The patrolman talked to him at the hospital and later at the police station. Without stating in which of these conversations the statement was made, or how long after the accident, the patrolman was permitted to testify, over objection by Simons, as follows:

> "I asked Delhart Dempsey what happened, and here is what he told me. He stated he was headed north on U. S. 13 and was in the process of making a left-hand turn into the private driveway and the truck stalled on him. Said he was making a left-hand turn, and he tried to crank his truck again and it caught, lunged forward and cut off again.
>
> "Q. Then what happened?
>
> "A. It caught, lunged forward, cut off again, and then the vehicles struck."

The Court instructed the jury that what Dempsey told the patrolman was to be considered only as against Dempsey and not as to Simons. To this ruling the plaintiff did not object and she does not assign it as error.

Neither Dempsey nor Simons was called as a witness. The plaintiff introduced in evidence the registration certificate for the truck, showing it was registered in the name of Simons, ownership of the truck by Simons being admitted in the answer of each defendant. With the exception of the coroner's report, mentioned below, no other evidence was offered to show the existence of the relation of principal and agent between Simons and Dempsey, the scope of the agency, if any, or the purpose for which Dempsey was driving the truck.

The witness Brauer was driving north on Highway 13. He observed the truck on his left side of the road, his attention being attracted by steam rising. The truck then went backward a few feet and he observed the Branch station wagon for the first time. There was noth-

ing between the two vehicles, both of which were badly damaged. The steam which he observed was coming from the truck.

The plaintiff also offered in evidence a certified copy of the death certificate and a certified copy of the coroner's report. On objection both documents were excluded. The plaintiff put in evidence a subpoena served on the coroner which showed that he was in the hospital.

The death certificate, signed by the coroner, contained, among other things, the statement:

> "DEATH WAS CAUSED BY: * * * (a) Broken neck and other bruises of chest and abdominable [*sic*] cavities. * * * DUE TO (b) Auto wreck on Highway 13 near Ahoskie, N. C. * * * Hit head-on with truck. * * * Deceased passenger car ran into truck making left turn."

The coroner's report contains the statement: "Cause of death: BROKEN NECK, INTERNAL BREAKS IN CHEST CAVITY." It further contains the coroner's statement of his findings that Dempsey was driving the truck, the purpose for which he was driving it, and the damage done to the Branch vehicle. It also sets forth purported statements by the defendant Dempsey to the coroner with reference to the manner in which he was driving the truck immediately before the alleged collision.

From a judgment of nonsuit as to each defendant, entered at the close of the plaintiff's evidence, the plaintiff appeals, assigning as error the granting of the defendant's motions for such judgment, the exclusions of the certified copy of the death certificate and of the above portions of the certified copy of the coroner's report, the exclusion of certain proposed testimony by the physician who examined Dr. Branch's body and the action of the court in permitting each defendant to amend his motion for change of venue, as above stated.

Jordan and Toms, Douglass and Douglass and John R. Jenkins, Jr., for plaintiff appellant.

Pritchett & Cooke, Cherry & Cherry, Broughton & Broughton for defendant Simons.

Jones, Jones & Jones for defendant Dempsey.

LAKE, J. Upon a motion for judgment of nonsuit the evidence of the plaintiff, together with all reasonable inferences to be drawn therefrom, must be taken to be true and must be interpreted in the light most favorable to the plaintiff. *Coleman v. Colonial Stores, Inc.,* 259 N.C. 241, 130 S.E. 2d 338; *Ammons v. Britt,* 256 N.C. 248, 123

S.E. 2d 579. However, in order to survive such motion by Dempsey, the evidence, when so construed, must be sufficient to sustain the burden which rests upon the plaintiff of proving negligence by the defendant Dempsey and that such negligence was the proximate cause of the death of Dr. Branch or of the damage to the station wagon or both. To survive such motion by Simons, the evidence, so construed, must also show that Dempsey was driving Simon's truck under such circumstances as to impose legal liability upon Simons for Dempsey's negligence.

Each defendant in his answer admits that Simons was the owner of the Ford truck. A certified copy of the registration of the truck with the North Carolina Department of Motor Vehicles was introduced in evidence by the plaintiff and so shows.

G.S. 20-71.1 provides that in an action to recover damages for injury to property or for injury to or the death of a person, arising out of an accident or collision involving a motor vehicle, "Proof of the registration of a motor vehicle in the name of any person, firm, or corporation, shall for the purpose of any such action, be *prima facie* evidence of ownership and that such motor vehicle was *then* being operated by and under the control of a person for whose conduct the owner was legally responsible, for the owner's benefit, and within the course and scope of his employment." (Emphasis added.) Proof of ownership, which is here admitted by the pleadings, is also *prima facie* proof of agency. *Hartley v. Smith*, 239 N.C. 170, 79 S.E. 2d 767. This statute creates no presumption and gives rise to no inference as to the existence of any agency relation before the operation of the vehicle begins or after it stops. It makes no reference to any authority of the driver to affect the owner's liability to other persons otherwise than by the driver's conduct in the operation and control of the vehicle.

There being no evidence to rebut this *prima facie* proof, the plaintiff's evidence is sufficient to show that, if Dempsey was driving the truck, he was the agent of Simons and was driving in the course of his employment so as to impose upon Simons legal liability for any negligence by Dempsey in such driving which was the proximate cause of the death of Dr. Branch or of damage to the station wagon. *Howard v. Sasso*, 253 N.C. 185, 116 S.E. 2d 341. It, of course, remains for the plaintiff to show, by evidence competent against Simons, that the driver was negligent.

It is, indeed, elementary that if an agent is negligent in the performance of an act in the course of his employment and such negligence is the proximate cause of the death of a third person, the principal, or master, is liable in damages without any showing of negli-

gence on the part of the principal, himself. However, it is equally well settled that judgment may not be recovered against either the agent or the principal until the plaintiff introduces evidence competent against that defendant and sufficient to support a finding of each fact upon which the liability of that defendant depends.

Dempsey, the agent, is not liable for the death of Dr. Branch, unless (1) Dempsey was negligent in the operation of the truck and (2) his negligence was the proximate cause of the death. Unless there is in the record evidence, competent against Dempsey, to prove both of these essential facts the judgment of nonsuit against Dempsey should be affirmed.

Simons, the principal, is not liable for the death of Dr. Branch unless (1) at the time of the collision the relation between Simons and Dempsey was such as to make Simons legally responsible for Dempsey's acts and omissions in the operation and control of the truck, (2) Dempsey was negligent in such operation or control, and (3) this negligence was the proximate cause of the death. Unless there is in the record evidence, competent against Simons, to prove each of these essential facts the judgment of nonsuit against Simons should be affirmed.

By the force of G.S. 20-71.1 there is sufficient evidence to support, but not compel, a finding for the plaintiff against Simons on the first of these essential facts, but that is the full effect of this statute. Before the plaintiff may recover from Simons, she must prove, by evidence competent against him, that Dempsey was negligent and that his negligence was the proximate cause of the death.

If the plaintiff had elected to sue only Simons, the principal, as she might have done, it would be obvious that she could recover only upon the basis of evidence, competent as against him, to show these three basic facts. Even if she had first sued Dempsey, the agent, and had obtained a judgment against him, the matter of his negligence would not be deemed *res judicata* in a subsequent action by her against Simons, the principal. *Pinnix v. Griffin,* 221 N.C. 348, 20 S.E. 2d 366; *Gadsden v. Crafts,* 175 N.C. 358, 95 S.E. 610. In the *Pinnix* case Barnhill, J., later C.J., speaking for the Court, said:

> "It is an obvious principle of justice that no man ought to be bound by a proceeding to which he is a stranger. Hence, a judgment against the agent is not conclusive in an action against the principal."

If a judgment against the agent, judicially determining that his negligence was the proximate cause of the plaintiff's injury, is not suffi-

cient to establish the principal's liability under the doctrine of *respondeat superior,* surely mere evidence of his negligence will not be sufficient for that purpose unless it be evidence competent against the principal. Suing both the principal and the agent in the same action is merely for convenience. It does not change the facts essential for recovery or the applicable rules of evidence.

In *Anderson v. Office Supplies,* 234 N.C. 142, 66 S.E. 2d 677, Barnhill, J., later C.J., again speaking for the Court, said:

> "That the declarations of Dockery [the driver] made immediately after the collision were admitted only as against him does not affect the result as to the corporate defendant. It is not alleged that the corporate defendant committed any act of negligence. As to it, plaintiff relies on the doctrine of *respondeat superior.* If, upon consideration of all the evidence, the jury shall find that plaintiff suffered injuries as a proximate result of the negligence of Dockery, then Dockery's negligence will be imputed to the corporate defendant, thus imposing liability upon it for the injuries sustained."

It appears from the report of the *Anderson* case that there the statement of the driver admitting his negligence was made immediately after the collision and so might well have been admitted as evidence against the employer on the ground that it was part of the *res gestæ.* 20 Am. Jur., Evidence § 676. Furthermore, an examination of the record in that case discloses that there the plaintiff himself, testified as to the negligent act of the driver. Thus, in the *Anderson* case there was ample evidence, competent against the owner-principal, to support a finding that his agent was negligent and that such negligence was the proximate cause of the plaintiff's injury, so the reversal of the judgment of nonsuit as to the principal was proper. The *Anderson* decision does not support the proposition that such a judgment as to the principal should be reversed when there is evidence of negligence competent against the agent but no such evidence competent against the principal. In the latter situation, though the agent may be held liable the principal may not be so held. This is not in conflict with, or an erosion of, the doctrine of *respondeat superior.* It is simply a refusal to apply that doctrine where, as against the principal, there is no evidence of a fact which is an essential element of the doctrine.

Two years after the *Anderson* case, Barnhill, J., later C.J., again speaking for the Court, said in *Hartley v. Smith, supra,* with reference to G.S. 20-71.1:

> "[T]his Act was designed and intended to, and does, establish a rule of evidence which facilitates proof of ownership and agency in automobile collision cases where one of the vehicles is operated by a person other than the owner. It was not 'enacted and designed to render proof unnecessary,' nor does proof of registration or ownership make out a *prima facie* case for the jury on the issue of negligence. Neither is it sufficient 'to send the case to the jury,' or 'support a finding favorable to plaintiff under that first (negligence) issue,' or 'to support a finding against a defendant' on the issue of negligence. * * *
>
> "*Non constat* the statute, it is still necessary for the party aggrieved to allege both negligence and agency in his pleading and to prove both at the trial."

Each defendant in his answer denies that Dempsey was driving the truck, denies that any collision occurred between the truck and the Branch vehicle, denies all allegations of negligence by either defendant and denies that the death of Dr. Branch and the damage to the station wagon resulted from any negligent act or omission of either defendant.

No witness testified that Dempsey was driving the truck. There was testimony that he was present at the scene and that he had suffered some cuts for which he was taken to the hospital and treated. The investigating patrolman testified to statements made to him by Dempsey to the effect that Dempsey was driving the truck. In his motion for change of venue, which the plaintiff introduced in evidence in its entirety, although the record indicates that only the fourth paragraph thereof was read to the jury, Dempsey stated that there was a collision between the two vehicles, that he was operating the truck and that in the collision he, himself, sustained personal injuries for which he then intended to file a counterclaim. This is sufficient evidence to justify the jury in finding, as against Dempsey, that Dempsey was driving the truck.

It is not, however, such evidence as against Simons, as the court below instructed the jury with reference to Dempsey's statements to the patrolman. As to Simons, the fact that Dempsey was driving the truck is the only basis for a finding of the alleged agency, there being no other proof of it. Extra-judicial statements by the alleged agent, as distinguished from testimony by him, are not admissible against the alleged principal to prove agency. *Sealey v. Insurance Co.*, 253 N.C. 774, 117 S.E. 2d 744; *Commercial Solvents v. Johnson*, 235 N.C. 237, 69 S.E. 2d 716.

However, the plaintiff also introduced in evidence Simons' own motion for change of venue in which Simons stated: "[S]aid collision involved an automobile being operated by the deceased who was traveling alone and a truck owned by this defendant who lived in Hertford County and operated by one Delhart Dempsey, a co-defendant who also resides in Hertford County." This admission by the defendant Simons is sufficient, as against him, to permit a finding that Dempsey was driving the truck and, therefore, to bring into operation the statutory provision making such *prima facie* proof that Dempsey was the agent of Simons and was driving the truck in the course of his employment as such agent.

In addition to these admissions by the defendants, the plaintiff's evidence as to the physical condition of the two vehicles, found 10 feet apart on the highway with nothing between them, plus the testimony of the witness Brauer that he saw the truck in the southbound lane of traffic, observed steam rising from it, saw it roll back and immediately observed the Branch vehicle and noted that both were severely damaged, is ample evidence to justify a finding that the two vehicles collided.

The defendants, of course, offered no evidence in view of the granting of their motions for judgment of nonsuit. In the present record there is no evidence whatever of any negligence by Dr. Branch in the driving of his station wagon. After the collision, his vehicle was found on its right side of the center line of the highway. The debris was found on his right side of the center line. The truck was observed on its left of the center line before it rolled back.

The investigating highway patrolman testified that after they had left the scene of the collision he talked with Dempsey and Dempsey stated that he, Dempsey, was in process of making a left turn into a private driveway and the truck stalled, whereupon he "tried to crank his truck again and it caught, lunged forward and cut off again * * * and then the vehicles struck." Dempsey, himself, was not called as a witness. Upon objection by Simons the court admitted the testimony as to this statement by Dempsey but stated that it was to be considered as against Dempsey only. This ruling is not now assigned as error.

Assuming this statement to have been made by Dempsey, it was made after his driving of the truck had ended and he had left the scene of the collision. It does not appear from the record whether it was made at the hospital or during the course of a subsequent interview at the police station, the time of which does not appear.

There is nothing in the record to indicate any authority given by Simons to Dempsey to make any statement. There is no evidence of

any agency whatever except by virtue of G.S. 20-71.1. In the absence of evidence of agency, apart from the mere act of driving a motor vehicle registered in the name of another, the agency must be deemed to have terminated when the driver has brought the vehicle to a final stop and has left it. This Dempsey did before he had any conversation with the patrolman.

In *Hubbard v. Railroad,* 203 N.C. 675, 166 S.E. 802, Stacy, C.J., speaking for the Court, said:

> "It is the rule with us that what an agent or employee says relative to an act presently being done by him within the scope of his agency or employment, is admissible as a part of the *res gestæ,* and may be offered in evidence, either for or against the principal or employer, but what the agent or employee says afterwards, and merely narrative of a past occurrence, though his agency, or employment may continue as to other matters, or generally, is only hearsay and is not competent as against the principal or employer."

In addition to the authorities there cited in support of this well established rule, see: *Teague v. Power Co.,* 258 N.C. 759, 129 S.E. 2d 507; *Howell v. Harris,* 220 N.C. 198, 16 S.E. 2d 829; *Hester v. Motor Lines,* 219 N.C. 743, 14 S.E. 2d 794; Stansbury, North Carolina Evidence, § 169; 20 Am. Jur., Evidence, § 599.

If this be a correct statement of the law as to the admissibility of a statement by one whose general employment by the principal continues to the time of the statement, it applies with even more force to one whose employment, if any, is for the sole purpose of driving a motor vehicle upon a single trip and whose driving, and employment, terminated before the statement was made.

In making the statement in question to the investigating highway patrolman, Dempsey was not acting pursuant to any authority conferred upon him by Simons. He was performing no duty imposed by law upon Simons.

G.S. 20-166 requires the driver of a vehicle, involved in an accident or collision resulting in injury or death to any person, to stop, render reasonable assistance and give certain specified information to the occupant or driver of the vehicle collided with, but the statute does not require a statement by him as to how he was driving or what caused the collision.

G.S. 20-166.1 requires the driver of any vehicle involved in a collision, resulting in injury or death of any person, to give notice of the collision to police officers (in this case to the Highway Patrol) and

within 24 hours to make a written report to the Department of Motor Vehicles upon a form supplied by it. These are duties which the law imposes upon the driver, not upon the owner. In performing them, if he did, Dempsey was not acting on behalf of Simons but for himself. Furthermore, whatever statement he made to the investigating patrolman after leaving the scene of the collision was not shown to have been made in the performance of these statutory duties. It is also to be noted that this statute provides that the reports required by it of the driver "shall not be used in any manner as evidence, or for any other purpose in any trial, civil or criminal, arising out of such collision" except in a respect not involved here.

G.S. 20-166.1(e) makes it the duty of the State Highway Patrol to investigate all collisions required to be reported to it by this section, and requires the investigating officer to make his report in writing to the Motor Vehicle Department, which report is open to inspection by the public. However, this statute contains no provision requiring a driver involved in such a collision to make any statement to the officer.

It cannot, therefore, be said that, by virtue of these statutes, one who registers the title of a motor vehicle in his name thereby gives blanket authority to whomsoever may subsequently drive it to make statements as to the manner of his driving so as to cause such statements to be competent in evidence against the registered owner as vicarious admissions of negligence for which he is legally liable.

Apart from this extra-judicial statement by Dempsey, there is no evidence as to how the collision occurred or as to the manner in which either vehicle was being operated prior thereto. There is, therefore, no evidence as against the defendant Simons of any negligence by the driver of his truck. Consequently, the judgment of nonsuit as to Simons was proper.

As to the defendant Dempsey, his statement to the patrolman is sufficient to permit an inference that Dempsey undertook to start the stalled truck while it was in gear and thereby caused it to lunge forward immediately in front of the Branch vehicle. This would constitute negligence in the operation of the truck. It would, of course, be for the jury to determine whether Dempsey in fact made such statement, whether it correctly stated what occurred, and whether, from it, such inference should be drawn. However, upon a motion for nonsuit his statement must be deemed true and all reasonable inferences therefrom favorable to the plaintiff must be drawn.

The plaintiff's evidence tends to show that the station wagon of Dr. Branch was in good condition approximately 30 minutes prior to the collision and immediately thereafter was observed to be dam-

aged about its front so that it was of no value except for salvage. The evidence is amply sufficient to permit a finding that the damage to the Branch vehicle was the result of the collision between it and the truck, which collision was proximately caused by the negligence of Dempsey.

The plaintiff's evidence tends to show that approximately 30 minutes before the collision Dr. Branch was in good health and sound physical condition. It tends to show that immediately after the collision he was found dead, strapped in the driver's seat, having sustained injuries about the face, shoulders and chest and broken bones in the area of the right arm. It tends to show that the steering wheel of his vehicle was bent upward, the dash was dented and the windshield broken out where his head would have struck if he was thrown forward against it. It tends to show that when he was found his head was hanging forward upon his chest and, unless held in position, would fall about. This is sufficient evidence to support an inference that his death was the result of the collision. Whether such inference should be drawn is, of course, a question to be determined by the jury. For the purpose of the judgment of nonsuit, it must be drawn.

As to the defendant Dempsey, there is in the record evidence sufficient to permit a jury to find that he was negligent in the driving of the truck, that such negligence was the proximate cause of a collision between the truck and the vehicle driven by Dr. Branch and that as a result of such collision Dr. Branch came to his death and his vehicle was damaged. That being true, it is for the jury to determine whether these were the facts. The granting of the motion for judgment of nonsuit as to the defendant Dempsey was, therefore, error.

There was no error in permitting each defendant to amend his motion for change of venue on the ground of correction of a typographical error. See McIntosh, North Carolina Practice and Procedure, 2d Ed., § 1283.

The assignments of error relating to the exclusion of proposed testimony by the physician who examined the body at the hospital are without merit. He testified that he made a "purely superficial examination," and that he had not seen the deceased prior to his death. This did not qualify him to express an opinion as to the cause of death upon the basis of his own findings. The questions were not in proper form to permit him to do so on the basis of an hypothesis. They did not recite the nature of injuries which the witness was to consider in forming and stating such opinion. "The rule is that an expert 'must base his opinion upon facts within his own knowledge,

or upon the hypothesis of the finding by the jury of certain facts recited in the question.'" *Service Co. v. Sales Co.,* 259 N.C. 400, 413, 131 S.E. 2d 9.

The remaining assignment of error relates to the exclusion from evidence of a certified copy of the death certificate, a certified copy of the coroner's report and certain portions of such report. Since there must be a new trial of the action against Dempsey, the competency of this evidence should be determined.

G.S. 130-73 provides: "Any copy of the record of a birth or death, properly certified by the State Registrar, shall be *prima facie* evidence in all courts and places of the facts therein stated."

It has been suggested that the statute does not provide that opinions or conclusions appearing in a death certificate shall be *prima facie* proof of the cause of death. *Rees v. Insurance Co.,* 216 N.C. 428, 5 S.E. 2d 154; *Blalock v. Durham,* 244 N.C. 208, 92 S.E. 2d 758. In neither of these cases was it necessary for the court to determine the extent, if any, to which a death certificate may be introduced in evidence to show the cause of death. In *Flintall v. Insurance Co.,* 259 N.C. 666, 131 S.E. 2d 312, suit was brought on a policy of life insurance which excepted death from certain causes. The death certificate and the attached report of the coroner who, as in the present case, was not a physician, stated the cause of death was "unknown." It does not appear that objection was interposed to the introduction of these documents. This Court said: "[W]hen the defendant introduced in evidence the proof of death filed by the plaintiff, and the coroner's certificate of death, they were sufficient to show that the cause of death was undetermined."

The purpose of the statute appears to be to permit the death certificate to be introduced as evidence of the fact of death, the time and place where it occurred, the identity of the deceased, the bodily injury or disease which was the cause of death, the disposition of the body and possibly other matters relating to the death. We think it was not the purpose of the Legislature to make the certificate competent evidence of whatever might be stated thereon. The death certificate offered in the present case contains statements from unidentified sources as to how the collision between the Branch vehicle and the truck occurred. The coroner who signed it did not see the accident. Had he been called as a witness, he could not have related such hearsay. It does not become competent evidence by reason of its being repeated or summarized in the death certificate signed by him. Since the document was offered in its entirety and portions of it were not admissible, the court did not err in excluding it.

For the same reason, there was no error in the exclusion of the certified copy of the coroner's report or of those portions thereof which were offered after the entire report was excluded. These portions included statements as to what the coroner "learned" from inquiries to unidentified persons, and the coroner's conclusion as to what the deceased knew with reference to the collision. Had the coroner been called as a witness, testimony by him as to these matters would not have been admissible. They do not become so when incorporated into his official report.

Reversed as to the defendant Dempsey.

Affirmed as to the defendant Simons.

PARKER, J. Concurring in part, and dissenting in part.

I agree with the statement in the majority opinion to the effect that plaintiff has sufficient evidence to carry the case to the jury against defendant Dempsey, and that the granting of his motion for judgment of nonsuit was reversible error.

I do not agree with the statement in the majority opinion that the granting of the motion for judgment of nonsuit as to the defendant Simons was proper. As I understand the majority opinion, such a conclusion is based on the statement therein that "there is, therefore, no evidence as against the defendant Simons of any negligence by the driver of his truck" because Dempsey's extrajudicial statement is incompetent against Simons.

Anderson v. Office Supplies, 234 N.C. 142, 66 S.E. 2d 677, was a civil action for damages resulting from a truck-motorcycle collision. It was admitted that the individual defendant was an employee of the corporate defendant and was about his master's business at the time of the collision. Plaintiff was nonsuited in the trial court, and on appeal the judgment entered was reversed. The Court in its opinion, written by Barnhill, J., said:

> "That the declarations of Dockery made immediately after the collision were admitted only as against him does not affect the result as to the corporate defendant. It is not alleged that the corporate defendant committed any act of negligence. As to it, plaintiff relies on the doctrine of *respondeat superior.* If, upon consideration of all the evidence, the jury shall find that plaintiff suffered injuries as a proximate result of the negligence of Dockery, then Dockery's negligence will be imputed to the corporate defendant, thus imposing liability upon it for the injuries sustained."

Not infrequently appellate courts call a statement of law in a prior decision which they find troublesome in deciding a case *obiter dictum.* Conceding *arguendo* — but not admitting — that the above quoted statement is *obiter dictum,* in my opinion, it is sound and correct law.

Grayson v. Williams, 256 F. 2d 61, involved a factual situation identical with the instant case. It was an action by Harold E. Williams against Murray Grayson and Southern Freightways, Inc., for damages arising out of a collision of a truck driven by Williams and one driven by Grayson as an employee of Southern Freightways, Inc. The jury returned a verdict for plaintiff against both defendants upon which judgment was entered. The only negligence charged against Southern Freightways, Inc., was that imputed by law from the negligent act, if any, of its employee, while engaged within the scope of his employment. Defendant corporation challenged the judgment, *inter alia,* on the ground that the court erred in allowing in evidence against it admissions of Grayson made by Grayson several hours later in a hospital. The Court based its affirmance of the judgment on two grounds, one of which is identical with the statement of law quoted above from our case of *Anderson v. Office Supplies, supra.* The Court said:

> "In order to find Southern Freightways, Inc. liable because of Grayson's acts, it was necessary to establish two facts; (1) that Grayson was acting within the scope of his employment; and (2) that he was guilty of actionable negligence. The first fact was admitted. Grayson's admissions against his interest were properly admitted to establish his negligence. These admissions constituted evidence from which the jury could find together with other facts that he was liable for the accident. Any facts properly admitted to establish his liability were sufficient, without more, to impose liability upon his employer. . . .
>
> "Let us assume that the court had instructed the jury that it could consider Grayson's declarations only in determining his negligence and together with a general verdict had submitted these three special questions to the jury.
>
> "1. Was plaintiff guilty of contributory negligence?
>
> "2. Was Grayson guilty of negligence?
>
> "3. Was his negligence the proximate cause of the accident? If the jury had answered 'no' to the first question and 'yes' to questions 2 and 3, and then had returned a general verdict against Grayson and a general verdict in favor of Southern

> Freightways, Inc., would not the court have been required to sustain a motion for judgment against Southern Freightways, Inc., notwithstanding the general verdict in its favor? To hold otherwise would be to make a mockery of the law, because it would mean that the agent had been found guilty of actionable negligence, upon competent evidence, while acting within the scope of his employment, yet his principal had escaped."

I do not agree with the further statement in this case that Grayson's admissions were admissible against his employer. Such a statement is at variance with numbers of our decisions, Stansbury, North Carolina Evidence, § 169, and with the decisive weight of authority in other jurisdictions, 8 Am. Jur. 2d, Automobiles and Highway Traffic, § 968; 31A C.J.S., Evidence, §§ 345, 346.

It is hornbook law in this jurisdiction and in this country that an employer is liable to a third person for any injury to either person or property which proximately results from tortious conduct of his employee acting within the scope of his authority and in furtherance of his employer's business. Although the employer is not directly negligent, the tortious conduct of his employee acting within the scope of his authority and in furtherance of his employer's business is imputed to his employer upon the doctrine of *respondeat superior* and imposes liability upon him. *Jackson v. Telegraph Co.*, 139 N.C. 347, 51 S.E. 1015, 70 L.R.A. 738; *Bryant v. Lumber Co.*, 174 N.C. 360, 93 S.E. 926, L.R.A. 1918A 938; *West v. Woolworth Co.*, 215 N.C. 211, 1 S.E. 2d 546; *Jackson v. Mauney*, 260 N.C. 388, 132 S.E. 2d 899; *Porter v. Grennan Bakeries*, 219 Minn. 14, 16 N.W. 2d 906; 35 Am. Jur., Master and Servant, § 552; 57 C.J.S., Master and Servant, § 570.

This is stated in 35 Am. Jur., Master and Servant, § 559: "The courts are generally agreed that an employer may be held accountable for the wrongful act of his employee committed while acting in his employer's business and within the scope of his employment, although he had no knowledge thereof, or had disapproved it, or even expressly forbidden it."

In *West v. Woolworth Co., supra*, the Court said:

> "While the actual authority of the employee is usually material in determining the scope of his employment it is not determinative of the liability of the principal. Employers seldom, if ever, instruct or directly authorize their employees to wrongfully invade the personal or property rights of others. We may assume that torts committed by employees are committed con-

trary to the desire and purpose of the employer. When, however, the employee is undertaking to do that which he was employed to do and, in so doing, adopts a method which constitutes a tort and inflicts injury on another it is the fact that he was about his master's business which imposes liability. That he adopted a wrongful or unauthorized method, or a method expressly prohibited, does not excuse the employer from liability."

In *Porter v. Grennan Bakeries, supra,* the Court said:

"Under the doctrine of *respondeat superior,* according to the generally accepted view, vicarious liability to third persons is imposed upon the master for his servant's torts, not because the master is at fault, or because he authorized the particular act, or because the servant represents him, but because the servant is conducting the master's business, and because the social interest in the general security is best maintained by holding those who conduct enterprises in which others are employed to an absolute liability for what their servants do in the course of the enterprise. *Loucks v. R. J. Reynolds Tobacco Co.,* 188 Minn. 182, 246 N.W. 893; *Eliason v. Western Coal & Coke Co.,* 162 Minn. 213, 202 N.W. 485; *Penas v. Chicago, M. & St. P. R. Co.,* 112 Minn. 203, 127 N.W. 926, 30 L.R.A., N.S., 627, 140 Am. St. Rep. 470; *New York Cent. R. Co. v. White,* 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667, L.R.A. 1917D, 1, Ann. Cas. 1917D, 629; *Standard Oil Co. v. Anderson,* 212 U.S. 215, 29 S. Ct. 252, 53 L. Ed. 480; *Farwell v. Boston & W. R. Corp.,* 4 Metc. 49, 45 Mass. 49, 38 Am. Dec. 339 (*per* Shaw, Chief Justice); Pound, Law and Morals, pp. 76, 77. Where the doctrine of *respondeat superior* is relied on as a basis for recovery by a third person, the tortious act of the servant committed in the scope of his employment, and not the master's fault or the absence of it in hiring or retaining the servant, is the basis of liability. The master is held liable for the servant's tort. *Fonda v. St. Paul City Ry. Co.,* 71 Minn. 438, 74 N.W. 166, 70 Am. St. Rep. 341; *Carlson v. Connecticut Co.,* 94 Conn. 131, 108 A. 531, 8 A.L.R. 569, and annotation; 35 Am. Jur., Master and Servant, §§ 548, 597."

Plaintiff has no evidence of any wrongdoing on the part of Simons other than the wrongdoing of his employee Dempsey. Simons is liable only if Dempsey, his employee and acting within the scope of his employment, was guilty of conduct which would impose liability upon Simons. If Dempsey was guilty of such conduct, then by operation of law alone, and without more, liability is imposed upon

Simons. The liability of Dempsey depends upon facts; that of Simons depends upon the applicable law when the facts are once established. The rule is well stated in 35 Am. Jur., Master and Servant, § 543:

> "By legal intendment, the act of the employee becomes the act of the employer, the individuality of the employee being identified with that of the employer. The latter is deemed to be constructively present; the act of the employee is his act, and he becomes accountable as for his own proper act or omission. The law imputes to the master the act of the servant, and if the act is negligent or wrongful, proximately resulting in injury to a third person, the negligence or wrongful conduct is the negligence or wrongful conduct of the master for which he is liable. . . .
>
> "The doctrine of *respondeat superior* under which liability is imposed upon the master for the acts of his servants committed in the course or within the scope of their employment has its foundation or origin in consideration of public policy, convenience, and justice. Substantial justice is best served by making a master responsible for the injuries caused by his servant acting in the master's service. The rule has been greatly developed and extended out of necessities of changing social and economic conditions. The rule itself and its development is an example of the process by which the judgment of society as to what is necessary to public welfare is from time to time expressed in juristic forms. It may be thought to be a hard rule to fix liability on the employer, even when the employee has passed out of sight and control, but it rests upon a public policy too firmly settled to be questioned. It is elemental that every person in the management of his affairs shall so conduct them as not to cause an injury to another, and if he undertakes to manage his affairs through others, he remains bound so to manage them that third persons are not injured by any breach of legal duty on the part of such others while they are engaged upon his business and within the scope of their authority. Inasmuch as he has made it possible for his employee to inflict the injury, it is only just that he should be held accountable. 'The maxim of *respondeat superior,*' said Lord Chief Justice Best in *Hall v. Smith,* 'is bottomed on this principle: that he who expects to derive advantage from an act which is done by another for him must answer for any injury which a third person may sustain from it.' "

In a civil action to recover damages for wrongful death against A, an alleged employee, and B, his alleged employer, because of the alleged employee's tortious acts done in the scope of his authority and in furtherance of his alleged employer's business, proximately resulting in plaintiff's intestate's death, the usual issues submitted to the jury are as follows:

1. Was the plaintiff's intestate killed by the negligence of A, as alleged in the complaint?
2. If so, was A at the time an employee of B and acting within the scope of his authority and in furtherance of his master's business?

If the jury should answer both issues yes, then, in the absence of any contributory negligence on the part of plaintiff's intestate, plaintiff would be entitled to recover damages jointly and separately from A and B, because as a matter of law the negligence of A under such findings by a jury is imputed to B and imposes liability on him on the doctrine of *respondeat superior.* The mere form of the customary issues in such cases is framed upon the principle that vicarious liability to plaintiff is imposed upon the employer for his employee's torts, not because the employer is at fault, but because the employee is conducting his employer's business. In other words, the fact that the employee was about his employer's business is what imposes liability on the employer.

The majority opinion holds that plaintiff has sufficient evidence to carry his case to the jury against Dempsey, based upon Dempsey's extrajudicial statement. With that holding I agree.

Henry L. Bazemore, a witness for plaintiff, testified to this effect, except when quoted: He went to the scene of the collision between a Dodge station wagon and a Ford truck on Highway #13, and saw Dr. Branch sitting behind the steering wheel of the Dodge station wagon, and a man was holding his head up. At the scene he saw defendant Dempsey, who had cuts and blood on him. He said at the scene in the hearing of Dempsey, "this man [Dr. Branch] is dead." Osborne Highsmith, a State patrolman and a witness for plaintiff, testified in effect: He went to the scene of the collision, and on arrival saw there defendant Dempsey and Dr. Branch sitting under the steering wheel of a Dodge station wagon motionless with his hands down to his side. Defendant Simons in paragraph five of his answer admits "that this defendant is a resident of Ahoskie, Hertford County, North Carolina, and that on the 1 day of February, 1963, he owned a 1956 Ford two-ton truck bearing 1963 North Carolina License No. 5349-RC," and in paragraph eleven of his answer he alleges that "he is advised that there was a collision on U. S. Highway #13 near Ahoskie, North Carolina, on February 1, 1963, involving a

truck of this defendant and another motor vehicle." Plaintiff introduced in evidence a certified copy of the registration of a 1956 Ford two-ton truck bearing 1963 North Carolina license No. 5349-RC showing that defendant Simons was the registered owner of this Ford truck. This evidence and the admissions in defendant Simons' answer above set forth bring into play the provisions of G.S. 20-71.1, which provide.

> "(a) In all actions to recover damages for injury to the person or to property or for the death of a person, arising out of an accident or collision involving a motor vehicle, proof of ownership of such motor vehicle at the time of such accident or collision shall be *prima facie* evidence that said motor vehicle was being operated and used with the authority, consent, and knowledge of the owner in the very transaction out of which said injury or cause of action arose.
>
> "(b) Proof of the registration of a motor vehicle in the name of any person, firm, or corporation, shall for the purpose of any such action, be *prima facie* evidence of ownership and that such motor vehicle was then being operated by and under the control of a person for whose conduct the owner was legally responsible, for the owner's benefit, and within the course and scope of his employment."

Evidence offered by plaintiff sufficient to carry his case to the jury against Dempsey, even if all such evidence is an extrajudicial statement by Dempsey incompetent as to Simons, taken in connection with Dempsey's presence at the scene of the collision fatal to Dr. Branch shortly after it occurred, with the presence of Simons' wrecked truck at the scene, and with the admissions in defendant Simon's answer above quoted, and the evidence of plaintiff that Simons was the registered owner of the Ford truck Dempsey was driving at the time of the fatal collision, which bring into play the provisions of G.S. 20-71.1, are sufficient, in my opinion, to carry plaintiff's case to the jury against Simons, in that they make out a *prima facie* case that the negligence of Dempsey, an employee of Simons and operating the Ford truck for Simons' benefit and within the course and scope of his employment, proximately resulting in Dr. Branch's death, is imputed to Simons, his employer, and imposes vicarious liability on Simons, not because Simons is at fault, but because his employee Dempsey at the time was about his employer's business, on the principle of *respondeat superior*. To hold otherwise would be to repudiate the doctrine of *respondeat superior* and to

ignore the provisions of G.S. 20-71.1, because it would mean that there is sufficient evidence to carry the case to the jury against Simons' agent Dempsey of actionable negligence, while operating a truck of Simons and acting within the scope of his employment and in furtherance of his employer's business, yet there is insufficient evidence to carry the case to the jury against his employer Simons, and Simons the employer escapes liability. I vote to reverse the judgment of nonsuit of plaintiff's case against Simons.

DENNY, C.J., joins in this concurring and dissenting opinion.

SHARP, J., concurring in part and dissenting in part. I agree with the majority that the judgment of nonsuit in favor of Dempsey must be reversed. I dissent from their conclusion that the judgment of nonsuit as to Simons should be sustained.

We have this situation: An agent or servant (Dempsey), driving a motor vehicle registered in the name of his principal (Simons), has a collision with another motorist, plaintiff's testate (Branch), who is killed. Plaintiff, alleging the actionable negligence of Dempsey while acting in the course and scope of his employment by Simons, sues both him and Simons for Branch's wrongful death. G.S. 20-71.1 (b) makes the registration of the vehicle in Simons' name *prima facie* evidence that he owned the motor vehicle and that at the time in question it was being operated by a person for whose conduct the owner was legally responsible. It does not make out a *prima facie case of negligence* on the part of either the driver or the owner of the vehicle. *Hartley v. Smith,* 239 N.C. 170, 79 S.E. 2d 767. See *Howard v. Sasso,* 253 N.C. 185, 116 S.E. 2d 341; *Whiteside v. McCarson,* 250 N.C. 673, 110 S.E. 2d 295.

Declarations made by Dempsey to the investigating officer after they had left the scene of the collision constitute the only evidence of Dempsey's actionable negligence. These declarations were not a part of the *res gestae.* Clearly they were admissible against Dempsey, who made them, *Morgan v. Bell Bakeries, Inc.,* 246 N.C. 429, 98 S.E. 2d 464, and, along with the other evidence, required the court to submit the case to the jury as to him. Did those declarations also take to the jury the case as to Dempsey's principal, Simons? The majority answer this question with an emphatic "No" and then nonsuit the case against him because there is no evidence, *competent against Simons,* to prove Dempsey's negligence. This rationale impels a discussion of this evidence question even though plaintiff failed to object to the exclusion of Dempsey's statement as against Simons.

The answer to the problem presented must be found in the law of agency, and it depends upon whether Dempsey made the statements within the scope of his authority as agent of Simons. At the outset, we must distinguish between extrajudicial declarations of an agent which tend to establish his agency and those of a proven or admitted agent which tend to establish his negligence. As against an alleged principal, the former are clearly incompetent. "The existence of the agency cannot be proved by the agent's statements out of court; it must be established *aliunde,* by the agent's testimony or otherwise, before his admissions will be received." Stansbury, N. C. Evidence § 169 (2d Ed. 1963); *Motor Lines v. Brotherhood* and *Dixie Lines v. Brotherhood,* 260 N.C. 315, 132 S.E. 2d 697; *Sealey v. Insurance Co.,* 253 N.C. 774, 117 S.E. 2d 744.

For the purpose of passing on the motion of nonsuit, Dempsey's agency and activity in the course of his employment by Simons are established by G.S. 20-71.1. Were not his words with reference to that activity also within the scope of his employment?

> "He who sets another person to do an act in his stead as *agent* is chargeable in substantive law by such acts as are done under that authority; so too, properly enough, admissions made by the agent in the course of exercising that authority have the same testimonial value to discredit the party's present claim as if stated by the party himself.
>
> "The question therefore turns upon the scope of the authority. This question, frequently enough a difficult one, depends upon the doctrine of Agency applied to the circumstances of the case, and not upon any rule of evidence." 4 Wigmore, Evidence § 1078 (3d Ed. 1940); *accord, Fanelty v. Jewelers,* 230 N.C. 694, 55 S.E. 2d 493; *Salmon v. Pearce,* 223 N.C. 587, 27 S.E. 2d 647; *Bank v. Wysong & Miles Co.,* 177 N.C. 284, 98 S.E. 769. See also McCormick, Evidence § 244 (1954); Stansbury *op. cit. supra* § 169.
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> "There is as much confusion in the law with respect to whether admissions by an agent are made within the scope of his employment as there is with respect to the *res gestae* rule. Of course, express authority to make admissions will rarely be found in a contract of employment." *Grayson v. Williams,* 256 F. 2d 61, 66 (10th Cir.)

As Wigmore points out, it is in the field of tortious liability that the scope of an agent's authority is most difficult to determine.

> "For example, if *A* is an agent to drive a locomotive, and a collision ensues, why may not his admissions, after the collision, acknowledging his carelessness, be received against the employer? Are his statements under such circumstances not made in performance of work he was set to do?" Wigmore, *op. cit. supra* § 1078.

In discussing this problem, he cites *Northern Central Coal Co. v. Hughes,* 224 Fed. 57 (8th Cir.) and *Rankin v. Brockton Public Market,* 257 Mass. 6, 153 N.E. 97, both personal injury cases in which the *post rem* statements of the employee were held incompetent as against the employer. He argues that it is absurd to hold that an employee has the power to make the employer heavily liable, yet that his extrajudicial confession of facts constituting negligence may not be heard in court. "(T)he pedantic unpracticalness of this rule as now universally administered makes a laughingstock of court methods. . . . Such quibbles bring the law justly into contempt with laymen." *Ibid.*

Other commentators have likewise advocated admitting the agent's statement if the declaration concerned a matter within the scope of the declarant's employment and was made before the termination of the agency or employment. See Am. Law Inst. Model Code of Evidence, Rule 508(a); Morgan, *The Rationale of Vicarious Admissions,* 42 Harv. L. Rev. 461 (1929); McCormick, *op. cit. supra* § 244, wherein it is said, "Some of the recent cases, in result if not in theory, support the wider test. Its acceptance by courts generally seems expedient."

The decisions in this jurisdiction contain many such statements as the following:

> "It is the rule with us that what an agent or employee says relative to an act presently being done by him within the scope of his agency or employment, is admissible as a part of the *res gestae,* and may be offered in evidence, either for or against the principal or employer, but what the agent or employee says afterwards, and merely narrative of a past occurrence, though his agency or employment may continue as to other matters, or generally, is only hearsay and is not competent as against the principal or employer. (citations omitted.)" *Hubbard v. R. R.,* 203 N.C. 675, 678, 166 S.E. 802, 804; *accord, Hughes v. Enterprises,* 245 N.C. 131, 95 S.E. 2d 577; *Lee v. R. R.,* 237 N.C. 357, 75 S.E. 2d 143; *Howell v. Harris,* 220 N.C. 198, 16 S.E. 2d 829; *Pangle v. Appalachian Hall,* 190 N.C. 833, 131 S.E. 42; *Southerland v. R. R.,* 106 N.C. 100, 11 S.E. 189.

Hester v. Motor Lines, 219 N.C. 743, 14 S.E. 2d 794, an action for wrongful death brought against the operator and the corporate owner of a truck and a third party, embodies a factual situation identical with that of the instant case. Over defendant's objection, a traffic officer was permitted to relate, as a witness for plaintiff, the account of the accident which the driver had given him when he made his investigation. In granting a new trial the Court said,

> "It is readily conceded that at the time this evidence was offered, it was competent only as against the defendant Helms, (truck driver), and was not competent as against his employer or the other defendant. . . . What an agent or employee says after an event, merely narrative of the past occurrence, is generally regarded as hearsay and is not competent as substantive evidence against the principal or employer." *Id.* at 745-46, 14 S.E. 2d at 796.

To the extent the rule laid down in *Hester* is retained in situations such as we have here, the rule of *respondeat superior* is eroded. The net result — all questions of insurance aside — is likely to be a judgment against an insolvent agent only.

This problem was considered in *Anderson v. Office Supplies,* 234 N.C. 142, 66 S.E. 2d 677, in an opinion by Barnhill, J. (later C.J.). In *Anderson,* plaintiff sued both the principal and the admitted agent for injuries inflicted upon him by the latter while he was about his master's business. Declarations by the agent after the collision established his actionable negligence. They were admitted in evidence only as against the agent. Said Justice Barnhill:

> "That the declarations of Dockery made immediately after the collision were admitted only as against him does not affect the result as to the corporate defendant. It is not alleged that the corporate defendant committed any act of negligence. As to it, plaintiff relies on the doctrine of *respondeat superior.* If, upon consideration of all the evidence, the jury shall find that plaintiff suffered injuries as a proximate result of the negligence of Dockery, then Dockery's negligence will be imputed to the corporate defendant, thus imposing liability upon it for the injuries sustained." *Id.* at 145, 66 S.E. 2d at 680.

The record in *Anderson,* however, discloses that there was evidence of the agent's negligence in addition to his extrajudicial statements. The statement quoted above was, therefore, not necessary to the decision in the case, and thus *dictum.* No authority was cited for it, and no

effort made to reconcile it with *Hester v. Motor Lines, supra.* Such a rationale would test the competency of the evidence to establish the agent's negligence only as against the agent, the active tort-feasor. To admit the evidence now under consideration against the master, it is not necessary to adopt the Barnhill statement if the agent's declarations were actually made in the scope of his authority.

Grayson v. Williams, supra, involved a factual situation indistinguishable from the case at bar. Plaintiff's judgment was challenged by defendant corporation on the ground that the trial court erred in allowing in evidence statements of the agent made several hours after the accident to the investigating officer and others. The Court of Appeals based its affirmance on two grounds; the first is identical with the *dictum* in *Anderson:*

> "It (the corporate defendant) is charged with no wrongdoing other than the wrongdoing of its agent, Grayson. It is liable only if Grayson, acting within the scope of his employment, was guilty of conduct which would impose liability upon him. Then by operation of law alone and without more, liability is imposed upon it. The liability of Grayson depended upon facts; that of the company depended upon the applicable law when the facts were once established. . . .
>
> . . .
>
> "Any facts properly admitted to establish his (agent's) liability were sufficient, without more, to impose liability upon his employer. . . .
>
> "To hold otherwise would be to make a mockery of the law, *because it would mean that the agent had been found guilty of actionable negligence, upon competent evidence, while acting within the scope of his employment, yet his principal had escaped.*" (Emphasis added.) 256 F. 2d at 67-68.

For the other ground of affirmance, the court adopted the reasoning in *Martin v. Savage Truck Line,* 121 F. Supp. 417 (D.D.C.), yet another case presenting the same factual situation. In *Martin,* the court rejected the principal's contention that,

> "(W)hile it was a statement against the interest of the person making it, subjecting him, as it did, not only to civil liability, but possibly to criminal sanctions, it cannot be considered a statement against the interest of his principal, because he was the agent of the principal only for the purpose of operating the vehicle, and not for the purpose of making statements concerning its operation." *Id* at 419.

The court reasoned:

> "Drivers of such vehicles are required by law to report accidents resulting in injury in which their motor vehicles are involved. Police authorities have special units for the immediate investigation of the numerous injuries which are of daily occurrence. To say, in these circumstances, that the owner of a motor truck may constitute a person his agent for the purpose of the operation of such truck over public streets and highways, and to say at the same time that such operator is no longer the agent of such owner when an accident occurs, for the purpose of truthfully relating the facts concerning the occurrence to an investigating police officer on the scene shortly thereafter, seems to me to erect an untenable fiction, neither contemplated by the parties nor sanctioned by public policy. It is almost like saying that a statement against interest in the instant case could only have been made had the truck been operated by an officer or the board of directors of the Corporation owning the truck; and trucks are not operated that way. To exclude the statement of the driver of the truck as to the speed of the truck at the time of the collision, which was not only clearly excessive in the circumstances, but even greater than the speed limit permitted on the highway between intersections, would be to deny an agency which I believe inherently exists regardless of whether the statement is made at the moment of the impact, or some minutes later to an investigating officer, or other authorized person." *Ibid.*

The above two cases do not represent the weight of authority, 8 Am. Jur. 2d, Automobiles § 968 (1963), yet a number of jurisdictions now recognize their logic and practical justice as the following decisions show:

In *Whitaker v. Keogh,* 144 Neb. 790, 795-96, 14 N.W. 2d 596, 600, the Supreme Court of Nebraska said:

> "We think the evidence was properly receivable as an admission against interest. Whatever an agent or employee does in the lawful exercise of his authority is imputable to the principal and where the acts of an agent or employee will bind the principal, his representations, declarations and admissions respecting the subject matter will also bind him, if made at the same time and constitute a part of the same transaction. Wigmore, Evidence, sec. 1078. The question is one of substantive law, the law of agency. *It is not a question of res gestae* as is often supposed. Wigmore, Evidence, sec. 1797." (Emphasis added.)

In *Thornton v. Budge,* 74 Idaho 103, 108, 257 P. 2d 238, 242, the Supreme Court of Idaho reached a like result, saying:

> "The agency of Henderson having been theretofore established, the statements of Henderson were admissible in evidence. The statements of an agent respecting the subject matter of an action and within the scope of his authority are binding on the principal."

In *Myrick v. Lloyd,* 158 Fla. 47, 49-50, 27 So. 2d 615, 616, we find:

> "We recognize a conflict of authority on this question; however we have chosen the above as the more practical and liberal rule. . . . When this statement was made the status of principal and agent continued. . . . It is also a fact that the statement had reference to matters occurring within the scope of his employment. When so acting the agent was acting for the principal who might have made such an admission himself against his own interest. It is our conclusion that in this case the statement was admissible."

In *Ezzo v. Geremirh,* 107 Conn. 670, 142 Atl. 461, it was held that the work of an agent, who had had an accident with employer's vehicle, was not complete until he had made all reports required by law; that in making these reports he was acting as defendant's agent and "it was therefore admissible against the defendant as a declaration of his agent made in the course of his agency." *Id.* at 681, 142 Atl. at 465.

In *K.L.M. Royal Dutch Airlines Holland v. Tuller,* 292 F. 2d 775, (D.C. Cir.), a statement relating to his duties made by the airplane radio operator, Oudshorn, in a formal report to the government inspector of accidents, some eight hours after his rescue, was held properly admissible in evidence against the airline in an action for wrongful death of a passenger killed in a crash. The court was not troubled by the hearsay rule:

> "Since reliability is the basic test for the admission of any hearsay statement, the interest of the one who utters it and the one to be charged is always important. That this statement is adverse to the interest of KLM is plain. The statement was also adverse to Oudshorn's personal interests in that it entailed the possible loss of his employment, impairment of his future employment opportunities, possible civil liability for Tuller's death, and even the possibility of criminal sanctions. We think that

such a recorded statement meets any reasonable test of reliability." *Id.* at 784.

See also *Kalamazoo Yellow Cab Company v. Sweet,* 363 Mich. 384, 109 N.W. 2d 821.

A number of courts, recognizing the trustworthiness of statements such as those under consideration here, have admitted them by extending the time for spontaneous declarations or relaxing the *res gestae* exceptions to the hearsay rule. Said the court in *Lucchesi v. Reynolds,* 125 Wash. 352, 216 Pac. 12 (driver-agent's statement to police at hospital to which he had taken his victim, held admissible):

> "This court, with most other modern courts, has, as we have heretofore said, considerably relaxed the one-time rule that testimony to be admissible as part of the *res gestae* must be contemporaneous with the happening of the event, and has established the rule . . . that the utterances need not be contemporaneous with and accompany the event, but that they are admissible when they are made under such circumstances 'as will raise a reasonable presumption that they are the spontaneous utterances of thoughts created by, or springing out of, the transaction itself and so soon thereafter as to exclude the presumption that they are the result of premeditation or design.' . . . The fact that the statements testified to by the officer had been elicited by his questions cannot militate against their reception. Of course, they were not involuntary exclamations, but they were none the less spontaneous and instinctive.
>
> "It would do little good to refer to cases which have held either one way or the other as to the admissibility of evidence as part of the *res gestae,* for, as was said by Wigmore, in his work on Evidence . . . 'To argue from one case to another on this question of "time to devise or contrive" is to trifle with principle, and to cumber the records with unnecessary and unprofitable quibbles.' " *Id.* at 354-55, 216 Pac. at 13.

See also *Navajo Freight Lines v. Mahaffy,* 174 F. 2d 305 (10th Cir.) (statement at the scene made by truck driver that his brakes jammed, held admissible); *Ambrose v. Young,* 100 W. Va. 452, 130 S.E. 810 (statement made at the scene by agent-driver to traffic officer within 20 minutes after collision, held admissible); *Wabisky v. D. C. Transit System,* 309 F. 2d 317 (D.C. Cir.) (testimony of police officer as to what street car operator said to him within 15-20 minutes after he struck a pedestrian, held admissible against his corporate employer).

In this jurisdiction a prior judgment against the agent is not *res adjudicata* as to his actionable negligence in a subsequent suit against the master. *Bullock v. Crouch,* 243 N.C. 40, 89 S.E. 2d 749. A former judgment in favor of the servant, however, precludes a later suit based on the same cause of action against the master whose liability, if any, is purely derivative. *Taylor v. Hatchery, Inc.,* 251 N.C. 689, 111 S.E. 2d 864. The master is entitled to his day in court with full opportunity to defend on every issue. *Bullard v. Oil Co.,* 254 N.C. 756, 119 S.E. 2d 910. To hold that evidence competent to establish liability as against the agent is *per se* also competent against the master would not impinge upon these rules. Such a holding would merely mean that in the subsequent suit against the master, the master could subject this evidence to his own cross-examination, offer evidence in contradiction, and perhaps — upon the same evidence — induce his jury to return a verdict exonerating him even though another jury had found his agent liable. As heretofore pointed out, however, it is not necessary in this case to deviate that far from the rule of *Hester v. Motor Lines, supra.* Here, to impose liability upon the master, it is only necessary to recognize that the agent's *post rem* statements were actually made within the scope of his authority. Where such authority exists, the agent's statement is no less hearsay, but the hearsay exclusion rule is inapplicable because, under the substantive law of agency, the agent's statement is considered "as if" made by the principal himself; and therefore, admissible as an admission against interest. *Kalamazoo Yellow Cab Co. v. Sweet, supra.* Even, however, if these statements were considered only as admissions against the interest of the agent, they would be no less reliable. Perhaps it will be suggested that employees, knowing that plaintiffs prefer to seek the deeper pocket of the employer, may be inclined to confess fault where none exists, or where it is doubtful, in order to help an injured plaintiff or to have the employer share the responsibility. This argument contravenes human nature. No motorist likes to admit that his negligence caused an accident. Ordinarily a person will absolve himself from blame in any situation where it is possible for him to do so. The employee who has been involved in a collision resulting in property damage, personal injury, or death, knows that, in addition to the possible loss of his job, he may face both civil and criminal liability. Although a principal may well have to share his agent's civil liability, he rarely has any criminal responsibility for the agent's motor vehicle accident. That agents customarily misrepresent the facts by deliberately making false statements which place the blame for the accident upon themselves, for the purpose of imposing liability upon their principals — especially

when such statements are made to investigating officers of the law — strains credulity and presupposes the untrustworthiness of agents and servants as a class.

On the theory that *post rem* statements of an agent may be introduced in evidence against the principal for the purpose of showing his knowledge of the transaction, this Court has sanctioned the admission of a statement by a defendant's shop foreman, "some time after the wreck," that a certain type of brake had given trouble. *Jones v. Chevrolet Co.,* 217 N.C. 693, 9 S.E. 2d 395. *Accord, Dressel v. Parr Cement Co.,* 80 Cal. App. 536, 181 P. 2d 962. Certainly this was a narrative of a past occurrence. The agent had no duty to make the statement; he was neither expressly nor impliedly authorized to discuss his employer's business. Nor was it a statement against his interest, since he himself had no potential liability whatever in the matter. Thus, in that situation, even the safeguard of personal liability of the declarant, present where the servant is the active tort-feasor, was lacking. Yet the court had no hesitancy in admitting the statement as evidence of notice of the existence of facts which created liability.

In the instant case, I conclude that Dempsey's employment did not end at the time he collided with Branch. The collision imposed additional obligations upon him. He had a duty to remain at the scene, to render aid to Branch, and then and there to disclose certain information to the nearest peace officer, Branch being dead or unconscious. G.S. 20-166. He remained in charge of Simons' truck and was responsible for its removal from the highway.

In view of the ever-increasing number of highway accidents, every owner of a motor vehicle who entrusts its operation to an agent or servant is bound to contemplate the possibility that it may be involved in a collision. Surely an agent's authority to operate the vehicle includes both the authority and the obligation — if he speaks at all — to give to those entitled to the information, including the investigating officer, a true account of the manner in which the wreck occurred. A statement made to an officer, who is subject to cross-examination if he testifies as to it, is not analogous to the accident reports which are required — and specifically excluded from evidence —by statute. When the driver makes such a statement to an officer, he is not indulging in casual conversation or idle chatter outside the scope of his authority. If the collision is one which must be reported, G.S. 20-166.1 also requires an investigation of it by either the State Highway Patrol, the Sheriff's office, the city, or rural police.

In his dissenting opinion in *Marshall v. Thomason,* 241 S.C. 84, 95, 127 S.E. 2d 177, 182, Lewis, J., arguing for the rule for which this dissent contends, said:

> "There can be no doubt that the driver had the power to make his employer liable by the manner in which he operated the vehicle. The truck was placed in the sole charge of the driver to operate. It is unrealistic, to say the least, to hold that the driver was the agent of the employer for every purpose in connection with the operation of the vehicle, except to truthfully relate the manner in which he operated it."

In my view, the authority of an agent who has had a collision in his principal's motor vehicle is not arbitrarily terminated when the vehicle comes to rest after the accident and the dust from the impact settles, nor does it cease at the end of some brief period of time allotted for spontaneous utterances or to *res gestae* intervals. Such allotments of time are usually proportional only to the chancellor's foot. To hold, as do the majority, that the collision spends the force of G.S. 20-71.1, and that it has no further effect "after it (the vehicle) stops" is, in cases such as this, to retreat to the days of *Carter v. Motor Lines,* 227 N.C. 193, 41 S.E. 2d 586. If the evidence should disclose that the driver of a vehicle was not, in fact, its owner's agent, the owner would be entitled to a peremptory instruction in his favor on the issue of agency, *Travis v. Duckworth,* 237 N.C. 471, 75 S.E. 2d 309. See *Taylor v. Parks,* 254 N.C. 266, 118 S.E. 2d 779. If the agency of the driver is eliminated, so is the owner's liability.

In passing upon the motion for nonsuit, I would hold that Dempsey, when he gave the investigating officer his version of how the collision occurred, was acting within the scope of his authority as the agent of Simons. My vote, therefore, is to reverse the judgment of nonsuit as to both defendants.

APPENDIX.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF NORTH CAROLINA:

The following amendment to the Rules and Regulations of The North Carolina State Bar was duly adopted at a regular quarterly meeting of the Council of The North Carolina State Bar.

Amend Article II, appearing 221 N.C. 583, by adding a new section to be designated as Section 5 as follows:

> "Section 5. APPLICATION FOR REINSTATEMENT. Any person who has been a member of The North Carolina State Bar, but who has been placed on the inactive list, and who desires to be reinstated or to resume the practice of law within this State may be reinstated as an active member upon the following conditions:
>
> (1) That he make application for active membership on a form to be prescribed by the Council and supply under oath all information therein requested.
>
> (2) That he satisfy the Council that he intends to resume the practice of law in North Carolina and that he has the moral qualifications, competency and learning in the law required for admission to practice law in the State of North Carolina, and that his resumption of the practice of law within this State will be neither detrimental to the integrity and standing of the Bar or the administration of justice, nor subversive to the public interest.
>
> (3) That he submit with his application a fee of Seventy-five Dollars ($75.00) if applicant be a non resident of the State of North Carolina or Fifty Dollars ($50.00) if he be a resident of the State of North Carolina, to be retained by The North Carolina State Bar.
>
> (4) That if an application is granted, the attorney promptly pay dues for the current year in which the application is filed."

NORTH CAROLINA — WAKE COUNTY.

I, Edward L. Cannon, Secretary-Treasurer of The North Carolina State Bar do hereby certify that the foregoing Rules and Regulations of The North Carolina State Bar have been duly adopted by the Council of The North Carolina State Bar and that said Council did by resolution, at a regular quarterly meeting unani-

mously adopt said amendment to the Rules and Regulations of The North Carolina State Bar as provided in General Statutes Chapter 84.
Given over my hand and the Seal of The North Carolina State Bar, this the 1st day of September, 1965.

EDWARD L. CANNON
Edward L. Cannon, Secretary
The North Carolina State Bar.

After examining the foregoing amendment to the Rules and Regulations of The North Carolina State Bar as adopted by the Council of The North Carolina State Bar, it is my opinion that the same complies with a permissible interpretation of Chapter 210, Public Laws 1933, and amendments thereto — Chapter 84, General Statutes.

This the 22nd day of November, 1965.

LAKE, J.
For the Court.

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This the 22nd day of November, 1965.

LAKE, J.
For the Court.

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ANALYTICAL INEDX

ABATEMENT AND REVIVAL.

§ 9. Death of Party and Survival of Action.

A criminal prosecution abates upon the death of the defendant. *S. v. Dixon*, 561.

ACTIONS.

§ 8. Distinction Between Action in Tort and on Contract.

When plaintiff alleges all the essential elements of fraud inducing plaintiff to execute the contract in suit, and seeks to rescind the contract for such fraud and to recover the consideration paid by plaintiff, the action arises out of the contract and is not in tort. *Byham v. House Corp.*, 50.

§ 12. Termination of Action.

An action properly instituted remains pending until there is a judgment making a final disposition of it. *Smith v. Smith*, 18.

ADMINISTRATIVE LAW.

§ 4. Appeal, Certiorari and Review.

The courts will not ordinarily interfere with the exercise of a discretionary power by an administrative agency unless the decision of the agency is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion. *Highway Com. v. Board of Education*, 35.

ADVERSE POSSESSION.

§ 1. Adverse Possession in General.

In order to acquire title by adverse possession plaintiff must have occupied the land under known and visible boundaries, and where the court fails to instruct the jury in regard to this essential element a new trial must be awarded. *McDaris v. "T" Corporation*, 298.

§ 22. Competency and Relevancy of Evidence.

Testimony to the effect that the boundaries of the land claimed fitted the description of the land as set forth in the deed asserted as color of title, *held* incompetent as a conclusion. *McDaris v. "T" Corporation*, 298.

§ 23. Sufficiency of Evidence, Nonsuit and Directed Verdict.

When a party introduces a deed in evidence which he intends to use as color of title, he must, in order to give legal efficacy to his possession, prove that the boundaries described in the deed cover the land in dispute. *McDaris v. "T" Corporation*, 298.

Where plaintiff introduces a deed as color of title and then offers testimony permitting the inferences that he went upon the land with a surveyor who had owned or had an interest in the land and who knew the property, that the surveyor pointed out the corners to him, and as a consequence plaintiff was familiar with the lines of the property "as contained in the deed", *held* some evidence fitting the description of the deed to the land, even though

ADVERSE POSSESSION—*Continued.*

part of the evidence should have been excluded as a conclusion had objection been made. *Ibid.*

APPEAL AND ERROR.

§ 3. Judgments Appealable.

Where the parties and the lower courts treat the trial court's denial of defendant's plea in bar on the ground of *res judicata* as an order sustaining a demurrer to the plea, the Supreme Court may so treat the order, and such ruling affects a substantial right and is appealable. *Kleibor v. Rogers*, 304.

§ 6. Moot Questions.

In an action by stockholders to prevent the corporation from conveying realty and to cancel a contract to convey, the question of whether plaintiffs are entitled to file *lis pendens* is not rendered moot by the joinder of the purchaser in the contract to convey, since the notice of *lis pendens* is not limited to the purchaser in giving notice. *Cutter v. Realty Co.*, 664.

§ 21. Exception and Assignment of Error to Judgment or to Signing of Judgment.

An assignment of error to the signing and entry of 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. *Mfg. Co. v. Clayton*, 165.

§ 21a. Exceptions and Assignments of Error to Rulings on Motions to Nonsuit.

An assignment of error to judgment of nonsuit is sufficient if it merely states that it is to such judgment and refers to the page of the record where the supporting exception is noted. *Douglas v. Mallison*, 362.

§ 23. Objections and Exception to Evidence and Motions to Strike.

An assignment of error to the exclusion of testimony should set forth the question asked, the objection, the ruling on the objection, and what the witness would have answered, so as to disclose the questions sought to be presented for review within the assignment of error itself. *Douglas v. Mallison*, 362.

§ 28. Necessity for Case on Appeal.

The failure of the judgment to conform to the verdict is an error appearing on the face of the record, and such error may be corrected on appeal without service of case on appeal. *Glace v. Pilot Mountain*, 181.

§ 29. Making up and Service of Case on Appeal.

It is the duty of appellant to see that the record is properly made up and transmitted to the Supreme Court. *S. v. Stubbs*, 420.

§ 32. Docketing and Calendar.

The Supreme Court may advance a case on the docket to expedite the administration of justice. *S. v. Childs*, 575.

§ 34. Form and Requisites of Transcript.

The record must disclose the filing date of every pleading, motion, affi-

APPEAL AND ERROR—*Continued.*

davit, or other document included in the transcrpit. *Patterson v. Buchanan*, 214.

§ 35. Conclusiveness of Record.

The Supreme Court is bound by the record as certified. *Rogers v. Rogers*, 386.

§ 38. The Brief.

Assignments of error not discussed in the brief are deemed abandoned. *Martin v. Underhill*, 669; *Dawson v. Light Co.*, 691.

§ 40. Harmless and Prejudicial Error in General.

Judgment on the verdict will not be disturbed in the absence of error in the trial sufficiently prejudicial to have affected the result. *Dixon v. Edwards*, 470.

§ 41. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Exception to the admission of evidence cannot be sustained when evidence of like import has theretofore been introduced without objection. *Glace v. Pilot Mountain*, 181.

The exclusion of evidence which is merely accumulative and, moreover, would have further supported the judgment of nonsuit cannot be held prejudicial on plaintiff's appeal. *Raper v. Byrum*, 269.

Where plaintiff's witness is permitted to state clearly plaintiff's view of the fact in question, an exception to the exclusion of statement of plaintiff's counsel as to what the answer alleged in this regard cannot be prejudicial. *Douglas v. Mallison*, 362.

Where the record does not show what the answer of the witness would have been had the witness been permitted to testify, it cannot be ascertained that the exclusion of the testimony was prejudicial. *Ibid.*

The exclusion of testimony offered for the purpose of showing that the witness made a representation amounting to a warranty cannot be prejudicial when the buyer shows no authorization on the part of the witness to bind the seller. *Ibid.*

Asserted error in limiting the admission of certain evidence to the purpose of corroboration will not justify a new trial when appellant fails to show a reasonable probability that the asserted error affected the result of the trial. *Equipment Co. v. Anders*, 393.

§ 42. Harmless and Prejudicial Error in Instructions.

An inadvertence in the instructions will not be held for prejudicial error when the inadvertence relates to a minor discrepancy in stating the evidence and it is apparent from the record that such inadvertence could not have affected the result. *Shopping Center v. Highway Comm.*, 209.

Conflicting instructions on a material point, the one correct and the other incorrect, must be held for prejudicial error, since it cannot be ascertained that the jury in coming to a verdict was not influenced by the incorrect charge. *Barber v. Heeden*, 682.

An instruction to the effect that plaintiff's contributory negligence would bar recovery if one of the "immediate" causes of the injury, rather than one of the "proximate" causes thereof, will not be held for prejudicial error when the evidence is to the effect that each act or omission attributable to plaintiff

APPEAL AND ERROR—*Continued.*

continued up to the moment of collision and that, if they occurred, they were of necessity proximate causes as well as immediate causes thereof. *Stewart v. Gallimore*, 696.

§ 49. Review of Findings or Judgments on Findings.

Where an order of the court is not supported by determinative findings of fact on the crucial questions presented for decision, the order must be vacated and the cause remanded for findings of fact and the entry of an order based upon such findings and the conclusions made therefrom. *Mills, Inc. v. Transit Co.*, 61; *Bank v. Ins. Co.*, 86.

Where the referee's findings, approved by the judge, are supported by the evidence, the only question presented on appeal is whether the facts found support the legal conclusions of the court below. *Morpul v. Knitting Mill*, 257.

§ 50. Review of Injunction Proceedings.

Even though the Supreme Court may review the evidence in injunction proceedings, the findings of the lower court are presumed correct with the burden upon appellant to assign and show error, and therefore when there are no exceptions or assignments of error with references to the findings of fact, and the facts found support the interlocutory order, the interlocutory order will be affirmed. *Mears v. Powell*, 729.

§ 51. Review of Judgments on Motions to Nonsuit.

Upon appeal from the court's refusal of motion for nonsuit, incompetent evidence admitted without objection must be considered, since if objection had been entered plaintiff might have introduced competent evidence in proof of the matter in question. *McDaris v. "T" Corporation*, 298; *Dixon v. Edwards*, 470; *Aaser v. Charlotte*, 494.

§ 59. Force and Effect of Decision of Supreme Court.

A decision of the Supreme Court must be construed in the light of the facts of the case in which it is rendered. *Hatley v. Johnston*, 73.

ASSAULT AND BATTERY.

§ 9. Defense of Others.

Driver of car has the right to interfere to prevent felonious assault by one passenger upon another. *S. v. Hornbuckle*, 312.

§ 11. Indictment.

An indictment charging that defendant assaulted a named person with intent to kill and did inflict serious and permanent bodily injuries not resulting in death by setting his victim afire, is sufficient to charge an assault where serious injury was inflicted. *S. v. Price*, 703.

§ 14. Sufficiency of Evidence and Nonsuit.

The evidence in this case *held* sufficient to overrule defendant's motion for judgment as of nonsuit in this prosecution for assault with a deadly weapon with intent to kill. *S. v. Braxton*, 342.

§ 15. Instructions.

It is error for the court to fail to charge upon the principle of self-defense presented by defendant's evidence. *S. v. Braxton*, 342.

ASSAULT AND BATTERY—*Continued.*

§ 17. Verdict and Punishment.

An assault with a deadly weapon with intent to kill is a misdemeanor and sentence of six years in the State's prison is not warranted. *S. v. Braxton*, 342.

AUTOMOBILES.

§ 6. Safety Statutes and Ordinances.

State statutes do not apply to a city street which is not a part of a State highway. *Coleman v. Burris*, 404.

§ 9. Stopping, Parking, Signals and Lights.

The violation of a municipal ordinance relating to parking and parking lights is negligence *per se*. *Coleman v. Burris*, 404.

§ 7. Attention to Road, Look-out and Due Care in General.

A motorist is required to keep a reasonable lookout in his direction of travel and is charged with having seen what he would have seen had he looked. *Raper v. Byrum*, 269.

§ 17. Right of Way at Intersections.

A motorist on a dominant highway does not have an absolute right of way but is under duty not to exceed a speed which is reasonable and prudent under the circumstances, and the duty to keep his vehicle under control, to keep a reasonably careful lookout, and to take such action as an ordinarily prudent person would take to avoid colliding with persons or vehicles upon the highway; nevertheless when he sees that a motorist has stopped his vehicle on the servient highway before entering the intersection, he may assume until the last moment that such motorist will not enter the intersection directly in his path of travel. *Raper v. Byrum*, 269.

§ 26. Impeding Traffic by Excessively Slow Speed.

South Carolina minimum speed law *held* to allow truck driver with one tire of dual wheel flat to drive at less than statutory minimum. *Conard v. Motor Express*, 427.

§ 33. Pedestrians.

The mere fact that a pedestrian attempts to cross a street at a point other than a crosswalk is not sufficient, standing alone, to support a finding of contributory negligence as a matter of law. *Warner v. Alsup*, 308.

§ 37. Relevancy and Competency of Evidence in General.

This action involved a collision at an intersection between vehicles driven respectively by plaintiff's intestate and defendant. There was no contention that traffic on the road was in any way a factor in causing the collision. *Held:* Testimony of a third driver as to his speed in approaching the intersection and concerning the absence of traffic meeting him, is irrelevant and was properly excluded. *Raper v. Byrum*, 269.

§ 38. Opinion Evidence.

Whether expert is competent to testify from examination of vehicles and the scene of the accident after the collision as to the angle of impact, the parts which first collided, the amount of overlap, etc., *quaere? Dixon v. Edwards*, 470.

AUTOMOBILES—*Continued.*

§ 41a. Sufficiency of Evidence of Negligence and Nonsuit in General.

Allegations and evidence tending to show that defendant operated his vehicle on a public highway in a reckless and careless fashion in violation of G.S. 20-140(b), operated his vehicle without lights and without keeping a proper lookout, and that such negligence was the proximate cause of plaintiff's personal injuries and damage, and that plaintiff was not guilty of contributory negligence, *held* sufficient to take plaintiff's case to the jury. *Bongardt v. Frink,* 130.

In order to make out his case, plaintiff must introduce evidence tending to show negligence on the part of defendant and also that such negligence was a proximate cause of the accident. *Raper v. Byrum,* 269.

Variance between plaintiff's pleading and proof concerning the name of the street on which the collision occurred and the compass directions in which the vehicles were traveling is immaterial and insufficient to require nonsuit when it does not appear that defendant was misled to his prejudice thereby. *Burton v. Radford,* 336.

Evidence tending to show merely that plaintiff, while a passenger in a car, fell asleep, and that he awoke when the car ran onto the right-hand shoulder of the road at a straight and level place, went some 20 yards and hit a ditch, causing the injuries in suit, *held* insufficient to overrule nonsuit. *Privette v. Clemmons,* 727.

§ 41b. Sufficiency of Evidence of Negligence in Violating Speed Restrictions.

Evidence that truck driver was operating vehicle at less than minimum posted speed because of emergency created by blow-out of one tire on dual wheel *held* insufficient to show violation of minimum speed statute. *Conard v. Motor Express,* 427.

§ 41c. Sufficiency of Evidence of Negligence in Passing Vehicles Traveling in Opposite Direction.

There being no evidence as to which vehicle was to the left of its center of the highway, nonsuit was proper. *Dixon v. Edwards,* 470.

§ 41e. Sufficiency of Evidence of Negligence in Stopping Without Signal or Parking Without Lights.

Evidence tending to show that defendant parked his truck with the left rear of the bed of the truck about four or five feet on the street in plaintiff's lane of travel, with no reflectors or lights on the rear of the truck, and that plaintiff, blinded by the lights of an on-coming vehicle, did not see the parked vehicle until too late to avoid collision, together with the introduction in evidence of the ordinance of the municipality in which the accident occurred and evidence sufficient to permit the jury to find that the parking of the vehicle was in violation of the ordinance, *held* sufficient to be submitted to the jury on the issue of defendant's negligence in violating the ordinance and also under the common law. *Coleman v. Burris,* 404.

Evidence tending to show that defendant driver parked the corporate defendant's truck on the right shoulder of the highway at an angle so that its left rear protruded eight to ten inches over the hard surface of the highway, without lights or reflectors that could be observed by motorists approaching the vehicle from its rear, that the shoulder of the road was 15 to 18 feet wide, and that planitiff's testate, driving in the right-hand lane, collided with the

AUTOMOBILES—*Continued.*

rear of the truck, *held* sufficient to be submitted to the jury on the issue of negligence in violating G.S. 20-161. *Sharpe v. Hanline*, 502.

Evidence tending to show that defendant parked his car without lights, with two wheels some three feet on the hard-surface, that the shoulder of the 20-foot street, both north and south of the place, was sufficiently wide to have parked the vehicle clear of the hard-surface, and that the driver of the car in which plaintiff was riding, blinded by the lights of oncoming traffic, collided with the parked car, *held* sufficient to be submitted to the jury on the issue of negligence under common law principles, notwithstanding that the manner of parking did not violate the municipal ordinance and that G.S. 20-161 was inapplicable. *Pardon v. Williams*, 539.

§ 41g. Sufficiency of Evidence of Negligence in Entering Intersection.

Evidence permitting a reasonable inference that the driver of a vehicle along a dominant highway having a speed limit of 55 miles per hour drove at a speed of some 60 miles per hour and entered an intersection with a servient highway without reducing speed, is sufficient to be submitted to the jury on the issue of negligence. *Raper v. Byrum*, 269.

Evidence tending to show that defendant operated an automobile so that it skidded from a servient highway onto the dominant highway, blocking plaintiff's lane of travel, causing plaintiff, in the emergency, to turn to his left and collide with a vehicle approaching from the opposite direction, *held* sufficient to take the issue of negligence to the jury. *Barber v. Heeden*, 682.

§ 41h. Sufficiency of Evidence of Negligence in Turning.

Testimony of a statement of the driver to the effect that when he attempted to make a left turn from the highway into a private driveway the motor of the truck stalled, and that while the truck was in gear he undertook to start the motor, causing it to lunge forward immediately into the path of a vehicle approaching from the opposite direction, held sufficient to be submitted to the jury on the issue of the driver's negligence, it being for the jury to determine whether the driver in fact made the statement and whether it correctly recounted what occurred and whether the inference of negligence should be drawn therefrom. *Branch v. Dempsey*, 734.

Evidence favorable to plaintiff tending to show that the driver of the car in which plaintiff was riding turned left to enter a motor court at the time when appealing defendant's vehicle was some 300 feet away, and that this vehicle was traveling some 60 miles per hour and crashed into the vehicle in which plaintiff was riding after its front wheels were into the motel driveway, *held* sufficient to be submitted to the jury on the issue of negligence. *Rogers v. Rogers*, 386.

Evidence to the effect that defendant approached an intersection without keeping a proper lookout, that he turned left to the intersecting road across plaintiff's lane of travel without giving signal and without first proceeding to the center of the intersection, *held* sufficient to be submitted to the jury on the issue of negligence. *Stewart v. Gallimore*, 696.

Plaintiff's evidence to the effect that as the driver of his truck was in the act of passing defendant's car, defendant turned abruptly left to enter a private driveway without giving any signal of his intention to turn left, and collided with the truck, causing the damage in suit, *held* sufficient to take the issue of negligence to the jury. *Simpson v. Lyerly*, 700.

AUTOMOBILES—*Continued.*

§ 41i. Sufficiency of Evidence of Negligence in Entering Highway.

Plaintiff's testimony and testimony of statements made by him tending to show that he entered a highway from a private driveway on the south, turned right and collided with defendant's vehicle, which was traveling west, and that he could see four-tenths of a mile along the highway to the east, with further evidence that plaintiff's car came to rest with one wheel over on defendant's side of the road, *is held* sufficient to be submitted to the jury on defendant's counterclaim on the issue of plaintiff's negligence in entering the driveway without maintaining a proper lookout and in driving at least a part of his truck to the left of the center of the highway. *Robinette v. Wike*, 551.

§ 41t. Sufficiency of Evidence of Negligence in Creating Dangerous Condition on Highway.

Evidence that defendant's wrecker was standing unattended in plaintiff's lane of travel, with a cable extending across the highway to a mired car, that the mired vehicle was hidden by a house from northbound traffic, that plaintiff, driving north, attempted to go around the parked wrecker and struck the cable, while traveling less than 20 miles per hour, together with evidence of circumstances under which the cable was difficult to see, *held* sufficient to be submitted to the jury on the issue of negligence. *Montford v. Gilbhaar*, 389.

§ 42a. Nonsuit for Contributory Negligence in General.

Nonsuit may not be entered for contributory negligence when the evidence is sufficient to raise the issue of last clear chance. *Warner v. Alsup*, 308.

Evidence that plaintiff drove into a cable extending across the highway from a wrecker, which cable was difficult to see because of light and color, *held* not to show contributory negligence as a matter of law on the part of plaintiff in traveling at a speed greater than was reasonable and prudent under the circumstances or in failing to keep his vehicle under proper control. *Montford v. Gilbhaar*, 389.

§ 42d. Nonsuit for Contributory Negligence in Hitting Stopped or Parked Vehicle.

Evidence tending to show that defendant parked his truck with the left rear of the bed of the truck some four or five feet on the street in plaintiff's lane of travel, with no reflectors or lights on the rear of the truck, and that plaintiff, blinded by the lights of an on-coming vehicle, did not see the parked vehicle until too late to avoid the collision, *held* not to disclose contributory negligence as a matter of law. *Coleman v. Burris*, 404.

Evidence tending to show that testate, driving a tractor-trailer along his right lane of a four-lane highway, collided with the rear of a truck which was parked on the right shoulder with its rear extending eight to ten inches over the hard surface, without lights or reflectors, and that at the time a vehicle was passing the tractor-trailer in the left lane for traffic going in that direction, *held* not to disclose contributory negligence as a matter of law on the part of testate. *Sharpe v. Hanline*, 502.

§ 42e. Nonsuit for Contributory Negligence in Passing Vehicle Traveling in Same Direction.

The evidence tended to show that defendant suddenly turned left to enter a private driveway and collided with plaintiff's truck as the truck was in the process of passing defendant's car, and that the driver of plaintiff's truck failed to sound his horn, *held* not to disclose contributory negligence as a

AUTOMOBILES—*Continued.*

matter of law, since, if the truck were following too closely, such act could not have been a proximate cause of the accident, and the failure to sound a horn is not contributory negligence *per se. Simpson v. Lyerly,* 700.

§ 42f. Nonsuit for Contributory Negligence in Passing Vehicles Traveling in Opposite Direction.

Evidence tending to show that plaintiff reached a one-lane bridge when defendant driver was some 50 to 60 feet therefrom, that plaintiff was already proceeding across the bridge when defendant driver entered thereon, that plaintiff was in full view at all times after entering upon the bridge, and that plaintiff had traveled some 50 or 60 feet on the bridge when defendant's truck skidded into plaintiff's vehicle, without any evidence that plaintiff was under duty to yield the right of way to defendant, *held* insufficient to establish contributory negligence as a matter of law. *Murray v. Bottling Co.,* 334.

§ 42g. Contributory Negligence in Entering Intersection.

Plaintiff's own evidence tending to show that his intestate, driving along a servient highway, brought his vehicle to a stop at a point where he had a clear view of the dominant highway to his left for at least a quarter of a mile, that intestate then drove into the intersection at a speed of less than five miles per hour and was struck by defendant's car when intestate had driven some four or five feet into the intersection *is held* to disclose contributory negligence as a matter of law on the part of intestate. *Raper v. Byrum,* 269.

Evidence *held* not to show contributory negligence as a matter of law on part of defendant in taking evasive action to avoid car skidding into intersection from servient road. *Barber v. Heeden,* 682.

Plaintiff's evidence was to the effect that the driver of his car approached the intersection within the legal speed limit, and struck defendant's car which has approached from the opposite direction and which turned left without signal across plaintiff's lane of travel, and the only evidence offered by plaintiff tending to show excessive speed was testimony to the effect that his car traveled some 156 feet after the collision with its right wheels in the ditch for a considerable part of that distance, *Held:* Plaintiff's evidence does not disclose contributory negligence as a matter of law on the part of plaintiff's driver. *Stewart v. Gallimore,* 696.

§ 42h. Nonsuit for Contributory Negligence in Turning or in Hitting Vehicle Making Turn.

Evidence held to show contributory negligence as matter of law on part of plaintiff in turning left across defendant's lane of travel and not to show contributory negligence as matter of law on part of defendant in failing to avoid collision *Banks v. Woods,* 434.

§ 42l. Contributory Negligence of Children.

A finding by the jury of contributory negligence on the part of a child almost eight years old is upheld upon evidence tending to show that the child looked both ways before crossing the highway to a mail box and then whirled around and ran back into the path of defendant's vehicle when it was some 65 to 75 feet away. *Weeks v. Barnard,* 339.

§ 43. Sufficiency of Evidence of Concurring Negligence and Nonsuit for Intervening Negligence.

Evidence that the driver of the truck in which plaintiff's intestate was a

AUTOMOBILES—*Continued.*

passenger ran off the highway to his right, cut back across the center line and skidded sideways out of control into a tractor-trailer, traveling in the opposite direction, and that a third truck ran into the wreckage before the driver could stop it, *held* to disclose that the negligence of the driver of the vehicle in which plaintiff's intestate was riding was the sole proximate cause of the accident, and the action was properly dismissed as to the drivers and owners of the other vehicles. *Carey v. Poplin*, 450.

Evidence held to raise issue of additional defendant's concurring negligence in hitting rear of original defendant's car and impelling it with even greater force into the car in which plaintiffs were riding. *Wise v. Vincent*, 647.

§ 45. Sufficiency of Evidence to Require Submission of Issue of Last Clear Chance.

Where the evidence discloses that intestate, dressed in white, was walking diagonally northeast in crossing a north-south street, that she was plainly visible for some distance, and that defendant, driving north, made no attempt to avoid striking her, did not sound his horn or give any warning of his approach, did not slow down, stop or turn, and struck her when she had gotten within a very short distance of the east curb of the street, *held* to take the case to the jury on the issue of last clear chance, and the granting of nonsuit was error. *Warner v. Alsup*, 308.

§ 46. Instructions in Auto Accident Cases.

An instruction to the effect that if the jury found from the greater weight of the evidence that plaintiff approached an intersection at a speed of 70 to 80 miles per hour and that such speed was a proximate cause of the collision, to answer the issue of contributory negligence in the affirmative, must be held for error as requiring the jury to find that plaintiff's speed was excessive to the stipulated degree in order for it to constitute unlawful speed. *Barber v. Heeden*, 682.

Separate instructions to answer the issue of contributory negligence in the negative if the jury failed to find that plaintiff was traveling at excessive speed, or failed to keep a proper lookout, or failed to keep his vehicle under control, must be held for error as requiring a negative answer to the issue if plaintiff was free of contributory negligence in any one of the aspects relied on, since the issue should be answered in the affirmative if plaintiff was guilty of contributory negligence constituting a proximate cause of the injury in any one of such aspects. *Ibid.*

§§ 54e, 54f. Competency and Sufficiency of Evidence on Issue of Respondeat Superior.

G.S. 20-71.1 does not render *post rem* admission of agent competent against principal; while testimony of statement of driver after collision that he was attempting to turn left across plaintiff's lane of travel is sufficient for jury as against him, it is incompetent as against his employer, and nonsuit of the employer was proper. *Branch v. Dempsey*, 733.

§ 55.1. Action by Owner to Recover for Damages to his Vehicle.

Judicial findings that the driver of plaintiff's car was not plaintiff's agent, that both drivers were actionably negligent, and that the driver of the other car was the agent of the second defendant, entitles plaintiff to judgment against both defendants for the damages to his car. *Burton v. Radford*, 336.

Evidence permitting the conclusion that a vehicle was in good condition

AUTOMOBILES—*Continued.*

approximately 30 minutes prior to the collision in suit, that it was involved in a collision with defendant's vehicle, and that immediately thereafter it was damaged about its front so that it was of no value except for salvage, is amply sufficient to support a finding that the damage was the result fo the collision. *Branch v. Dempsey*, 733.

§ 65. Careless and Reckless Driving.

Evidence tending to show that defendant, in driving his automobile on a public street, struck a traffic island knocking down iron posts thereon, traveled on the left side of the street, made a left turn in the path of an approaching truck, etc., and that when an officer interviewed him some 20 minutes thereafter defendant appeared to be intoxicated, *held* sufficient to be submitted to the jury on the charge of careless and reckless driving. *S. v. Abernethy*, 724.

§ 70. Warrant for Drunken Driving.

Where every feature of the record discloses that the case was contested solely upon whether defendant was under the influence of intoxicating liquor when he drove his automobile on a public street, and neither the evidence nor the charge refers in any way to drugs, the fact that the warrant, charging defendant with operating an automobile on a public street while under the influence of intoxicating liquor or drugs, failed to characterize the drugs as narcotic drugs, is not fatal. *S. v. Best*, 477.

BANKS AND BANKING.

§ 1. Control and Regulation.

Business Corporation Act applies to banks. *Cooke v. Outland*, 601; Qualified bank shareholder has right to inspect records for proper purpose at proper time. *Ibid.*

BIGAMY.

§ 2. Prosecutions.

In a prosecution for bigamous cohabitation, the legal wife of defendant is a competent witness to prove a valid, subsisting marriage at the time defendant contracted the second marriage. *S. v. Vandiver*, 325.

Evidence of guilt of bigamous cohabitation held sufficient to be submitted to jury. *Ibid.*

BROKERS AND FACTORS.

§ 1. Nature and Regulation of the Relationship.

The statute making it unlawful to engage in the business of a real estate broker or salesman without a license must be strictly construed with a view to the evil it was intended to supress. *McArver v. Gerukos*, 413.

A person who is not a licensed real estate broker or salesman may not recover compensation, either under contract or upon *quantum meruit*, for activities in regard to the purchase, sale or leasing of land when such activities are restricted by the statute to licensed brokers or salesmen. *Ibid.*

Person purchasing land for his own account is not required to be licensed even though purchase is for resale. *Ibid.*

BURGLARY AND UNLAWFUL BREAKINGS.

§ 4. Sufficiency of Evidence and Nonsuit.

Evidence of *corpus delecti* with presumptions from recent possession of stolen property held sufficient to overrule nonsuit. *S. v. Allison*, 512.

CHATTEL MORTGAGES AND CONDITIONAL SALES.

§ 11.1. Assumption of Debt by Purchaser from Mortgagor.

Where the chattel mortgagor sells the mortgaged chattel to a purchaser who assumes the mortgage debt and pays installments thereon with the assent of the mortgagee, the purchaser becomes liable on the debt as principal and the original mortgagor becomes a surety, and if the original mortgagor pays the debt he is subrogated to the rights of the mortgagee, even without an assignment. *Hatley v. Johnson*, 73.

COMPROMISE AND SETTLEMENT.

A prior settlement is an affirmative defense and such plea in bar must be pleaded, and therefore when the pleading setting up such defense is withdrawn by discretionary order of the court, the plea in bar must fall. *Bongardt v. Frink*, 130.

A settlement and release obtained by plaintiff's insurer will not bar insurer's right of action against defendant when insurer has neither consented nor ratified such settlement, and in the instant case evidence solicited on cross-examination of plaintiff in regard to the allegations of his reply, withdrawn prior to trial, setting up the release signed by defendant, *held* not to compel the conclusion that plaintiff either consented to or subsequently ratified the act of his insurer in obtaining the release. *Ibid.*

An offer of settlement by the execution of a series of promissory notes in the full amount of the claim is not an offer of compromise, and is competent in evidence. *Tindal v. Mills*, 716.

CONSPIRACY.

§ 3. Nature and Elements of Criminal Conspiracy.

A conspiracy is an agreement by two or more persons to do an unlawful act, or to do a lawful act in an unlawful way or by unlawful means, and it is not necessary that the agreement be accomplished, the agreement itself being the offense. *S. v. Guthrie*, 659.

The conspiracy to commit an unlawful act and the unlawful act are separate offenses, and a defendant may be convicted of the substantive offense even though found not guilty of conspiracy to commit it. *Ibid.*

§ 5. Relevancy and Competency of Evidence.

Acts and declarations of co-conspirators in furtherance of the common design are admissible against all co-conspirators. *S. v. Guthrie*, 659.

CONSTITUTIONAL LAW.

§ 7. Delegation of Powers by General Assembly.

The General Assembly may not delegate its supreme legislative power to any other branch of the State Government or agency, but as to specific subject matter it may delegate a limited portion of its legislative power to an ad-

CONSTITUTIONAL LAW—*Continued.*

ministrative agency if it prescribes the standards under which the agency is to exercise the delegated power. *Turnpike Authority v. Pine Island*, 109.

Statute delegating power to the North Carolina Turnpike Authority *held* to prescribe sufficient standards for the exercise of the delegated power and is constitutional. *Ibid.*

§ 10. Judicial Powers.

Settled law may not be changed by judicial fiat, questions of public policy being uniquely the province of the legislative branch of the government. *Riegel v. Lyerly*, 204.

§ 13. Police Power — Safety, Sanitation and Health.

It is within the police power of the State to prescribe minimum standards for the design and construction of buildings for the safety of the occupants, their neighbors and the public at large. *S. v. Walker*, 482.

§ 14. Police Power — Morals and Public Welfare.

The General Assembly has authority to regulate the sale and distribution of intoxicating liquors. *Wholesale v. ABC Board*, 679.

§ 24. Due Process.

Defendant was charged with operating a nightclub between the hours of 2:00 a.m. and 3:00 a.m. on Sunday under a county ordinance proscribing certain commercial activities between the hours of 2:00 a.m. until midnight on Sunday on property within 300 yards of any public school or church building. *Held:* The ordinance is unreasonable and discriminatory and violates due process, since its proscriptions have no reasonable relationship to the maintenance of peace and quiet during the operation of public schools or during church services. *S. v. Smith*, 173.

A resident of the State who has departed with intent to defraud his creditors or to avoid service of process, or a resident who keeps himself concealed in the State with like intent, is amenable to service of process by publication under G.S. 1-98.2(6). *Harrison v. Hanvey*, 243.

§ 28. Necessity and Sufficiency of Indictment or Warrant.

A person may not be tried or convicted for a criminal offense without a formal and sufficient accusation. *S. v. Stubbs*, 420.

§ 29. Right to Jury Trial.

Defendant is not entitled to have jury determine the question of the voluntariness of his confession. *S. v. Painter*, 277.

Defendant may not waive his constitutional right to a jury trial. *S. v. Cox*, 344.

§ 31. Right to Confrontation and Access to Records and Evidence.

At the time of arresting defendant, the officer found a partially filled bottle of whiskey on the seat of defendant's car, which bottle the officer kept in his home until the trial. Defendant contended that the failure of the officer to turn the whiskey over to the sheriff's office deprived his counsel of foreknowledge of its existence, and that the introduction of the bottle in evidence took his counsel by surprise, denying defendant a fair trial. *Held:* The contention is untenable, it being manifest that defendant knew the bottle was in his automobile and could have advised his attorney about it. *S. v. Hudler*, 382.

CONTEMPT OF COURT.

§ 8. Appeal and Review.

No appeal lies from the imposition of punishment for direct contempt, and review upon *habeas corpus* is not *de novo* but is limited to a determination of whether the court imposing sentence had jurisdiction and whether its findings of fact set forth on the record support its order, the findings being conclusive. *In re Parker*, 485.

CONTRACTS.

§ 6. Contracts Against Public Policy in General.

There can be no recovery on a contract for activities in violation of statute. *McArver v. Gerukos*, 413.

§ 8. Contracts Relating to Judicial Sales.

A contract to stifle bidding at a judicial sale is *contra bonos mores* and void, and will be declared so *ex mero motu* when such defect appears from the evidence of either party, since such defect may not be waived. *Martin v. Underhill*, 669.

Evidence to the effect that defendant agreed to go to a judicial sale and bid on the property for plaintiff, without evidence that at the time of the agreement defendant intended to attend the sale or bid upon the property on his own account, *held* not to disclose a purpose to prevent or discourage the bidding and does not disclose that the contract was void as against public policy. *Ibid.*

§ 10. Contracts Exempting Party from Liability for Negligence.

Contracts exempting a party from liability for negligence are not favored by the law and are to be strictly construed. *Casualty Co. v. Oil Co.*, 121.

There is a distinction between a contract by which one seeks to exempt himself from liability to an injured party for negligent injury, and a contract whereby a party purchases indemnity from a third person against liability for negligent injury, and contracts of indemnity are not contrary to public policy. *Gibbs v. Light Co.*, 459.

The rule that a public utility may not contract against its own negligence relates to negligence in the performance of one of its duties of public service and not to negligence which is in no way connected with its public service. *Ibid.*

Contracts exculpating a person from liability for his own negligence are not favored and are to be strictly construed. *Ibid.*

A contract under which an employer, contracting for construction and maintenance of transmission lines, agrees to indemnify the electric company for liability to the contractor's employees for injury resulting from the electric company's negligence is not contrary to public policy, and although it will be strictly construed, will be upheld as to injuries coming clearly within its terms. *Ibid.*

§ 12. Construction and Operation of Contracts in General.

The provisions of apposite statutes in force at the time of the execution of a contract become a part thereof, and the parties are chargeable with notice of the statutory provisions. *Teer Co. v. Highway Com.*, 1.

A contract must be construed as a whole, and a paragraph or excerpt must be interpreted in context with the rest of the agreement. *Bank v. Ins. Co.*, 86.

CONTRACTS—*Continued.*

§ 19. Novation.

A novation is a substitution of a new contract for an old one which is thereby extinguished. *Equipment Co. v. Anders*, 393.

In the case of a novation of an executory contract, the substitution of the newer obligations of the parties, respectively, constitutes consideration for the release of the original obligations; if the contract has been executed by one of the parties, a valid novation requires a consideration *dehors* the original agreement. *Ibid.*

The return of one of the items purchased under a contract of sale is sufficient consideration on the part of the purchaser to support a novation of the contract. *Ibid.*

CORPORATIONS.

§ 4. Authority, Rights and Duties of Stockholders.

By provision of statute in this State, G.S. 55-38, a shareholder owning five per cent of the shares of a private corporation and who has held such shares for a period of six months is entitled to inspect the records and books of the corporation at a proper time and place for a proper purpose. *Cooke v. Outland*, 601.

Written demand of a shareholder for inspection of the records and books of a corporation for the purpose of enabling the shareholder to determine the value of his stock and to investigate the conduct of the management of the corporation to determine whether it is being efficiently managed, states proper purposes for inspection, and the burden rests upon the corporation and its officers, if they desire to defeat the demand, to allege and prove that the demand was not made for a proper purpose germane to the stockholder's status but was to advance a speculative purpose or some other improper purpose. *Ibid.*

§ 21. Corporate Seal.

As a general rule a corporation may use or adopt any seal, and if it adopts a seal different from the corporate seal for special occasions or if it has no corporate seal, the seal adopted is the corporate seal for the time and the occasion. *Bank v. Ins. Co.*, 86.

COSTS.

§ 3. Taxing Costs in Discretion of Court.

In a reference, the judge has discretion to apportion the costs. *Morpul v. Knitting Mills*, 257.

COUNTIES.

§ 2. Powers and Ordinances.

The exercise of the police power by a county will not be declared void because the regulation recites an invalid statute as the grant of power for the enactment if there are other valid authorizations for such enactment. *S. v. Smith*, 173.

Where the only effect of an ordinance is to proscribe designated commercial activities on Sunday, such ordinance may not be upheld under G.S. 153-9(55), since the proscription of the ordinance is entirely commercial. *Ibid.*

COURTS.

§ 9. Jurisdiction of Superior Court after Judgment or Orders of Another Superior Court Judge.

The denial of a motion for leave to amend does not preclude movant from again making the motion upon later trial before another Superior Court judge. *Casualty Co. v. Oil Co.*, 121.

Procedural rulings entered prior to voluntary nonsuit are not *res judicata* in a subsequent action. *Gibbs v. Light Co.*, 459.

§ 20. What Law Governs — Laws of This and Other States.

Where action is brought here on an insurance policy issued in another state to a resident of that state, the substantive laws of that state must be applied here. *Connor v. Ins. Co.*, 188.

In an action here to recover for a negligent injury inflicted in another state, the laws of such other state govern the right of action, with procedural questions arising on the enforcement of such right to be determined by the laws of this State. *Cobb v. Clarke*, 194; *Conard v. Motor Express*, 427.

CRIMINAL LAW.

§ 3. Attempts.

An attempt to take personal property from another under the circumstances delineated by G.S. 14-87 is an accomplished offense. *S. v. Spratt*, 524.

§ 4. Distinction Between Prosecutions and Civil Proceedings.

A proceeding for removal of a public officer under G.S. 128-16 is not a criminal prosecution for punishment but is a civil proceeding. *S. v. Hockaday*, 687.

§ 23. Plea of Guilty.

In a prosecution for burglary in the first degree, G.S. 14-51, the acceptance by the court of defendant's plea of guilty of felonious breaking and entering of a house otherwise than burglariously, G.S. 14-54, will not be disturbed when there is nothing in the record tending to show that defendant's plea was not freely, voluntarily, understandingly, and intelligently entered, the plea being to a lesser degree of the offense charged, G.S. 15-170, and carrying a much less severe sentence. *S. v. Perry*, 517.

Defendant's plea of guilty is equivalent to a conviction of the offense charged and precludes defendant from questioning the facts charged in the indictment, and his appeal presents only whether such facts constitute a punishable offense under the laws and the Constitution. *Ibid.*

§ 26. Plea of Former Jeopardy.

A plea of former jeopardy does not pertain at a second trial procured by a defendant upon *habeas corpus* or a post conviction hearing. *S. v. Gainey*, 437.

A plea of guilty voluntarily entered at a second trial waives a plea of former jeopardy. *Ibid.*

§ 33. Facts in Issue and Relevant to Issues.

Where defendant, charged with rape, appears in front of the prosecutrix' house shortly after midnight, some three and one-half hours after the crime was committed, it is competent to show as a circumstance throwing light on his conduct, that he was then intoxicated, since if defendant had been sober

CRIMINAL LAW.—*Continued*

his appearance at that time and place would be a circumstance strongly suggesting innocence, but if he were intoxicated and guilty it would explain his abnormal and unusual conduct in appearing where he might be readily identified as the assailant. *S. v. Davis*, 720.

If evidence is competent, objection on the ground that it tends to discredit defendant is untenable. *Ibid.*

§ 34. Evidence of Defendant's Guilt of Other Offenses.

Evidence of guilt of other offenses may be competent to show intent. *S. v. Painter*, 277.

§ 38. Evidence of Like Facts and Transactions.

Whether defendant's intoxication before and after the crime is competent upon the question of defendant's intoxication at the time the crime was committed is a question of remoteness to be determined upon the facts of each particular case. *S. v. Davis*, 720.

§ 55. Blood Tests.

It is competent for a witness stipulated by the parties to be an expert to testify as to the effect of stated percentages of alcohol in the bloodstream, and that the percentage found by his test of the blood of defendant exceeded the amount at which all persons were under the influence of alcohol, it being shown that the sample analyzed was timely taken, properly traced and properly identified. *S. v. Webb*, 546.

§ 65. Evidence of Identity by Sight.

Testimony of a witness that he *thought* defendant was one of the crowd who committed the offense *held* competent and sufficient to take the question of identity to the jury. *S. v. Guthrie*, 659.

§ 71. Confessions.

Intoxication of defendant does not render his confession incompetent but merely goes to its weight unless defendant's intoxication amounts to mania. *S. v. Painter*, 277.

The evidence disclosed defendant had been drinking a large quantity of liquor each day and was intoxicated when arrested, that he was placed in jail, that the next morning he asked to see an FBI agent, that he was taken to a conference room, and that during the interrogation he became sick and was given a drink of whiskey to steady his nerves. *Held:* The evidence does not show that defendant was intoxicated to the point of mania or that he was given whiskey to induce a confession, and the circumstances in regard to intoxicants does not render his confession incompetent. *Ibid.*

Evidence that defendant asked to talk with an FBI agent, that he was taken to a conference room and told of his right to representation by an attorney, his right to remain silent and that anything he said might be used against him, and that thereafter defendant voluntarily made the confession offered in evidence, with no evidence to the contrary, *held* sufficient to support a ruling admitting the confession in evidence. *Ibid.*

While the better practice is for the court to determine the voluntariness of a confession upon a *voir dire* in the absence of the jury, where there is plenary evidence to sustain a finding that the confession was voluntary, and no evidence to the contrary, and defendant merely objects to the admission of

CRIMINAL LAW.—*Continued*

the confession but offers no evidence in regard to its voluntariness, the ruling of the court admitting the confession amounts to a finding that the confession was voluntary, and the absence of a specific finding of voluntariness is not fatal. *Ibid.*

Whether a confession offered in evidence is voluntary and competent is a question of law and fact for the court and not an issue of fact for the jury, and defendant's objection on the ground that the question should have been submitted to the jury is untenable. *Ibid.*

The competency of a confession is a preliminary question for the trial court to be determined upon the circumstance of each particular case, and if the court's findings in regard to voluntariness are supported by competent evidence, the findings are not subject to review. *S. v. Mitchell*, 584.

The fact that one defendant confesses upon being confronted with the fact that an article of clothing in his possession had another's name sewed in it and that the other defendant confessed after being awakened by the first defendant and told to get items which they had taken from the store, *held* not to render the confessions incompetent, since the mere fact that the confessions were made when defendants were confronted with circumstances normally calling for explanation is sufficient to render the confessions incompetent. *Ibid.*

It is not essential in every case that defendant be cautioned that he has the right to remain silent and that his statements might be used against him in order for his confession, freely and voluntarily made, to be competent. *Ibid.*

Where the trial court hears evidence of the defendants and of the State in regard to the voluntariness of the confessions offered in evidence, which evidence is of record, a general finding by the court that the confessions were voluntary is sufficient, and the court is not required to find detailed facts with respect to the question. *Ibid.*

Where a defendant, upon investigation of a "hit and run" accident by the police of the municipality in which he resides, telephones the police department of the city in which the accident occurred and states to an officer that he was the driver of a car involved in the accident, the fact that the officer receiving the confession did not, and had no time to, warn defendant of his constitutional right to remain silent is feckless. *S. v. Harrelson*, 589.

The evidence for the State *held* sufficient to support a finding that defendant's confession was freely and voluntarily made, notwithstanding defendant's evidence *contra*, and the admission of the confession in evidence was not error. *S. v. Herring*, 713.

§ 78. Competency of Defendant's Wife as Witness.

In a prosecution for criminal cohabitation the legal wife of defendant is competent to prove a valid, subsisting marriage at the time defendant contracted the second marriage. *S. v. Vandiver*, 325.

The fact that subsequent to the assault the defendant marries the prosecuting witness does not render her an incompetent witness against him at the trial. *S. v. Price*, 703.

§ 79. Evidence Obtained by Unlawful Means.

Testimony disclosing that an officer was advised by a fellow officer to intercept the vehicle operated by defendant, that when the truck passed he followed, whereupon defendant and his companion abandoned the truck and fled, that the truck had cardboard boxes on its bed from which eminated the odor of whiskey, and that a search disclosed a number of gallons of whiskey in

CRIMINAL LAW.—*Continued*

fruit jars enclosed in the cardboard boxes, *held* proper predicate for a search, and motion to suppress the evidence was correctly denied. *S. v. Banks,* 590.

§ 80. Evidence of Character of Defendant.

Where defendant does not testify or offer evidence of his good character, the State is precluded from showing his bad character for any purpose. *S. v. Tessnear*, 319.

§ 82. Direct Examination of Witnesses.

The trial court has discretionary authority to permit the solicitor to ask leading questions in proper instances. *S. v. Painter*, 277.

§ 87. Consolidation of Counts for Trial.

The trial court has discretionary authority to consolidate indictments against the male and female partners for bigamous cohabitation. *S. v. Vandiver*, 325,

§ 92. Introduction of Additional Evidence.

The trial court has discretionary power to permit the introduction of additional evidence after argument to the jury. *S. v. Jackson,* 558.

§ 94. Expression of Opinion on Evidence by Court During Trial.

Defendant objected to cross-examination in regard to his arrest in another state on other charges, asserting that since defendant was not found guilty in such other State of the charges the interrogation was unreasonable. The court stated in overruling the objection that the court thought it just as unreasonable for a man to be sent to jail in such other state for nothing. *Held:* The remark of the court must be held for prejudicial error as reflecting upon the credibility of defendant. *S. v. Hopson,* 341.

§ 97. Argument and Conduct of Solicitor.

Where, immediately upon defendant's objection to a single improper remark of the solicitor in his argument, the court instructs the jury not to consider the statement, the impropriety is ordinarily cured, and the contention made by defendant for the first time on appeal that the court should have gone further and instructed the jury that the statement was unfair and prejudicial to defendant, is not sustained on the facts of this case. *S. v. Best,* 477.

The trial court has discretionary power to limit the scope of subsequent argument after the introduction of additional evidence. *S. v. Jackson,* 558.

§ 98. Function of Court and Jury in General.

In a prosecution in which the State relies upon circumstantial evidence it is the duty of the court, upon motion to nonsuit, to determine whether there is substantial evidence of each essential element of the offense charged and of defendant's guilt thereof, and it is the function of the jury to say whether the circumstances in evidence are so connected and related as to point unerringly to guilt, and to exclude to a moral certainty every other reasonable hypothesis except that of guilt. *S. v. Lowther,* 315.

§ 99. Consideration of Evidence on Motion to Nonsuit.

Upon motion for nonsuit, evidence offered by the State must be taken in the light most favorable to it, and conflicts therein must be resolved in the State's favor, the credibility and effect of the evidence being a question for the jury. *S. v. Church,* 534; *S. v. Jackson,* 558; *S. v. Carter,* 626.

CRIMINAL LAW.—*Continued*

§ 101. Sufficiency of Evidence to Overrule Nonsuit.

Prima facie evidence justifies but does not compel a finding of the ultimate fact to be proved, and in a criminal case such evidence coupled with other evidence must establish defendant's guilt beyond a reasonable doubt. *S. v. Tessnear*, 319.

Testimony of the prosecuting witness tending to identify defendant as one of the perpetrators of the offense established by the evidence, even though there be contradictions and discrepancies in the State's evidence as to identify, is sufficient to overrule nonsuit. *S. v. Guffey*, 331.

Circumstantial evidence as to the identity of defendant as one of the persons who committed the crimes charged in the bill of indictment, *held* sufficient to overrule nonsuit. *S. v. Allison*, 512.

§ 106. Instructions on Burden of Proof and Presumptions.

In this prosecution in which the State relied upon circumstantial evidence, the court's charge that the circumstances or conditions relied upon must be such as are not only consistent with guilt but inconsistent with innocence, *held* an insufficient statement of the intensity of proof necessary to warrant a verdict of guilty on circumstantial evidence, it being necessary for that purpose that the circumstances be so connected or related as to point unerringly to defendant's guilt and exclude any other reasonable hypothesis, the burden remaining upon the State to satisfy the jury beyond a reasonable doubt of defendant's guilt. *S. v. Lowther*, 315.

§ 107. Instructions — Statement of Evidence and Application of Law Thereto.

It is prejudicial error for the court to fail to instruct the jury on substantive features of the case arising on the evidence, even though there is no prayer for special instructions. *S. v. Hornbuckle*, 312.

While the trial court has wide discretion as to the manner in which the case is presented to the jury, it is the duty of the court to explain, without special request therefor, each essential element of the offense charged and to apply the law with respect to each element to the evidence bearing thereon. *S. v. Mundy*, 528.

A charge presenting the principal features of the evidence relied on respectively by the prosecution and the defense is sufficient, G.S. 1-180, and if defendant desires further elaboration on a subordinate feature he must tender request therefor. *S. v. Guffey*, 331.

An inadvertence in stating the contentions of the parties or in recapitulating the evidence must be called to the trial court's attention in time for correction. *S. v. Cornelius*, 452.

Where the evidence is simple and direct and without equivocation, and the sole controversy is whether defendant was under the influence of intoxicating liquor at the time he drove upon a public street, an instruction submitting to the jury under correct statements of the applicable law whether defendant was intoxicated at the time and place in question will not be held for error for failure of the court to state the evidence, counsel having answered in the negative whether he wished further instructions. *S. v. Best*, 477.

Where the court correctly defines a term in its charge to the jury, it is not ground for exception that the court fails to repeat the definition each time the term is repeated in the charge. *S. v. Davis*, 720.

CRIMINAL LAW.—*Continued*

§ 108. Expression of Opinion on Evidence by Court in Charge.

Instruction that statute raised "a deep presumption" that possession of nontaxpaid liquor was for purpose of sale, *held* error. *S. v. Tessnear*, 319.

§ 118. Sufficiency and Effect of Verdict.

The verdict of the jury may be given significance and interpreted by reference to the charge, the facts in evidence and the instructions of the court. *S. v. Best*, 477; *S. v. Anderson*, 548.

§ 120. Unanimity of Verdict, Polling Jury and Acceptance of Verdict.

A jury has full control of its verdict up to the time it is delivered to the court and ordered recorded by the judge, and when the foreman makes a slip of the tongue which he corrects before the clerk can finish his inquiry as to whether all the jurors so say, and when the corrected verdict of guilty is confirmed by a poll of the jury, the acceptance of the verdict is without error. *S. v. Webb*, 546.

§ 121. Arrest of Judgment.

Arrest of judgment for insufficiency of the indictment does not entitle defendant to his discharge, since the State, if it so elects, may put defendant on trial upon a proper indictment. *S. v. Guffey*, 331.

The Supreme Court will arrest the judgment *ex mero motu* for a fatally defective indictment. *S. v. McKoy*, 380.

A motion in arrest of judgment will lie only for a fatal defect appearing on the face of the record proper, and cannot be based upon an asserted variance between the indictment and proof. *S. v. Carter*, 626.

§ 131. Severity of Sentence.

A sentence within the statutory maximum may not be held excessive. *S. v. Garris*, 711; *S. v. Hunt*, 715.

Where the court does not enter separate judgments but consolidates for judgment and sentence eight cases and enters one judgment thereon, such judgment cannot exceed the maximum for one offense. *S. v. Seymour*, 216; *S. v. Massey*, 579.

Sentence of six years in the State's prison may not be imposed for a misdemeanor. *S. v. Braxton*, 342.

Defendant's contentions that his sentence for escape was excessive for that other prisoners charged with the same offense had received shorter sentences, and for that in addition to the sentence imposed he lost his "good time" credit, are untenable. *S. v. Gibson*, 487; *S. v. Garris*, 711.

Where a defendant has entered a plea of guilty he has a right to an opportunity to rebut representations in aggravation of punishment and to make representations in mitigation, but upon the hearing on the question of punishment the court is permitted wide latitude and the rules of evidence will not be strictly enforced, and the hearing of incompetent or hearsay evidence is not ground for disturbing the sentence in the absence of a showing of prejudice. *S. v. Perry*, 517.

Under G.S. 20-176, prior to the 1965 amendment to G.S. 20-105, a person convicted of a misdemeanor for violating Article 3 of the Motor Vehicle Act in instances in which the statute does not provide other penalties, could not be sentenced to more than 60 days in jail. G.S. 14-3 does not apply to convictions under the Motor Vehicle Act. *S. v. Massey*, 579.

A statutory penalty of fine or imprisonment in the discretion of the court is not a specific punishment, and therefore in the case of infamous offenses

CRIMINAL LAW—*Continued.*

the punishment is limited by G.S. 14-2 to not more than 10 years imprisonment. *S. v. Grice*, 587.

Upon remand for proper sentence, defendant is entitled to credit for time served. *Ibid.*

§ 139. Appellate Jurisdiction in General.

The Supreme Court will take notice *ex mero motu* of error in permitting defendant to waive a jury trial in a criminal prosecution in the Superior Court after plea of not guilty. *S. v. Cox*, 344.

A fatally defective indictment is insufficient to confer jurisdiction, and the Supreme Court will take notice thereof and arrest the judgment *ex mero motu*. *S. v. McKoy*, 380.

§ 141. Judgments Appealable.

Where, upon motion for change of venue for prejudice, the court denies the motion but orders or states that it will order a special venire from a designated county, such interlocutory order is not appealable and an attempted appeal therefrom will be dismissed. *S. v. Childs*, 575.

An interlocutory order which does not put an end to the action is not appealable unless it destroys, impairs, or seriously imperils a substantial right of defendant. *Ibid.*

§ 143. Right of Defendant to Appeal.

A plea of *nolo contendere* does not preclude defendant from prosecuting an appeal. *S. v. Smith*, 173.

§ 147. Case on Appeal.

It is the duty of appellant to see that the record is properly made up and transmitted to the Supreme Court. *S. v. Stubbs*, 420.

Where the indictment upon which defendant was tried has been lost subsequent to the trial, a substituted copy may not be inserted in the record by stipulation of the solicitor or assistant solicitor and counsel for defendant, but an order determining and providing a true copy of the indictment as returned by the grand jury must be inserted in the record by the trial court, there being disagreement between defendant and the State as to the wording of the indictment. *Ibid.*

The trial judge has jurisdiction to settle the case on appeal, notwithstanding that at the time of settlement he has resigned as a judge of the Superior Court. *Ibid.*

The duty of defendant's counsel to have proper record made up for appeal, including a true copy of the bill of indictment showing return by the grand jury, applies under the Rules of the Court equally to counsel appointed for indigent defendants. *S. v. Price*, 703.

§ 148. Docketing of Transcript in Supreme Court.

Motion of the Attorney General to advance this case on the docket to hear the attempted appeal from a non-appealable interlocutory order is allowed to preclude an unwarranted delay in the trial which might prove fatal to the prosecution of the case. *S. v. Childs*, 575.

§ 149. Certiorari.

Where the indictment upon which defendant was tried has been lost subsequent to the trial, defendant properly moves for *certiorari* in order to give

CRIMINAL LAW—*Continued.*

him an opportunity to move in the Superior Court for an order that a copy of the indictment as returned by the grand jury be supplied and certified so that he can proceed with his appeal. *S. v. Stubbs,* 420.

§ 150. Necessary Parts of Record Proper.

The indictment or warrant is an essential part of the record on appeal in a criminal action. *S. v. Stubbs,* 420.

§ 152. Form and Requisites of Transcript.

The setting forth of all of the evidence in the record in question and answer form is a violation of Rule of Practice in the Supreme Court No. 19 (4). This Rule is mandatory and may not be waived by the parties, and its violation warrants dismissal of the appeal when no error appears on the face of the record proper. *S. v. Best,* 477.

§ 162. Harmless and Prejudicial Error in Admission of Evidence.

Exception to the admission of evidence is waived by permitting evidence of the same import to be introduced thereafter without objection. *S. v. Creech,* 730.

§ 168. Review of Judgments on Motions to Nonsuit.

The fact that incompetent evidence must be considered in order for there to be sufficient evidence to overrule nonsuit does not entitle defendant to reversal of refusal to nonsuit, since if the incompetent testimony had been excluded the State might have offered sufficient competent evidence to take the case to the jury. *S. v. Mitchell,* 584.

§ 169. Determination and Disposition of Cause.

Upon the death of the defendant prior to argument of the appeal, the action abates and the appeal will be dismissed. *S. v. Dixon,* 561.

Where defendant has been sentenced to a term in excess of that allowed by statute, the cuase will be remanded for proper sentence giving defendant credit for the time served under the erroneous sentence. *S. v. Grice,* 587.

§ 173. Post Conviction Hearing.

A post conviction hearing is not a trial nor a substitute for appeal, but is a remedy for determination by the court of the question of law whether defendant was deprived of any constitutional right in his original trial, and it is not necessary that defendant be present at his post conviction hearing. *S. v. Gainey,* 437.

Upon *habeas corpus* subsequent to a conviction at a new trial held pursuant to order entered at a post conviction hearing, defendant may not object that his petition for a post conviction hearing did not request a new trial. *Ibid.*

CURTESY.

Curtesy has been abolished, but G.S. 29-30 preserves to a surviving spouse the benefits of curtesy. *Smith v. Smith,* 18.

DAMAGES.

§ 14. Burden of Proof and Sufficiency of Evidence of Damages.

The burden is upon the complaining party to establish by evidence such

DAMAGES—*Continued.*

facts as will furnish a basis for assessment of substantial damages according to some definite and legal rule. *Midgett v. Highway Comm.*, 373.

DEATH.

§ 1. Proof of Cause of Death.

Evidence tending to show that approximately 30 minutes before the collision in suit testate was in good health and sound physical condition, that immediately after the collision he was found dead, strapped in the driver's seat of his car, with injuries about his face, shoulders and chest, that the steering wheel of his vehicle was bent upward, and that his head was hanging forward upon his chest and, unless held in position, would fall about, *held* sufficient to support the inference that testate's death was the result of the collision. *Branch v. Dempsey*, 734.

A certified copy of the coroner's death certificate is competent to prove the identity of the deceased and the cause of death, but is not competent as to narration therein of accounts of the fatal accident. *Ibid.*

DEEDS.

§ 19. Restrictive Covenants.

Restrictive covenants are not favored and are to be strictly construed against limitation on use. *Hullett v. Grayson*, 453.

A restrictive covenant against a temporary building, garage, garage apartment or trailer for temporary or permanent use *held* ambiguous, and the courts will not restrain the use by the grantee of a detached garage of permanent-type construction. *Ibid.*

DESCENT AND DISTRIBUTION.

§ 9.1. Share of Surviving Spouse.

Litigation "affects share of surviving spouse" if it affects decision of whether to take life estate under the statute. *Smith v. Smith*, 18. Filing of request for order fixing time under which she may make election during pendency of litigation affecting share is made in time and delay of clerk in entering order may not be imputed to widow. *Ibid.* Acceptance from heir of deed to his one-half interest in lands of estate does not constitute election and does not preclude widow upon later setting aside of deed to elect to take life estate under statute. *Ibid.*

DIVORCE AND ALIMONY.

§ 16. Alimony Without Divorce.

A valid separation agreement executed in conformity with G.S. 52-12 precludes the wife from thereafter maintaining an action for alimony in addition thereto. *Van Every v. Van Every*, 506.

The wife, upon the denial of her motion for subsistence and counsel fees *pendente lite* may take a voluntary nonsuit of her action for alimony without divorce and custody of the children of the marriage, the husband having filed no pleading and not having asserted any claim or demanded any relief against the plaintiff. *Griffith v. Griffith*, 521.

DIVORCE AND ALIMONY—*Continued.*

§ 18. Alimony Pendente Lite.

Where the husband does not assert adultery as a bar to the wife's right to alimony *pendente lite*, the court is not required to find the facts, either in denying or in granting subsistence *pendente lite*, and its order denying subsistence and counsel fees *pendente lite* will not be disturbed in the absence of a showing of abuse of discretion or error of law. *Griffith v. Griffith*, 521.

DOWER.

§ 1. Nature and Existence.

Dower and curtesy have been abolished, but G.S. 29-30 preserves to a surviving spouse the benefits of dower and curtesy. *Smith v. Smith*, 18.

EMINENT DOMAIN.

§ 1. Nature and Extent of Power.

The power of eminent domain is an inherent power of a sovereign state, and the power of the state to condemn property for a public purpose is limited only by the constitutional requirement that just compensation be paid for land appropriated. *Highway Com. v. Board of Education*, 35.

The general rule that property already devoted to a public use by an agency having the right of eminent domain may not be condemned by another agency does not apply when the condemnor is the sovereign itself. *Ibid.*

Where an unchallenged finding of fact is to the effect that the Highway Commission was seeking to condemn property of a school administrative unit for controlled-access facilities for a limited-access highway, *held*, the State Highway Commission is given specific authority to condemn both private and public property for controlled-access facilities, G.S. 136-89.49(2), and in condemning such facility acts virtually for the State itself, and therefore is not subject to the general rule and may condemn such property notwithstanding the property is devoted to a public use by an agency itself having the power of eminent domain. *Ibid.*

§ 2. Acts Constituting a "Taking".

Where a municipality operates a sewage disposal plant, permanent in nature, which constitutes a nuisance amounting to a partial taking of abutting property, a temporary cessation of the operation of the plant does not abate the owner's action for permanent damages, and the municipality upon payment of such damages acquires a permanent easement which it may or may not exercise in the future as it sees fit. *Glace v. Pilot Mountain*, 181.

In this action to recover for damages from waters of ocean flooding land during storm upon contention that construction of highway at elevation prevented waters from flowing harmlessly into sound, evidence of damage prior to storm was irrelevant and there was no competent evidence of material damage so that nonsuit was proper; further, if damage was caused solely from failure to keep drains under highway open, damage resulted from negligence and was not a "taking". *Midgett v. Highway Comm.*, 373.

§ 3. What is Public Purpose Within Power of Eminent Domain.

Private property can be taken under the power of eminent domain only for a public use, and what is a public use is a judicial question of law for the trial court, reviewable on appeal. *Highway Comm. v. Batts*, 346.

EMINENT DOMAIN—*Continued.*

"Public use" as related to the exercise of the power of eminent domain is not capable of precise definition applicable to all situations but must be construed with relation to the progressive demands and changing concept of governmental duties and functions, but, even so, it must be related to the carrying out of a public function and not the use by or for particular individuals or for the benefit of particular estates. *Ibid.*

Uncontradicted evdience held to show that the proposed road was not for a public use. *Ibid.*

§ 5. Amount of Compensation.

The amount of compensation is the difference between the fair market value of the property before and after its depreciation from the operation of a nuisance. *Glace v. Pilot Mountain,* 181.

Where interest is not mooted in the action the act of the court in allowing interest from the date the cause of action arose is error, and the judgment will be corrected to allow interest only from the date of the judgment, with computation of interest as part of the cost from date of the verdict to the entry of judgment. *Ibid.*

In determining the value of property taken by eminent domain, it is permissible for the jury to take into consideration the reasonable probability of a change in the zoning ordinance regulating the property or the issuance of a permit for a nonconforming use. *Shopping Center v. Highway Comm.,* 209.

§ 6. Evidence of Value.

In an action to recover compensation for land taken by eminent domain, whether the purchase price paid by plaintiff is competent in evidence on the question of value must be determined in accordance with whether, under all the circumstances, including the time elapsing between the purchase and the taking, physical changes in the property taken, changes in its availability for valuable uses, and changes in the use of property in the vicinity which might affect the value, the purchase price fairly points to the value of the property at the time of the taking. *Shopping Center v. Highway Comm.,* 209.

§ 7a. Proceedings to Take Land and Assess Compensation in General.

In proceedings to condemn an interest in lands, the court has the power to hear and determine whether the condemnation is for a public use and whether the Highway Commission is entitled to maintain the proceeding. *Highway Comm. v. Batts,* 346.

In a proceeding by the State Highway Commission to condemn an interest in lands for a proposed road, an answer alleging that the road was not for a public use states a legal defense, and demurrer *ore tenus* to the answer is overruled. *Ibid.*

§ 10. Abandonment or Discontinuance of Proceedings.

Where employees of the Highway Commission go upon land of a private owner and cut trees upon the right of way of a proposed road, and it is later judicially determined that the road was for a private use and that the Highway Commission had no power to condemn property for the road, the cutting of the trees amounts to an unauhorized respass for which the Commission, as a State agency, cannot be held liable, since it had no authority to commit the trespass. *Highway Comm. v. Batts,* 346.

ESCAPE.

§ 1. Prosecutions for Escape.

Defendant's contentions that his sentence for escape was excessive for that other prisoners charged with the same offense had received shorter sentences, and for that in addition to the sentence imposed he lost his "good time" credit, are untenable. *S. v. Gibson*, 487; *S. v. Garris*, 711.

A prisoner may be punished for an escape even though at the time of the escape he has completed service of the maximum legal term, but when the maximum legal term for the offense of which he was convicted plus the sentence for repeated escape have been served, he is entitled to his immediate release. *S. v. Massey*, 579.

A defendant convicted of breaking and entering and larceny who is assigned to work under the work-release program, G.S. 148-33.1, may be sentenced to not more than two years imprisonment for failing to return to custody of the Prison Department, and a sentence of 21 months cannot be held cruel or unusual. *S. v. Hunt*, 715.

ESTATES.

§ 4. Termination of Life Estates and Allocation of Income and Expenses.

Upon termination of life estate, rents are to be apportioned between life tenant's representative and remaindermen. *Wells v. Trust Co.*, 98.

Upon the death of the life beneficiary of a trust, the ordinary expenses incurred in the administration and management of the trust, including charges for labor and supplies, building repairs, property insurance and taxes, and trustee's commissions, must be apportioned in the same percentages as the apportionment of rents. *Ibid.*

ESTOPPEL.

§ 4. Equitable Estoppel.

Equitable estoppel is to be applied as a means of preventing injustice and must be based on the conduct of the party to be estopped which the other party relies upon and is led thereby to change his position to his disadvantage. *Smith v. Smith*, 18.

EVIDENCE.

§ 15. Relevancy and Competency of Evidence in General.

When evidence is material and competent, objection on the ground that it would tend to discredit a party in the eyes of the jury, is untenable. *S. v. Davis*, 720.

§ 24. Public Documents.

A certified copy of a death certificate is competent in evidence to prove the fact of death, the time and place where it occurred, the identity of the deceased, the bodily injury or disease which was the cause of death, the disposition of the body, and other matters relating to the death, but statements from unidentified sources repeated or summarized therein by the coroner are incompetent in evidence. *Branch v. Dempsey*, 733.

§ 31. Admissions and Declarations of Agents.

Neither G.S. 20-71.1, G.S. 20-166, G.S. 20-166.1 nor G.S. 20-166.1(e) has

EVIDENCE—*Continued.*

the effect of rendering the statement made by the driver of a vehicle subsequent to the accident in suit competent as against the registered owner of the vehicle to prove negligence or proximate cause. *Branch v. Dempsey*, 733.

§ 35. Opinion Evidence in General.

Ordinarily, witness may testify only as to facts from which conclusion may be drawn by the jury. *McDaris v. "T" Corporation*, 298.

§ 44. Medical Expert Testimnoy.

A medical expert may not testify as to the cause of death based solely upon a purely superficial examination of the body the expert had not theretofore seen, since his testimony must be based upon facts within his own knowledge brought out in evidence or upon hypothetical facts embodied in proper questions. *Branch v. Dempsey*, 733.

§ 55. Evidence Competent for Purpose of Corroboration.

Where plaintiff testifies in regard to noxious odors on his land emanating from defendant's abutting sewage disposal plant, it is not error to permit him to read a telegram sent to the municipal officials a few months after the plant began operation, to the effect that plaintiff was forced to abandon his home by reason of the odors, the testimony being competent to corroborate plaintiff's testimony at the trial. *Glace v. Pilot Mountain*, 181.

EXECUTORS AND ADMINISTRATORS.

§ 24a. Actions for Personal Services Rendered Decedent.

Allegations to the effect that plaintiff rendered personal services to decedent, that she received no compensation therefor, but that she undertook and continued the services "upon the understanding" that intestate would recompense her by will should he predecease her, *held* sufficient, liberally construed and considered in context, to allege a mutual understanding and not merely a unilateral understanding on plaintiff's part. *Dixon v. Bank*, 322.

Plaintiff's evidence in this case *held* sufficient to sustain a finding that plaintiff rendered, and intestate received, personal services under the mutual understanding that plaintiff would be compensated therefor by will. *Ibid.*

§ 24b. Limitation of Actions for Personal Services Rendered Decedent.

Where there is allegation and evidence that plaintiff rendered services to intestate under agreement that she would be compensated therefor by will, plaintiff's cause of action does not arise until the death of intestate without making testamentary provision as agreed, and therefore plaintiff's recovery is not limited to the three years preceeding intestate's death. *Dixon v. Bank*, 322.

FIDUCIARIES.

The relationship of debtor and creditor exists between an insurance agent and insurer in regard to commissions due the agent, and ordinarily the contract between them creates no trust relationship expressly or by necessary implication. *Bank v. Ins. Co.*, 86.

FORGERY.

§ 2. Prosecutions.

In a prosecution for forgery and issuing a forged instrument, G.S. 14-119, G.S. 14-120, evidence that defendant had theretofore forged checks other than those specified in the indictment may be competent on the question of intent. *S. v. Painter*, 277.

FRAUDS, STATUTE OF.

§ 3. Pleading the Statute.

A denial of allegations constituting the basis of plaintiff's cause of action is a sufficient pleading of the statute of frauds. *Dixon v. Bank.* 322.

§ 6a. *Contracts Relating to Realty.*

A resulting trust does not come within the statute of frauds. *Martin v. Underhill*, 669.

FRAUDULENT CONVEYANCES.

§ 3. Actions to Set Aside Conveyances.

Where there is no evidence that the grantee accepted the deed with intent to delay, hinder or defraud creditors of the grantor, nonsuit is properly entered, notwithstanding evidence that the consideration for the deed was less than the reasonable market value of the land and that the grantor executed the deed with intent to delay, hinder or defraud creditors. *Murphy v. Hovis*, 448.

GAMES AND EXHIBITIONS.

§ 2. Liability of Proprietors to Patrons.

The promoter of an athletic event is not an insurer of the safety of patrons purchasing tickets, but is under duty to exercise reasonable care to guard against creating a hazard and the duty to use reasonable care to discover and remove dangerous conditions of which he has actual or implied knowledge. *Aaser v. Charlotte*, 494.

What constitutes reasonable care on the part of a promoter of an athletic event varies with the circumstances and extends not only to the physical conditions of the premises themselves but also to forseeable activities of his employees, the contestants, and the spectators. *Ibid.*

The promoter of an athletic event is charged with notice of dangerous conditions or activities created or engaged in by its employees, but as to acts of third persons the proprietor is liable only for those injuries resulting from a condition or activity of which he had knowledge or which had existed for a sufficient length of time for him to have discovered and removed the danger in the exercise of due diligence. *Ibid.*

Evidence held insufficient to show implied knowledge of dangerous activities of boys in corridors of arena. *Ibid.*

The purchaser of a ticket of admission to a wrestling match is an invitee, and the promoter, while not an insurer of the spectator's safety, is under duty to use reasonable care to prevent injury through a defect in the condition of the premises or by the actions of the contestants in the course of the match. *Pierce v. Murnick*, 707.

Precautions which the promoter must take to guard against injury to

GAMES AND EXHIBITIONS—*Continued.*

spectators varies with the nature of the exhibition, but the law does not require him to take such precautions as will unreasonably impair the enjoyment of the exhibition by the usual patrons. *Ibid.*

The evidence tended to show that a spectator at a wrestling match, purchasing and using a ringside seat, was injured when a wrestler was thrown from the ring so that he fell against plaintiff. The evidence further tended to show that plaintiff was a habitual spectator at wrestling matches and that the ring and seating arrangements were such as were habitually used at such exhibitions. *Held:* Nonsuit was properly entered, if not for the insufficiency of evidence of negligence, then on the ground of contributory negligence. *Ibid.*

HABEAS CORPUS.

§ 2. To Obtain Freedom From Unlawful Restraint.

No appeal lies from the imposition of punishment for direct contempt, and review upon *habeas corpus* is not *de novo* but is limited to a determination of whether the court imposing sentence had jurisdiction and whether its findings of fact set forth on the record support its order, the findings being conclusive. *In re Palmer*, 485.

§ 4. Review.

Habeas corpus is a collateral attack on a judgment of imprisonment for contempt, and no appeal lies from the order entered therein, and whether the order will be reviewed on *certiorari* rests in the sound discretion of the Court and the Court in the exercise of such discretion may decline to issue the writ. *In re Palmer*, 485.

HIGHWAYS AND TURNPIKES.

§ 1. Powers and Functions of Commission and Authorities.

The Highway Commission acts for the sovereign itself in condemning land for highway purposes and may condemn school property for a controlled-access facility, and has broad discretionary power in selecting highway routes. *Highway Commission v. Board of Education*, 35.

The North Carolina Turnpike Authority is empowered to construct toll road in phases. *Turnpike Authority v. Pine Island*, 109.

The North Carolina State Highway Commission is an agency of the State charged with the duty to establish and maintain a State-wide system of highways, and the Commission has such powers as have been delegated to it and those which are necessarily incidental to the purpose for which it was created, including the power of eminent domain, G.S. 136-18(1), G.S. 136-19, G.S. 136-103, but it does not have power to condemn private property to construct a road for the private use of any person or group of persons. *Highway Comm. v. Batts*, 346.

§ 8.1. Contracts for Construction of Highways.

The statutory requirement for competitive bids for contracts let by the Highway Commission for construction work in excess of the designated amount constitutes a prerequisite to the exercise of the power of the Highway Commission to let such contracts, and persons dealing with the Commission are presumed to know and are bound by the law with respect to the requirement of competitive bidding. *Teer Co. v. Highway Com.*, 1.

HIGHWAYS AND TURNPIKES—*Continued.*

§ 9. Actions Against Commission.

Contractor for construction of highway may recover for additional work only in accordance with provision of contract, and Board of Review acts in judicial capacity and not as arbitration board. *Teer v. Highway Comm.*, 1.

The Highway Commission, as an agency of the State, is subject to suit, in contract or in tort, only in accordance with statutory authorization, subject to the exception that where it takes private property for a public purpose 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. *Ibid.*

HOMICIDE.

§ 10. Defense of Others.

Private citizen has right to interfere to prevent felonious assault on third person. *S. v. Hornbuckle*, 312.

§ 20. Sufficiency of Evidence and Nonsuit.

Where the evidence tends to show that deceased was killed by a bullet fired from a pistol in the hand of the defendant, but the most incriminating evidence as to how the shooting occurred is testimony of a statement of defendant that it was an accident, *held*, the evidence is insufficient to overrule nonsuit in the absence of some showing from which culpable negligence might be found. *S. v. Church*, 534.

HUSBAND AND WIFE.

§ 12. Separation Agreements.

The eminence, experience, and character of counsel who represent the wife in procuring a property settlement bear directly on her subsequent attempt to set it aside as fraudulent. *Van Every v. Van Every*, 506.

Allegations held insufficient to raise issue of fraud in procuring execution of separation agreement. *Ibid.*

INDEMNITY.

§ 1. Nature and Requisites of Indemnity Agreements.

Contracts of indemnity are not contrary to public policy. *Gibbs v. Light Co.*, 459.

§ 2. Construction and Operation of Indemnity Contracts.

A contract under which the contractor for construction and maintenance of transmission lines agrees to indemnify the electric company for "all claims and causes of action of any character which any" of the contractor's employees may have against the electric company resulting from the performance of the contract, *held* to include indemnity against injury to the contractor's employees resulting from the electric company's negligence. *Gibbs v. Light Co.*, 459.

§ 3. Actions on Indemnity Agreements.

In an action by an employee against the third person tort-feasor, the tort-

INDEMNITY—*Continued.*

feasor is not entitled to litigate its rights under an indemnity agreement with the employer. *Gibbs v. Light Co.*, 459.

INDICTMENT AND WARRANT.

§ 4. Evidence and Proceedings Before Grand Jury.

Where some of the evidence before the grand jury is competent and some incompetent, a motion to quash the indictment for the admission of incompetent evidence will not be allowed, since the courts will not inquire as to how far the incompetent testimony contributed to the finding of a true bill. *S. v. Vandiver*, 325; *S. v. Squires*, 388.

§ 8. Duplicity.

A defendant waives duplicity in the warrant when he goes to trial without making a motion to quash. *S. v. Best*, 477.

§ 9. Charge of Crime.

Each count in an indictment should be complete in itself. *S. v. McKoy*, 380.

An indictment which does not incorporate the word "feloniously" or charge that the offense is a felony cannot support a conviction of an offense greater than a misdemeanor. *S. v. Price*, 703.

An indictment charging every essential element of a statutory offense is sufficient, notwithstanding it fails to specify the statute under which it was drawn. *S. v. Hunt*, 714.

Where a warrant properly and sufficiently charges defendant with the commission of a statutory offense and then alleges evidentiary matter descriptive of the manner and means by which the offense was committed, the evidentiary averments will be treated as surplusage and cannot warrant quashal. *S. v. Abernathy*, 724.

§ 13. Bill of Particulars.

A motion for a bill of particulars is addressed to the discretion of the trial court and the denial of such motion will not be disturbed in the absence of a showing of abuse of discretion. *S. v. Vandiver*, 325.

A charge in the bill of indictment must be complete in itself and may not be aided as to an essential element of the offense by averment in the prior warrant. *S. v. Guffey*, 331.

§ 15. Motions to Quash.

A motion to quash a warrant in its entirety is properly denied when one of the counts contained therein is clearly good, even though another count may be bad for duplicity. *S. v. Anderson*, 548.

Quashal of indictments and warrants is not favored. *S. v. Abernathy*, 724.

INFANTS.

§ 4. Right of Infant to Recover for Torts.

Negligent injury to an unemancipated child gives rise to a cause of action on behalf of the child to recover damages for pain and suffering, permanent injury and impairment of earning capacity after attaining majority; and to a cause of action by the parent for loss of services and earnings of the child during minority and expenses incurred for necessary medical treatment for the child's injuries. *Kleibor v. Rogers*, 304.

INSURANCE.

§ 2. Brokers and Agents — Commissions.

Relationship of debtor and creditor exists between insurance agent and insurer in regard to commissions, and, after death of agent, failure of insurer to disclose facts to personal representative in regard to commissions on renewals does not create a constructive trust, but personal representative held entitled to commissions on renewal premiums under terms of contract so long as policies remain in force. *Bank v. Insurance Co.*, 86.

An insurance agent is liable to the insurer if the agent issues a policy in violation of his instructions resulting in loss to insurer. *Hildreth v. Casualty Co.*, 565.

§ 3. Construction and Operation of Policies in General.

An insurance contract must be liberally construed in accordance with its purport and intent. *Buck v. Guaranty Co.*, 285.

The rule that a contract of insurance must be construed strongly against insurer and liberally in favor of insured applies when the language of the policy is ambiguous or is susceptible of more than one construction and does *not* apply when the language of the policy is plain and unambiguous and susceptible of only one reasonable construction, in which event the courts will enforce the contract according to its terms. *Walsh v. Ins. Co.*, 634.

§ 9.1. Credit Life Insurance.

The creditor has an insurable interest in the life of the debtor, and as between the creditor and an insured debtor, credit life insurance is collateral security. *Hatley v. Johnston*, 73.

§ 29. Confining Illness.

The provisions of a health policy that insured should be continuously confined within doors by sickness or disease in order to be entitled to specific benefits has been construed by the courts as descriptive of the extent of the illness rather than a restriction on insured's conduct or activities. *Walsh v. Ins. Co.*, 634.

Evidence held to show defendant did not suffer confining illness as defined by the policy. *Ibid.*

§ 34. Death or Injury by Accident or Accidental Means.

If existing disease is contributing factor in causing death, death does not result exclusively from accidental means. *Horn v. Ins. Co.*, 157.

§ 45. Notice and Proof of Loss Under Accident Policies.

Where insurer tenders the amount of the death claim and resists plaintiff's action on the supplementary contract for accidental death solely on the ground that insured's death was not accidental as defined by the policy, insurer waives its right to deny liability on the ground that notice and proof of loss were not given as required by the policy. *Horn v. Ins. Co.*, 157.

§ 46. Actions on Accident Policies.

In an action under supplementary provisions of a policy for additional payments if death of insured results from an accident, plaintiff has the burden of proving death by accident within the definition of that term in the policy. *Horn v. Ins. Co.*, 157.

INSURANCE—*Continued.*

§ 47.1. Insurance Against Damage From Uninsured Vehicles.

"Uninsured vehicle" as used in an uninsured motorist endorsement in a policy of automobile insurance must be construed in accordance with its language interpreted in the light of the purport and intent of the endorsement and the pertinent statutes to protect the insured and any operator of insured's car with insured's consent against injury caused by the negligence of uninsured or unknown motorists, and such coverage is not affected by the language or statutory compliance of a liability policy, if any, on the other vehicle involved in the collision. *Buck v. Guaranty Co.*, 285.

An automobile upon which a liability policy has been issued is nevertheless an uninsured vehicle within the intent and purview of the statutes and a motorist endorsement if the policy on such automobile does not cover the liability of a person using the vehicle and inflicting injury on the occasion of the collision in question. *Ibid.*

Plaintiff was injured while driving, with permission of the owner, a vehicle covered by a policy of insurance having an uninsured motorist endorsement. Judgment was obtained against the driver of the other car involved in the collision but no judgment was obtained against the owner of the other car because of the adjudication that the driver was operating the vehicle without the knowledge or consent of the owner, and execution on the judgment was returned unsatisfied. *Held:* Plaintiff was within the coverage of the uninsured motorist endorsement on the policy on the car driven by her. *Ibid.*

§ 57. Drivers Insured Under Liability Policy.

Use of a vehicle with the owner's permission within the coverage of a policy of liability insurance may be either express or implied from the course of conduct between the parties or the relationship between them disclosing acquiescence signifying assent. *Bailey v. Ins. Co.*, 675.

Ordinarily, one permittee within the coverage of a liability policy does not have authority to select another permittee without specific authority from the named insured. *Ibid.*

§ 60. Auto Liability Insurance — Notice of Accident to Insurer.

Insurer in a liability policy does not waive failure of insured to give notice by employing counsel to investigate under a reservation of rights, but insurer does waive failure to give notice as required by the policy if it undertakes to defend the action and breaches the duty to act diligently and in good faith in making such defense. *Connor v. Ins. Co.*, 188.

§ 61. Whether Liability Policy is in Force at Time of Accident.

Where plaintiff makes out a *prima facie* case against insurer upon its liability policy, insurer's contention that the policy had been cancelled prior to the accident causing the injury is an affirmative defense, and plaintiff's action against insurer may not be nonsuited upon such defense when the defense is not established by plaintiff's own evidence. *Griffin v. Indemnity Co.*, 443.

§ 62. Cooperation of Insured in Defense of Action.

Where plaintiff, in his action against the tort-feasor's insurer after return of judgment unsatisfied against the tort-feasor, admits the absence of the tort-feasor from the trial, the burden is upon plaintiff to establish reasonable justification of the tort-feasor's absence from the trial, and when the evidence is conflicting insurer is not entitled to nonsuit. *Connor v. Ins. Co.*, 188.

INSURANCE—*Continued.*

Failure of insured to give notice of accident and failure of insured to cooperate in defense of an action brought against him by the party injured in a collision with the insured's car, are separate, and submission of a single issue of waiver of both requirements, with the confusion augmented by a charge to the effect that the act of insurer in filing answer would waive a subsequent breach by insured of his obligation to cooperate in the defense, must be held for prejudicial error, the evidence being conflicting as to whether insured's absence from the trial against him and his failure to cooperate was justified. *Ibid.*

§ 65. Rights of Injured Party Against Insurer After Judgment Against Insured.

Evidence that insurer had issued its policy of automobile liability insurance covering the operation of the vehicle inflicting the damage, that the accident occurred during the term of the policy, and that plaintiff had obtained a judgment against insured upon which execution had been returned unsatisfied by reason of her insolvency, nothing else appearing, entitles plaintiff to judgment against insurer. *Griffin v. Indemnity Co.*, 443.

§ 86. Fire Insurance—Payment and Subrogation.

Insurer paying the landlord damages resulting from a fire caused by negligence is subrogated to the landlord's rights against the third person tortfeasor causing or responsible for the loss. *Casualty Co. v. Oil Co.*, 121.

INTOXICATING LIQUOR.

§ 2. Beer and Wine Licenses.

License to sell and distribute beer is a privilege granted by the State Board of Alcoholic Control to those meeting the standards which the Board has set up, and such license may and should be revoked if the Board determines, after notice and a hearing, that the licensee has failed to observe the Board's regulations or failed to obey the laws of the State pertaining to the sale of beer. *Wholesale v. ABC Board*, 679.

Evidence that the licensee for a period of some two years had followed the general practice of giving free beer and quantity discounts to large customers, *held* sufficient to support the Board's findings and conclusions and to justify the revocation of the permit, and the Board's order of revocation must be affirmed on appeal, the Board's findings being conclusive when supported by evidence. *Ibid.*

§ 10. Presumptions and Burden of Proof.

G.S. 18-11 authorizes but does not compel a jury to infer that the possessor of nontaxpaid whiskey possessed the whiskey for the purpose of sale. *S. v. Tessnear*, 319.

§ 12. Competency and Relevancy of Evidence.

In a prosecution for possession and possession for the purpose of sale of intoxicating liquor, evidence that defendant's house had the reputation of having whiskey for sale is incompetent as hearsay. *S. v. Tessnear*, 319.

It is competent for an expert in the field to testify that the still in question, examined by the witness, was capable of making whiskey. *S. v. Little*, 440.

INTOXICATING LIQUOR—*Continued.*

It is competent for an expert in the field to testify that mash found by the witness at a still site had fermented and was ready to run, and to testify as to what was needed to put the still in operation. *Ibid.*

§ 13c. Sufficiency of Evidence and Nonsuit on Charge of Possession or Possession for Sale.

In this prosecution for possession of nontaxpaid whiskey and for possession thereof for the purpose of sale, the State's evidence *held* sufficient to overrule defendant's motions of nonsuit. *S. v. Tessnear*, 319.

§ 13e. Sufficiency of Evidence on Charge of Possession of Equipment for Manufacture.

Evidence in this case *held* sufficient to be submitted to the jury upon an indictment charging defendant with unlawfully and wilfully having in his possession materials and equipment designed and intended for the unlawful manufacture of intoxicating liquor. *S. v. Little*, 440.

§ 15. Instructions.

In a prosecution for possession and possession for the purpose of sale of intoxicating liquor, an instruction that possession of any quantity of nontaxpaid whiskey "raises a deep presumption" that the possession was for the purpose of sale *held* prejudicial error as an expression of opinion in violation of G.S. 1-180. *S. v. Tessnear*, 319.

§ 16. Verdict.

Where the warrant charges unlawful possession of intoxicating liquor for the purpose of "being sold, bartered, exchanged, given away, or otherwise disposed of * * *", and the evidence and charge relate solely to possession for the purpose of sale, the ambiguity may be resolved by reference to the evidence and charge, and it is not prejudicial if the words "bartered, exchanged, given away, or otherwise disposed of" are treated as surplusage. *S. v. Anderson*, 548.

JUDGMENTS.

§ 28. Conclusiveness of Judgment and Bar in General.

Ordinarily a plea of *res judicata* may be maintained only where there is identity of parties, subject matter and issues. *Kleibor v. Rogers*, 304.

§ 29. Parties Concluded.

Nothing else appearing, a judgment dismissing on the ground of contributory negligence an action instituted in behalf of a minor child by his mother as next friend to recover damages for negligent injury does not bar a subsequent action instituted by the child's father to recover damages for loss of services and earnings of the child during minority and for expenses incurred for medical treatment of his son's injuries, there being no allegation that the father controlled or participated in the institution or prosecution of the prior action. *Kleibor v. Rogers*, 304.

§ 30. Matters Concluded.

The sole child of intestate was successful in obtaining judgment setting aside his deed to the widow for his intestate share. *Held:* The right of the widow to elect to take a life estate in the homeplace instead of the fee in one-

JUDGMENTS—*Continued.*

half of the lands of the estate was not in issue in the action to set aside the deed, and the judgment therein does not constitute an estoppel. *Smith v. Smith*, 18.

LANDLORD AND TENANT.

§ 8. Assignment and Subletting.

In the absence of an agreement to the contrary, the sublease of the premises does not release lessee from his obligations under the lease, including the implied obligation not to damage the premises as a result of negligence. *Casualty Co. v. Oil Co.*, 121.

The allegations were to the effect that lessee of a filling station subleased same and that sublessee was guilty of negligence resulting in damage to the premises by fire. *Held:* Liability of lessee to lessor for the negligent act of the sublessee is not based on the principle of *respondeat superior* but is based upon breach of implied covenant by lessor that waste would not be committed by negligence in the use of the property, and under express covenant of lessee to indemnify and save lessor harmless from any claims through the negligence of lessee, his sublessee and assigns. *Ibid.*

§ 10. Expiration of Term, Notice, Renewals and Extensions.

If a lease for a term of a year provides for renewal upon 30 days notice prior to the expiration of the term, a holding over by the tenant after term without giving notice does not constitute a renewal or extension under the terms of the lease, and the acceptance of rent in the former amount by the lessor after expiration of the term does not waive his right to notice. *Kearney v. Hare*, 571.

This lease for a period of a year provided for extensions from year to year successively for a period of four years upon notice 30 days prior to the expiration of the current term. At the request of lessor, the tenant paid rent for the entire second year in installments beginning some two months prior to the expiration of the term. *Held:* By requesting and accepting payment of rent prior to the time lessee was required to give notice, the lessor waived notice, and the extension was effected under the lease, giving the right to extend the lease for each successive year for the remainder of the four-year period upon payment of rent and the giving of due notice. *Ibid.*

Provisions of a lease relating to renewals and extensions will be construed in favor of the tenant. *Ibid.*

§ 11. Holding Over.

Where a tenant for a fixed term of one year or more holds over after the expiration of the term, the lessor may eject him or recognize him as a tenant; if lessor continues to recognize him as a tenant, a tenancy from year to year, under the same terms as those of the former lease, insofar as they are applicable, is created by presumption of law in the absence of a new contract or circumstances rebutting such presumption. *Kearney v. Hare*, 570.

§ 17. Waste and Injury to Property by Lessee.

An agreement in the lease that lessor should not exercise any of his remedies against lessee by reason of any default until after 30 days notice by registered mail applies to possessory remedies of lessor and does not require lessor to give notice of his claim for damages from waste. *Casualty Co. v. Oil Co.*, 121.

LANDLORD AND TENANT—*Continued.*

An action for waste may be brought before the expiration of the term, and although the existence of the lease contract establishes the relationship upon which the duty to exercise due care arises, the action for waste resulting from negligent conduct sounds in tort. *Ibid.*

Lessee, in the absence of specific agreement to the contrary, is under implied obligation to treat the demised premises in such manner that no injury be done the property, and while lessor may not hold lessee liable for accidental damage by fire, he may hold lessee liable for damage by fire resulting from negligence. Lessor's covenant to make all repairs to the demised premises at his own expense is not a covenant excluding such implied obligation. *Ibid.*

LARCENY.

§ 4. Warrant and Indictment.

An indictment for larceny must allege the owner or the person in possession of the goods stolen. *S. v. McKoy*, 380.

§ 5. Presumptions and Burden of Proof.

When it is established that a store has been broken into and entered and that merchandise has been stolen therefrom, the possession of the stolen merchandise shortly after it had been stolen raises the presumptions of fact that the possessor is guilty of the larceny and of the breaking and entering. *S. v. Allison*, 512.

§ 7. Sufficiency of Evidence and Nonsuit.

Evidence tending to show that a store building was broken and entered at nighttime and goods taken therefrom, that some of the goods were found shortly thereafter in a car in which defendant and his companions were riding, together with testimony of an accomplice tending to show that the goods were taken by defendant and his companions after breaking and entering, *held* sufficient to overrule nonsuit. *S. v. Allison*, 512.

Evidence tending to show that an inventory of television sets owned by a corporation disclosed that sets having serial numbers listed were missing, and that two or three weeks later six of the sets so identified were found in possession of defendant or in the joint possession of defendant and his codefendant, *held* sufficient to overrule nonsuit. *S. v. Holloway*, 581.

§ 8. Instructions.

In a prosecution for larceny of goods having a value in excess of $200, the court must instruct the jury that the burden is upon the State to show that the value of the goods exceeded $200 in order to sustain a conviction of the felony, it being established by verdict of the jury that defendant did not commit the larceny pursuant to an unlawful breaking and entering. *S. v. Holloway*, 581.

Unless the larceny was by breaking and entering, the trial court is required to charge that the jury must find beyond a reasonable doubt that the value of the property exceeded $200 before the jury can find defendant guilty of the felony. *S. v. Herring*, 713.

§ 10. Judgment and Sentence.

Under the 1959 amendment to G.S. 14-72, larceny by breaking and entering a building is a felony without regard to the value of the property stolen. *S. v. McKoy*, 380.

LIMITATION OF ACTIONS.

§ 7. Fraud, Mistake and Ignorance of Cause of Action.

A cause of action for fraud is not barred until three years after the fraud constituting the basis of the action is discovered or should have been discovered, and where a confidential relationship exists the failure to discover the facts constituting the fraud may be excused. *Bennett v. Trust Co.*, 148.

§ 17. Burden of Proof.

Upon defendant's plea of the applicable statute of limitations, the burden devolves upon plaintiffs to show that their action was instituted within the time allowed. *Bennett v. Trust Co.*, 148.

The burden is upon plaintiff upon defendant's plea of the applicable statute of limitations to prove that the action was commenced within the time limited, including the burden of proving that defendant adopted the seal affixed to the instrument, or other facts and circumstances, when relied on by plaintiff to repel the three-year statute pleaded, and when neither the referee nor the court finds the crucial facts in regard thereto, the cause must be remanded. *Bank v. Ins. Co.*, 86.

LIS PENDENS.

Lis pendens is now statutory in this State, and there can be no valid notice of *lis pendens* except in actions of the types enumerated by the statute. *Cutter v. Realty Co.*, 664.

An unauthorized notice of *lis pendens* may be cancelled upon motion prior to the hearing of the action on its merits. G.S. 1-120 is not applicable to cancellation of an unauthorized notice. *Ibid.*

The purpose of *lis pendens* is to give notice of a claim which is contra or in derogation of the record. *Ibid.*

An action by stockholders against the corporation and its subsidiary and the officers and directors thereof to restrain the subsidiary from conveying land owned by it, to restrain the corporation from assuming the liabilities of the subsidiary, and to rescind a contract for the sale of the land by the subsidiary is not for the purpose of establishing a trust or lien upon realty nor an action "affecting title" within the purview of G.S. 1-116(a), and therefore order cancelling notice of *lis pendens* upon motion was properly entered. *Ibid.*

MASTER AND SERVANT.

§ 3. Distinction Between Employee and Independent Contractor.

Ordinarily, a general manager, even though he aids in the selection of subordinate employees and has direction and control over such subordinates in the performance of their duties, is not an independent contractor and is not liable for the negligence of such subordinate employees when such subordinate employees are on the payroll of the principal employer and subject to his ultimate control, and perform their duties in the furtherance of the principal employer's business. *Davis v. Wilson*, 138.

§ 45. Nature and Construction of Compensation Act in General.

An injury must result from an accident in order to be compensable under the North Carolina Workmen's Compensation Act. *Lawrence v. Mill*, 329.

§ 51. Dual Employments.

The operator of heavy equipment may be held the employee of both the

MASTER AND SERVANT—*Continued.*

general employer and the special employer with regard to liability under the Workmen's Compensation Act when the general employer leases the heavy equipment to a special employer who directs the work being performed and who has the power of terminating the employment at the work site but no power to terminate the general overall employment. *Leggette v. McCotter*, 617.

§ 63. Hernia and Back Injuries.

Claimant's testimony that at the time of his back injury he was reaching for a hanger from a box about four feet high in the same way that he had performed that duty of his employment for more than a year, *held* insufficient to support a finding that the back injury was the result of an accident. *Lawrence v. Mill*, 329.

§ 64. Whether the Accident Causes the Injury.

Claimant testified that he had not been sick for some five years prior to the accident and that since the accident he had been totally disabled, and a physician who examined claimant after the accident testified that claimant had a contusion and bruises of the left hip and to a less extent of his right hip and right lateral chest wall. *Held:* The evidence was sufficient to sustain a finding of the Industrial Commission that the accident caused temporary disability, notwithstanding other evidence that claimant was suffering from osteomylitis of some ten years' duration. *Anderson v. Construction Co.*, 431.

§ 86. Right of Action Against Third Person Tort-Feasor.

A provision in a contract for construction work that the contractor should indemnify the contractee for any liability to the employees of the contractor resulting from the negligence of the contractee does not violate G.S. 97-9, since the Workmen's Compensation Act recognizes the right of third parties to enforce contracts of indemnity against employers. *Gibbs v. Light Co.*, 459.

In an action by an employee against the third person tort-feasor, the tort-feasor is entitled to assert the joint and concurring negligence of the employer, G.S. 97-10.2(e), but the third person tort-feasor is not entitled to litigate in the employee's action its rights under an indemnity contract between it and the employer, and therefore cannot be entitled to have the insurer of the employer's indemnity liability made a party. *Ibid.*

Where there is an agreement by the employer to indemnify the third person tort-feasor against liability for negligent injury to the employer's workmen, the third person tort-feasor may not claim that the employer is estopped from maintaining the action in the employee's name in regard to that part of the recovery which might go to the employer and its insurer in reimbursement of the sums paid out to the injured employee under the Workmen's Compensation Act, the language of the indemnity agreement being sufficiently broad to cover the entire recovery by the employee. *Ibid.*

Insurer who has paid a claim under our Compensation Act may not be held liable for the failure of its agents to perform their agreement with the injured employee to file his claim for the negligent injury against the third person tort-feasor, there being no evidence that the individuals were authorized by insurer to enter into any such undertaking on its behalf or that the filing of a claim on behalf of the employee was in the course of their employment as insurer's agents. *Whitworth v. Casualty Co.*, 530.

Plaintiff, injured as a result of a defect in a highway in South Carolina, alleged that the individual defendants gratuitously agreed to file his claim for

MASTER AND SERVANT—*Continued.*

his injury with the South Carolina Highway Commission and negligently failed to do so. *Held:* In view of the fact that the South Carolina statute provides for liability only if the highway department has actual or constructive notice of such defects, the absence of evidence as to when or how the defect occurred so as to supply the basis for a finding of actual or constructive notice thereof, is fatal, since there could be no recovery in the absence of such showing. *Ibid.*

§ 88. Filing of Claim for Compensation.

The statutory limitation upon the filing of a claim for compensation under the Workmen's Compensation Act is a condition precedent annexed to the right to compensation, and when no claim is filed on behalf of the widow within one year of the employee's death, proceedings instituted subsequent thereto are properly dismissed, irrespective of whether the neglect of the widow's attorneys should be imputed to her. *Montgomery v. Fire Department*, 553.

§ 92. Prosecution of Appeal to Superior Court.

Where, after an award, additional hearings are had from which appeal is taken, the Industrial Commission should certify the entire record, and when the record does not contain the proceedings upon the original hearing, making it impossible to ascertain judicially what matters had been adjudicated and precluded in the original hearing, the Superior Court should direct the Industrial Commission to certify the entire transcript of its proceedings in the matter, and consider defendant's appeal in the light of the entire record. *Campbell v. Mills*, 384.

§ 93. Review in Superior Court.

While the findings of the Industrial Commission are conclusive if supported by competent evidence, whether the evidence is sufficient to support the findings is a question of law for the court. *Lawrence v. Mill*, 329.

On appeal from the Industrial Commission, the courts may review the evidence to determine, not what the evidence proves or fails to prove, but only whether there is any competent evidence to sustain the findings, the credibility of the witnesses and the weight to be given their testimony being the exclusive province of the Commission. *Anderson v. Construction Co.*, 431.

Where appellant properly presents for review jurisdictional findings of the Industrial Commission it is the duty of the Superior Court to review the evidence and make its independent findings as to the jurisdictional facts, and when it appears that the Superior Court affirmed the findings of the Commission upon the assumption that the jurisdictional findings were binding if supported by competent evidence, the cause must be remanded. *Burns v. Riddle*, 705.

MUNICIPAL CORPORATIONS.

§ 5. Distinction Between Governmental and Private Powers.

In operating or leasing an arena for the holding of exhibitions and athletic events, and in operating refreshment stands in the corridors of the building during such events, a municipality acts in a proprietary capacity. *Aaser v. Charlotte*, 494.

§ 10. Liability for Torts.

Where a city, in leasing an arena for an athletic game, retains the privi-

MUNICIPAL CORPORATIONS—*Continued.*

lege of occupying and using the corridors for the operation of refreshment stands, the lease of the arena itself does not relieve the municipality of liability for an injury to a ticket holder injured in one of the corridors. *Aaser v. Charlotte*, 494.

§ 12. Injuries from Defects or Obstructions in Streets or Sidewalks.

Evidence that the holder of a municipal water franchise maintained a water meter box which had been sunk in the ground some seven or eight inches below the level of the adjacent unpaved street, leaving an open hole above, that such condition had existed for six or seven months, and that both the municipality and the water company had been warned of this condition as constituting a danger to pedestrians, and that plaintiff was injured when she stepped into the hole and fell, *held* sufficient to be submitted to the jury on the issue of actionable negligence of the municipality and water company. *Wallsee v. Water Co.*, 291.

But evidence *held* to show contributory negligence as a matter of law on part of pedestrian stepping into hole. *Ibid.*

§ 15. Injuries to Lands by Sewer Systems.

Where a municipality operates a sewage disposal system which, even though operated in a non-negligent manner, constitutes a nuisance, permanent in character, by reason of noxious odors which diminish the value of abutting property, the property owner may recover damages as for a partial taking of property by eminent domain, and plaintiff's evidence in this case *held* sufficient to be submitted to the jury on the theory of such taking. *Glace v. Pilot Mountain*, 181.

§ 25. Zoning Ordinances and Building Permits.

Municipalities have been delegated the police power to prescribe in the interest of public safety minimum standards for the materials, design and construction of buildings, G.S. 160-182, and, in a prosecution for violating a municipal building ordinance by remodeling and repairing without first obtaining a permit in violation of the ordinance, attack of the ordinance on the ground of lack of authority of the municipality and of the Legislature to promulgate the regulations is untenable. *S. v. Walker*, 482.

NEGLIGENCE.

§ 1. Acts and Omissions Constituting Negligence in General.

While breach of contract does not ordinarily give rise to an action in tort, where the contract imposes a duty to exercise due care in the performance of the contract and that duty is violated, an action may be maintained to recover the resulting damages on the theory of negligence. *Casualty Co. v. Oil Co.*, 121.

Negligence and nuisance are separate torts. *Midgett v. Highway Comm.*, 373.

There can be no recovery for a negligent omission unless it results in damage. *Whitman v. Casualty Co.*, 530.

§ 7. Proximate Cause.

A proximate cause may be an act or omission which does not immediately precede the injury or damage, and therefore proximate cause and immediate cause are not synonymous. *Stewart v. Gallimore*, 696.

If any degree, however small, of causal negligence is attributable to a person, he incurs liability therefor. *Wise v. Vincent*, 647.

NEGLIGENCE—*Continued.*

§ 8. Concurring and Intervening Negligence.

There may be two or more proximate causes of an injury, and if negligence from separate and distinct sources or agencies, even though operating independently of each other, join and concur in producing the result complained of, the author of each is liable. *Wise v. Vincent*, 647.

If the negligence of one party continues up to the moment of impact, such negligence cannot be insulated by the negligence of another. *Ibid.*

§ 9. Indemnity.

Where two persons are jointly liable in respect to a tort, one being liable because he is the active wrongdoer and the other by reason of constructive or technical fault imposed by law, the latter, if blameless as between himself and his co-tortfeasor, will ordinarily be allowed to recover full indemnity over against the actual wrongdoer as upon a contract implied in law. *Hildreth v. Casualty Co.*, 565.

§ 11. Contributory Negligence in General.

It is not necessary that contributory negligence be the sole proximate cause of the injury in order to bar recovery, it being sufficient for this purpose if it be one of the proximate causes thereof. *Raper v. Byrum*, 269; *Wallsee v. Water Co.*, 291.

The law imposes upon a person *sui juris* the duty to exercise the care of a reasonably prudent person to protect himself from injury, the standard of care being constant while the degree of care varies with the exigencies of the situation and the danger to be avoided. *Wallsee v. Water Co.*, 291.

Mere forgetfulness or inattention to a known danger will not constitute contributory negligence when it is due to conditions which would divert the attention of a reasonably prudent person, but if under the circumstances an ordinarily prudent person would not have forgotten or been inattentive to the danger, such forgetfulness or inattention constitutes negligence. *Ibid.*

What constitutes contributory negligence as a matter of law cannot be determined by inflexible rule but must be decided in accordance with the facts in each particular case. *Ibid.*

§ 16. Contributory Negligence of Minors.

While a child between the ages of 7 and 14 is presumed incapable of contributory negligence, such child may be found to be contributorily negligent if such child fails to exercise that degree of care commensurate with her knowledge, age, capacity, discretion and experience. *Weeks v. Barnard*, 339.

§ 20. Pleadings in Negligence Actions.

It is sufficient for plaintiff to allege facts establishing negligence and establishing such negligence as the proximate cause of his damage, and the failure of the complaint to allege the conclusions of negligence and proximate cause is not a defect. *Casualty Co. v. Oil Co.*, 121.

Allegations that a filling station attendant failed to place the prong of the lift in proper position to hold an automobile he was raising, that the automobile slipped on the lift in such manner that the prong on the lift punctured the gasoline tank, causing gasoline to run from the tank, and that the gasoline vapors were ignited by the open flame of a heater nearby, *held* sufficient to allege actionable negligence, notwithstanding failure of plaintiff to use the term "proximate cause." *Ibid.*

Contributory negligence must be pleaded. *Douglas v. Mallison*, 362.

In this action to recover for injuries resulting when the "A-frame" of the

NEGLIGENCE—*Continued.*

machine plaintiff had purchased from defendants fell back on plaintiff while he was operating the machine, allegations in the answer to the effect that plaintiff knew that the "A-frame" of the machine folded back toward the chassis for the purpose of transportation, and that in preparing the machine for use plaintiff failed to take precautions to prevent the frame from folding back toward him, *held* sufficient to allege contributory negligence of plaintiff in failing to take the necessary precautions. *Ibid.*

§ 24a. Sufficiency of Evidence of Negligence in General.

Plaintiff is entitled to go to jury in his action and defendant is entitled to go to the jury on his cross-action, respectively, if the evidence considered in the light most favorable to him is sufficient to permit a legitimate inference that the injury and damage were proximately caused by the actionable negligence of the other, unless his own proof establishes contributory negligence as a matter of law. *Banks v. Woods,* 434.

§ 26. Nonsuit for Contributory Negligence.

Since the burden of proof on the issue of contributory negligence is upon defendants, a motion for judgment of involuntary nonsuit upon that ground should be allowed only when plaintiff's evidence, considered alone and taken in the light most favorable to him, together with all inferences favorable to him which may reasonably be drawn therefrom, so clearly establishes the defense that no other conclusion can reasonably be drawn. *Raper v. Byrum,* 269; *Murray v. Bottling Co.,* 334; *Sharpe v. Hanline,* 502; *Stewart v. Gallimore,* 696; *Simpson v. Lyerly,* 700.

Nonsuit for contributory negligence should be denied when opposing inferences are permissible from plaintiff's proof. *Montford v. Gilbhaar,* 389.

When plaintiff's own evidence, considered in the light most favorable to him, affirmatively shows contributory negligence so clearly that no other conclusion can be reasonably drawn from the evidence, defendant's motion to nonsuit should be allowed. *Wallsee v. Water Co.,* 291; *Douglas v. Mallison,* 362.

Nonsuit for contributory negligence may not be entered when the evidence raises the issue of last clear chance for the determination of the jury. *Wanner v. Alsup,* 308.

§ 28. Instructions.

An instruction which in effect places the burden upon defendant to prove by the greater weight of the evidence that the facts were in accord with his contentions, negating negligence on his part, must be held for reversible error, even though correct instructions were given in other parts of the charge. *Barber v. Heeden,* 682.

§ 37a. Definition of "Invitee."

Under the laws of the State of Georgia, in which this cause of action arose, a house guest is an invitee. *Cobb v. Clark,* 194.

Under the laws of the State of Georgia, where this cause of action arose, as well as under the laws of this State, an invitee who exceeds his invitation and goes to areas not open to his use becomes a mere licensee. *Ibid.*

One who purchases a ticket for an athletic game is an invitee of the operator of the exhibition and, while in a corridor providing access to portions of the building which his ticket entitles him to enter, is an invitee of the owner of the building who had retained the right to control the corridors. *Aaser v. Charlotte,* 494.

NEGLIGENCE—*Continued.*

A person entering a business establishment for the purpose of paying a bill is an invitee. *Dawson v. Light Co.*, 691.

§ 37b. Duties to Invitee.

A proprietor is not an insurer of the safety of his invitees but is under duty to exercise ordinary care to keep his premises within the compass of the invitation in reasonably safe condition and to give warning of hidden dangers or unsafe conditions of which the proprietor knows or in the exercise of reasonable supervision and inspection should know. *Dawson v. Light Co.*, 691.

The mere fact that a proprietor has no mat on the floor at the entrance of its office during a period of rain is not negligence, and a proprietor cannot be held under duty to keep a person continuously mopping the floor to avoid dampness during a rainy spell. *Ibid.*

§ 37f. Sufficiency of Evidence and Nonsuit in Actions by Invitee.

Evidence that a house guest, occupying the status of an invitee under the laws of the state in which the cause of action arose, in the absence of her host, turned off the light in her bedroom, walked down a dimly lit hall, and, because of the inadequate illumination, by mistake opened the cellar door instead of the nursery door, and fell down the steps to her injury, *is held* insufficient to be submitted to the jury on the issue of negligence, since plaintiff herself was responsible for the lack of light in the hall. *Cobb v. Clark*, 194.

Evidence tending to show that plaintiff invitee, after paying her bill, slipped on a little mud or a little bit of water just inside the door of the office, without evidence that the proprietor had created such condition or that the condition had existed for a sufficient length of time to give the proprietor notice thereof, *is held* insufficient to overrule nonsuit. *Dawson v. Light Co.*, 691.

NUISANCE.

§ 1. Conditions Constituting Private Nuisance.

Negligence and nuisance are separate torts. *Midgett v. Highway Comm.*, 373.

A structure may become a nuisance by reason of the manner of its maintenance and management. *Midgett v. Highway Comm.*, 373.

One who seeks damages for the taking of property by the sovereign by reason of the alleged creation and maintenance by the sovereign of a permanent and continuing nuisance must make a *prima facie* showing of substantial and measurable damages, and in the absence of competent evidence of material damage resulting directly from the creation of a permanent structure or obstruction, nonsuit is proper. *Ibid.*

PARENT AND CHILD.

§ 4. Right of Parent to Recover for Injuries to Child.

Ordinarily, parent may sue for loss of services and earnings of child during minority and expenses occurred for necessary medical treatment, and child may recover for impairment of earning capacity after majority. *Kleibor v. Rogers*, 304.

PARTITION.

§ 12. Partition by Exchange of Deeds.

The fact that the life tenant's three children, who are the contingent re-

PARTITION—*Continued.*

maindermen under a devise of a share in common to their mother for life with remainder to her next of kin, join and are joined with their mother in an exchange of deeds executed solely for the purpose of partition with another of the tenants in common, is no evidence that the parties treated the contingent remaindermen as owning a vested remainder. *McCain v. Womble*, 640.

PARTNERSHIP.

§ 3. Mutual Rights, Duties and Liabilities of Partners.

The fiduciary relationship existing between partners entitles one partner to demand an accounting of the other upon request, and the statute of limitations does not begin to run against the right to such accounting until one partner has notice of the other's termination of the partnership and his refusal to account. *Bennett v. Trust Co.*, 148.

§ 8. Death of Partner.

The death of one partner ordinarily terminates the partnership and entitles his personal representative to sue the surviving partner for an accounting immediately upon the failure of the surviving partner to file an accounting with the clerk within twelve months from the deceased partner's death. *Bennett v. Trust Co.*, 148.

Whether widow of deceased partner should have discovered fraudulent misappropriations by other partner *held* for jury. *Ibid.*

PATENTS.

§ 1. Nature of Patents and Jurisdiction to Enforce Rights Thereunder.

While only a Federal Court has jurisdiction of an action involving the construction of the patent laws, a State court has jurisdiction of an action to enforce the payment of royalties or license fees. *Morpul v. Knitting Mill*, 257.

§ 2. Licensing, Contracts and Royalties.

If the means or method used by the licensee of the patent would infringe the patent but for the license, such licensee is liable for the royalties specified in the licensing agreement. *Morpul v. Knitting Mill*, 257.

Where there is no essential conflict in the evidence and the case presents only whether the method or means used by the licensee was an application of prior art or was covered by the patent, the licensee's liability for royalties may be determined as a question of law. *Ibid.*

Under the doctrine of equivalents, a person may not avoid liability for the use of a patent by merely varying the details of the patented method or by merely reversing the motion of the parts of a machine to accomplish the same purpose, but if the desired result is achieved by another and a non-equivalent method, no liability arises. *Ibid.*

A patent must be construed with reference to the distinctive features of the prior art, and the prior art may diminish the extent of the patent, since the patent cannot be held to include the prior art. *Ibid.*

Plaintiff's method for elongating the stitch in knitting the cuff of socks was by the patented method of modifying the machine by inserting an auxiliary stitch cam or other means or apparatus to lower the needles of the machine. Defendant obtained the same result of elongating the stitch, without any modification of the machine, solely by adjusting the machine so as to raise the cylinder in the conventional way under the prior art. *Held:* The patent was

PATENTS—*Continued.*

not upon the product, and defendant was not liable for royalties under his license. *Ibid.*

PAYMENT.

§ 4. Evidence and Proof of Payment.

The burden is upon the party asserting payment to establish this affirmative defense. *Iredell County v. Gray*, 542.

PHYSICIANS AND SURGEONS.

§ 12. Liability of Physician or Surgeon for Acts of Anesthetist, Assistants and Nurses.

As a general rule, a physician who exercises due care is not liable for the negligence of nurses, attendants or internes who are not his employees. *Davis v. Wilson*, 139.

Evidence held to show that physicians in charge of hospital laboratory were employees and not independent contractors. *Ibid.*

PLEADINGS.

§ 4. Prayer for Relief.

The fact that a party prays for damages to which he is not entitled does not preclude recovery by him on a theory supported by allegation and proof. *Equipment Co. v. Anders*, 393.

§ 8. Counterclaims and Cross-Actions.

A cross-action by defendant against a codefendant or third party must be germane to the claim alleged by plaintiff, and ordinarily must be one in which all the parties have a community interest. *Gibbs v. Light Co.*, 459.

In action by injured party against insurer and its agents after return of execution against insured unsatisfied, insurer is entitled to file cross-action against its agents for indemnity for wrongfully issuing the policy. *Hildreth v. Casualty Co.*, 565.

§ 12. Office and Effect of Demurrer.

Allegations in the complaint must be liberally construed with a view to substantial justice between the parties, giving the pleader every reasonable intendment in his favor. *Dixon v. Bank*, 322; *Douglas v. Mallison*, 362.

§ 25. Amendment of Pleadings.

The trial court has the discretionary power to permit an amendment to a motion to correct an asserted typographical error. *Branch v. Dempsey*, 733.

§ 27.1. Withdrawal of Pleadings.

Motion to be allowed to withdraw a pleading is addressed to the sound discretion of the trial court, and evidence in this case held to negate abuse of discretion in allowing the withdrawal. *Bongardt v. Frink*, 130.

§ 28. Variance.

Plaintiff may recover only upon the case made out in his pleading. *Morpul v. Knitting Mill*, 257.

PLEADINGS—*Continued.*

§ 29. Issues Raised by Pleadings and Necessity for Proof.

The issues in an action arise upon the pleadings in the case. *Highway Comm. v. Board of Education*, 35; *Bongardt v. Frink*, 130.

§ 30. Motions for Judgment on the Pleadings.

Defendant's motion for judgment on the pleadings presents the question of law whether the complaint as modified by the reply alleges facts sufficient to state a cause of action or admits facts which constitute a complete legal bar thereto. *Van Every v. Van Every*, 506.

On motion for judgment on the pleadings, exhibits attached thereto and made a part thereof are properly considered. *Ibid.*

PRINCIPAL AND AGENT.

§ 4. Proof of Agency and Extent of Authority.

Even though the testimony of an agent in regard to modification of the contract is incompetent to establish the agent's authority to modify it, his testimony may be competent to establish the terms of the modification when there is other evidence tending to show the principal authorized the modification or ratified it. *Equipment Co. v. Anders*, 393.

Statements of the alleged agent are incompetent to prove the fact of agency. *Branch v. Dempsey*, 733.

§ 6. Ratification and Estoppel.

In order to constitute a ratification of an unauthorized act of an agent, the principal must have knowledge of all of the facts relative to the unauthorized transaction and must signify his intent to ratify by word or by conduct which is inconsistent with an intent not to ratify. However, the principal will be bound by a course of conduct reasonably tending to show an intention to ratify even though he may not so actually intend, since the law will presume that a person intends the legal consequences of what he does. *Equipment Co. v. Anders*, 393.

While a principal must have actual knowledge of all the facts relative to an unauthorized act of his agent in order to ratify the unauthorized act, and is not chargeable with what would be discovered by reasonable inquiry, nevertheless knowledge of the principal may be inferred, and when a person of ordinary intelligence would infer the facts the principal may be charged with knowledge. *Ibid.*

A principal may not ratify the act of his agent in part and repudiate such act in part. *Ibid.*

Evidence held to raise jury question whether principal ratified agent's act in negotiating a novation of the contract. *Ibid.*

PRINCIPAL AND SURETY.

§ 10. Payment by Surety and Subrogation.

When the mortgagor sells a chattel and the purchaser assumes the mortgage and makes payments to the mortgagee, the original mortgagor becomes a surety, and when credit insurance on his life pays the balance of the mortgage debt his estate is subrogated to the rights of the mortgagee against the purchaser. *Hatley v. Johnston*, 73.

PROCESS.

§ 9. Service by Publication.

In order to sustain service of process by publication plaintiff must show that the case is one in which service by publication is authorized by statute and that the service by publication has been made in accordance with statutory requirements. *Harrison v. Hanvey*, 243.

Evidence held insufficient to show intent to defraud creditors or to avoid service so as to support service under G.S. 1-98.2(6). *Ibid.*

Affidavit for service of process by publication under G.S. 1-98.4 must show the name and residence of the person to be served or, if they are unknown, that diligent search and inquiry had been made to discover such residence and, even if unknown, they must be set forth with as much particularity as is known to the applicant, and the fact that defendant could not be found at his last residence does not eliminate this requirement, since the clerk is required to mail a copy of the notice to such address and such notice might be forwarded to defendant notwithstanding his absence from his last known residence. *Ibid.*

Application for service of process by publication must advise defendant not only as to the time limit for making his defense but also that upon his failure to appear plaintiff would apply to the court for the relief sought. *Ibid.*

The purpose of publication is to give notice, and publication of notice of service must be in a newspaper most likely to give notice to defendant notwithstanding the omission of such requirement in the statute, G.S. 1-99(1), since due process so requires. *Ibid.*

§ 13. Service on Foreign Corporations by Service on Secretary of State.

Evidence held sufficient to support findings that contract between parties was to be performed in this State, and that nonresident party had contacts in this State in the performance of its business sufficient to support service by service on Secretary of State. *Byham v. House Corp.*, 50. Findings held insufficient to support conclusion as to whether foreign corporation was doing business in this State for purpose of service of process by service on Secretary of State. *Mills, Inc. v. Transit Co.*, 61.

PUBLIC OFFICERS.

§ 11. Criminal Liability.

G.S. 128-16 provides for the removal of a public officer for the causes enumerated for the protection of the public, and a proceeding thereunder is not a criminal prosecution, and therefore the 1959 amendment bringing justices of the peace within the purview of that statute does not preclude prosecution of a justice of the peace under G.S. 14-230 for corrupt malfeasance, this statute being applicable by its terms unless it is elsewhere provided that the defaulting officer might be indicted. *S. v. Hockaday*, 687.

QUASI-CONTRACTS.

§ 1. Elements and Essentials of Right of Action.

There can be no recovery upon *quantum meruit* for activities in violation of statute. *McArver v. Gerukos*, 413.

RAILROADS.

§ 5. Crossing Accidents.

Nonsuit held proper in this action for wrongful death resulting when in-

RAILROADS—*Continued.*

testate drove into the side of the second engine of a freight train which had been standing at nighttime, blocking the crossing, for some 30 seconds prior to the injury, with its ground lights, its platform light, and cab lights burning. *Morris v. R. R.*, 537.

RAPE.

§ 1. Nature and Elements of Offense of Rape.

Consent of prosecutrix which is induced by fear and violence is void and is no legal consent. *S. v. Carter*, 626.

§ 4. Competency and Relevancy of Evidence.

Evidence that defendant was intoxicated at time crime was committed is competent as part of *res gestæ*, but evidence that he was intoxicated some three hours thereafter is not competent to prove he was intoxicated at time of crime, but may be competent to show why he walked by prosecutrix' house late at night after the commission of the crime. *S. v. Davis*, 720.

§ 5. Sufficiency of Evidence and Nonsuit.

Evidence of defendant's guilt of rape held sufficient to be submitted to the jury. *S. v. Carter*, 626.

§ 16.1. Verdict and Punishment.

Punishment for carnal knowledge of a female child over 12 and under 16 years of age by a male person over 18 years of age cannot exceed 10 years imprisonment. *S. v. Grice*, 587.

§ 18. Prosecutions for Assault with Intent to Commit Rape.

Evidence that defendant was intoxicated some three hours after crime was committed is incompetent to show he was intoxicated when crime was committed, but is competent to explain why he then walked past house of prosecutrix. *S. v. Davis*, 720.

RECEIVING STOLEN GOODS.

§ 5. Sufficiency of Evidence and Nonsuit.

Evidence of receiving stolen goods with knowledge they had been stolen *held* sufficient to overrule nonsuit. *S. v. Jackson*, 558.

REFERENCE.

§ 8. Review of Exceptions.

Where order affirming the report of the referee is treated by the parties as a judgment, the Supreme Court may do so in order to dispose of the appeal, but nevertheless the cause must be remanded for judgment in accordance with the report of the referee as amended by the court. *Morpul v. Knitting Mill*, 257.

§ 9. Remand of the Cause to the Referee.

Where the Supreme Court remands a cause for necessary findings of fact, the Superior Court may make its own findings or may recommit the cause to the referee for further hearing and findings. *Bank v. Ins. Co.*, 86.

REGISTRATION.

§ 5. Parties Protected by Registration.

Deed of the son of intestate to his step-mother for his interest in the lands of the estate was set aside for fraud. On the day judgment was rendered setting aside his deed, he executed deed of trust to his attorneys. *Held:* The attorneys, having knowledge of the respective rights of the parties, may not claim as innocent purchasers for value so as to preclude the widow from thereafter electing to take a life estate in the homeplace under G.S. 29-30(c). *Smith v. Smith,* 18.

ROBBERY.

§ 1. Nature and Elements of the Offense.

In order to constitute common law robbery there must be a taking of personal property, although the value of such personal property is not material if the taking is by force or putting the owner in fear. *S. v. Guffey,* 331.

An attempt to take money or other personal property from another under the circumstances delineated by G.S. 14-87 constitutes an accomplished offense and is punishable to the same extent as if there was an actual taking. *S. v. Spratt,* 524.

§ 2. Indictment.

An indictment for robbery that charges that defendant did by force take, steal and rob the prosecuting witness "of the value of one thousand dollars" is insufficient to charge the offense of common law robbery, since the indictment must describe the property sufficiently to show that the property is the subject of robbery. *S. v. Guffey,* 331.

It is not required that an indictment charging the felonious taking of goods from the person of another by the use of force or a deadly weapon aver that the taking was with the intent to convert the personal property to defendant's own use, the question of specific intent being properly submitted to the jury under the charge. *S. v. Williams,* 446.

§ 5. Instructions.

While the felonious intent to take the goods of another and appropriate them to defendant's own use is a necessary element of armed robbery, attempt to commit armed robbery, and common law robbery, and while in every case the court must give in its charge some explanation of felonious intent, the comprehensiveness and specificality of the instructions relating to felonious intent depends upon the facts in the particular case. *S. v. Spratt,* 524.

In this prosecution for an attempt to commit armed robbery the State's evidence tended to show that defendant threatened the cashier of a store with a pistol and attempted to take money from the drawer. Defendant relied upon an alibi. *Held:* An instruction to the effect that the jury, in order to convict, must find beyond a reasonable doubt that defendant attempted to take the property of another with "intent to rob" and that felonious intent is an essential element of the offense, is a sufficient instruction under the facts of the case upon the question of felonious intent. To "rob" or "robbery" imports an intent to steal. *Ibid.*

Felonious intent is an essential element of the offense of armed robbery, of an attempt to commit armed robbery, and of common law robbery, and the court must so instruct the jury and define in some sufficient manner the term "felonious intent", the extent of the definition required being dependent upon the evidence in the particular case. *S. v. Mundy,* 528.

ROBBERY—*Continued.*

In a prosecution for armed robbery, a charge which fails to give any instruction with reference to felonious intent constituting an essential element of the offense must be held for prejudicial error. *Ibid.*

§ 6. Verdict and Sentence.

Where, in a prosecution for armed robbery, the jury returns a verdict of robbery, the court may not impose a sentence in excess of 10 years. *S. v. Williams,* 446.

SALES.

§ 5. Express Warranties.

Any affirmation of fact or promise by the seller relating to the article sold is an express warranty if the natural tendency of the statement is to induce the buyer to purchase the article, and the buyer does purchase it in reliance upon the statement. *Douglas v. Mallison,* 362.

§ 6. Implied Warranties.

There can be no implied warranty of the quality or fitness of a second-hand machine for the intended use when the purchaser testifies that he, himself, had formerly used the machine and his evidence discloses that he thoroughly inspected it at the time of sale. *Douglas v. Mallison,* 362.

§ 14b. Burden of Proving Breach of Warranty.

The buyer is not entitled to recover for personal injuries resulting from breach of warranty unless he carries the burden of proving the warranty, its breach, and his injury foreseeable as a natural consequence of the breach. *Douglas v. Mallison,* 362.

§ 14g. Measure of Damages for Breach of Warranty.

Independent of negligence, the purchaser may recover for a personal injury which results from a breach of warranty if such injury might have been foreseen as a natural consequence of such breach. *Douglas v. Mallison,* 362.

§ 16. Actions by Purchaser or User for Personal Injuries.

Evidence held to show contributory negligence as a matter of law in using machine with obvious defect. *Douglas v. Mallison,* 362.

SCHOOLS.

§ 4. Duties and Authority of Boards of Education.

A municipal board of education created by virtue of G.S. 115-27 is an administrative agency of the State with power to sue and be sued as authorized by statute and with power to condemn land for school purposes. *Highway Comm. v. Board of Education,* 35.

§ 65. Disturbing Classes and Defacing Property.

Evidence tending to show that numerous persons who were opposed to the consolidation of the high schools in question came upon the grounds of one of the schools, that one of them broke open the transom and entered a locked schoolroom while class was in session, unlocked the door, that members of the crowd removed the teacher bodily from the building, together with testimony of the teacher in pointing out one of defendants, that he thought that defend-

SCHOOLS—*Continued.*

ant was one of the crowd who carried him out, *held* sufficient to be submitted to the jury in a prosecution of such defendant under G.S. 14-273, but as to the other defendants, nonsuit should have been entered for want of evidence identifying them as members of the crowd. *S. v. Guthrie,* 659.

SEALS.

Two or more persons may adopt the same seal, and where only one seal appears on the contract between two parties, even when one of the parties is a corporation, whether both intended to adopt the seal is a question of fact, while whether the instrument is a sealed instrument is for the court. *Bank v. Ins. Co.,* 86.

SEARCHES AND SEIZURES.

§ 1. Necessity for Search Warrant.

A plea of guilty properly entered waives defendant's right to protest the legality of a search without a warrant. *S. v. Perry,* 517.

Where defendants flee from truck when stopped by officers, officers may search the truck without a warrant. *S. v. Banks,* 590.

A search warrant is not required for search by officers of a car of one of defendants at the scene where defendants were apprehended in the act of breaking and entering a store. *S. v. Carver,* 710.

§ 2. Requisites and Validity of Warrant.

It is not required that the officer using a search warrant should have made the affidavit. *S. v. Tessnear,* 319.

STATE.

§ 4. Actions Against the State.

Statutes authorizing suit against the State or a State agency are in derogation of the sovereign right of immunity and are to be strictly construed. *Teer Co. v. Highway Comm.,* 1.

§ 5a. Construction of Tort Claims Act in General.

Under the South Carolina statute there can be no recovery for injury from defect in a highway unless the Commission had actual or constructive notice of the defect. *Whitworth v. Casualty Co.,* 530.

STATUTES.

§ 2. Constitutional Proscription Against Passage of Local or Special Acts Relating to Designated Subjects.

Even though a statute creating a turnpike authority limits the authority to the construction, for the time being, of one toll highway, such act is not a local act proscribed by Art. II, § 29, of the State Constitution, since even one toll highway may be of statewide significance in developing and rendering a section of the State accessible to motor traffic. *Turnpike Authority v. Pine Island,* 109.

Trade within the purview of Art. II, § 29 includes any employment or business embarked in for gain or profit. *S. v. Smith,* 173.

A statute authorizing a single county to regulate the operation of pool

STATUTES—*Continued.*

rooms, dance halls, and nightclubs located within 300 yards of the property of any public school or Church building is void as a local act regulating trade. Constitution of North Carolina, Art. II, § 29. *Ibid.*

The fact that a statute is local and regulates trade does not render it void if the regulation of trade is merely incidental or consequential and if the regulation prohibits all of a certain type of activity on Sunday and its primary effect is not the regulation of trade but the requirement of proper observance of Sunday. *Ibid.*

§ 4. Construction in Regard to Constitutionality.

A statute may be constitutional in part and unconstitutional in part, and if its parts are separate and independent the valid part may stand and the invalid part be rejected. *S. v. Smith,* 173.

§ 5. General Rules of Construction.

A statute must be construed to ascertain and put into effect the legislative intent. *Buck v. Guaranty Co.,* 285.

The use of the word "including" in a statutory delegation of authority does not necessarily restrict it to the matters enumerated in the inclusion, and the doctrine of *expressio unius est exclusio alterius* does not ordinarily apply. *Turnpike Authority v. Pine Island,* 109.

Where a statute gives authority to a county to regulate the operation of "public pool rooms, billiard parlors, dance halls, and any club," the doctrine of *ejusdem generis* applies, and the word "club" must be construed "nightclub." *S. v. Smith,* 173.

Even though an amendment limiting the application of a statute provides that the amendment should not affect pending litigation, such amendment is pertinent in an action instituted prior to its effective date for the purpose of showing that prior to the amendment the Legislature considered the statute to be applicable to the excluded class. *Cooke v. Outland,* 601.

It will be presumed, when consonant with the context and in the absence of an expression to the contrary, that the Legislature intended that a term used in a statute should be given its natural and ordinary meaning and not its generic meaning, and the statutory or judicial definition of such term in connection with other statutes is not controlling and at best may only throw some light upon the usage in the statute in question. *Yacht Co. v. High,* 653.

§ 10. Construction of Criminal and Penal Statutes.

A statute making it unlawful to engage in a business without a license must be strictly construed. *McArver v. Gerukos,* 413.

§ 11. Repeal and Revival.

If a statute within the power of the General Assembly to enact is objectionable as a local act relating to subjects enumerated in Art. II, § 29, of the Constitution because its scope is limited by a particular section of the act, the repeal of the limiting section validates the act in regard to its future operation. *Turnpike Authority v. Pine Island,* 109.

Repeals by implication are not favored. *S. v. Hockaday,* 687.

SUBROGATION.

Where mortgagor sells vehicle, and purchaser makes payments to mortgagee, the original mortgagor becomes surety, and when he dies and his credit insurer pays the mortgagee, his estate is subrogated to the rights of the mort-

SUBROGATION—*Continued.*

gagee against the purchaser for the amount of the insurance payment. *Hatley v. Johnston*, 73.

TAXATION.

§ 4. Limitation on Increase in Public Debt.

Since bonds issued by the North Carolina Turnpike Authority are payable by statutory restriction solely from tolls which may be collected from those who elect to use the toll roads, G.S. 136-89.59, such bonds do not constitute a debt of the State within the purview of Art. II, § 14 with regard to the passage of revenue acts, or the purview of Art. V, § 4 in regard to the increase of the public debt. *Turnpike Authority v. Pine Island*, 109.

§ 23. Construction of Taxing Statutes in General.

A proviso of a taxing statute stipulating that certain transactions should be taxed at a lower rate than that made applicable generally, or providing that as to certain transactions the total tax should not exceed a specified amount, are partial exceptions and come within the rule that statutory exemptions from a tax are to be strictly construed. *Yacht Co. v. High*, 653.

An administrative interpretation of a taxing statute which has continued over a long period of time with the silent acquiescence of the Legislature should be given consideration in the construction of the statute. *Ibid.*

§ 28c. Computation of Corporation Income Tax.

Provision for loss carry-over in computing income tax for a particular year is not required by the organic law but is solely a matter of grace, and such allowance must be determined in accordance with public policy as set forth in the statute permitting such loss carry-over. G.S. 105-147(9)(d). *Mfg. Co. v. Clayton*, 165.

Where a corporation realizes a gain from the liquidation of wholly-owned subsidiaries, such gain, even though not constituting taxable income, G.S. 105-144(c), does constitute income "from all sources including income not taxable" within the purview of G.S. 105-147(9)(d)(2), and consequently must be deducted from any asserted loss carry-over from a previous year. *Ibid.*

§ 29. Sales, Use and Excise Taxes.

A pleasure yacht, self-propelled by an internal combustion engine, while a self-propelled motor vehicle, is not one designed primarily for use upon the highways within the meaning of G.S. 105-164.4(1), and is subject to the State's three per cent sales tax, it being apparent that "highways" was not used in the statute in its generic sense. *Yacht Co. v. High*, 653.

A judgment denying a housing authority refund of sales taxes on articles purchased by it from retailers affirmed on authority of *Housing Authority v. Johnson, Commissioner of Revenue*, 261 N.C. 76. *In re Housing Authority*, 719.

§ 39. Foreclosure of Tax Liens.

In this action to enforce tax liens, one of defendants testified that he paid the taxes in cash at a bank to a named person whom he believed to be the attorney for the county at the time. *Held:* In the absence of evidence that the named person was the duly authorized agent of the county to collect and receive taxes, or that the monies paid to this person were ever turned over to the treasury of the county, defendants have failed to establish the affirmative defense of payment, and a directed verdict for the county thereon is without error. *Iredell County v. Gray*, 542.

TORTS.

§ 2. Joint Tort-Feasors.

In order to constitute two or more persons joint tort-feasors it is necessary that they act together in committing the wrong or that the independent acts of each unite in point of time and place in causing the injury. *Clemmons v. King*, 199.

§ 4. Right to Have Others Joined for Contribution.

An original defendant is not entitled to have another joined for contribution unless such other is a joint tort-feasor which plaintiff could have sued at his election. *Clemmons v. King*, 199.

An original defendant may deny negligence, allege that the negligence on the part of a third party was the sole proximate cause of the injury, and allege that such third party was guilty of joint and concurring negligence, but it is not sufficient to allege the mere conclusion of concurring negligence, it being required that the original defendant allege acts of such third party which support the conclusion of negligence on the part of such third party and that such negligence was a proximate cause of the injury. *Ibid.*

Where the original defendant denies negligence and alleges that the sole proximate cause of the collision was the negligence of a third person, then alleges the mere conclusion that if she were negligent the negligence of such third person concurred and constituted at least one or more of the proximate causes of the collision, without alleging, either conditionally or alternately, facts sufficient to show joint or concurring negligence on the part of such third party, the original defendant may not maintain the cross-action against such third party for contribution. *Ibid.*

The original defendant is entitled to have an additional defendant joined for contribution under G.S. 1-240 upon allegation of facts supporting the conclusions that the additional defendant was guilty of negligence which concurred in proximately causing plaintiff's injuries, notwithstanding the original defendant also alleges in the alternative that the additional defendant was guilty of negligence constituting the sole proximate cause of the injury and also that, if the original defendant were negligent, the negligence of the additional defendant intervened and insulated such negligence. *Wise v. Vincent*, 647.

TRIAL.

§ 4. Nonsuit for Failure of Plaintiff to Prosecute.

When plaintiff's counsel appears and announces his readiness to proceed to trial when the cause is called on a "clean-up" calendar, the court has no authority to dismiss the action on the ground of laches for failure to prosecute the action. *Stanley v. Basinger & Co.*, 718.

§ 17. Admission of Evidence Competent for Restricted Purpose.

Where a document is offered in its entirety and portions of it contain incompetent matter, the ruling of the court excluding it from evidence will not be held for error. *Branch v. Dempsey*, 733.

§ 19. Office and Effect of Motion to Nonsuit.

Motion of nonsuit presents the question of law for the court as to the sufficiency of the evidence to be submitted to the jury. *Bailey v. Ins. Co.*, 675.

TRIAL—*Continued.*

§ 21. Consideration of Evidence on Motion to Nonsuit.

On motion to nonsuit, the evidence must be considered in the light most favorable to plaintiff and plaintiff is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. *Bongardt v. Frink,* 130; *McArver v. Gerukos,* 413; *Dixon v. Edwards,* 470; *Martin v. Underhill,* 669; *Stewart v. Gallimore,* 696; *Simpson v. Lyerly,* 700.

On motion to nonsuit, only those portions of defendant's evidence which are favorable to plaintiff may be considered. *McArver v. Gerukos,* 413; *Dixon v. Edwards,* 470.

Upon motion to nonsuit defendant's counterclaim, all of the evidence supporting the counterclaim must be considered in the light most favorable to defendant, since defendant is in the position of a plaintiff in regard to the counterclaim. *Robinette v. Wike,* 551.

§ 22. Sufficiency of Evidence to Overrule Nonsuit.

Discrepancies and contradictions, even in plaintiff's evidence, are for the jury to resolve. *Coleman v. Burris,* 404; *Aaser v. Charlotte,* 494.

§ 26. Nonsuit for Variance.

Nonsuit will not be granted for an immaterial variance which does not prejudice defendant. *Burton v. Radford,* 336.

Nonsuit of a counterclaim will not be entered for a slight variation between defendant's allegations and plaintiff's testimony and testimony of plaintiff's statements as to how the accident occurred, since plaintiff could not have been misled by his own testimony and statements. *Robinette v. Wike,* 551.

§ 27. Nonsuit on Affirmative Defense.

Nonsuit may not be entered upon an affirmative defense unless plaintiff's own evidence establishes such defense so clearly that no other reasonable conclusion can be drawn therefrom, and defendant's evidence tending to establish such defense cannot warrant nonsuit, since its credibility is for the jury. *Griffin v. Indemnity Co.,* 443.

§ 29. Voluntary Nonsuit.

Claimant may take voluntary nonsuit at any time prior to verdict when defendant asserts no affirmative relief. *Griffith v. Griffith,* 521. This rule applies to divorce action even though court has denied plaintiff's motion for alimony *pendente lite. Griffith v. Griffith,* 521.

§ 31. Request for Peremptory Instructions.

Request for peremptory instructions presents the question of law as to the sufficiency of the evidence. *Bailey v. Ins. Co.,* 675.

§ 33. Instructions — Statement of Evidence and Application of Law Thereto.

Inadvertence in stating the evidence must be called to the trial court's attention in apt time. *Shopping Center v. Highway Comm.,* 209.

Mere statement of the contentions of the parties is not sufficient, but the trial court is required to explain the law to the jury and apply it to the variant factual situations presented by the evidence. *Patterson v. Buchanan,* 214.

TRIAL—*Continued.*

§ 34. Instructions on Burden of Proof.

The burden of proof is a substantial right, and erroneous or conflicting instructions thereon must be held for prejudicial error. *Barber v. Heeden,* 682.

§ 40. Form and Sufficiency of Issues.

An issue which does not dispose of all material controversies arising on the pleadings will not support a final judgment. *Anderson v. Cashion,* 555.

§ 41. Tender of Issues.

Where the issues submitted are sufficient to embrace all questions in dispute between the parties, assignment of error to the failure of the court to submit issues tendered will not be sustained. *Equipment Co. v. Sanders,* 393.

§ 48. Motions to Set Aside Verdict in General.

Denial of motion to set aside the verdict supported by the evidence will not be disturbed. *Robinette v. Wike,* 551.

§ 51. Setting Aside Verdict as Contrary to Weight of Evidence.

A motion to set aside the verdict as being contrary to the weight of the evidence is addressed to the sound discretion of the trial court and denial of the motion is not reviewable in the absence of manifest abuse of discretion. *Martin v. Underhill,* 669.

§ 52. Setting Aside Verdict for Inadequate or Excessive Award.

A finding of the amount of damages by the court under agreement of the parties is as conclusive as though the damages were established by verdict of the jury, and the court's findings in regard thereto will not be set aside on the ground the damages allowed are excessive in the absence of manifest abuse of discretion. *Sherrill v. Boyce,* 560.

§ 57. Findings and Judgment of Court, Appeal and Review.

Except in a small claim action, it is irregular for the court, in a trial by the court under agreement of the parties, to render a verdict on issues submitted to itself. *Anderson v. Cashion,* 555.

While it is irregular for the court, in a trial by the court under agreement of the parties, to submit issues to itself, where there is no objection or exception thereto such procedure will not require a new trial if it can be ascertained from the issues and the court's answers thereto that the court found ultimate facts constituting a legal basis for the judgment. *Sherrill v. Boyce,* 560.

TRUSTS.

§ 6. Title, Authority and Duties of Trustee in General.

Title of trustee *held* divested by exercise of power of disposition by life beneficiary. *Wells v. Trust Co.,* 98.

§ 14. Creation of Constructive Trusts.

A constructive trust does not arise where there is no fiduciary relationship and there is an adequate remedy at law, and mere silence of the debtor and failure to disclose the facts to the person entitled to collect the obligation, or even the debtor's request of secrecy to a third person, does not constitute fraud as the basis of a constructive trust when the facts are equally available to the person entitled to collect the obligation. *Bank v. Ins. Co.,* 86.

TRUSTS—*Continued.*

An insurance agent's personal representative had possession of the contract between the agent and the insurer providing for the payment of commissions on renewal premiums. *Held:* The purposeful and deliberate failure of insurer to disclose the facts in regard to the receipt of renewal premiums does not create a constructive trust in regard to the personal representative's right to collect the commissions on renewal premiums. *Ibid.*

§ 17. Presumptions and Burden of Proof.

The burden is upon plaintiff to establish a resulting trust by clear, cogent and convincing proof, but whether plaintiff's evidence has that convincing quality is a question for the jury and not for the court upon motion to nonsuit. *Martin v. Underhill,* 669.

§ 19. Sufficiency of Evidence to Establish Resulting or Constructive Trust.

Evidence that prior to a judicial sale the parties agreed that defendant would bid on the property for plaintiff and, if he were the highest bidder, would take title for plaintiff, and would thereafter convey title to plaintiff upon plaintiff's payment of the purchase price plus a fee, and that pursuant to the agreement defendant purchased the property at the sale, *is held* sufficient to be submitted to the jury in an action to enforce the parol trust. *Martin v. Underhill,* 669.

WATERS AND WATER COURSES.

§ 1. Surface Waters.

In this action to recover damages from flooding by ocean water diverted from sound by elevated highway, evidence held to show that storm of intensity causing damage could have been anticipated and was not therefore "Act of God." *Midgett v. Highway Comm.,* 373.

WILLS.

§ 27. General Rules of Construction.

A will should be construed to give effect to the intent of testator as gathered from the language of the instrument considered as a whole in the light of the circumstances confronting testator at the time, and such intent must be given effect unless contrary to some rule of law or at variance with public policy. *Trust Co. v. Bass,* 218; *McCain v. Womble,* 640.

Where it is apparent that a word or phrase used in one part of a will has a particular meaning, such meaning will ordinarily be attributed to such word or phrase when used in other instances in the same instrument. *Trust Co. v. Bass,* 218.

When the language of a will clearly expresses the intent of testator which is consonant with rules of law and public policy, such intent must be given effect, and extrinsic evidence is not competent to establish a different intent. This rule includes the designation of beneficiaries. *McCain v. Womble,* 640.

Ordinary words will usually be given their ordinary meaning, and technical words will be construed in their technical sense unless the will discloses a contrary intent. *Ibid.*

§ 32. Rule in Shelley's Case.

A trust providing that the net income therefrom should be paid to a desig-

WILLS—*Continued.*

nated person for life and at the death of such person to his heirs does not come within the Rule in *Shelley's* Case, since the interest of the life beneficiary is an equitable and that of the heirs a legal estate. *Wells v. Trust Co.*, 98.

The Rule in *Shelley's* Case applies to personalty as well as realty. *Riegel v. Lyerly*, 204.

A devise and bequest of the remainder of the estate to testator's wife for the term of her natural life with a limited power to invade the *corpus* if the income from the estate were insufficient for her support, with later provision that upon the death of the wife two-thirds of the estate should go to testator's mother and one-third "in fee simple to the heirs at law of my said wife," *held* to transmit to the wife a life estate in two-thirds and a fee simple in one-third of the estate under the Rule in *Shelley's* Case. *Ibid.*

§ 33. Fees, Life Estates and Remainders.

A devise of land to designated beneficiaries "to share and share alike" is a devise in fee. *Wells v. Trust Co.*, 98.

§ 34. Whether Estate is Vested or Contingent.

As a general rule a devise or bequest of the remainder to a class vests in members of the class as ascertained at the time of testator's death unless it appears from the terms of the will that testator intended the members of the class to be ascertained at the time of the death of the first taker. *Trust Co. v. Bass*, 218.

The rule that the law favors the early vesting of estates is not a rule of law but a rule of interpretation and must give way when a contrary intent is apparent from the will. *Ibid.*

Whether a remainder is contingent or vested is not dependent upon whether the amount of the estate which will remain for distribution is uncertain but whether the persons who are to take the remainder are uncertain, and therefore the fact that the trustee of the trust set up by will is authorized to invade the corpus for the benefit of the life beneficiary is not determinative of whether the remainder after the life estate is vested or contingent. *Ibid.*

Where a will directs that after the termination of the life estate therein set up the corpus should be divided between members of a class, the postponement of the enjoyment of the remainder is ordinarily for the purpose of letting in the prior life estate, and the remainder ordinarily vests at the death of testator unless the will clearly uses "words of futurity" to indicate testator's intent that only those take who answer the roll at the termination of the particular estate. *Ibid.*

Testator set up a trust for the benefit of his son for life with provision that at the death of the son the corpus should be distributed to testator's "next of kin." At the time of testator's death the son was the sole member of the class of testator's "next of kin" and it was apparent from the will that testator intended the son to be excluded as a member of the class to take the remainder. *Held:* Since no one could qualify as testator's next of kin as long as the son lived, the remainder is contingent. *Ibid.*

§ 38. Annuities and Income.

Under testator's will the income of two trusts was to be paid to testator's son and to the adopted child of testator's son respectively in such proportion as the trustee in its discretion should deem best calculated to achieve the purposes therein set out, with further provision that upon the death of either the income not distributed should be paid to the survivor. *Held:* Income accrued but not distributed to the son at the time of the son's death must be paid to

WILLS—*Continued.*

the son's adopted daughter and does not pass under the son's will. *Trust Co. v. Bass*, 218.

§ 39. Devises with Power of Disposition.

Power of disposition may be exercised by changing the quality of the estate in remainder without changing identity of remaindermen. *Wells v. Trust Co.*, 98.

§ 43. Representation and Per Capita and Per Stirpes Distribution.

The will in question devised a life estate to testator's daughter with remainder to her "next of kin." *Held:* There being nothing in testator's will to indicate that he did not intend to use the words "next of kin" in their technical sense, such meaning must be ascribed to them, and the will devises a contingent remainder to the children of the life tenant, and precludes the principle of representation. *McCain v. Womble*, 640.

§ 45. Gift to "Next of Kin."

Testamentary direction that after the death of the life beneficiary of the trust set up in the will the trustee should pay over and deliver the corpus of the estate to testator's "next of kin" requires a distribution to testator's nearest of kin and not to testator's heirs or distributees generally unless it appears that testator intended a distribution under the principle of representation. *Trust Co. v. Bass*, 218.

Judgment that testator made his son's adopted daughter the beneficiary of a trust because of his love and affection for her, and not because he mistakenly believed her to be his granddaughter, is not decisive of the question whether he intended to include her as next of kin to take the corpus of another trust after a life interest to testator's son. *Ibid.*

Under terms of will in this case, life beneficiaries of income were excluded from next of kin entitled to share in corpus. *Ibid.*

The words "next of kin" will be interpreted as having the established technical sense of "nearest of kin" unless the will indicates that testator did not use them in their technical sense. *McCain v. Womble*, 640.

§ 60. Dissent of Widow and Effect Thereof.

Litigation "affects share of surviving spouse" if it affects decision of whether to take life estate under the statute. *Smith v. Smith*, 18. Filing of request for order fixing time under which she may make election during pendency of litigation affecting share is made in time, and delay of clerk in entering order may not be imputed to widow. *Ibid.* Acceptance from heir of deed to his one-half interest in lands of estate does not constitute election and does not preclude widow upon later setting aside of deed to elect to take life estate under statute. *Ibid.*

WITNESSES.

§ 1. Age.

The competency of a nine-year old girl to testify is addressed to the sound discretion of the trial judge, and where the record discloses an investigation by the court showing that the child was intelligent and had an understanding of the sanctity of an oath, the record fails to show any abuse of discretion in permitting the child to testify. *S. v. Carter*, 626.

§ 2. Mentality.

The trial court's finding that a witness was mentally competent to testify is conclusive. *S. v. Squires*, 388.

GENERAL STATUTES, SECTIONS OF, CONSTRUED.

G.S.

1-38. Court must instruct jury on essential element of occupation under known and visible boundaries. *McDaris v. "T" Corporation*, 298.

1-86. Denial of motion for change of venue and order for special venire are not appealable. *S. v. Childs*, 575.

1-98.2(6). Evidence held insufficient to show intent to defraud creditors or to avoid service so as to support service under statute. *Harrison v. Hanvey*, 243.

1-98.4. Affidavit for service of process by publication must show name and address of person to be served or, if unknown, that diligent inquiry has been made. *Harrison v. Hanvey*, 243.

1-99(1). Notice of service must be published in newspaper most likely to give notice. *Harrison v. Hanvey*, 243.

1-116(a). Action by stockholders to restrain subsidiary from conveying land and restrain corporation from assuming liabilities of subsidiary is not one affecting title, and *lis pendens* may not be filed. *Cutter v. Realty Co.*, 664.

1-120. Unauthorized notice of *lis pendens* may be cancelled upon motion prior to hearing. *Cutter v. Realty Co.*, 664.

1-151. Complaint will be liberally construed upon demurrer. *Dixon v. Bank*, 322.

1-168. Immaterial variance does not justify nonsuit. *Robinette v. Wike*, 551.

1-180. Where evidence is simple and sole controversy is whether defendant was under influence of intoxicating liquor, the court need not state the evidence. *S. v. Best*, 477.
Instruction that possession of nontaxpaid whiskey "raises a deep presumption" of possession for sale held prejudicial. *S. v. Tessnear*, 319.
Party must request elaboration on subordinate feature. *S. v. Guffey*, 331.

1-185. Except in small claim action, it is irregular for court to submit issues to itself. *Anderson v. Cashion*, 555.

1-240. Defendant may allege in the alternative right to contribution, that other defendant's negligence was sole cause, and that it insulated his negligence. *Wise v. Vincent*, 647.

1-277. Denial of plea in bar on ground of *res judicata* is appealable. *Kleibor v. Rogers*, 304.

1-283. Trial judge may settle case on appeal, even though at time he has resigned as judge. *S. v. Stubbs*, 420.

6-21(6). Court may apportion costs in reference proceedings. *Morpul v. Knitting Mill*, 257.

8-57. Fact that subsequent to assault defendant marries prosecutrix does not render her incompetent witness. *S. v. Price*, 703.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

8-57; 14-183. In prosecution for criminal cohabitation, wife is competent to prove marriage. *S. v. Vandiver,* 325.

14-2; 14-26. Statutory penalty of fine or imprisonment in discretion of court is not specific punishment, and sentence may not exceed 10 years. *S. v. Grice,* 587.

14-3; 20-176. Prior to the 1956 amendment to G.S. 20-105, a person convicted of misdemeanor under Motor Vehicle Act could not be sentenced to more than 60 days in jail. *S. v. Massey,* 579.

14-21. Where failure to resist is induced by fear, crime is rape. *S. v. Carter,* 626.

14-33. Assault with deadly weapon with intent to kill is misdemeanor, and sentence of six years in prison is not warranted. *S. v. Braxton,* 342.

14-51; 14-54; 15-170. Acceptance of plea of guilt of less offense upheld. *S. v. Perry,* 517.

14-72. Court must instruct jury that burden is on the State to show that goods stolen exceeded $200 in order to sustain conviction of felony. *S. v. Holloway,* 581.

14-87. It is not required that indictment charge that intent was to convert personalty to defendant's own use. *S. v. Williams,* 446.
Attempt to take money from a person under circumstances delineated by statute is an accomplished offense. *S. v. Spratt,* 524.

14-119; 14-120. In prosecution for forgery, evidence that defendant had theretofore forged checks competent to show intent. *S. v. Painter,* 277.

14-183. Trial court has discretionary power to consolidate indictments in proper instances; Evidence of guilt of bigamous cohabitation held sufficient to be submitted to jury. *S. v. Vandiver,* 325.

14-273. Evidence held sufficient to be submitted to jury on issue of defendant's guilt. *S. v. Guthrie,* 659.

15-143. Motion for bill of particulars is addressed to discretion of court. *S. v. Vandiver,* 325.

15-153. Quashal not favored. *S. v. Abernathy,* 724.

15-221. It is not necessary that defendant be present at post-conviction hearing. *S. v. Gainey,* 437.

18-4. Evidence of guilt of possession of equipment intended for manufacturing liquor held sufficient. *S. v. Little,* 440.

18-11. Authorizes but does not compel finding that possession of nontaxpaid whiskey was for purpose of sale. *S. v. Tessnear,* 319.

20-71.1. Does not render *post rem* admission of agent competent against principal. *Branch v. Dempsey,* 733.

20-134; 20-129(d); 136-66.1. If street is not part of State highway, State regulations do not apply. *Coleman v. Burris,* 404.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

20-138. Duplicity in charging that defendant drove while under influence of intoxicating liquor or narcotics is waived by failure to object in apt time. *S. v. Best*, 477.

20-140(a)(b). Evidence held sufficient to be submitted to jury on charge of reckless driving. *S. v. Abernathy*, 724.

20-140(b). Evidence held sufficient to show reckless and careless driving. *Bongardt v. Frink*, 130.

20-141(a)(b)(c). Evidence of negligence of driver along dominant highway in entering intersection held for jury. *Raper v. Byrum*, 269.

20-141(e). Evidence held not to show contributory negligence as a matter of law in hitting unlighted vehicle parked on hard surface. *Coleman v. Burris*, 404.

20-149. Evidence held to disclose that failure to sound horn before attempting to pass could not have been proximate cause of accident. *Simpson v. Lyerly*, 700.

20-154. Evidence of left turn without signal to enter drive held to take issue of negligence to jury. *Simpson v. Lyerly*, 700.

20-161. Evidence held sufficient for jury on issue of negligence in violating statute. *Sharpe v. Hanline*, 502.
Parking partially on hard-surface without lights held sufficient to take issue of negligence to jury under common law, irrespective of statute. *Pardon v. Williams*, 539.

20-166; 20-166.1; 20-166.1(e). None of the statutes has the effect of rendering statement made by driver subsequent to act competent against registered owner of vehicle. *Branch v. Dempsey*, 733.

20-174(a)(e). Pedestrian attempting to cross street at point other than crosswalk is not contributorily negligent as matter of law. *Wanner v. Alsup*, 308.

20-279.21(b)(3). If policy does not cover liability of person using vehicle, vehicle is an uninsured vehicle. *Buck v. Guaranty Co.*, 285.

24-5. Plaintiff held entitled to interest only from date of judgment in condemnation. *Glace v. Pilot Mountain*, 181.

29-30(c)(4). Stepson's action to set aside deed to widow is litigation affecting share of surviving spouse. *Smith v. Smith*, 18.

31-38. Devise to beneficiaries to share and share alike is devise in fee. *Wells v. Trust Co.*, 98.

34-4; 42-6; 42-7. Common law rule of non-apportionment of rents has been amended by statutes. *Wells v. Trust Co.*, 98.

37-12(1). Administrative expenses of trust must be apportioned in same percentages as apportionment of rents. *Wells v. Trust Co.*, 98.

50-6. Misconduct of husband prior to execution of deed of separation does not bar his right to divorce on ground of separation. *Edmisten v. Edmisten*, 488.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

52-12. Allegation held insufficient to raise issue of fraud in procuring execution of separation agreement. *Van Every v. Van Every,* 506.

55-17(3). Corporation may adopt seal for time and occasion. *Bank v. Ins. Co.,* 86.

55-38. Right of shareholder to inspect records and books of corporation. *Cooke v. Outland,* 601.

55-144; 55-146. The court must find facts supporting conclusion that foreign corporation was transacting business in this State. *Mills, Inc. v. Transit Co.,* 61.

55-145(a)(1); 55-146(a), (b). Evidence held to support conclusion that foreign corporation had contacts in this State in the performance of its business for purpose of service on Secretary of State. *Byham v. House Corp.,* 50.

55-195.2. Credit life insurance is collateral as between creditor and insured debtor. *Hatley v. Johnston,* 73.

58-40; 58-41. Agent's right to commission is not prescribed by statute but depends upon contract. *Bank v. Ins. Co.,* 86.

58-176. Insurer paying damages resulting from fire is subrogated to insured's rights against third person tort-feasor causing fire. *Casualty Co. v. Oil Co.,* 121.

59-82. Evidence held for jury as to whether action for fraud in partnership accounting was instituted within three years from date fraud was or should have been discovered. *Bennett v. Trust Co.,* 148.

93A-1. Person purchasing land for his own account is not required to be licensed even though purchase is for resale. *McArver v. Gerukos,* 413.

97-2(6). Injury must result from accident in order to be competent. *Lawrence v. Mill,* 329.

97-9; 97-10.1(e). Provision of contract that contractor should indemnify contractee for liability of employees of contractor resulting from negligence of contractee is valid. *Gibbs v. Light Co.,* 459.

97-24. The statutory limitation for filing compensation claim is condition precedent annexed to the right to compensation. *Montgomery v. Fire Dept.,* 553.

97-86. Findings of the Industrial Commission which are supported by competent evidence are conclusive. *Anderson v. Construction Co.,* 431.

105-147(9)(d); 105-144(c). Gain from liquidation of wholly-owned subsidiaries, even though not taxable income, must be deducted from asserted loss carryover. *Mfg. Co. v. Clayton,* 165.

105-164.4(1). While pleasure yacht is self-propelled motor vehicle, it is not designed for use upon highways and is subject to three per cent sales tax. *Yacht Co. v. High,* 653.

128-16. Proceeding under statute is not a criminal prosecution and therefore 1959 amendment does not preclude prosecution of justice of the peace under G.S. 14-230. *S. v. Hockaday,* 688.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

130-73. Death certificate is not competent as to statements from unidentified sources repeated or summarized therein by the coroner. *Branch v. Dempsey,* 733.

136-1; 115-125; 136-89.49(2). Highway Commission may condemn school property for control access. *Highway Comm. v. Board of Education,* 35.

136-29. Board of review is not board of arbitration. *Teer Co. v. Highway,* 1.

136-89. Delegation of authority to Turnpike Authority to select routes, fix tolls, issue bonds, determine points of ingress and egress is constitutional. *Turnpike Authority v. Pine Island,* 109.

136-108. Uncontradicted evidence held to show that the proposed roadway was not for a public use. *Highway Comm. v. Batts,* 346.

143-138; 160-182. State has delegated its police power to municipalities to prescribe minimum standards for design and construction of buildings. *S. v. Walker,* 482.

148-13. Contention that punishment for escape was excessive because defendant would lose his reward for "good time" held untenable. *S. v. Garris,* 711.

148-33.1. Work release prisoner may not be sentenced to more than two years for failing to return to custody. *S. v. Hunt,* 714.

153-9(55). Ordinance regulating dance halls may not be upheld under statute. *S. v. Smith,* 173.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

Art. I, § 8. General Assembly may delegate portion of legislative power to administrative agency. *Turnpike Authority v. Pine Island,* 109.

Art. II, § 14. Bonds payable solely out of revenue of facility they finance are not debt of State within constitutional limitations. *Turnpike Authority v. Pine Island,* 109.

Art. II, § 29. Authorization of single toll road is a public act, since one toll road may be of statewide significance. *Turnpike Authority v. Pine Island,* 109.
Regulation of operation of pool room, dance hall or night club relates to trade and may not be done by local act. *S. v. Smith,* 173.

Art. V, § 4. Bonds payable solely out of revenue of facility they finance are not debt of State within constitutional limitations. *Turnpike Authority v. Pine Island,* 109.